Tan Hee Liang v Chief Assessor and Another
[2008] SGCA 43

Case Number : CA 1/2008

Decision Date : 28 October 2008

Tribunal/Court : Court of Appeal

Coram : Choo Han Teck J; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Tan Hee Joek (Drew & Napier LLC) for the appellant; Julia Mohamed (Inland Revenue Authority of Singapore) for the respondents

Parties : Tan Hee Liang — Chief Assessor; Comptroller of Property Tax

Revenue Law – Property tax – Annual value – Whether Chief Assessor correct in not excluding from gross rental contributions payable towards sinking fund and special levy – Sections 2(1), 2(7) Property Tax Act (Cap 254, 2005 Rev Ed)

28 October 2008 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal from the decision of the High Court judge ("the Judge") dismissing the appellant's appeal from the decision of the Valuation Review Board ("the Board") (see the High Court judgment in *Tan Hee Liang v Chief Assessor* ("the Judgment") reported at [2008] 1 SLR 586). The appellant is the owner of a shop unit ("the subject property") and, essentially, his case centred on the correct amount to be excluded from the total monthly rental ("gross rental") in the ascertainment of the annual value (for taxation purposes) of the subject property. The respondents are the Chief Assessor and the Comptroller of Property Tax.

2 As characterised by the parties, the sole issue before us is whether, in arriving at the annual value, the Chief Assessor was correct in not excluding from the gross rental the contributions payable by the appellant towards a sinking fund and a special levy. However, the simplicity of this characterisation obscures what is really a difficult exercise in both concept and logic. As can perhaps be appreciated, this case raises interesting issues regarding the correct meaning to be given to the expression "annual value" as found in s 2(1) of the Property Tax Act (Cap 254, 2005 Rev Ed) ("PTA").

3 However, whatever meaning is eventually ascribed to the particular provision must also take into account the prevailing tax assessment practices of the relevant authorities, lest unwarranted confusion be unintentionally caused. As such, after we first heard the parties, we invited them to tender additional written submissions on s 2(1) of the PTA. The Chief Assessor submitted additional submissions on 16 May 2008, with the appellant filing submissions in reply two weeks later. We took these additional submissions into account in reaching the decision detailed in this judgment.

Facts leading to legal proceedings

4 Having provided the brief backdrop to the present appeal, we come now to the facts. The facts leading to the institution of legal proceedings are relatively simple and can be stated within a brief compass. As we briefly alluded to above, the appellant is the owner of the subject property which is specifically located within a shopping complex, City Plaza, which in turn is located at

810 Geylang Road, Singapore 409286.

5 As such, and this is common ground between the parties, the appellant pays separate quarterly contributions to: (a) a management fund (referred by the parties as contributions to a "maintenance fund"); (b) a sinking fund; and (c) a special levy imposed by the City Plaza Management Corporation Strata Title Plan No 669 ("the MCST"). The MCST also refers to payments to the management fund, *viz*, category (a) above, as the "maintenance contributions". For consistency, we shall refer to the payments to the fund under category (a) as "payments to the management fund" in this judgment.

6 In the present case, the subject property was let to a tenant at a gross rental of $4,000, making an annual rental of $48,000. Under cl 30(b) of the tenancy agreement, the landlord was to bear all rates, assessments, property tax (but not goods and services tax) and all other outgoings imposed upon or payable in respect of the subject property and to insure the same against fire. It is common ground between the appellant and the Chief Assessor that there is deemed included in the gross rental the payments made by the appellant to the management fund, the sinking fund and the special levy.

7 In assessing the annual value of the property at $45,600, the Chief Assessor allowed to be excluded the appellant's payments to the management fund of approximately $2,400 per year but not those towards the sinking fund and the special levy. In other words, the Chief Assessor had decided that contributions made by the appellant towards the sinking fund and the special levy were not to be excluded from the gross rental in the calculation of the annual value, whereas payments to the management fund were allowed to be excluded.

8 Being dissatisfied with the Chief Assessor's decision to allow only the payments to the management fund to be excluded from the assessment of the annual value and not allow those contributions payable towards the sinking fund and the special levy to be excluded, the appellant commenced a series of legal proceedings which culminated in the present appeal.

The appeals to the Board and the High Court

9 The appellant first appealed against the Chief Assessor's decision to the Board. The Board dismissed the appellant's appeal and the appellant appealed against the Board's decision to the High Court. As the arguments raised and considered in the proceedings below are of some utility to understanding the true nature of the issues raised before us, we propose to detail them at some length. We should mention that the arguments raised before the Board and the High Court are largely identical.

The parties' arguments below

The rationale behind exclusion of payments to the management fund

10 Both the appellant and the Chief Assessor agreed before the Board and the High Court that, in the computation of the annual value, the appellant's payments to the management fund should be *excluded*. However, the *rationale* for the exclusion of this component was not agreed upon by both parties. As will be seen later, it is this conceptual difference that the issue raised in the present appeal can be said to stem from.

11 The appellant's position was that payments to the management fund should be excluded, as such payments were *unrelated to the subject property* since they related only to the common

property and *not* to the subject property. There was thus an attempt to differentiate between common property and individual property privately owned by individuals. On the other hand, the Chief Assessor argued that the reason why payments to the management fund should be excluded was that this component was *for payment for "services"*, and the case authorities, such as the 1959 High Court decision of *Chartered Bank v The City Council of Singapore* [1959-1986] SPTC 1 ("*Chartered Bank*"), stated that such payments should be excluded.

Arguments in respect of exclusion of payments towards sinking fund and special levy

12 Following from the parties' dispute on the rationale behind why payments to the management fund should be excluded in the computation of the annual value, the parties were (and are) in dispute as to whether the appellant's payments towards the sinking fund and special levy should be excluded as well.

(1) The Chief Assessor's arguments

13 The Chief Assessor took the position that the payments towards the sinking fund and the special levy should *not* be excluded because these payments, unlike the appellant's payments to the management fund, were not payments for services but for expenses *for maintenance and repair*. The Chief Assessor argued that since the statutory definition of "annual value" in s 2(1) of the PTA specifically stated that the landlord had to bear the expenses of repair and maintenance, the payments towards the sinking fund and special levy must be included in the computation of the annual value. The Chief Assessor further took the position that no distinction should be drawn between payments towards repair and maintenance of the subject property and of the common property.

14 The Chief Assessor attempted to find support in this court's decision in *MCST Plan Nos 1298 and 1304 v Chief Assessor* [2006] 4 SLR 404 ("*Centrepoint Shopping Centre*") for the argument that, since the subsidiary proprietor of an individual lot owns a part of the common property under s 13 of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("LTSA") and the determination of the annual value of an individual lot would invariably take into account the enjoyment to be derived from facilities and amenities forming part of the common property, it would be wrong to exclude the payments for maintenance and repair even though they related to the common property.

(2) The appellant's arguments

15 The appellant took the position before the Board and the High Court that the payments towards the sinking fund and the special levy should be excluded because these payments were *unrelated* to the rent or the letting of the subject property, being payments *towards the common property*, just like the appellant's payments to the management fund.

16 The appellant relied on this court's decision in *BCH Retail Investment Pte Ltd v Chief Assessor* [2007] 2 SLR 580 ("*BCH No 2*") to support his argument that payments towards the sinking fund and the special levy were unrelated to the rent or the letting of the subject property as they were payments in relation to the common property and not the subject property. As it was not the common property, but the subject property, that was being assessed for property tax, the appellant argued that payments that were related to the common property should be excluded since such payments were unrelated to the rent or the letting of the subject property.

The Board's decision

17 The Board upheld the Chief Assessor's decision based on the following three grounds:

(a) A "common law service charge exception" was established in *Chartered Bank* ([11] *supra*). The sinking fund and the special levy were collected for purposes beyond the provision of services or profit on those services. Thus, payments to the sinking fund and the special levy did not fall within the categories decided by the High Court in *Chartered Bank* or in *BCH Retail Investment Pte Ltd v Chief Assessor* [2002] 4 SLR 844 ("*BCH No 1*").

(b) It was impermissible for the appellant, relying on the English Court of Appeal decision of *Bell Property Trust, Limited v Assessment Committee for the Borough of Hampstead* [1940] 2 KB 543 ("*Bell Property Trust*"), to extend the service charge exception established by *Chartered Bank* and *BCH No 1*. *Bell Property Trust* was decided prior to the introduction of the commonhold system (the English equivalent of our strata titles system) and was hence inapplicable to our strata titles system in so far as the judgment in that case assumed that only the payments for the area within the apartment could be taken into account. It therefore differentiated between rent paid for actual occupation of the flat and the remuneration for the benefit of services and amenities provided by the landlord. The Board was also of the view that Goddard LJ in *Bell Property Trust* was relying upon such an assumption when he held at 556 that the cost of repairs to "common parts" was deductible.

(c) To differentiate the maintenance of the common parts from that within the four walls of the strata unit would be out of sync with the PTA, LTSA and this court's decision in *Centrepoint Shopping Centre*.

18 As can be seen, the Board accepted the Chief Assessor's arguments that it had to be determined if the payments for the sinking fund and the special levy fell within the common law service charge exception. The Board did not analyse if the payments were related to the rent or the letting of the subject property (pursuant to *BCH No 2*) in deciding whether the payments should be excluded from the computation of annual value of the subject property. However, no fault should be attached to the Board for not having done so as *BCH No 2* was only decided *after* the Board had considered the appellant's appeal before it.

The High Court's decision

19 The Judge accepted the appellant's arguments and rejected the abovementioned three grounds of the Board for upholding the Chief Assessor's decision not to exclude the payments towards the sinking fund and the special levy from the computation of the annual value of the subject property. Notwithstanding this, the Judge agreed with the *conclusion* argued for by the Chief Assessor (and of the Board, which upheld the Chief Assessor's decision) in that contributions to the sinking fund and the special levy ought *not* to be excluded, but reached this conclusion by a *different process of reasoning*, which, in our view, can broadly be divided into two separate parts.

First part of the Judgment: Following the decision in BCH No 2

20 In the first part of the Judgment, the Judge disagreed with the reasoning of both the Board and the Chief Assessor and held (at [31] of the Judgment) that the contributions to the sinking fund and the special levy, as well as the payments to the management fund, "are unrelated to the elements of rent or letting of the [subject] property". In other words, the Judge saw no reason to distinguish between contributions towards the sinking fund and the special levy from the payments to the management fund.

21 Specifically, the Judge's reasons for rejecting all three grounds of the Board (see [17] above) were as follows:

(a) The Board took too restrictive a view when it limited allowable "deductions" to what it called the "service charge exception" established by *Chartered Bank* and *BCH No 1*. This court's decision in *BCH No 2* made it clear that what was to be excluded in the determination of annual value was remuneration of any kind paid by the tenant which was unrelated to the elements of rent or letting.

(b) *Bell Property Trust* could not be said to be inapplicable in the context of Singapore's strata title system. This case was followed by the High Court in *BCH No 1* and referred to by this court in *BCH No 2*. From s 2(7) of the PTA and the decision of this court in *Centrepoint Shopping Centre* ([14] *supra*), the "annual value" of the individual lot still referred only to the gross amount at which the individual lot could reasonably be expected to be let; the expenses of repair, insurance, maintenance or upkeep, *etc*, which might be included in such gross amount, all related to the individual lot.

(c) The Board's reasoning, that to differentiate the maintenance of the common parts from that within the four walls of the strata unit would be out of sync with the approach of the LTSA, PTA and this court's decision in *Centrepoint Shopping Centre*, was incorrect.

22 As a result of the reasoning set out above, the Judge rejected the Chief Assessor's arguments that the payments towards the sinking fund and the special levy were related to rent or letting and that a distinction should be drawn between the payments to the management fund and those to the sinking fund or the special levy.

23 The Judge also accepted the appellant's submission that no principled distinction could be drawn between payments to the management fund (which the Chief Assessor allowed to be excluded) and those to the sinking fund or the special levy (which the Chief Assessor disallowed). The Judge accepted that *all* of these items were *unrelated* to the elements of rent or the letting of the subject property, *ie*, the individual lot. At [31] of the Judgment, the Judge stated:

> On that basis, it ought to follow that no principled distinction could be drawn between contributions to the management fund or (as the parties call it) maintenance contributions (which the Chief Assessor allowed to be excluded) and those to the sinking fund or the special levy (which he disallowed). All of them are unrelated to the elements of rent or letting of the property, *ie*, the strata lot.

24 On that basis, one would have thought that the Judge would then rule in the appellant's favour. Indeed, it ought then to have followed that, since payments to the management fund were excluded, the same should have applied to the contributions towards the sinking fund and the special levy as well. As it turned out, the Judge held that it was insufficient for the appellant to demonstrate *only* that the contributions to the sinking fund or the special levy were unrelated to the elements of rent or the letting of the subject property in order for them to be excluded from the annual value. This formed the focus of the *second part* of the Judgment.

Second part of the Judgment: A further requirement

25 In the second part of the Judgment, the Judge held that the appellant had to satisfy a *further requirement* to the effect that the payment by the tenant must, in character and quantum, be *bona fide* in return for something other than the use and occupation of the subject property, *viz*,

that the *tenant* derived a service or benefit from the said payment ("the further requirement"); if no such benefit was forthcoming, then there would be no justification for excluding the payment or the relevant part from the gross rental in arriving at the annual value.

26 The Judge reasoned that if the landlord could not show that the *tenant* derived a service or benefit for the payment, the consideration for the payment *must* be for the letting and the payment should therefore not be excluded in the ascertainment of the annual value. Explaining his reasons further, the Judge drew a distinction between "painting, repairs to the common property" and "the installation of additional facilities … for the benefit of the subsidiary proprietors", as follows (at [36] and [37] of the Judgment):

> Unlike painting, repairs to the common property or renewal or replacement of fixtures and fittings where necessary (as envisaged in s 29(1)(*b*) of the BMSM Act [Building Maintenance and Strata Management Act (Act 47 of 2004)]), expenditure from the sinking fund could extend to the installation of additional facilities or the making of improvements to the common property for the benefit of the subsidiary proprietors constituting the management corporation (as envisaged in s 29(1)(*d*) of the BMSM Act). Contributions towards expenditure for the former would qualify for exclusion in the same way that:
>
> (a) in *Bell Property Trust* … the cost of repairs to and maintenance of the parts of the building not demised to the tenants were allowed; and
>
> (b) in *Chartered Bank* … depreciation of the air-conditioning plant and ducting and the lift and fire extinguishers were allowed.
>
> On the other hand, contributions towards expenditure for the latter (ie, additional facilities and improvements) would, in my view, not qualify for exclusion as they are, principally at least, for the benefit of the subsidiary proprietors.

27 In the result, the Judge determined that the tenant did not derive any service or benefit from the payments to the sinking fund and special levy and therefore dismissed the appellant's appeal from the Board's decision. In other words, the Judge upheld the Chief Assessor's decision not to exclude the payments towards the sinking fund and the special levy from the computation of the annual value.

The arguments before us

The appellant's arguments

28 Before us, the appellant did not take issue with the Judge's treatment of the legal issues in the first part of the Judgment. Indeed, according to Mr Tan Hee Joek, counsel for the appellant, the Judge had in fact accepted and adopted a large portion of the appellant's submissions below in this regard. Instead, and not surprisingly, the appellant was dissatisfied with the *second* part of the Judgment, *viz*, the imposition of the further requirement.

29 Thus, reduced to its core, the appellant's argument was premised on a single proposition: The Judge erred in imposing the further requirement that the payment sum in dispute be of service or benefit to the tenant. To this there were in fact several sub-arguments. First, the appellant submitted that the need for the further requirement was not argued before the Judge. It was a requirement which the Judge had imposed without the input of either party. While there might be cases where such a practice was without fault, it was urged upon us that where the outcome of a

case turned on a particular point, the parties must be given the opportunity to address the court on it. Thus, in the instant case, where the Judge had failed to do this, it would be manifestly unfair to the appellant for the case to have been decided against him on a point not argued by either party.

30 The second sub-argument on the main premise was substantive in nature. According to the appellant, the necessity of the further requirement was unsupported by authority. To support this proposition, the appellant referred extensively to the established case law to show that, even in cases where there had been no benefit conferred on the tenant by way of a payment, the courts had not disallowed the exclusion of such payment. The overarching reason, it was implicitly argued, must be the guiding principle that only payments related to rent or letting could be included in the ascertainment of the annual value.

3 1 *Alternatively*, in lieu of the main premise described above, it was submitted by the appellant before us that, *even if* the Judge was correct that there was in law the further requirement, this requirement was in fact fulfilled on the facts and based on the Judge's own analysis at [36] and [37] of the Judgment.

The Chief Assessor's arguments

32 The Chief Assessor's arguments, on the other hand, were premised on "two prongs".

First prong of the Chief Assessor's arguments

33 The first prong was essentially that payments towards the sinking fund and special levy were expenses that *were related* to elements of rent and letting and should not be excluded because these payments were expenses for maintenance and repair, unlike the appellant's payments to the management fund which were "payments for services". This ostensibly militates *against* the Judge's reasoning in the first part of his decision. While there was no formal cross-appeal as such by the Chief Assessor, reliance was placed on O 57 r 9A(5) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) to make this submission against the first part of the Judge's decision. This particular provision allows a respondent to specify his desire to contend on an appeal that the decision of the court below should be varied in the event of the appeal being allowed in whole or in part, or that the decision of that court should be affirmed on grounds other than those relied upon by that court, even though the said respondent had not appealed from the decision of the court below.

34 Returning to the first prong of the Chief Assessor's arguments before us, it was said that the expression "the landlord paying the expenses of repair, insurance, maintenance or upkeep and all taxes (other than goods and services tax)" ("the qualifying words") in that part of s 2(1) of the PTA defining "annual value" meant that, in ascertaining the annual value of the property, expenses incurred for repair, insurance, maintenance or upkeep and all taxes (other than goods and services tax) were to be *included* in the ascertainment. Accordingly, as the uses of both the sinking fund and the special levy were for either repairs or maintenance to the common property, these were properly the responsibility of the landlord and, as such, *should not be excluded* from the gross rental in the ascertainment of the annual value.

35 Before us, counsel for the Chief Assessor, Ms Julia Mohamed, further explained that the reason why the payments to the management fund in the present case were *excluded* from the computation of the annual value was because these had to do with "services" and hence came within the exception created in *Chartered Bank* ([11] *supra*). However, when asked whether *Chartered Bank* in fact correctly stood for such a proposition given that some of the exclusions allowed in that case were in fact hardly "services" but resembled maintenance instead, Ms Mohamed departed from her

written submissions and urged us to consider the correctness of *Chartered Bank* itself. In this respect, she submitted that there was in fact *no basis* to treat payments to the management fund any differently from contributions to the sinking fund and the special levy, and that instead of excluding payments to the management fund, these ought instead to have been *included*. This was notwithstanding the *apparently prevailing practice* of the tax authorities to exclude contributions to funds such as the management fund in the present case from the ascertainment of the annual value of the subject property.

Second prong of the Chief Assessor's arguments

36 The second prong of the Chief Assessor's argument was simply to agree with the Judge's finding that the further requirement was necessary and that the appellant had not succeeded on this requirement based on the facts of the present appeal.

The issues before us

37 By the end of the hearing before us, and having set out the parties' arguments in some detail in the preceding paragraphs, it is apparent that the single issue raised by both parties as being the "sole" issue for our determination in fact consisted of several sub-issues, none of which can swiftly be described as simple.

38 First, what is the function of the qualifying words (see [34] above)? This is especially important, given that the qualifying words have hitherto been authoritatively interpreted to mean that such contributions coming within the terms of the qualifying words ought to be included instead of excluded. We also understand from Ms Mohamed that the former interpretation represents the current practice of the relevant authorities.

39 Secondly, does the fact that these sums relate to the common property take them out of the ambit of the definition of "annual value" within the meaning of limb (a) of the definition in s 2(1) of the PTA (see [42] below) in the first instance inasmuch as the concept of annual value is not intended to embrace any sums related to the common property as such? If the answer is in the affirmative, then that would conclude the present appeal in favour of the appellant inasmuch as both these sums (*viz*, the special levy and the sinking fund contributions) have nothing to do with the definition or concept of "annual value" within the meaning of the PTA. In other words, even if we find that contributions towards maintenance funds (such as the management fund) ought to be included owing to the qualifying words in s 2(1) of the PTA, the next question is whether maintenance contributions towards the common property (as opposed to the individual lot) ought to be included. This begs the further (and more fundamental) question: Can a sensible and conceptually defensible distinction be drawn between common property and individual lots for the purposes of tax assessment in a strata development such as City Plaza, which is the development at the heart of the present case? If, however, the answer is in the negative , that would not necessarily or automatically conclude the present appeal in favour of the respondents because the respondents might be unable to demonstrate that the aforementioned sums fall within the qualifying words and, if so, such sums would not be subject to property tax within the meaning of the PTA.

40 Thirdly, *assuming* that a distinction can be drawn between common and individual properties in a strata development, how does this affect the assessment of tax given that the two, while structurally separate (so assumed at present), nonetheless interact in a very real sense? In answering this question, one should also bear in mind what this court said in *BCH No 2* to be the very premise underlying the ascertainment of annual value, *viz*, the relation to the rent or letting of the subject property, which in turn approximates to the *real value* of the property.

41 We now consider each of these issues in turn.

The qualifying words

The definition of "annual value"

42 We start first with the statutory definition of "annual value". According to Leung Yew Kwong & Mani Usilappan, *Property Tax in Singapore and Malaysia* (Butterworths Asia, 2nd Ed, 1997) at p 39, the annual property tax payable for a property is the product of the annual value and the tax rate. As such, the annual value is an integral factor to be taken into account when calculating the tax payable in respect of a property. "Annual value" is defined in s 2(1) of the PTA as follows:

> **Interpretation**
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> **2.**—(1) In this Act, unless the context otherwise requires —
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> …
>
> "annual value" —
>
> (*a*) in relation to a house or building or land or tenement, not being a wharf, pier, jetty or landing-stage, means the gross amount at which the same can reasonably be expected to be let from year to year, the landlord paying the expenses of repair, insurance, maintenance or upkeep and all taxes (other than goods and services tax); and
>
> (*b*) in relation to a wharf, pier, jetty or landing-stage, means the gross amount at which the same can reasonably be expected to be let from year to year, the tenant paying the expenses of repair, insurance, maintenance or upkeep[.]

The function of the qualifying words

43 From the above definition of "annual value", it can be seen that the sub-category of properties comprising "wharf, pier, jetty or landing-stage" is treated differently from that category of properties comprising "house or building or land or tenement". For the latter category of properties which comprise the bulk of the properties in the Valuation List, the annual value would *include* the element of the landlord's expenses for repair, insurance, maintenance or upkeep and all taxes. For the former category of properties, the annual value would include the landlord's taxes but not the expenses for repair, insurance, maintenance or upkeep. To illustrate this point in relation to the category comprising "house or building or land or tenement", the authors of *Property Tax in Singapore and Malaysia* helpfully provide an illustration, as follows (at p 40):

> (1) An unfurnished house is let at $22,000 per annum with the landlord paying the property tax and insurance and the tenant paying the expenses of repair and maintenance. Similar unfurnished houses in the neighbourhood are generally let at $24,000 per annum with the landlord paying all the expenses of property tax, repair, maintenance and insurance. *The annual value of each house will be $24,000*. [emphasis added]

44 In this respect, the function of the qualifying words (see [34] above) in this category of properties is to affix the responsibility of paying all the expenses of property tax, repair, maintenance and insurance *on the landlord*. Indeed, as the Judge pointed out in the Judgment (at [8]), "[t]he effect of that definition is that the landlord may be assumed to include, within the rental charged to

the tenant, an amount to recoup his expenses of repair, insurance, maintenance or upkeep of the premises let".

Whether maintenance contributions towards common property should be included

A preliminary point: The main forms of maintenance contributions

45 Having resolved the threshold question of the function of the qualifying words, we come now to a more substantive matter: whether maintenance contributions towards common property should be included. In order to answer this question, there is a need to set the proper background context from which the discussion can follow. Generally, maintenance contributions take two basic forms – *via* a *management fund* and a *sinking fund*, respectively. The latter constitutes an issue in so far as the present appeal is concerned although (as we shall see below), the former is not irrelevant, especially with respect to the question of general principle.

46 Both the funds mentioned in the preceding paragraph are, in fact, the focus (in so far as the current legal position is concerned) of s 38 of the Building Maintenance and Strata Management Act (Act 47 of 2004) ("BMSMA"). The provision itself is reproduced below (at [70]). For present purposes, however, the explanatory note to the Building Maintenance and Management Bill (Bill 6 of 2004) is apposite; in particular, it states as follows:

> Clause 37 [the present s 38 of the BMSMA] requires a management corporation to establish and maintain a management fund and sinking fund. The *management fund* is to be used to pay for the *regular* maintenance and repair of the common property and other common expenses of the management corporation, insurance premiums and other expenses in carrying out its powers and duties under the Bill. The *sinking fund* is to be used *only* for expenses incurred in painting or treating of any part of the common property which is a structure or other improvement for the preservation and appearance of the common property, the renewal or replacement of any electrical and mechanical installations existing for common use or purposes and other *major* repairs and improvements to, and maintenance of, the common property and boundary wall. [emphasis added]

47 Section 38 of the BMSMA in turn derives its existence from various sections in Pt IV of the LTSA. Part IV was repealed with effect from 1 April 2005 by s 138(1) of the BMSMA read with item (12) of the second column of the Third Schedule to the BMSMA. It is thus necessary to have regard to the predecessor provisions of s 38 in the LTSA.

Management fund

48 First, the composition and purpose of the management fund can be gleaned from ss 42(2) and 48(1) of the LTSA. Of these, s 48(1)(*m*) provides for the purpose of the management fund, as follows:

> **Duties of management corporation**
>
> **48.**—(1) A management corporation shall, for the purposes of the subdivided building concerned —
>
> …
>
> (*m*) from time to time determine in general meeting the amounts necessary in its opinion

to be raised by way of contributions for the purpose of meeting its actual or expected liabilities —

(i) incurred or to be incurred under paragraph (*a*), (*b*), (*c*) or (*d*);

(ii) for the payment of insurance premiums; and

(iii) for any other expenditure of the management corporation.

Sub-paragraphs (*a*), (*b*), (*c*) and (*d*) of s 48(1) (referred to as "paragraph (*a*), (*b*), (*c*) or (*d*)" above) in turn provide as follows:

(*a*) control, manage and administer the common property for the benefit of all the subsidiary proprietors;

(*b*) properly maintain and keep it in a state of good and serviceable repair —

(i) the common property; and

(ii) any property vested in the management corporation;

(*c*) where necessary, renew or replace any fixtures or fittings comprised in the common property and any property vested in the management corporation;

(*d*) when so directed by a special resolution, install or provide additional facilities or make improvements to the common property for the benefit of the subsidiary proprietors[.]

49 This must then be compared with s 39(1) of the BMSMA which, read with s 38(3) of the same Act, provides for the purposes for which the management corporation may disburse moneys from its management fund:

Management corporation to determine contributions by subsidiary proprietors

39.—(1) The management corporation shall, from time to time at a general meeting, determine the amounts which are reasonable and necessary to be raised by contributions *for the purpose of meeting its actual or expected liabilities incurred or to be incurred* within the period (not exceeding 12 months) specified in the determination *in respect of* —

(*a*) *the regular maintenance and keeping in good and serviceable repair pursuant to section 29 of parts of the parcel being the common property, fixtures, fittings and other property (including movable property) held by or on behalf of the management corporation*;

(*b*) *the common expenses of the management corporation (except those in subsection (2)(*a*) to (*d*))*;

(*c*) *the payment of insurance premiums*; and

(*d*) *all other liabilities* incurred or to be incurred during that period by or on behalf of the management corporation in carrying out its powers, authorities, duties and functions under this Act other than liabilities referred to in subsection (2).

[emphasis added]

Comparing the two sets of provisions, it can be observed that they are not identical. In other words, the purposes of the management fund as defined in the BMSMA do not replicate those specified in the LTSA. In particular (and this is important for reasons to be seen later), while ss 48(1)(*a*) and 48(1)(*b*) of the LTSA are largely reproduced in ss 39(1)(*a*) and 39(1)(*b*) of the BMSMA, ss 48(1)(*c*) and 48(1)(*d*) of the LTSA are not similarly reproduced. Sections 48(1)(*a*) and 48(1)(*b*) of the LTSA relate largely to the *present* maintenance and repair of the common property in question, and the sense of this can also be gathered from ss 39(1)(*a*) and 39(1)(*b*) of the BMSMA. On the other hand, s 48(1)(*c*) and 48(1)(*d*) of the LTSA, in so far as they largely refer to *future* maintenance and repair (by the use of the words "renew", "provide additional facilities" and "make improvements"), no longer find expression in s 39(1) of the BMSMA. Although s 39(1)(*d*) of the BMSMA provides for a "catch-all" clause with regard to any other liabilities incurred by the management corporation, we do not think that this was intended to capture the "missing" s 48(1)(*c*) and 48(1)(*d*) of the LTSA since these sections had been deliberately left out in the BMSMA – the intention being to *repeal*, amongst other provisions, these particular sections.

Sinking fund

50 Turning now to the sinking fund, its composition may be gleaned from ss 48(1)(*n*) and 48(1)(*p*) of the LTSA. As with the case of the management fund, s 48(1)(*p*) provides for the establishment of a sinking fund for the purposes specified in s 48(1)(*n*), which provides as follows:

> **Duties of management corporation**
>
> **48.**—(1) A management corporation shall, for the purposes of the subdivided building concerned —
>
> …
>
> (*n*) from time to time determine in general meeting the amounts necessary in its opinion to be raised by way of contributions for the purpose of meeting its actual or expected liabilities —
>
> (i) for painting or repainting any part of the common property which is a building or other structure;
>
> (ii) for the renewal or replacement of any electrical and mechanical installations existing for common use or purposes;
>
> (iii) for major repairs and improvements to, and maintenance of, the common property and boundary walls; and
>
> (iv) for any other expenditure approved by the management corporation in general meeting.

51 Before making a comparison with the relevant section of the BMSMA (as we have done in respect of the management fund), we pause to observe that s 48(1)(*n*) of the LTSA in fact replicates, to some extent, some of the purposes applicable for the disbursement of moneys from the management fund as set out in s 48(1)(*c*) and 48(1)(*d*) of the LTSA. These sections in fact largely relate to the *future* maintenance and repair of the common property and the expression of such can be found in ss 48(1)(*n*)(i), 48(1)(*n*)(ii) and 48(1)(*n*)(iii) in so far as they allude to the "*re*painting",

"*re*newal" and "improvements" of particular features of the common property. There was thus, under the LTSA, a degree of overlap between the purposes of the management fund and the sinking fund.

52 We now compare s 48(1)(*n*) of the LTSA with s 39(2) of the BMSMA which, read with s 38(6) of the BMSMA, provides for the purposes for which the management corporation may disburse moneys from its sinking fund:

> (2) The management corporation shall, also from time to time at a general meeting, determine the amounts which are reasonable and necessary to be raised by contributions *for the purpose of meeting its actual or expected liabilities incurred or to be incurred in respect of* —
>
> (*a*) *painting or treating of any part of the common property which is a structure or other improvement for the preservation and appearance of the common property*;
>
> (*b*) *major repairs and improvements to, and maintenance of, the common property and boundary wall*;
>
> (*c*) *the renewal or replacement pursuant to section 29 of parts of the parcel being the common property, fixtures, fittings and other property (including movable property) held by or on behalf of the management corporation*;
>
> (*d*) *the acquisition of movable property*; and
>
> (*e*) *such other liabilities* expected to be incurred at a future time where the management corporation determines in a general meeting that the whole or part thereof should be met from its sinking fund.
>
> [emphasis added]

53 It is very clear from this comparison that almost the whole of s 48(1)(*n*) of the LTSA is replicated in s 39(2) of the BMSMA. This can be contrasted with the incomplete adoption of the purposes of the management fund as set out previously in the LTSA in the later BMSMA. In order to understand the reason why this is so, we have to examine the relevant legislative materials. Indeed, the concept of the *sinking fund* was first introduced by s 17 of the Land Titles (Strata) (Amendment) Act 1987 (Act 16 of 1987). As the explanatory statement to the Land Titles (Strata) (Amendment) Bill (Bill 10 of 1986) put it:

> Some of the major changes introduced [by the Bill] are as follows:
>
> …
>
> (*b*) A management corporation is required to establish a *sinking fund in addition to* the *management fund* …
>
> [emphasis added]

And, during the second reading of the Bill, the Minister for Law, Mr E W Barker, observed thus (see *Singapore Parliamentary Debates, Official Report* (29 July 1986) vol 48 at cols 124–125):

> A management corporation will be required to establish a *sinking fund* to meet expenditure which *will* be incurred for *major* repairs and renovations. This fund is *in addition to* the *management fund* which a management corporation is now required to maintain. [emphasis added]

54 We have earlier alluded to the noticeable differences in the adoption of the purposes of the management fund and the sinking fund in the BMSMA as distinguished from the LTSA. In so far as maintenance and repair are concerned, we note that, under the LTSA, the management fund and the sinking fund shared certain overlapping purposes, *viz*, the *future* maintenance and repair of the common property. These overlaps were, however, largely erased, having regard to the corresponding provisions in the BMSMA (which represents the current position). Having regard to the legislative debates as reproduced above, we think that the management fund and sinking fund are meant to have *distinct* functions. Otherwise, why state that the sinking fund is *in addition* to the management fund? However, the degree of overlap in the LTSA perhaps, and unfortunately, obscured this otherwise intended clear distinction between the two funds. This was, to our minds, put right in the BMSMA in so far as the overlapping purposes were no longer reproduced.

55 All this establishes a relatively obvious point – that (put in a nutshell) the *maintenance fund* is for *regular* maintenance and repair of the common property in the *present*, *whereas* the *sinking fund* is for *major* maintenance and repair of the common property which *might* take place in the *future* (see also Tan Sook Yee, *Principles of Singapore Land Law* (Butterworths Asia, 2nd Ed, 2001) at pp 606–607). The broad distinction between *present* and *future* maintenance and repair thus finds expression across the two types of funds. Therefore, intrinsic within what has just been stated are at least two basic distinctions. The first (and broad) distinction is in relation to the *time* at which the respective maintenance and repair are effected. The second is in relation to the *types* of maintenance and repair involved. This first distinction is (as we shall see below at [80]) of some legal significance in so far as the present appeal is concerned.

Whether maintenance should be included

56 Returning to the issue at hand (*viz*, whether maintenance contributions should be included in the calculation of annual value), it follows from the analysis in the preceding part of this judgment (at [43]–[44] above) that, flowing also from the meaning ascribed to the qualifying words, expenses *relating to maintenance* should *prima facie* be the responsibility of the owner (as defined in s 2(1) of the PTA). This in turn means that such expenses, which (as we shall see) to the extent that they are provided for by way of contributions towards the sinking fund and the special levy, should be *included* in the gross rental for the ascertainment of the annual value. We need only add that the meaning of "maintenance" is relatively clear and that a broad, commonsensical definition should be adopted. In this regard, *Collins Cobuild English Language Dictionary* (Harper Collins Publishers India Pvt Ltd, 1991) at p 877 pertinently defines "maintenance" as "the activity of keeping something such as a building, vehicle or machine in good condition by regularly checking it and doing necessary repairs". This definition accords with the interpretation given to the meaning of "maintain" in a number of other cases. For example, the House of Lords in *Hamilton v National Coal Board* [1960] AC 633 defined "maintain" in the context of the Mines and Quarries Act 1954 (c 70) (UK) to mean "keep[ing] in proper order by acts of maintenance before the thing to be maintained falls out of condition" (see *per* Lord Keith of Avonholm at 647).

57 We ought to mention that the issue of whether payments to the management fund should be included was in fact raised for Ms Mohamed's consideration in the course of the oral hearing before us. As would be recalled (and see [35] above), Ms Mohamed had departed from her written submissions and submitted before us that payments to the management fund ought to be *included* and not excluded as was the past practice of the relevant authorities. However, this does *not* mean that such past practice has been incorrect, for a further question has still to be answered: To what extent do the various expenses provided for by such contributions relate to maintenance within the meaning of the qualifying words? Ms Mohamed's new submission before us did not perhaps take into

account the response to this question. It cannot, in other words, be the case that there is a blanket rule that *all* expenses be included (or excluded).

58 In the context of the present case, this neatly dovetails into the second issue we have identified for determination (see [39] above), *viz*, whether maintenance contributions towards the *common property* (as opposed to the *individual lot*) ought to be included. This, as we note, in turn necessitates an even more fundamental enquiry: What is the distinction, if any, between a common and individual property in so far as of a strata development (such as that involved in the present appeal) is concerned?

The formal distinction between common property and individual lot

59 As Prof Tan notes in *Principles of Singapore Land Law* ([55] *supra* at p 590), the entire basis of the strata titles scheme is predicated on the subdivision of airspace above the ground as well as subterranean space. Thus, once it is accepted that a parcel of airspace can be adequately delineated, an expanded definition of land is possible, and a registered proprietor of a "lot" can be one in relation to a parcel of land in the conventional sense or in relation to a parcel of defined airspace. A building can be subdivided into different lots of delineated parcels of airspace – subsidiary or individual lots. The tax regime applicable to property, which comprises a lot the title of which is issued under the LTSA, is provided for in s 2(7) of the PTA.

60 Under the system of registration of titles, there is little problem in providing for the separate registration of titles of the delineated areas of airspace. Each individual lot is delineated on the strata title plan and includes any accessory lot delineated as such on the strata title lot. An "accessory lot" is defined in s 3 of the LTSA as "a lot intended for separate proprietorship and use with any other specified lot or lots for any purpose". By ss 13(3) and 15(1) of the LTSA, neither the accessory lot nor its share of the common property may be dealt with separately from the individual lot.

61 On the other hand, "common property" is defined in s 3 of the LTSA. Common property, such as open space, lifts, corridors and rubbish chutes, are owned by the registered subsidiary lot owners as tenants in common. Each registered subsidiary owner of a "lot" is assigned a certain share value or share units. The share units in turn determine, *inter alia*, the proportionate share of common property owned. To regulate the occupation of the subdivided building, the relevant legislative framework provides for the establishment of a management corporation which is made up of the subsidiary owners and which is responsible for the maintenance of the common property. It also lays down, as by-laws, a basic code of conduct that binds all occupiers. In addition to these statutory by-laws, the management corporation may also make new or extra by-laws.

62 In other words, as statutorily defined, an individual lot is wholly separate and distinct from the common property. One does not shade into another in so far as formal definition and distinction are concerned. However, carved out (as they are) of the same airspace, it would be overly simplistic to dismiss out-of-hand the notion that the two interact. Indeed, as we shall see, while there is a legal difference between an individual lot and common property, there is nonetheless a connection between the two inasmuch as one's share in the overall proportion of the lots determines the ownership of common property. Therefore, despite the formal distinction as envisaged in law, there is, practically speaking, some degree of interaction between common property and individual lots. All the subsidiary proprietors as tenants hold common property in common, and as such they have unity of possession. The subsidiary proprietor of a lot, as tenant in common with the other subsidiary proprietors of common property, has the right to use any part of it. With this in mind, we proceed to examine how this, in turn, interacts with the purpose of tax assessment.

The interaction between the common property and individual properties for the purposes of property tax assessment

Purpose of property tax assessment: Annual value reflects real worth of property

63 Returning to the issue as to whether the fact that the sums in issue in the present appeal relate to the common property takes them outside the ambit of s 2(1) of the PTA, we are of the view that it does *not*. There are two cogent reasons in support of this conclusion.

64 First, although sums or contributions related to the common property would appear, at first blush, to have nothing to do with the lot or property concerned, further reflection suggests that, as a matter of both logic as well as justice and fairness, each owner or subsidiary proprietor of each individual lot or property enjoys the common property and that, therefore, the annual value of the lot or property concerned should justifiably incorporate the value of such enjoyment. As we have demonstrated above, notwithstanding the legal distinction between common property and specific lots, they do, in reality, interact in a very real sense and it would therefore be wholly artificial to distinguish them for the purposes of property tax assessment. This in fact follows closely the observations of this court in *BCH No 2* that the annual value of a property relates to the rent or the letting of the subject property. In so far as contributions to the common property enhance the value of the property as a whole, and therefore increase the annual value of the individual lot, we see no reason why such contributions should not be *included* for the purposes of ascertaining the annual value of the subject property.

65 Secondly, the value that is attributable to the common property ought *not* to fall (in the context of property tax) into a "legal black hole". Indeed, as this court observed in *Centrepoint Shopping Centre* ([14] *supra*) at [10]:

> ***Whilst we do not accept the appellant's construction that the property which is the subject of s 2(7) includes the subsidiary proprietor's interest in the common property, we would accept that, in practice, the determination of the annual value of a lot would almost inevitably take account of the enjoyment to be derived from facilities and amenities forming part of the common property even though no specific value would be separately ascribed to such facilities and amenities. After all, it is unrealistic to suggest that (following the definition of "annual value" in s 2(1) of the PTA) "the gross amount at which [a lot] can reasonably be expected to be let from year to year" will not have implied therein some value for the enjoyment to be derived from at least some parts of the common property***. That may explain why s 2(7)(c) provides that in assessing the annual value of a lot "no *separate* annual value shall be attributed to the land" [emphasis added]. In other words, ***whilst the assessment of the annual value of a lot may indirectly take into account the facilities and amenities afforded by the common property***, no separate value is to be ascribed to the land in such assessment. However, it does not follow that property tax may not be charged where, instead of being held for enjoyment in common by all occupants of strata lots, parts of the common property are let or licensed for a rent or fee. Nothing in the PTA precludes the assessment of property tax in such circumstances. [emphasis added in bold italics]

Indeed, if this were not the case, it would be anomalous that no one pays tax for the common property in a strata development.

66 The Board was, in fact, cognisant of the point just made (see *Tan Hee Liang v The Chief Assessor* [2007] SGVRB 2, especially at [24]–[25]). However, whilst the Judge also acknowledged this particular point, he was of the view that *Centrepoint Shopping Centre* did not assist the respondents

in the manner we have just outlined (see the Judgment, especially at [26]–[28]). With respect, however, the fact situation in *Centrepoint Shopping Centre* was, as the Judge himself appeared to acknowledge (at [26]), quite different. That case concerned the licensing of parts of the common property for a fee. The argument made by the taxpayer in that case was to the effect that the annual value of each individual lot included a proportion of the gross amount at which the common property could be let and that those parts of the common property which were licensed for a fee were not subject to property tax. In our view, although the latter proposition did not follow from the former, this does not mean that the former proposition is untenable in relation to the specific factual context with which we are concerned in the present appeal. On the contrary, the Judge, who in fact delivered the judgment of this court in *Centrepoint Shopping Centre*, acknowledged this former proposition in the very passage quoted in the preceding paragraph (and also at [26] of the Judgment; see also the reasoning at [35]–[37] where there was at least an implicit assumption that contributions to the common property *could* be related to rent or letting).

67 Accordingly, we are of the view that it did not follow that, just because the contributions to the sinking fund and special levy were payments *towards the common property*, they had *nothing* to do with the rent or the letting of the specific lot. The next question then is *how* to attribute *the extent* to which such payments are related to the specific lot in question.

Practical attribution (relating to the specific lot)

68 When the two related considerations referred to in the preceding paragraphs are taken into account, it is clear that each owner or subsidiary proprietor ought to be responsible for (in the words utilised in the relevant definition of "annual value" reproduced at [42] above, and constituting part of the qualifying words set out at [34] above) "paying the expenses of repair, insurance, maintenance or upkeep and all taxes" in relation to the common property *in so far as it is relates to their individual lot or property*. In other words, a system of *proportional contribution* towards such expenses ought to constitute part of the annual value of the individual lot or property in question. This proportional contribution (*ie*, practical attribution), in fact, adequately reflects the actual benefit accrued to the individual lot owner from his enjoyment or utilisation of the common property. Thus, in reference to the monthly contributions the individual lot owner makes towards, for instance, the management fund, sinking fund or special levy, this in essence reflects that particular owner's enjoyment of the common property and we see no reason why it should not be included for the purposes of property tax assessment.

Practical attribution (purposes related to maintenance and repair)

69 However, this not the end of the inquiry. The next issue is: *Out* of these monthly contributions, how much is actually related to maintenance and repair, which s 2(1) of the PTA has mandated must be *included* in the calculation of the annual value? This is, in fact, the *second* aspect of the issue of practical attribution. In this regard, the important question that arises in the context of the present appeal is this: To what extent, if at all, do the sums paid by the appellant in respect of the special levy and/or the sinking fund relate to the expenses that constitute (in law) part of the annual value of the subject property (looked at from the distinctive perspective of the common property)?

70 Returning to the fact situation in the present appeal, in our view, it is clear that the sums paid by the appellant in respect of both the special levy as well as the sinking fund *do* relate – *in part at least* – to the common property. *However,* the difficulty that arises in this regard is that, at least in so far as the payments to *the management fund and sinking fund* are concerned, it is clear (from the relevant provisions of the BMSMA) that such payments, whilst utilised to meet expenses referred

to in the qualifying words in s 2(1) of the PTA, can *also* be utilised to meet *other* purposes which have *nothing to do with the concept of "annual value"*. It is clear that payments or contributions which relate to such *other* purposes ought *not* to be included in the assessment of the annual value of the lot or property concerned. Indeed, it is clear that these other purposes have, in principle, *nothing to do with the elements of rent or letting* in the first place. Let us elaborate by considering the specific provisions in the BMSMA itself. The relevant provisions of the BMSMA are, in fact, to be found in both ss 38 and 39. Section 38 of the BMSMA reads as follows:

Management funds and sinking funds

38.—(1) A management corporation shall establish and maintain a fund as its *management fund*.

(2) A management corporation shall pay into its *management fund* —

(*a*) *all moneys received by it in respect of contributions determined under section 39 (1)*;

(*b*) the proceeds of the sale or other disposal of any movable property of the management corporation;

(*c*) any fee received by the management corporation under section 47;

(*d*) any amounts paid to the management corporation by way of discharge of insurance claims; and

(*e*) interest received on any investment belonging to the management fund.

(3) *A management corporation shall not disburse any moneys from its management fund otherwise than for the purpose of —*

(*a*) *meeting its liabilities referred to in section 39(1)*;

(*b*) carrying out its powers, authorities, duties or functions under this Act; or

(*c*) *transferring moneys therein not required to meet the liabilities of the management fund to the sinking fund*.

(4) A management corporation shall also establish and maintain a fund as its *sinking fund.*

(5) In addition to any moneys transferred under subsection (3)(*c*), a management corporation shall pay into its *sinking fund* —

(*a*) *all moneys received by it in respect of contributions determined under section 39(2)*;

(*b*) any amount paid to the management corporation by way of discharge of insurance claims and not paid to the management fund;

(*c*) all other amounts received by the management corporation and not paid or payable into the management fund; and

(*d*) interest received on any investment belonging to the sinking fund.

(6) *A management corporation shall not disburse any moneys from its sinking fund otherwise than for the purpose of* —

(*a*) *meeting its liabilities referred to in section 39(2)*; or

(*b*) carrying out its powers, authorities, duties or functions under this Act.

(7) A management corporation may only *invest* any moneys in its management fund *or* sinking fund in any manner permitted by law for the investment of trust funds.

(8) A management corporation shall pay any moneys in its management fund or sinking fund that are not otherwise invested in accordance with subsection (7) into an account established with a financial institution in the name of the management corporation.

(9) A management corporation may borrow moneys and secure the repayment thereof and of any interest in such manner as may be agreed upon by the management corporation and the lender, otherwise than by charging the repayment on the common property.

(9A) No moneys in the management fund or sinking fund shall be used for any purpose of a collective sale of the property under Part VA of the Land Titles (Strata) Act (Cap. 158) other than for the purpose of convening any general meeting under the Second Schedule to that Act.

(9B) The moneys remaining in the management fund and sinking fund as at the date of the legal completion of a collective sale of the property in accordance with Part VA of the Land Titles (Strata) Act shall be returned as soon as practicable to the subsidiary proprietors of the lots in shares proportional to the contributions levied by the management corporation on the subsidiary proprietors in accordance with this Act.

(10) A management corporation shall —

(*a*) cause proper books of account to be kept in respect of moneys received or expended by the management corporation showing the items in respect of which the moneys were received or expended; and

(*b*) cause to be prepared, from the books referred to in paragraph (*a*), a proper statement of accounts of the management corporation in respect of each period commencing on the date the management corporation was constituted or the date up to which the last previous such statement was prepared and ending on a date not earlier than 4 months before each annual general meeting.

[emphasis added]

71 Section 39 of the BMSMA (the relevant parts which we have already set out at [49] above) reads as follows:

Management corporation to determine contributions by subsidiary proprietors

39.—(1) The management corporation shall, from time to time at a general meeting, determine the amounts which are reasonable and necessary to be raised by contributions *for the purpose of meeting its actual or expected liabilities incurred or to be incurred* within the period (not exceeding 12 months) specified in the determination *in respect of* —

(*a*) *the regular maintenance and keeping in good and serviceable repair pursuant to section 29 of parts of the parcel being the common property, fixtures, fittings and other property (including movable property) held by or on behalf of the management corporation*;

(*b*) *the common expenses of the management corporation (except those in subsection (2 (a) to (d))*;

(*c*) *the payment of insurance premiums*; and

(*d*) *all other liabilities* incurred or to be incurred during that period by or on behalf of the management corporation in carrying out its powers, authorities, duties and functions under this Act other than liabilities referred to in subsection (2).

(2) The management corporation shall, also from time to time at a general meeting, determine the amounts which are reasonable and necessary to be raised by contributions *for the purpose of meeting its actual or expected liabilities incurred or to be incurred in respect of* —

(*a*) *painting or treating of any part of the common property which is a structure or other improvement for the preservation and appearance of the common property*;

(*b*) *major repairs and improvements to, and maintenance of, the common property and boundary wall*;

(*c*) *the renewal or replacement pursuant to section 29 of parts of the parcel being the common property, fixtures, fittings and other property (including movable property) held by or on behalf of the management corporation*;

(*d*) *the acquisition of movable property*; and

(*e*) *such other liabilities* expected to be incurred at a future time where the management corporation determines in a general meeting that the whole or part thereof should be met from its sinking fund.

(3) If the management corporation becomes liable to pay any moneys that it is unable to pay immediately, the management corporation shall determine that amount to be raised by contributions.

(4) A determination made by a management corporation under subsection (1) or (2) may specify that the amounts to be raised for the purposes therein referred to shall be raised by such regular periodic contributions as may be specified in the determination.

[emphasis added]

72 In so far as the payments to *the management fund and the sinking fund* are concerned, it will be seen that such payments or contributions can be utilised for *both* the purposes of maintenance and repair *as well as* for *other* purposes. The question that arises – in a very practical way – is *what proportion* should be allocated to the former purposes, for it is *that* proportion of the contributions that would be included as part of the annual value of the lot or property concerned (here, the subject property). Likewise, *the special levy* may relate wholly or partly to the purposes embodied in the qualifying words. Thus, in the usual case, how would one properly resolve this problem of attribution

which we have identified? In our view, this is a problem which falls squarely on the Chief Assessor to resolve by the adduction of suitable evidence showing the precise attribution. Only then does the evidential burden of proof shift to the taxpayer (here, the appellant) to demonstrate to the Chief Assessor why any particular item and/or proportion that is included ought to be excluded instead.

Time when the funds are utilised

73 However, this is not an end to the matter. We have noted earlier in this judgment (especially at [55] above) that there is a distinction in the point in time at which funds from the maintenance fund and the sinking fund, respectively, are utilised (or at least specifically allocated) for the purposes of maintenance and repair. Hence, in addition to the difficulty of practical attribution, there arises the issue of *when* the funds utilised from the sinking fund for the purposes of maintenance and repair can be included in the assessment of the annual value for the purposes of property tax. We are of the view that such inclusion can take place *only when the maintenance and repair are in fact effected or at least specifically allocated (which would, in the nature of things, be a major undertaking* (see above at [55])*.* Thus, in so far as present maintenance preserves the value and hence goes towards the present value, this should be included. As for future maintenance, we think this might enhance (or preserve) the value of the property and hence is related to the annual value. However, just when "specific allocation" of funds for such future maintenance takes place is something which we think the Chief Assessor would be in a better position to provide some firm guidelines on after consultation with the relevant industry stakeholders. Apart from the precise timing when the payments ought to be taken into account, there is a further issue of whether one-off payments have a permanent effect on the property tax payable. It would seem to us as a matter of common sense that there may have to be some flexibility on this issue. This is an important point which will have a crucial bearing on the outcome of one of the key issues before us in the present appeal.

The Judge's further requirement not applicable

74 We should pause to observe, at this juncture, that the further requirement raised by the Judge (see generally above at [25]–[26]) might still be in issue where the item concerned does *not* come within the qualifying words and is not otherwise related to rent or letting. Put simply, would the further requirement still apply before the item concerned is excluded for the purposes of assessment of property tax? We would, with respect, disagree with the Judge that the further requirement should apply. As the appellant correctly points out, there is no authority whatsoever that supports the further requirement. More importantly, we see no reason, in principle, why the further requirement should apply. Indeed, the imposition of such a requirement could, depending on the particular factual matrix at hand, result (as the appellant correctly pointed out) in further artificial distinctions being drawn. As this court emphasised in *BCH No 2* ([16] *supra*), the pivotal focus is on whether or not the items concerned are related to rent or letting. Of course, if they fall within the qualifying words, then such items would also be included, as the Legislature clearly mandates that this should be the case. Indeed, the qualifying words themselves deal with the relationship between the landlord and the tenant without the need for a further judicial or interpretive overlay which the further requirement, in substance, represents.

Summary of applicable principles

75 Thus, to summarise the applicable principles:

(a) *Practical attribution (relating to the specific lot)*: While there is a need to show that the specific lot owner's payments to the management fund, sinking fund and/or the special levy must relate to the specific lot in question (in so far as these contributions are ostensibly made towards

the common property), this issue resolves itself by virtue of the *actual* contribution made by the specific lot owner. In other words, once it is established that there cannot be an iron curtain separating common property on the one hand and the specific lot on the other (inasmuch as a benefit to the former will naturally result in a corresponding benefit to the latter), the only practical manner of attribution is by way of the specific lot owner's actual contributions to the funds concerned.

(b) *Practical attribution (purposes related to maintenance and repair)*: It is, however, necessary to show that part of the specific lot owner's payments to the management fund, the sinking fund and/or the special levy goes towards purposes of maintenance and repair for such contributions to be included in the calculation of the annual value of the specific property concerned. Indeed, to obviate any future difficulties in this particular regard, we suggest (at [80] below) that the Chief Assessor ought to issue relevant advice or (preferably) guidelines.

(c) *Time at which the funds are utilised*: In relation specifically to the sinking fund, we have noted above its distinction with the management fund. Thus, even after it is established that certain parts of the management fund and the sinking fund go towards maintenance and repair, in so far as the sinking fund is concerned, contributions thereto should only be included for the purpose of the calculation of the annual value of the specific property concerned when the maintenance and repair are in fact effected or at least specifically allocated (which would, in the nature of things, be a major undertaking). However, just when "specific allocation" of funds for such future maintenance takes place is something which we think the Chief Assessor would be in a better position to provide some firm guidelines on after consultation with the relevant industry stakeholders (see above at [73]).

(d) *Further requirement laid down by the Judge not applicable*: Finally, for the avoidance of doubt, the further requirement laid down by the Judge in the court below is not applicable.

Application of the relevant principles law to present case

76 We now apply the relevant principles of law as discussed above to the facts at hand.

Contributions to the sinking fund

77 In so far as the contributions to *the sinking fund* are concerned, we do not think that they should be included based on the evidence presently available.

78 First, in relation to the first aspect of practical attribution (see [68] above), we do not think that the Chief Assessor has shown exactly *how* much of the sinking fund is related to the rent and value of the specific property concerned. Whilst we have said that the mere fact that such contributions are made towards the maintenance and repair of the *common property* will not preclude their inclusion in the assessment of the annual value, the onus remains on the Chief Assessor to prove the practical attribution. However, while this has not been done in the present case, we have *also* stated that this problem actually resolves itself and hence this issue is moot.

79 Secondly, in relation to the second aspect of practical attribution (see [69] above), the Chief Assessor has not shown the proportion of the specific lot owner's contributions towards the sinking fund which can be attributed to maintenance and repair of the common property in question.

80 Thirdly, it will be seen that, in so far as the principle with regard to *timing* set out above (at [73]) is concerned, it is clear, in our view, that, absent an *actual* allocation or expenditure *vis-à-vis*

the sinking fund in respect of the maintenance and the repair of the common property, there should be no inclusion of the amount concerned in the annual value for the purposes of property tax. However, as we are of the view that this is an issue best left to the Chief Assessor to resolve by way of clear guidelines as to when specific allocation takes place, we will remit this issue alone back to the Chief Assessor to decide.

Contributions to the special levy

81 The special levy in the present case was collected over a period of three years from July 2005 to June 2008 for external upgrading works (as approved through the passage of a special resolution at the MCST's second annual general meeting). The crucial question is whether this is a form of repair or maintenance. The question of whether the special levy was to be used for such a purpose is not in question.

82 In our view, in contrast with the sinking fund, as the relevant sections of the BMSMA (as reproduced and discussed above) demonstrate, *the special levy*, in the context of the present appeal, is related *wholly* to the purposes embodied in the qualifying words and has been allocated specifically for a purpose relating to maintenance and repair. As the issue of timing does not arise, it should therefore be *included* as part of the annual value of the subject property. There of course remains the issue as to whether this will result in a temporary or permanent increase in the annual value of the property concerned. This is, strictly speaking, not before us and must necessarily depend, *inter alia*, on the nature of the use to which the special levy is being put to.

Payments to the management fund

83 Finally, no issue arises in the present appeal in so far as the payments to the management fund are concerned. This is because the Chief Assessor – somewhat curiously, in our view – permitted such contributions to be *excluded* for the purposes of assessment of the annual value of the subject property and there has been no cross-appeal on that point. Here again (as with the contributions to *the sinking fund*), these contributions can, ostensibly at least, be utilised *both* for the purposes of maintenance and repair (see ss 39(1)(*a*)–39(1)(*c*) of the BMSMA, reproduced above at [71]) *as well as* for *other* purposes (see s 39(1)(*d*) of the BMSMA, reproduced above at [71]). However, having regard to its overall purpose and, indeed, its common characterisation by the parties herein as a "maintenance fund", it is inconceivable that such fund could always be excluded on the apparent premise that it is *never* concerned with maintenance and repair. The better view must be that it should have *some* use towards maintenance and repair, and it was therefore wrong for the Chief Assessor to have hitherto adopted what was, in effect, a blanket exclusion for unclear reasons which can only be explained on a mistaken belief that such payments to the respective management funds *always* have nothing to do with maintenance and repair. In the circumstances, payments to the *management fund* ought, in our view, to be included in the assessment of the annual value for the purposes of property tax in so far as they relate to maintenance and repair.

84 However, by allowing the appellant's payments to *the management fund* to be *excluded*, the Chief Assessor has, in fact, accorded the appellant a *concession* of sorts. The Chief Assessor is, of course, entitled to make this concession as a matter of administrative discretion and practice (as well as, perhaps, even as a matter of legal right: see s 69 of the PTA as well as [85] below).

85 Leaving aside the special administrative concession extended by the Chief Assessor to the appellant with respect to the latter's payments to the management fund (which is, in any event, *not* an issue before this court in the present appeal), it would appear that whilst the Chief Assessor was correct in including the appellant's contributions to *the special levy* in the assessment of the annual

value of the subject property, it ought *not* (in the absence of proof of an actual allocation of funds towards maintenance and repair) to have included the appellant's contributions to *the sinking fund as a matter of course* in the assessment of the annual value of the same. However, in the final analysis, assuming that the contributions to the sinking fund were properly included, while we think that the Chief Assessor was wrong as a matter of principle, the result reached in terms of the final sum taxed was perhaps correct, taking into account the overall treatment of the three funds in question. In particular, we note that in so far as the management fund usually constitutes a larger sum than the sinking fund or the special levy (and it is, indeed, collected more regularly and, hence, more frequently), it is in fact the taxpayers who have enjoyed some benefit in view of the Chief Assessor's erroneous practice to date of *totally* excluding payments to the management fund from the calculation of the annual value of the respective properties concerned. We should, however, also note in this last-mentioned regard the Chief Assessor's further submissions which acknowledged that "there may not be a need to reopen the past cases as section 69 of the [PTA] allows for remission".[note: 1] Looked at in the round, it would appear that the (albeit unintended) net result approximates that which would have been achieved had the Chief Assessor assessed the annual value of the properties concerned in accordance with the legal principles set out above. For the avoidance of doubt, our comments in this regard should not obscure the ruling that we have made to remit the issue relating to the sinking fund back to the Chief Assessor for determination.

Conclusion

86 In the circumstances, whilst we dismiss the appeal with regard to the special levy, we remit the issue relating to the sinking fund back to the Chief Assessor for determination.

87 In so far as the issue of costs is concerned, we are of the view that it would be fair for each party to bear their own costs of both the appeal as well as the hearings below. The usual consequential orders are to apply.

[note: 1]At para 58 of the respondents' further submissions.