HSBC Institutional Trust Services (Singapore) Ltd, (trustee of Starhill Global Real Estate Investment Trust) *v* Toshin Development Singapore Pte Ltd
[2012] SGHC 8

Case Number	: Originating Summons No 376 of 2011
Decision Date	: 13 January 2012
Tribunal/Court	: High Court
Coram	: Lai Siu Chiu J
Counsel Name(s)	: Ang Cheng Hock SC, William Ong, Magdalene Sim (Allen & Gledhill LLP) for the plaintiff; Cavinder Bull SC, Yarni Loi, Gerui Lim, Adam Maniam (Drew & Napier LLC) defendant.
Parties	: HSBC Institutional Trust Services (Singapore) Ltd, (trustee of Starhill Global Real Estate Investment Trust) — Toshin Development Singapore Pte Ltd

Land – Landlord and Tenants – Duration of Tenancy – Periodic Tenancies

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 108 of 2011 was dismissed by the Court of Appeal on 27 August 2012. See [2012] SGCA 48.]

13 January 2012

Lai Siu Chiu J:

Introduction

1 This dispute revolved around the operation of the tenancy by Takashimaya department store of its current premises at Ngee Ann City, Orchard Road, Singapore. The holding company of Takashimaya is Toshin Development Singapore Pte Ltd ("the defendant"). The rent payable under the terms set out in the lease in question was subject to review pursuant to a particular rent review mechanism. HSBC Institutional Trust Services (Singapore) Ltd ("the plaintiff/lessor") on behalf of Starhill Global Real Estate Investment Trust alleged that the defendant/lessee had acted in such a manner as to render the rent review mechanism inoperable. The plaintiff filed Originating Summons No. 376 of 2011 ("the Originating Summons") on 13 May 2011 for declarations that the rent review mechanism was inoperable, that this was so because of the defendant's action; and prayed for an order that there be an inquiry as to the prevailing market rental value of Takashimaya's premises.

2 After hearing lengthy arguments from the parties, I dismissed the plaintiff's application on 2 September 2011. As the plaintiff has appealed against my decision (in Civil Appeal No.108 of 2011), I now set out my grounds for dismissing its application.

The background

3 The plaintiff is a locally incorporated company and is the trustee of Starhill Global Real Estate Investment Trust (SG REIT). SG REIT has an interest in the building known as Ngee Ann City, situated at No. 391 Orchard Road, Singapore where Takashimaya is located. SG REIT is managed by a company known as YTL Starhill Global REIT Management Limited ("YSGRM").

4 The defendant is also a Singapore company and is in the business of developing and managing

shopping centres. It is a wholly owned subsidiary of Toshin Development Co Ltd (Toshin Japan), a Japanese company which is in turn part of the Takashimaya group based in Japan.

5 At issue between the plaintiff and defendant was the operation of a lease of premises Lot No U5785V of Town Subdivision 21 at Ngee Ann City ("the Premises"). In 1993, Toshin Japan leased the Premises from a company known as Orchard Square Properties Private Limited. In 2005, Orchard Square Properties assigned its interest in the lease to the plaintiff, and in 2010, Toshin Japan transferred its interest in the lease to the defendant. As it stands, the plaintiff is the current lessor and the defendant the current lessee of the Premises.

6 The terms of the lease between the parties are contained in Lease Instrument No IA/138539R as varied by Variation of Lease Instrument No IA/139624V and Transfer Instrument No. IB/700860B. (The various lease instruments will collectively be referred to as "the Lease Agreement").

7 The Lease Agreement was to endure for a period of twenty years, commencing on 8 June 1993. These twenty years were divided into several Rental Terms, each lasting for a successive period of three years, except for the final Rental Term which would last for two years. Pursuant to cl 2.4 of the Lease Agreement, the amount of rent payable by the defendant to the plaintiff for the rental of the Premises was subject to review every three years for each new forthcoming Rental Term. The amount of rent for the Rental Term immediately preceding the rent review exercise was referred to as the "Current Annual Rent", and the amount of rent for the forthcoming Rental Term was referred to as the "New Annual Rent".

8 Clause 2.4 of the Lease Agreement set out the three-step mechanism by which the amount of rent was to be reviewed. The steps were structured as successive redundancies, such that it was only if the first step failed that the second step would be engaged, and only if the second step failed that the third step would be engaged as a last resort. The first step was contained in cl 2.4(c)(i) which provided that: "the Lessor and the Lessee shall in good faith endeavour to agree on the prevailing market rental value of the [Premises]... for purpose(*sic*) of determining the New Annual Rent for the relevant Rental Term."

9 Clause 2.4(c)(iv) clarified that the "prevailing market rental value" would be adopted as the New Annual Rent, subject to the conditions that (i) if this amount was less than the Current Annual Rent, the latter value would prevail as the New Annual Rent and (ii) that if this amount exceeded 125% of the Current Annual Rent, then the New Annual Rent would be fixed at 125% of the Current Annual Rent.

10 If no agreement was reached by three months before commencement of the forthcoming Rental Term then the first step would have failed and only then would the second and possibly the third steps be engaged. This mechanism was set out in cl 2.4(c)(ii). Since the storm clouds of controversy were largely gathered around this clause, it is necessary to set it out in full:

> If by three (3) months (time being of the essence) before commencement of the relevant Rental Term the parties have not reached agreement on the New Annual Rent, the parties shall appoint three international firms of licensed valuers (the "licensed valuers") on the basis that each of the licensed valuers shall proceed to separately determine the prevailing market rental value of the [Premises]. The licensed valuers shall be nominated by agreement between the Lessor and the Lessee or in absence of agreement by the parties on any one of the licensed valuers by a date ten (10) weeks (time being of the essence) before commencement of the relevant Rental Term, such of the licensed valuers as have not been agreed upon shall be nominated by the President for the time being of the Singapore Institute of Surveyors and Valuers... All costs and expenses

of and in connection with the appointment of the licensed valuers shall be borne by the Lessor and the Lessee in equal shares. The licensed valuers shall act as experts and not as arbitrators and their respective decisions shall be binding and conclusive on the parties.

11 To briefly summarise, the first step envisioned the lessor and lessee agreeing on the prevailing market rental value. If they could not agree, then the second step required that they appoint three valuers to identify this value. If they could not agree on the identities of the valuers then the third step required that the President of the Singapore Institute of Surveyors and Valuers (SISV) appoint the valuers. Crucially, the expenses involved in engaging these valuers no matter how appointed, were to be borne equally by the lessor and the lessee; this meant that the valuers were to be *jointly appointed* by the parties.

12 A New Rental Term for the Premises was scheduled to commence on 8 June 2011; in the months before this date, the parties sought to conduct the rent review exercise beginning negotiations sometime in January 2011.

The dispute

13 The point of contention between the plaintiff and defendant centered on the second and third steps of the mechanism. These steps involved valuers drawn from international firms of licensed valuers, of which only eight such firms in Singapore could qualify. The plaintiff claimed that the defendant had acted in such a manner as to render the second and third steps inoperable, by unilaterally hiring seven out of the eight firms to conduct a valuation of the Premises for the defendant's own purposes over a period stretching from July 2010 to February 2011, before the joint conduct of the rent review exercise by the parties for the New Rental Term commencing on 8 June 2011. It should also be noted that the defendant had actually approached the eighth firm, Savills (Singapore) Pte Ltd ("Savills") but Savills had declined engagement by the defendant.

14 The reliefs claimed by the plaintiff in the Originating Summons consisted of first, a declaration that the rent review mechanism had been rendered inoperable; second, a declaration that the defendant's actions in unilaterally engaging seven of the eight valuation firms had rendered the mechanism inoperable; and third, an order that there be an inquiry as to the prevailing market rental value of the Premises with this court to issue directions as to the proper conduct of the inquiry.

15 The plaintiff's basis for its claim started off with a resolute allegation that if any of the seven valuers that had been engaged by the defendant were to participate in the rent review exercise, then their findings would be tainted by conflicts of interest. As the proceedings progressed, the precise basis of the plaintiff's claim wavered from an allegation of a conflict of interest to allegations of bias and improper influence. Notwithstanding the uncertain nature of the plaintiff's unhappiness, it was clear that the plaintiff sought to convince this court that something was not proper about the defendant's behaviour in unilaterally engaging seven out of the eight qualifying valuers, with these same valuers being potentially involved in a rent review exercise that was due to commence soon.

16 Counsel for the plaintiff Ang Cheng Hock ("Mr Ang") submitted four arguments at the hearing on 29 August 2011 in support of the plaintiff's claim. First, that appointed valuers must act independently and impartially. Mr Ang submitted that it was implied in cl 2.4(c)(ii) that the valuers were not expert witnesses, but someone who had to make a rental determination that would bind the parties. Second, that the valuers would want to abide by their previous valuations. Third, that the defendant might have disclosed certain information to the valuers which the plaintiff would not be aware of. Fourth, that the defendant's conduct suggested that they would know in advance which valuers would provide low valuations of the prevailing market rental value. Since this was to its advantage, the

defendant could then support the appointment of these valuers during the joint rent review exercise.

17 Two concerns seemed to emerge from plaintiff's counsel's above submissions. The first and second arguments advanced gave the impression that the plaintiff was, firstly, concerned that the findings of the valuers in the rent review exercise would to some measure be tainted by conflicts of interest or bias. The third and fourth arguments seemed to indicate that the plaintiff was, secondly, concerned that the defendant would have obtained some form of advantage in the rent review exercise which was to the plaintiff's detriment. The defendant's responses to these concerns will be set out later.

18 Before delineating the issues to be resolved in this matter, it might be worthwhile pausing here to consider the nature of the plaintiff's claim. Although this was not stated in so many words in the plaintiff's submissions, the plaintiff's claim appeared to really be one about breach of contract, in that the defendant had acted in such a way that the contract embodied in the Lease Agreement could no longer be performed according to its terms. The plaintiff had also alleged that the defendant should not be allowed to act in a manner that would result in the frustration of the purpose of the contract [note: 1]. Yet the plaintiff seemed to have envisioned the Lease Agreement subsisting by simply asked for declaratory reliefs and that the court order an inquiry into the market rental value of the Premises. In substance, the latter remedy would amount to the court substituting its own terms for those in the Lease Agreement, which was a contract made between the parties. I had my reservations about the legitimacy of this remedy, but decided to postpone my consideration of this until after the merits of the case had been fully canvassed.

The issues

19 Two issues needed to be resolved before I was able to come to a decision on the overarching issue of whether the rent review mechanism in the Lease Agreement had indeed been rendered inoperable as the plaintiff claimed. The first issue was whether the independence of the valuers in the rent review exercise would be compromised. This issue would encompass considerations of conflicts of interest and bias whether apparent or actual. Although the plaintiff had also alleged improper influence, the allegations in my view were not substantiated and seemed to merely be a gloss on the conflicts of interest and bias allegations. The second issue was whether the defendant would stand to gain any unfair advantage in the rent review exercise as a result of its 2010 engagement of seven out of the eight potential valuers.

Would the independence of the valuers in the rent review exercise be compromised?

20 To some extent, the sub-issues of conflicts of interest, bias and improper influence merge and conflate into one another. For example, if as the plaintiff claimed, a valuer was suffering from a conflict of interest, this could be a result of the valuer labouring under an improper influence from his relationship with the defendant which end result would be that the valuer would be biased toward the defendant. The discussion can be crystallised to the inquiry on whether the valuer's independence for the forthcoming rent review exercise would be compromised; with the sub-issues merely its facets. However, the plaintiff had alleged that it was important for the valuers to avoid the *appearance* of bias when engaged in the forthcoming rent review exercise. For this reason, it is necessary to distill the issue of bias from the overall discussion in order to ascertain how allegations of *apparent* and/or *actual* bias will affect the overall determination.

Conflicts of interest

21 At its most basic, a conflicts of interest situation would arise when a person is under a duty to

act in a party's interests; while that duty subsists, that person acts in such a manner as to favour another party's interests over the first party. The conflicting interests could be those of a third party, or of the person himself. A potential conflicts of interest situation would arise when the person is merely tempted to act so as to favour another party's interests.

22 The plaintiff's case was that the valuers would owe duties to both parties jointly if they were engaged for the forthcoming rent review exercise, notwithstanding that the parties' interests in the rent review exercise would not be aligned with each other's. The conflict stemmed from the fact that, as claimed by the plaintiff, during the rent review exercise, the valuers would also owe the defendant a duty as a result of their prior engagement. The duty owed by the valuers to the defendant would arise because valuers as professionals owed their clients a duty of care when conducting a valuation for the latter. If the valuers were engaged to conduct a second valuation of the same scope in the future, the valuers would have an interest in adhering to the values they had produced during the first valuation [note: 2].

23 It is plain from the above paragraph that the conflict alleged was between the duty owed by the valuers to the defendant that subsisted from the previous valuation, and the duties owed by the valuers jointly to the parties during the forthcoming rent review exercise. It seemed clear enough that the scope of the previous engagement and the rent review exercise were very similar in that both involved valuations of the Premises for the purposes of ascertaining its rental value. The foundation stone of the plaintiff's argument was its claim that the valuers would continue to owe a duty to the defendant singly during the rent review exercise, where this duty would have subsisted from the previous engagement by the defendant. Without this duty, there would be no conflict in the duties owed to the parties during the rent review exercise.

24 In support of its argument, the plaintiff relied on the case of *Nugent v Benfield Greig Group plc* [2002] 1 BCLC 65 ("*Nugent*") for the proposition that professional valuers would be bound by previous valuations conducted for their clients. In *Nugent*, the valuers were tasked with valuing shares that had been held by a director of a company before he was killed in a helicopter crash in 1996. His shareholding passed to his executors, and the company's articles required that the shares be offered to other shareholders of a company at a price to be valued by auditors. It came to light that the same firm of auditors appointed for this purpose in 1999 had previously been engaged by the same company in 1998 to value its shares with the direction that the valuation should be as low as possible for tax purposes; and also in 1997 to value the same deceased director's shares for the purposes of assisting the remaining directors of the company in determining their approach in respect of those shares. The plaintiff executors brought an action against the defendant company pursuant to s 459(1) of the United Kingdom Companies Act 1985 alleging unfair prejudice; the defendant company applied for summary judgment against the plaintiff alleging that the plaintiff's claim stood no real prospect of success. Under those circumstances, Aldous LJ delivering the judgment of the English Court of Appeal dismissed the defendant's application and held that there was a reasonable argument that the plaintiff had been unfairly prejudiced. The auditor's independence had been compromised because it was restricted in their appointment as valuer "by the advice that they had [previously] given in very different circumstances"; and furthermore it had advised the defendant on a matter which was presently in dispute between the plaintiff and defendant.

25 Counsel for the defendant, Cavinder Bull ("Mr Cavinder") responded that *Nugent* could be distinguished from the present case because in *Nugent* the auditor had been engaged for the purpose of providing a valuation of the shares that was as low as possible, but in the present case the defendant's previous engagement of the valuers was to provide a fair and accurate valuation of the market rental value [note: 3]. Thus, while the auditors in *Nugent* would have to contradict themselves

in the later valuation of the shares for market value, this consideration would not apply here since both the 2010 valuations and the rent review exercise would be undertaken to ascertain market value. Mr Cavinder went on to say that the rent review exercise would not have required the valuers to value the Premises under very different circumstances as was the case in *Nugent*.

26 However, it seemed to me that Aldous LJ's reasons in *Nugent* were slightly different. At [32] of the judgment, the learned judge held:

> It followed that by the time of the 1999 offer round, [the company] knew that [the auditor] had put their name to a report valuing an ordinary share at [a low value]. It is therefore arguable that they must have known that despite the purposes of the previous request, namely that the valuation was for the purposes of reporting to the Inland Revenue, it was unlikely that they would say that the value placed on the shares was wrong or was valued on a wrong basis.

27 Of greater concern to Aldous LJ was the auditors' professional unwillingness to depart from the valuations which they had made earlier, notwithstanding the purposes for which they were made. This priority of concerns must be right. The purposes for which a valuation is done can be hard to define and discern, and even if the direction given to the valuers is supposedly clear, the understanding of this direction can be modified by the context in which the valuation is done and the valuer's own standards and assumptions. It does not seem wise to ascertain if a potential conflict of interest could arise on the basis of amorphous purposes.

28 This much was clear on the facts of this case. Mr Cavinder submitted that the 2010 valuations were done on a "best rent" basis [note: 4] but later in the defendant's Supplementary Submissions it was submitted that the valuers were engaged in 2010 valuations to provide "fair and accurate" valuations [note: 5]. Of course the descriptions "best" and "fair and accurate" are not exclusive of one another, but the subtle semantic differences could be difficult to evaluate if we needed to ascertain the purposes of the valuations to decide if there was a potential conflict of interest or not.

29 The 2010 valuation reports themselves appeared to disclose different understandings of the concept of "market rental value". On 9 May 2011, the Managing Director of the defendant, Kiyoshi Takehara, sent a letter to SG REIT enclosing five of the 2010 valuation reports with the defendant's confidential information redacted. Perusing the reports, it is noted that four of the reports, namely those from DTZ Debenham Tie Leung (SEA) Pte Ltd ("DTZ") [note: 6], Chesterton Suntec International Pte Ltd ("Chesterton") [note: 7], Cushman and Wakefield ("Cushman") [note: 8] and Knight Frank Pte Ltd ("Knight Frank") [note: 9] all understood market rental value to mean the "best rent" which could reasonably be expected to be obtained for the Premises. In contrast, the report from Colliers International Consultancy and Valuation (S) Pte Ltd ("Colliers") [note: 10] understood market rental value to mean the rent which the Premises might "reasonably be expected" to fetch.

30 The defendant's objectives in engaging valuers for the 2010 valuation included the need to plan the defendant's business operations for the future, including negotiations with its sub-tenants on rental rates; and also the need for the Takashimaya group which was publicly listed in Japan, to prepare reports for its shareholders. The former objective is significant – if the defendant had engaged the valuers to assist in its negotiations with its sub-tenants, then the defendant would have been approaching the 2010 valuations from the point of view of a sub-landlord, in diametric contrast to the 2011 rent review exercise where the defendant would be in the position of a tenant. The concept of "best rent" could mean two very different things, depending on whether it was the landlord or the tenant asking for the definition.

31 The discussion above serves to underscore the point that it is difficult to disclaim a conflict of interest simply because the ostensible purposes of the valuations were different. The purposes may be defined ambiguously or may be understood differently by different valuers, and the context in which the valuations were undertaken could modify the purposes of the valuation.

32 Returning to the case of *Nugent*, I was not convinced that it could stand for the proposition that professional valuers would be bound by previous valuations conducted for their clients. One line in *Nugent* which the plaintiff relied heavily upon (at [37] of the judgment) was where Aldous LJ stated:

> ...[the auditors] could not reasonably approach the task of valuer without restrictions imposed by the advice that they had given in very different circumstances.

33 I accept that the "very different circumstances" referred to the auditors' previous instructions to obtain a low valuation for the shares. But the restrictions imposed by that advice referred to the auditors' own professional unwillingness to depart from their previous low valuation. I could not see how the "restrictions" referred to any sort of duty on the part of the auditors that subsisted beyond the submission of the earlier valuation report. Professional valuers owe their clients a duty to conduct the valuation in a professional manner, but once the valuation has been completed, then it seems to me that the task has been performed and the situation is cut and dried. Valuers do not warrant the quality of their valuations beyond the date of valuation, and there is no reason why the valuers' duty to their client should be rehydrated and reconstituted beyond the valuation date. Perhaps an exception to this would be where the client has engaged the valuer for a continuing series of valuations, but this was not the case here.

34 If the valuers' professional shackles could be released, then there would be no reason to be concerned about a conflict of interest. This would easily be achieved by jointly appointing the valuers and issuing directions to them upon their appointment that they should be independent and would not be bound by any previous valuations conducted at any time in the past for either party. Indeed, this was the suggestion put forward by Takehara of the defendant in his letter of 9 May 2011 to the plaintiff [note: 11], and I find it an eminently sensible one. If the defendant itself issued directions that the valuers are not liable to suit by the defendant on the basis of their previous valuations, then there would be no argument that the valuers were beholden to the defendant by any sort of residual duty. The plaintiff's claim that the defendant's actions were designed to bind the valuers to their previous valuations in anticipation of the forthcoming rent review exercise [note: 12] cannot therefore stand.

35 I note the plaintiff's objection to the above suggestion, in that the suggestion was only put forward by the defendant *after* the plaintiff had discovered that the valuers were previously engaged by the defendant. The plaintiff claimed that if it had not discovered the previous engagements, than the defendant would not have made such a suggestion [note: 13]. However, even if this was true, and even if the 2011 rent review exercise had been carried out without the plaintiff's knowledge of the defendant's previous engagements of the valuers, it would be most peculiar if the defendant was to then sue the valuers for not adhering to their previous 2010 valuations. The mere whiff of such a suit would suffice for the plaintiff to itself bring an action to disclaim the 2011 rent review exercise results on the basis of actual bias.

36 For completeness, I should point out another dimension of the conflicts of interests issue, which is the possibility that the valuers' own interests in future engagements from the defendant and consequential financial gain would conflict with the plaintiff's interests. But this was not alleged by

the plaintiff, and it is not for this court to speculate that the valuers as reputable professionals would conduct their business in such an unprofessional and/or unbecoming manner.

Bias

37 To lay the parties' cases on the table very simply, the plaintiff sought to draw an analogy between this case and cases involving judicial determinations, and presented several cases to support its proposition that decisions of an independent expert can be impeached on the basis of perceived bias. Applied to the facts of the case, the plaintiff submitted that the alleged conflict of interest would create an appearance of partiality which tainted the seven valuers and was a ground for rendering the rent review mechanism unworkable. In response, the defendant argued that the valuers would be acting as experts in the rent review exercise, not adjudicators; thus, actual bias rather than apparent bias should be established in order to exclude an expert's decision. The defendant submitted that actual bias had not been established on the facts.

38 The plaintiff also relied on a letter from the Singapore Institute of Surveyors and Valuers ("SISV") addressed to the plaintiff dated 4 April 2011 This letter was written in response to a letter dated 16 March 2011 written by Chong Thoon Shin of the plaintiff to SISV, requesting SISV's opinion on whether CB Richard Ellis ("CBRE"), one of the valuation firms, should be excluded from the 2011 rent review exercise on the basis that CBRE had conducted a rental valuation of the same premises in 2010 and because of this, that there could potentially be a conflict of interest.

39 SISV's response was that valuers to be jointly appointed by the parties should be *perceived* as fair and equitable and that any firm that undertook a rental valuation of the Premises before the rent review exercise should not be included for the purposes of the rent review exercise. The plaintiff relied on this as support for its submission that perceived bias was a relevant consideration. With respect, SISV's opinion was not very useful in the light of the discussion to follow. Further, this opinion was sought without the knowledge, let alone consent, of the defendant. Therefore, there was no reason for the defendant to be bound by it.

40 The realm of bias allegations is a veritable minefield. The parties' submissions appeared to invite me to make two determinations: first, whether the valuers would be acting as experts or adjudicators; and second, whether apparent bias suffices to cast doubt on the independence of the valuers or whether actual bias must be shown. The issue may not be as plainly dichotomised as that; indeed the issue of bias is in fact very much tied up with the issue of conflicts of interest as the plaintiff's case suggested. At its simplest, the plaintiff's allegation of bias meant that the valuers acted (or in this case, if appointed, would act) such as to favour the defendant in the rent review mechanism. While the reasons for such favouritism can be manifold, the logical premise is that the valuers would have acted with partiality because they had an interest in the outcome of the proceedings.

41 As to whether the valuers would be acting as experts or adjudicators, the Lease Agreement made it clear. Clause 2.4(c)(ii) of the Agreement states:

> The licensed valuers shall act as experts and not as arbitrators and their respective decisions shall be binding and conclusive on the parties.

42 This however, may not be the end of the inquiry because the context in which the valuers operated suggested that there was a dimension of dispute resolution to the matter. The valuers would only be relevant at the second step of the rent review mechanism in cl 2.4(c)(ii), which states that the valuers would only be called in to assist if the parties were unable to agree on the prevailing

market rental value. The valuers would thus be engaged in the context of a dispute, in order to determine the very thing which the parties could not agree on. Furthermore, the parties had agreed to be bound by the valuers' determinations, and the valuers' determinations would decide on their substantive rights, *viz* the amount of rent that the defendant would pay and the plaintiff would receive for the next three years, both of which were characteristic of adjudicative behaviour.

43 On the other hand, there were also factors apart from cl 2.4(c)(ii) pointing away from the valuers acting as dispute resolvers. The valuers in creating a valuation would be undertaking substantially the same exercise as they would be in a situation where there was no dispute. A valuation of market rental value can be requested unilaterally by one party, and there is no need for a dispute to force the determination of this issue. Additionally, valuers arrive at valuations by taking into account various considerations which are removed from the merits of the parties' cases, such as the location of the property, its condition *etc*, rather than making decisions based on the parties' submissions.

44 There would be little point in weighing the various factors above to make a determination of whether the valuers in this case were experts or adjudicators and in any event analogies are only useful up to the point when they differ. A valuer is not a judicial actor, and to compare him to one would be misleading.

45 I can accept that the valuers appointed as experts in the context of the rent review mechanism, should be independent and cannot be biased, but I am not sure how much further beyond that I can go.

46 Taking the plaintiff's case at its highest, that an allegation of perceived or apparent bias is sufficient to impeach a valuer's determination, I still found very little to convince me of its merit. In the first place, the concept of apparent bias serves to protect public confidence in the impartiality and integrity of a legal system. Otherwise, as Andrew Phang JC stated in *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR(R) 604, "all that is noble and fine which undergirds the law will be tarnished and destroyed." This was echoed in *Metropolitan Properties Co (F.G.C.) Lt v Lannon and ors* [1968] 3 WLR 694 which the plaintiff relied on in support of its case. At 707H, Lord Denning held:

> Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased."

47 It goes without saying that apparent bias can impeach decisions of the judiciary. The same is also true for other tribunals such as industrial, administrative or professional tribunals and arbitrators. Tribunals and arbitrators both form parts of their own quasi-legal systems in that there is some form of continuity and organisation in the circumstances they operate in. Tribunals might be susceptible to judicial review, and arbitrators' awards are fortified by various domestic regimes and international treaties. The point to note is that these constitute systems in which the public confidence in the operation of the system needs to be protected if the system is to continue to be relied upon. Putting things into perspective, the valuers in the present case are appointed on the basis of a contractual agreement made between two parties, and the only persons who would participate in this system are the very same two parties who made the agreement. Notwithstanding that the Lease Agreement was to endure for twenty years, it would still be a little bit of a stretch to say that this mechanism constituted a legal system in which public confidence was reposed in and should be protected.

48 I take the point that the parties were companies which benefited from public participation. The plaintiff is the trustee of a real estate investment trust and the defendant is a wholly owned

subsidiary of a Japanese public listed company. There are certainly some sectors of the public which would be interested in the operation of the rent review mechanism. However, that is not the same thing as saying that there is public interest in maintaining public confidence in the rent review mechanism.

49 That said, even if we accept that the principles of apparent or perceived bias should apply to the instant case and even if we accept that apparent bias would be enough to impeach a valuer's determination, I am hard pressed to discern any apparent bias. I had opined at [33] that conflicts of interest in the sense of the valuer being conflicted between the plaintiff's and the defendant's interests are not an issue in this case. Further, the possibility of financial interest in future remuneration from the defendant to the valuers was not alleged in this case. There was no other allegation or evidence of other interests which the valuers held. Under such circumstances I am hard put to see what other interests the valuers could have in the outcome of the case and why they would act with partiality.

50 I note that the test for apparent bias has been variously stated as "reasonable suspicion" of bias and "real likelihood" of bias [note: 14]. But I should make it clear that I had not even engaged these formulations of the test because I could not see any suspicion or likelihood of bias, let alone a reasonable or a real one. To my mind, there was no justification for the independence of the valuers to be compromised by an allegation of bias.

Unfair advantage

51 I turn next to the second issue of whether the defendant would have gained an unfair advantage in the 2011 rent review exercise by engaging the valuers in 2010 to value the market rental value of the Premises. The plaintiff submitted that the defendant in appointing the valuers in 2010 would then know the likely values which the valuers would produce in 2011, and know which valuers to promote during stage two of the rent review mechanism when the parties had to agree on the appointment of the valuers [note: 15].

52 The plaintiff relied on the Australian case of *Gollin & Co v Karenlee Nominees* (1983) 153 CLR 455 ("*Gollin*") for the proposition that the defendant should not be allowed to "shop around" for the lowest valuations such that it would know which valuer to promote during the 2011 rent review exercise. However, the plaintiff's reliance on this case is misplaced because that case concerned unilateral appointments of valuers by both parties for a rent review, and not joint appointment of valuers by both parties as in the instant case. That case was also concerned with the requirement of notice to the other party of the identity of the valuer before a valuation is obtained, as a prerequisite of a valid appointment. The Australian High Court's comments on the undesirability of "shopping around" must be read in that context: the parties in that case were not to obtain valuations from each of the valuers and then appoint those which were to their advantage.

53 In the instant case, the 2010 valuations are irrelevant to the 2011 rent review exercise and therefore there is no question that the defendant after allegedly having done its shopping around could appoint those which were to its advantage.

54 Perhaps the plaintiff was advancing the *Gollin* holding a little further to suggest that after the defendant knew what valuations the valuers had produced in 2010, they could anticipate the values that the valuers would produce in 2011 and then promote the valuers who would produce valuations in their favour. This however, is premised on the assumption that the 2010 and 2011 valuations would be in some manner consistent with one another. As I held above at [33], the valuers are not duty bound to abide by their previous valuations. There is no reason to believe that the valuers would have

a propensity to value the Premises at a similar value. I had also accepted the defendant's submission that by the date of the hearing before this court, more than a year would have passed since the 2010 valuations taken at value date 8 June 2010; the intervening events might provide the valuers with reason to differ. I further agreed with Mr Cavinder that the 2010 valuation figures were similar enough that no significant advantage would be obtained, (although this is a submission which carries less weight because it could be mere coincidence that the valuations did not differ much). The plaintiff's fears appeared to be unfounded.

Would the rent review mechanism had been rendered inoperable?

55 In the light of my findings that the valuers were not involved in a conflict of interest; and also that the defendant had not obtained any unfair advantage by engaging seven of the eight valuers in 2010, I found that the rent review mechanism was still operable. I therefore dismissed the plaintiff's application with costs to the defendants to be taxed unless otherwise agreed. There was no need for me to make a determination on the remaining issue in this action, which was whether the court was entitled to order an inquiry into the market rental value of the Premises in the event that it was found that the rent review mechanism had indeed broken down. I gave the parties liberty to apply in the event there was a dispute *vis a vis* the terms of their joint letter to the President of SISV to nominate three valuers in accordance with cl 2.4(c)(ii), and/or the joint Request for Proposal to the three valuers when nominated by the President of SISV.

[note: 1] Notes of Evidence 29 August 2011 at p 4

[note: 2] Notes of Evidence 2 Sept 2011 p 18 and Plaintiff's Written Submissions p 24

[note: 3] Defendant's Supplementary Submissions at p ii

[note: 4] Notes of Evidence 29 August 2011, at p 11E

[note: 5] Defendant's Supplementary Submissions at p ii

[note: 6] Chong Thoong Shin's 1st Affidavit at p 205

[note: 7] *Ibid* at p 254

[note: 8] *Ibid* at p 301

[note: 9] *Ibid* at p 347

[note: 10] *Ibid* at p 238

[note: 11] Chong Thoong Shin's 1st affidavit p 201

[note: 12] Plaintiff's submissions p 25

[note: 13] *Ibid* at p 34

[note: 14] *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR(R) 604 and *Re*

Shankar Alan s/o Anant Kulkarni [2007] 1 SLR(R) 85

[note: 15] Plaintiff's Submissions, p 39