Chiu Teng @ Kallang Pte Ltd *v* Singapore Land Authority
[2013] SGHC 262

Case Number : Originating Summons No 457 of 2013

Decision Date : 27 November 2013

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Alvin Yeo SC, Lim Wei Lee, Lionel Leo and Edmund Koh (WongPartnership LLP) for the applicant; Edwin Tong, Kristy Tan and Peh Aik Hin (Allen & Gledhill LLP) for the respondent; Aurill Kam, Lim Wei Shin, Terence Ang and Leon Ryan (Attorney-General's Chambers) for the Attorney-General.

Parties : Chiu Teng @ Kallang Pte Ltd — Singapore Land Authority

Administrative Law – Judicial review

27 November 2013 Judgment reserved

Tay Yong Kwang J:

1 This case concerns the judicial review of the Singapore Land Authority's ("the SLA") assessment of the differential premium ("DP") payable for the lifting of title restrictions for two particular plots of land. The applicant alleges that the assessment of the DP was done without reference to the Development Charge Table of Rates ("the DC Table") published by the Urban Redevelopment Authority ("the URA"). The applicant thus seeks a quashing order against the assessed DP and a mandatory order to direct the SLA to assess the DP in accordance with the DC Table. The Attorney-General, a non-party to the action, also made submissions during the hearing before me.

The facts leading to the application

2 The applicant is a company in the business of property development. It is currently the lessee of adjoining plots of land identified as Lot Nos 1338M TS 17 ("Lot 1338M") and 2818V TS 17 ("Lot 2818V") (collectively referred to as "the Land").

3 The applicant acquired Lots 1338M and 2818V on 15 January 2010 and 25 March 2010 respectively through competitive tenders for the purpose of redevelopment. The SLA's consent for the sale of both lots was needed and this was duly obtained.

4 The lease documents for both lots contained two references to the payment of a differential premium. The first, which will henceforth be referred to as the DP Clause, states thus:

> The demised land shall not be used for other than the abovementioned development except with the prior permission of the Lessor. The lessee shall be required to pay a differential premium, as appropriate, in respect of any increase in floor area or change of use from a lower use category to higher use category from the existing use which will result in an enhanced value.

The second clause, henceforth referred to as the Land Return Clause, reads:

The Lessee shall notify the Lessor in writing of such portions of the demised land which are not used for the purposes specified. If directed by the Lessor, the Lessee shall surrender to the Lessor such land not used for the purposes specified at rates equivalent to the compensation payable for such land if it had been acquired under the Land Acquisition Act on the date of the direction.

Provided that if the Lessor does not issue a direction for the surrender of such land within 1 year from the said notification by the Lessee under this clause or within such other period as may otherwise be mutually agreed between the Lessor and the Lessee, the Lessor shall, at the request of the Lessee, lift the restrictions in the Lease under [the DP Clause] in relation only to such land; subject to the Lessee obtaining the necessary approvals from the relevant authorities regarding the proposed use of such lands and the payment of a differential premium under [the DP Clause].

5 Generally, state land is sold at a price based on the proposed use and intensity at the time of sale. State leases usually specify, as a condition in the lease, the permissible use of the land under the lease and the maximum gross floor area for the said permissible use. This ensures that the land is used in line with prevailing land policy, as evinced in the Master Plan (which is the statutory land use plan guiding Singapore's development in the medium term over the next 10 to 15 years). The Master Plan shows the permissible land use and intensity for developments in Singapore. Each parcel of land is zoned for different categories of land use, which include commercial, residential and industrial use. Thus, state leases generally include a DP clause which stipulates that a DP shall be payable if there is a change in the use or an increase in the intensity of use beyond the permissible amount.

6 The SLA published two circulars and maintained a website to provide the public with information on how the payable DP is computed. The material portions of the first circular, which was published sometime in 2000 ("the 2000 SLA Circular"), stated (with "PP" meaning Provisional Planning Permission):

1. With effect from 31 July 2000, the Singapore Land Authority has implemented a transparent system of determination of differential premium (DP) for the lifting of State title restrictions involving change of use and/or increase in intensity. This is to encourage optimisation of land use and to facilitate the overall pace of redevelopment in Singapore. It will also provide greater certainty to landowners who will now be able to compute the DP payable themselves.

2. The determination of DP will be based on the published Table of Development Charge (DC) rates. …

…

4. Where the use as spelt out in a particular title restriction does not fit into any of the Use Groups in the Table of DC Rates, the DP payable will be determined by the Chief Valuer on a case-by-case basis.

…

6. As the material date for determination of DP is pegged to the PP date, all applications for lifting of title restriction must have a valid PP. Applications without a valid PP will be rejected. The Singapore Land Authority reserves the discretion on whether to grant an application for lifting of title restriction and/or topping up of lease in accordance with its policies.

…

8. The new system for determining DP does not apply to the computation of premium payable for the upgrading of lease tenure (i.e. the topping-up of lease tenure). Such premium will still be assessed by the Chief Valuer on a case-by-case basis.

9. If you have any queries concerning this circular, please feel free to contact us at SLA. We will be pleased to answer queries on this matter.

7 The second circular, published sometime in 2007 ("the 2007 SLA Circular"), is substantially similar to the 2000 SLA Circular:

1. With effect from 18 July 2007, in line with the revision of the Development Charge (DC) system whereby Government will peg the amount of DC based on 70% of the enhancement in land value, the differential premium (DP) system will similarly be adjusted for the lifting of State title restrictions involving change of use and/or increase in intensity.

2. The determination of DP will still be based on the published Table of Development Charge (DC) rates. The material date of determination of DP will be pegged to the date of Provisional Planning Permission (PP) or the start date of the validity of the second and subsequent PP extensions, similar to DC. The prevailing Table of DC rates at the grant of PP will be used.

…

4. Where the use as spelt out in a particular title restriction does not fit into any of the Use Groups in the Table of DC Rates, the DP payable will be determined by the Chief Valuer on a case-by-case basis.

5. As the material date for determination of DP is pegged to the PP date, all applications for lifting of title restriction must have a valid PP. Applications without a valid PP will be rejected. The Singapore Land Authority reserves the right on whether to grant an application for lifting of title restriction in accordance with its prevailing policies.

…

7. The basis of charging 50% of the full value for remnant State land will remained unchanged notwithstanding the revision of the Development Charge (DC) system and correspondingly, the Table of DC Rates. Accordingly, SLA will apply a factor of 5/7 to the new revised Table of DC Rates (i.e. Table of DC Rate x 5/7 x size of remnant State land x plot ratio) when computing the premium for remnant State land.

8. If you have any queries concerning this circular, please feel free to contact us at SLA. We will be pleased to answer queries on this matter.

8 The material portions of the SLA website (as assessed on 20 January 2011) are reproduced below:

…

Differential Premium

A payment, known as differential premium (DP), will be charged for lifting the title restriction. The DP is the difference in value between the use and/or intensity stated in the State title and the approved use and/or intensity in the provisional planning permission.

DP is computed based on the Development Charge (DC) Table of Rates. The material date of determination of DP is pegged to the date of Provisional Permission (PP) or the date of the second and subsequent PP extensions. …

Where the use stipulated in the title restriction does not fit into any of the Use Groups in the DC Table, the DP payable will be determined by the Chief Valuer on a case-by-case basis.

…

Option for Spot Valuation

Landowners/developers who are not satisfied with the differential premium (DP) payable based on the Development Charge (DC) Table of Rates can write in to SLA to appeal against the differential premium amount. SLA will then consult Chief Valuer (CV) for a spot valuation. …

If the new DP payable upon appeal turns out to be higher than the initial DP based on the DC Table of Rates, the appellant is not allowed to fall back on the initial DP amount.

If the appellant is still not satisfied with Chief Valuer's spot valuation, another appeal can be made. However, before the second appeal is processed, the appellant must pay up the DP (based on CV's valuation) first and an appeal fee of $10,000. If the revised DP on the second appeal is lower than the first appeal, the excess amount collected will be returned.

9 The SLA website had a section entitled "Terms of Use". Two clauses are relevant to this application:

1. … By accessing and using any part of this Site, you shall be deemed to have accepted, and agreed to be bound by, these Terms of Use. …

Disclaimer of Warranties and Liability

8. The Contents of this Site are provided on an "as is" basis. **SLA does not make any representations or warranties whatsoever and hereby disclaims all express, implied and statutory warranties of any kind to you or any third party**, whether arising from usage or custom or trade or by operation of law or otherwise, including but not limited to the following:

a . **any representations or warranties as to the accuracy**, completeness, reliability, timeliness, currentness, quality or fitness for any particular purpose of the Contents of this Site; and

b . **any representations or warranties that the Contents and functions available on this Site shall be error-free** or shall be available without interruption or delay, or that any defects on the Site shall be rectified or corrected, or that this Site, the Contents and the hosting servers are and will be free of all viruses and other harmful elements.

9 . **SLA shall not be liable to you or any third party for any damage or loss whatsoever**, including but not limited to direct, indirect, punitive, special or consequential damages, loss of

income, revenue or profits, lost or damage data, or damage to your computer, software, modem, telephone or other property, arising directly or indirectly from:

a. your access to or use of this Site;

b. any loss of access to or use of this Site, howsoever caused;

c . **any inaccuracy** or incompleteness in, or errors or omissions in the transmission of, the Contents;

d. any delay or interruption in the transmission of the Contents on this Site, whether caused by delay or interruption in transmission over the internet or otherwise; or

e . **any decision made or action taken by you or any third party in reliance upon the Contents**,

regardless of whether SLA has been advised of the possibility of such damage or loss.

[emphasis added]

10 The first affidavit of Thong Wai Lin, the Director of the Land Sales and Acquisition Division of the SLA, explains (at [27], [86] and [87]) how the Table of Development Charge rates are determined. The DC Table is split across different categories of land use and different geographical sector areas in Singapore. There is a specific rate for each category of land use in each particular sector area. The rates are revised half-yearly in March and September. The rates are not spot valuations but are based on past transactional prices of a preceding six-month period and on the average of such prices in a particular sector area. As the DC Table is a snapshot of rates determined in advance, the DC Table does not necessarily reflect the actual prevailing value of land. In a rising market, the DC Table's rates would be lower than spot valuations. In contrast, a spot valuation assesses the actual value of a piece of land at the time of assessment. A plot of land located in a more desirable location may have a much higher value than another plot of land in the same sector. The Chief Valuer takes into account various factors, including transactions involving similar developments (corrected for differences in time), the natural attributes of the land, its shape, and its accessibility.

11 On or about 25 January 2010 (shortly after the applicant had acquired Lot 1338M), the applicant filed an application with the URA for the requisite planning permission for redevelopment. Provisional permission was granted on 2 July 2010. The applicant then submitted revised plans to comply with the requirements of the provisional permission. Planning permission was granted by the URA on 14 January 2011.

12 On or about 25 January 2011, the applicant submitted an application to the SLA for the lifting of title restrictions on the Land for the purposes of redevelopment. On or about 21 February 2011, the applicant's solicitors, Legal21 LLC, wrote to the SLA to seek the SLA's written consent to sell units in the proposed redevelopment to individual purchasers and to align the lease tenures of Lots 1338M and 2818V (which had 67 and 64 years remaining respectively). By way of an email dated 4 March 2011, the SLA informed Legal21 LLC that "[a]pplications for consent for sale typically take approximately 4 weeks from the date of receipt to process" but that the SLA was "happy to expedite the case" and hoped to give a definite response by 9 March 2011.

13 On 15 March 2011, the SLA sent an email to the applicants stating that the alignment of the

tenures of both Lots 1338M and 2818V would involve a downgrading of the tenure of Lot 1338M which required a surrender and re-issue of the lease for the said lot. The email also stated that the SLA would process the application for the lifting of title restrictions upon approval for the downgrading of tenure; this would ensure that the calculation of the DP payable took into account the aligned tenure.

14 The applicant made numerous telephone calls and sent many emails between March and November 2011 to rush the SLA into making a decision. In the meantime, the applicant obtained the requisite construction permit on 8 April 2011 and started construction work despite the lack of response. Finally, on 29 November 2011, the SLA wrote a letter to Legal21 LLC. The contents of this letter are set out below:

> 2. The Lessor has no objections to the sale of the individual units in the Development by your client in respect of [the Land]. The consent is restricted to the particular sale and all the other covenants [in the leases] shall remain in full force and respect
>
> …
>
> 6. Your client has also applied for the downgrading of [Lot 1338M] to align with the tenure of [Lot 2818V] which is currently being processed.
>
> 7. As for your client's application to lift title restrictions in respect of [the Land], we would like to inform your client that **differential premium equal to 100% of the enhancement to land value as assessed by the Chief Valuer will be levied for the lifting of title restrictions**. Before we may process this application, your client is required to apply to URA to subdivide [Lot 2818V] since [Lot 2818V] will be developed separately from its remaining parcel. Please let us have a copy of the URA's written permission for the sub-division once that is issued.
>
> 8. You may contact the undersigned if you have further questions.
>
> [emphasis added]

15 The applicant accordingly applied for, and obtained on 4 January 2012, the URA's permission for the requisite sub-division of Lot 2818V. This was forwarded to the SLA. On 13 January 2012, the SLA wrote to the applicant stating that it was prepared to recommend the surrender of the existing title to Lot 1338M and re-issue a fresh title to align the tenures of Lots 1338M and 2818V. The applicant accepted this offer on 8 February 2012. On 16 August 2012, the SLA informed the applicant that the surrender and the re-issue were approved. To that end, the SLA wrote to the applicant on 14 September 2012, attaching the re-issued lease for execution. The applicant duly executed the re-issued lease on 24 September 2012.

16 On 20 February 2013, the SLA wrote to the applicant stating that it was prepared to lift the title restriction upon payment of $44,067,828.23. The breakdown of this sum is as follows:

(a) DP in respect of Lot 1338M $33,523,349.00

(b) GST on DP in respect of Lot 1338M $2,346,634.43

(c) DP in respect of Lot 2818V $7,660,640.00

(d) GST on DP in respect of Lot 2818V $536,244.80

(e) Processing fee for Lot 1338M $80.00

(f) Processing fee for Lot 2818V $880.00

(g) Total $44,067,828.23

17 On 6 March 2013, the applicant wrote to the SLA seeking clarification on how the DPs payable were calculated. In its reply dated 13 March 2013, the SLA stated that the DPs were "assessed by the Chief Valuer based on 100% enhancement in land value for the lifting of title restrictions." Legal21 LLC, in a letter to the SLA dated 2 April 2013, wrote:

> With respect, your said letter of reply dated 13 March 2013 is unhelpful, as no requested clarification on the basis of calculation of the differential premium set out in your said letter dated 20 February 2013 was offered. Specifically, our clients would like to seek clarification on which date the determination of the differential premium is pegged to, and which table of development charge rates was used. Our clients have instructed a team of valuers to conduct a separate assessment to the Chief Valuer's assessment of the differential premium payable and to render advice on the same to our clients. …

18 The SLA sent a letter on 3 April 2013, stating that the material date for the determination of the DP was 2 July 2010 (*i.e.*, the date of provisional permission). More importantly, the SLA also stated that:

> The differential premium payable in respect of Lots 1338M and [2818V] is determined by the Chief Valuer. As such, the Development Charge table was not adopted in determining the differential premium.

19 On 9 April 2013, Legal21 LLC wrote a further letter to the SLA:

> We are instructed to request for clarification as to why the table of development charge rates, which is the prescribed method of assessment as published by SLA, was not adopted in determining the differential premium payable.
>
> We are further instructed that the differential premium payable for the 2 plots, computed based on the table of development charge rates as at March 2010, are as follows:
>
> In respect of Lot [1338M] S$8,831,607
>
> In respect of Lot [2818V] S$2,343,508

20 The SLA replied to Legal21 LLC by way of a letter dated 11 April 2013 stating:

> We would like to explain that **this case is different from conventional leasehold sites** because lots 1338M and [2818V] **were formerly directly alienated to the former owner instead of through competitive tender.** Under the applicable policy for lifting restrictions on directly alienated properties, and where the land is capable of independent development, private sector lessees are required to pay differential premium (DP) based on the full difference (i.e. 100%) between the land values based on the proposed and original use / intensity, if allowed. The Government has stated clearly on 29 Nov 11 that DP pegged at 100% of the enhancement in land values will be levied for the lifting of title restrictions in this case. [emphasis added]

21 In response, Legal21 LLC wrote to the SLA on 24 April 2013, seeking the following particulars:

(a) Full details of the policy pertaining to the DP chargeable for directly alienated land ("the Policy"), including its rationale, when it was first established and applied and when the Policy will be applied and against whom;

(b) Whether the Policy applied to all lessees of directly alienated properties (including subsequent lessees);

(c) Details of whether the Policy had been established by the SLA, and details of where a copy of the Policy may be obtained; and

(d) Confirmation that the Policy had not been published by the SLA, if this was indeed the case.

22 As an aside, the Policy was applied to the proposed redevelopment by CapitaLand of Market Street Car Park. This was widely reported in the Straits Times and the Business Times. In particular, in a news release dated 3 January 2008, it was stated:

> The existing lease of Market Street Car Park, which expires on 31 March 2073, has a restriction on use. The restriction has to be lifted to permit a re-development of the site and this will be subject to the following two conditions:
>
> - **payment by the lessee (CCT) of 100% of the enhancement in land value as assessed by the Chief Valuer in a spot valuation**; and
>
> - no extension of the existing lease of Market Street Car Park
>
> [emphasis added]

23 On 30 April 2013, Legal21 LLC wrote to the SLA stating that the applicant wished to appeal against the assessed DP on a without prejudice basis and enclosed a cheque for the $5,000 appeal fee. Legal21 LLC also stated:

> … Further, there are no conditions specified under [the Leases of both lots] to indicate that [the Land] was "special" and this warranted a different method of computing the differential premiums. In all the circumstances, our clients take the position that the Chief Valuer ought to have assessed the enhancement in land value by reference to the Development Charge.

24 For the purposes of the appeal, the SLA met with the applicant on 8 May 2013. The SLA explained to the applicant the mechanism behind the computation of the DP (*i.e.*, 100% of the enhancement in value of the land as assessed by the Chief Valuer in a spot valuation). A further meeting was held on 15 May 2013, where representatives of the applicant, SLA and the Chief Valuer's Office ("CVO") were present. The applicant brought valuers from Colliers International (Singapore) Pte Ltd ("Colliers") along to the meeting. The CVO explained to Colliers that the CVO had adopted the comparison method, which involves using comparables with similar land use, for the spot valuation used to determine the DP payable. The applicant allegedly agreed at the meeting to submit a valuation report for CVO's consideration. This originating summons was filed on 17 May 2013. In a letter dated 6 July 2013 (*i.e.*, after this Originating Summons was filed) from Legal21 LLC to Allen & Gledhill (the SLA's solicitors), the applicants denied that they had agreed to furnish the CVO with an alternative valuation report. The applicant has since withdrawn from the appeal process.

25 At a pre-trial conference on 5 June 2013, the Attorney-General applied to be given the right to be heard at the substantive hearing before me. That was granted by the Assistant Registrar. At another pre-trial conference on 12 July 2013 before me, the parties agreed to address both the issue of leave and the substantive hearing in a consolidated hearing because of the urgency of the matter. Accordingly this judgment will deal with both the application for leave for judicial review and the merits of the case.

Leave and other preliminary issues

26 An applicant seeking judicial review must meet three conditions for leave to be granted (*Jeyaretnam Kenneth Andrew v Attorney-General* [2013] 1 SLR 619 at [5] and affirmed by the Court of Appeal ([2013] SGCA 56 at [5])):

(a) The subject matter must be susceptible to judicial review;

(b) The applicant has sufficient interest (i.e., *locus standi*) in the matter;

(c) The material before the court discloses an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the applicant.

27 The parties agreed that the subject matter was susceptible to judicial review and that the applicant had sufficient interest in the matter to apply for judicial review. Accordingly the only issue before me with regard to leave is whether the applicant could make out an arguable or *prima facie* case of reasonable suspicion. As the parties had agreed to consolidate the application for leave with the substantive application, the applicant's case would therefore be decided on its merits.

28 There are however two preliminary issues which have to be decided before the substantive issues can be addressed. The first issue pertains to whether the application for leave is out of time due to the operation of O 53 r 1(6) of the Rules of Court (Cap 322 R 5 2006 Rev Ed). The second relates to whether the applicant had exhausted all alternative remedies before seeking judicial review.

Was the application for leave out of time?

29 O 53 r 1(6) of the Rules of Court reads:

> Notwithstanding the foregoing, leave shall not be granted to apply for a **Quashing Order** to remove any judgment, order, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made within 3 months after the date of the proceeding or such other period (if any) as may be prescribed by any written law or, except where a period is so prescribed, the delay is accounted for to the satisfaction of the Judge to whom the application for leave is made; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the Judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired. [emphasis added]

30 The applicant took the position that the SLA made its decision on 20 February 2013 as that was when the SLA informed the applicant of the amount of DP payable (see [16] above). It was only then that the applicant became aware of the SLA's decision to assess the DP payable without reference to the DC Table. As the application for leave to apply for judicial review was filed on 17 May 2013, the application was made within the time prescribed by O 53 r 1(6) of the Rules of Court.

31 The SLA argued that the effective date of the SLA's decision was 29 November 2011 (see [14]

above). That was the date the SLA first conveyed to the applicant that the DP levied in its case would be "equal to 100% of the enhancement in land value as assessed by the Chief Valuer" and not based on the DC Table rates. The application was therefore way out of time.

32 The Attorney-General did not make any submissions on whether the application was out of time.

33 The applicant made several arguments in support of its contention that the SLA decision was made on 20 February 2013:

(a) DP is assessed and imposed only after the SLA has made a decision to allow the lifting of title restrictions. As SLA only decided to lift title restrictions on 20 February 2013, the decision pertaining to the assessment of the DP could only have been made on or after 20 February 2013;

(b) The 29 November 2011 letter was wholly unclear and could not reasonably be construed to be a decision on the assessment of DP payable. The SLA stated that the application for lifting of title restrictions would be processed only after approval for subdivision for the lot now known as Lot 2818V. The DP payable would be assessed by the SLA only in the course of processing the application for lifting of title restrictions. The applicant also made several calls to the SLA to enquire about the amount of DP payable but received no response until 20 February 2013;

(c) The 29 November 2011 letter, while referring to DP being payable at 100% of the land enhancement value, did not indicate to the applicant that the SLA had decided to assess DP without reference to the DC Table. The applicant had understood the letter to mean that the DC Table would be adopted but that DP would be assessed at 100% of the applicable DC Table. This was buttressed by the 2007 SLA Circular in which the SLA wrote that it would "apply a factor of 5/7 to the new revised Table of DC Rates" with regard to remnant State land (see [7] above). The applicant reasonably expected that "100% land enhancement value" would be calculated in a similar way; and

(d) In a letter from the SLA to Legal21 LLC dated 30 April 2013, the SLA themselves wrote that "[i]n view of your appeal, we are pleased to grant to your client a further extension of time to accept the offer dated 20 Feb 13".

34 The SLA submitted that its decision was made on 29 November 2011. The method of DP assessment stated in the 29 November 2011 letter was not contingent on the sub-division of the lot now known as Lot 2818V. The only thing pending was the quantum of DP payable. It was clear that the letter informed the applicant of the SLA's final decision on the methodology for assessing the DP payable.

35 O 53 r 1(6) also allows a court to grant an extension of time where "the delay is accounted for to the satisfaction of the Judge" (see also *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2011] 3 SLR 94 at [49] and *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2007] 2 SLR(R) 568 at [18]). The applicant submitted that the circumstances justified the grant of an extension of time. The applicant at all material times believed that the SLA would assess the DP payable in accordance with the DC Table and only found out that the SLA would not be doing so on 20 February 2013. The SLA submitted that an extension of time should not be granted. The delay of more than 17 months was inordinately long. Further, as an established and experienced developer, the applicant should have understood the significance of the words "equal to 100% of the enhancement in land value as assessed by the Chief Valuer" to mean that the DC Table would not be used. Lastly, the applicant had proceeded with the redevelopment and had already received substantial payments from

individual purchasers. It would therefore be unfair to the SLA for the applicant to take advantage of this and further delay the payment of the DP.

36 I agree with the applicant. Time only started to run from 20 February 2013 and not 29 November 2011. The SLA's decision was a multiple-step decision process. As a practical matter, the nub of the applicant's complaint was not just the method that was used to compute the DP payable but also the outcome of that method. The applicant would have had no grievance if the outcome of the Chief Valuer's assessment of the DP was similar to the DP payable under the DC Table. The 29 November 2011 letter did not specify the amount of money that was payable. The applicant therefore did not have the full picture before it and would not have been in a position to determine if an application for judicial review should be made (indeed, an application at that early stage would have been premature). This is strengthened by the SLA letter dated 30 April 2013 (see [33(d)] above) in which the SLA said that the offer to lift the title restrictions upon payment of the DP would run from 20 February 2013.

37 If I am wrong on this point and time started running from 29 November 2011, I would hold that the delay in filing this originating summons is justified for the same reasons articulated in [36]. It would have been reasonable for the applicant in the circumstances of this case to have misapprehended which event was the final decision to challenge. In any case, O 53 r 1(6) of the Rules of Court only applies to quashing orders and not to mandatory orders. The applicant has sought both a quashing order against the SLA's decision and a mandatory order requiring the SLA to assess the DP in accordance with the DC Table. O 53 r 1(6) would only operate against the former and not the latter.

38 I therefore hold that the application for judicial review is not time-barred under O 53 r 1(6) of the Rules of Court.

Did the applicant exhaust all possible alternative remedies?

39 As a general rule, a person seeking judicial review of a decision by a public body must exhaust all alternative remedies before invoking the courts' jurisdiction in judicial review (*Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 at [25]). The applicant submitted that it was not caught by this general rule because the prescribed appeal process presupposes a developer which is not satisfied with a DP payable based on the DC Table (see [8] above). As the DP payable in this case was not based on the DC Table, the appeal process is inapplicable to the applicant. The SLA submitted that the crux of the inquiry is whether the alternative remedy is "equally effective and convenient" (citing *Regina v Hillingdon London Borough Council, Ex parte Royco Homes Ltd* [1974] QB 720 at 728) and the administrative appeal in this case was expedient and hassle-free and effective in that the SLA and the Chief Valuer would be prepared to hear and consider any alternative valuation that a developer puts forward.

40 The appeal process contemplates an aggrieved developer who, disagreeing with the DP based on the DC Table, initiates an appeal process culminating in the SLA consulting the Chief Valuer for a spot valuation. The appeal process is not an alternative remedy for two reasons. First, as the applicant has pointed out, the DP payable in its case was not based on the DC Table and accordingly, the appeal process does not apply to the applicant. Second, and more fundamentally, the appeal process necessarily involves a spot valuation done by the Chief Valuer. This is precisely the outcome that the applicant seeks to impugn as the applicant argues that the DC Table should apply. There is simply no room in the prescribed process for the DP to be assessed based on DC Table rates. The foregoing also accords with *Regina v Secretary of State for the Home Department, Ex parte Swati* [1986] 1 WLR 477 at 485, where Sir John Donaldson MR held that the general rule does not apply

where "the applicant can distinguish his case from the type of case for which the appeal procedure was provided."

41 I therefore hold that the applicant did not fail to comply with the general rule to exhaust all alternative remedies before invoking the courts' jurisdiction in judicial review. There were no alternative remedies for the applicant to seek.

The substantive application for judicial review

Weight to be ascribed to Gaw Seng Suan's affidavit

42 The SLA disputed the admissibility of, and the weight to be ascribed to, an affidavit filed by a Gaw Seng Suan ("Gaw"), an ex-employee of the SLA. The applicant had requested Gaw to provide an expert opinion on the issue of whether the Land Return Clause in the leases for both lots (see [4] above) would have indicated to a reasonable property developer looking to purchase the Land that the DP payable for a change in use of the Land would be assessed at 100% of land enhancement value as assessed by the Chief Valuer through a spot valuation. Gaw opined that a reasonable developer in the applicant's shoes would expect the DP payable to be assessed on the basis of the DC Table and that it was not market knowledge that the presence of a Land Return Clause in a lease would lead to a higher DP or the DP being assessed on a different basis.

43 The SLA argued that Gaw's expert evidence is inadmissible. The issue at stake is not a question of expert opinion because it does not pertain to any point of scientific, technical or other specialised knowledge. Mr Gaw was never a property developer. In any case, Gaw's responsibilities at the SLA pertained to records management and administrative work. Gaw was not involved in any work relating to the DP Clause and/or the Land Return Clause or the policy of charging DP equal to 100% of the enhancement of land value as assessed by the Chief Valuer. Thus, Gaw had no basis to hold himself out as an expert nor did he have any particular insight into the issue.

44 In response, the applicant pointed out that it was not disputed that Gaw had worked on the change in DP policy (*i.e.*, from spot valuations for all cases to the DC Table-based system) which eventually resulted in the issue of the 2000 SLA Circular. Gaw also had significant experience providing specialist advice on land matters to private sector clients, including issues relating to the lifting of title restrictions and DP assessments. The fact that Gaw was not a property developer is not a reason to disregard his evidence. Further, s 47 of the Evidence Act (Cap 97, 1997 Rev Ed) states that expert evidence is admissible if the court is "likely to derive assistance from an opinion upon a point of scientific, technical or other specialised knowledge" and it was introduced in 2012 to broaden the categories of admissible expert evidence and to allow the Court to have the benefit of any expert opinion that may be useful and is in the interests of justice (citing the second reading of the Evidence (Amendment) Bill as reported in *Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88).

45 The Attorney-General submitted that the question posed to Gaw — that is, whether the Land Return Clause would have put a reasonable property developer on notice — is a question for the court's determination and not for expert opinion. As the Court of Appeal held in *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [85] (in turn citing *The H156* [1999] 2 SLR(R) 419 at [27]), an expert may not usurp the function of the court and present his finding. In other words, an expert may not answer the very question that is before the court (in this regard, see also Chen Siyuan, "Expert Evidence and the Ultimate Issue Rule" (2011) Research Collection School of Law, Paper 21 (<http://ink.library.smu.edu.sg/sol_research_smu/21>, accessed on 22 October 2013). Further, there was no explanation as to how Gaw's experience equipped him to

provide an opinion.

46 In my view, Gaw's evidence was admissible pursuant to s 47 of the Evidence Act. However, his evidence was of limited weight. The issue is not just about actual knowledge — the enquiry also touches on constructive knowledge (*i.e.*, what a reasonable property developer would have known had he made the requisite enquiries, as shall be discussed below at [122] to [127]). Gaw was not a property developer and his opinion with regard to whether a reasonable property developer would have known that the Land Return Clause meant that the DP payable would be based on a spot valuation by the Chief Valuer at 100% of the enhancement value would be premised on, at best, second-hand knowledge based on his dealings with private sector developers. His second-hand knowledge would not be persuasive.

The arguments

47 The applicant's various arguments can essentially be divided into two strands: first, the SLA's decision to assess DP via a spot valuation was irrational and unreasonable because no public authority would act so inconsistently, especially in the light of the unequivocal representations made. Second, the SLA's decision deprived the applicant of its legitimate expectation of the DP being assessed in accordance with the DC Table.

48 The SLA argued, firstly, that its decision was not irrational and unreasonable because the SLA has statutory duties and functions to discharge; in particular, the public interest in ensuring that the State realises the full value of State land. Secondly, the doctrine of substantive legitimate expectation has yet to be accepted as part of Singapore law. Even if it is part of the law, the applicant could not have had the legitimate expectation that the DP would be assessed in accordance with the DC Table. Even if the applicant had such a legitimate expectation, the disappointment of that expectation in this case was justified.

49 The Attorney-General averred that the policy of assessing DP via a spot valuation cannot be impugned in court because this would be tantamount to a "merits review". Moreover, the application of the policy to the applicant was not unreasonable because it was done after due deliberation with all stakeholders. The Attorney-General also argued that the doctrine of substantive legitimate expectation should not be adopted in Singapore. In any event, no substantive legitimate expectation could be said to have arisen on the facts. At most, any legitimate expectation would have pertained to procedure and this had already been given effect to.

The issues

50 Accordingly two main issues arose for consideration in this case:

(a) Was the SLA's decision to assess the DP through a spot valuation instead of abiding by the DC Table irrational and/or unreasonable?

(b) Should the doctrine of substantive legitimate expectation be recognised in Singapore law? If so, can the applicant avail itself of this doctrine?

Was the SLA's decision to assess DP via a spot valuation irrational and/or unreasonable?

51 The applicant's first argument is that the SLA's decision to assess the DP by means of a spot valuation was irrational and/or unreasonable. The assessment, it submitted, ought to have been in accordance with the DC Table.

52 In *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 ("*Wednesbury*"). Lord Greene MR, speaking for a unanimous Court of Appeal, held (at 229) that:

> It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. **He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.** If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation [1926] Ch 66 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another. [emphasis added]

53 In the House of Lords decision of *Council of Civil Service Unions and others v Minister of the Civil Service* [1985] 1 AC 374 ("the *GCHQ* case"), Lord Diplock equated *Wednesbury* unreasonableness with irrationality (at 410):

> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is **so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.** Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. [emphasis added]

Lord Diplock's comments were adopted in Singapore law by the Court of Appeal case of *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 ("*Chng Suan Tze*") at [119].

54 Both the SLA and the Attorney-General contended that *Wednesbury* unreasonableness is a high standard that is difficult to meet. The SLA cited the Court of Appeal case of *Manjit Singh s/o Kirpal Singh and another v Attorney-General* [2013] SGCA 45 at [7] where it was stated that "[t]he *Wednesbury* test sets a high bar". The Attorney-General relied on *Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582 where V K Rajah J (as he then was) (at [125]) held that the standard of unreasonableness "is from a jurisprudential perspective, pragmatically fixed at a very high level".

55 Before the analysis can proceed any further, it is useful to characterise the act that the applicant is seeking to impugn as being unreasonable.

56 The SLA, in its first affidavit filed by Thong Wai Lin, Director of the Land Sales and Acquisition Division of the SLA, averred (at [36]) that:

> Directly-alienated lands, where the leases contain the Land Return Clause, have always been one of those cases to which the DC Table has no application. …

> In the case of directly-alienated land where the lease contains the Land Return Clause, the policy is to charge DP based on 100% enhancement in value as assessed by the Chief Valuer in a spot valuation, if the State decides to forego the right to the return of the land and to allow the requested change of use of the land.
>
> [emphasis in original]

The SLA thus characterised its decision as one that was made pursuant to an existing policy and not as a result of a change in policy. The SLA thus did not depart from the DC Table (a method that was spelt out in the SLA circulars and the SLA website, see [6] – [8] above). The Attorney-General essentially agreed with the respondent and pointed out that there were two operative policies: one concerning State leases without a Land Return Clause where the DP payable is calculated according to the DC Table and another concerning State leases with a Land Return Clause where, assuming that the Government chooses not to exercise its right to require the return of the land, the DP is charged based on 100% of the enhancement in land value as assessed by the Chief Valuer in a spot valuation. The applicant did not indicate clearly which characterisation it was relying on, presumably because its arguments would remain the same either way.

57 At the outset, I would like to point out that there is an immense difference between, on the one hand, the implementation of a second extant policy (which was not discernible from the public statements put out by the SLA), and on the other hand, a change in policy (with there being only one policy applicable to start with) or a decision not to apply a policy to a particular case. In the former, the policy was already in operation at the time of the act in issue. In the latter, the change of policy or decision not to apply the policy is contemporaneous with the act in issue. The legal analysis that flows from each characterisation is markedly and necessarily different. This court's analysis shall be premised on the former (see also [68] – [71] below).

58 The applicant submitted that the plain wording of the SLA Circulars and the SLA website is clear, unambiguous and affirmative: the DP would be assessed by reference to the DC Table. No other policy or method for assessing DP is specified in the aforementioned sources or in any other publicly available document. The 2000 SLA Circular (see [6] above) explicitly states that the specified method for assessing DP is "a transparent system" which "provide[s] greater certainty to landowners who will now be able to compute the DP payable themselves." The SLA Circulars and the SLA website are exhaustive and they only specify two exceptions: where the use stipulated in the title restriction does not fit into any of the use groups in the DC Table and where the lease tenure is upgraded. None of these exceptions applies here.

59 The applicant argued that the SLA had acted unreasonably in the *Wednesbury* sense because a legitimate expectation arose that the "SLA will behave as it says it will". This conflates the doctrine of substantive legitimate expectation with *Wednesbury* unreasonableness. The issue of whether substantive legitimate expectation is part of Singapore law and if so, whether it is a stand-alone head of judicial review or is in truth a subset of *Wednesbury* unreasonableness will be discussed subsequently (see [117] below).

60 The essence of the applicant's arguments was that it was unreasonable for the SLA not to adhere to its public promulgations. The applicant proceeded to point out that the existing policy of charging a DP based on 100% enhancement in value as assessed by the Chief Valuer in a spot valuation (see [56] above) is inconsistent with an earlier statement by the then Minister for National Development Mah Bow Tan (*Singapore Parliamentary Debates, Official Report* (19 July 2010) vol 87, at col 815):

> Currently, DP or DC rate is pegged at 70% of the enhancement in land value. The DP or DC collected allows the State to provide the necessary infrastructure and services (eg, roads, drainage and sewerage) without which the developer cannot materialise the higher development intensity in the area. **The balance of the gain from the land value enhancement is retained by the land-owner and provides an incentive for him to undertake the development work.**
>
> In calibrating the DC rate, there is a need to balance between providing an equitable share of the land value enhancement for the State to fund the necessary infrastructure and services and, at the same time, providing a reasonable incentive for land-owners and developers to undertake development works. We believe that the current 70% DC rate is reasonable in the current market conditions.
>
> [emphasis added]

In a similar vein, the 2000 SLA Circular (see [6] above) states that:

> With effect from 31 July 2000, the Singapore Land Authority has implemented a transparent system of determination of differential premium (DP) for the lifting of State title restrictions involving change of use and/or increase in intensity. **This is to encourage optimisation of land use and to facilitate the overall pace of redevelopment in Singapore**. [emphasis added]

61 Further, on its plain terms, the Land Return Clause only requires the lessee to inform the SLA if any part of the land is not being used for the purpose specified in the lease. When the applicant made its application for the lifting of title restrictions, the whole of the land was being used for the specified purposes. Thus the question of the State giving up its right to take back the land does not even arise and it would be wrong to assess the DP on the basis of compensating the state for giving up such a right. Additionally, the SLA has not been able to provide any explanation as to why the policy should apply to subsequent *bona fide* purchasers of directly alienated lands, where the subsequent purchaser obtained the land through a competitive tender process and derived no benefit from the earlier direct alienation. The subsequent purchaser would also have no way of finding out that the land was directly alienated to the former owner.

62 The SLA averred that it was not unreasonable for the DP to be assessed by a spot valuation at 100% value. It was in the interests of the public for the State to realise the full value of any land that it disposes of. Where directly alienated land is concerned, the State is in fact forfeiting its legal right to take back the land (pursuant to the Land Return Clause) and the chance to re-sell the land at a higher price in a competitive tender. The State must ensure that it obtains a DP that fully and accurately reflects the enhancement in value that the state is foregoing. Indeed, the SLA was merely discharging its statutory duties and functions. Section 6(1)(*a*) of the Singapore Land Authority Act (Cap 301, 2002 Rev Ed) ("the SLA Act") states that it shall be the function and duty of the SLA "to optimise land resources". This necessarily entails a duty on SLA's part to obtain the full enhancement on land value where directly-alienated state lands are concerned.

63 The Attorney-General argued that the reasonableness (or otherwise) of the policy to assess DP by a spot valuation at full value is a "polycentric" matter which is not suited to a "merits review" by the court. In assessing the DP, the SLA acts as the agent of the Government (s 6(1)(*e*)(iv) of the SLA Act). In carrying out this function, the SLA is involved in "polycentric" decision making; s 6(2) of the SLA Act stipulates:

> In carrying out its functions, the Authority shall —

(*a*) have regard to efficiency and economy and to the social, industrial, commercial and economic needs of Singapore…

64 It is well-established that the courts will be slow to review such "polycentric" matters. In *Lee Hsien Loong v Review Publishing Co Ltd and another and another suit* [2007] 2 SLR(R) 453 ("*Lee Hsien Loong*"), Sundaresh Menon JC (as he then was) held (at [96] and [98]) that:

> 96 Second, within the span of executive decisions that are immune from judicial review are those involving matters of "high policy". This includes such matters as dissolving Parliament, the conduct of foreign affairs, the making of treaties, matters pertaining to war, the deployment of the armed forces and issues pertaining to national defence. These are what the American courts call "political questions" and the reasons underlying the deference accorded to the executive branch of government in such areas have been articulated in the cases I have referred to. In my judgment, cases concerning international boundary disputes or the recognition of foreign governments comfortably fall within this class of cases.
>
> …
>
> 98 … In my judgment, the correct approach is not to assume a highly rigid and categorical approach to deciding which cases are not justiciable. Rather, as Laws LJ put it in Marchiori ([94] supra) at [39], the intensity of judicial review will depend upon the context in which the issue arises and upon common sense, which takes into account the simple fact that there are certain questions in respect of which there can be no expectation that an unelected judiciary will play any role. In this regard, the following principles bear noting:
>
> (a) Justiciability depends, not on the source of the decision-making power, but on the subject matter that is in question. Where it is the executive that has access to the best materials available to resolve the issue, its views should be regarded as highly persuasive, if not decisive.
>
> (b) Where the decision involves matters of government policy and requires the intricate balancing of various competing policy considerations that judges are ill-equipped to adjudicate because of their limited training, experience and access to materials, the courts should shy away from reviewing its merits.
>
> …

65 The Attorney-General also cited Lord Woolf, *et al, De Smith's Judicial Review* (Sweet & Maxwell, 7th Ed, 2013) at paras [1-042] and [1-043]:

> A third limitation on the court's institutional capacity occurs when a legal challenge is made on substantive grounds to a matter which is "polycentric" — where the decision-taker has broad discretion involving policy and public interest considerations. …
>
> Most "allocative decisions" — decisions involving the distribution of limited resources — fall into the category of polycentric decisions. If the court alters such a decision, the judicial intervention will set up a chain reaction, requiring a rearrangement of other decisions with which the original has interacting points of influence. …
>
> …

Another typical polycentric decision is one involving the allocation of scarce resources among competing claims.

66 It was submitted that the formulation of the policy to assess the DP by a spot valuation was clearly a polycentric decision that was taken only after due deliberation and consultation with other relevant agencies and stakeholders on whether to exercise the right to take back the land. This policy is inextricably intertwined with the State's macro-policy considerations of what is in Singapore's economic, commercial, industrial and social interests.

67 In order to satisfy the high threshold of *Wednesbury* unreasonableness, the applicant must show that the SLA had, on one formulation, taken into account extraneous considerations that it should not have taken into account or had not taken into account considerations which it should have taken into account. Alternatively, the applicant must show that the SLA's decision was so outrageous in its defiance of logic that no sensible person who had applied his mind could have arrived at the same decision.

68 There are three ways of characterising the SLA's allegedly unreasonable conduct:

(a) Applying the policy of assessing the DP via a spot valuation at 100% of land enhancement value;

(b) Applying the policy of assessing DP via a spot valuation at 100% of land enhancement value but not disclosing the existence of such a policy beforehand;

(c) Applying the policy of assessing DP via a spot valuation and at 100% of land enhancement value, not disclosing the policy beforehand and not taking into account the applicant's legitimate expectation.

69 In the first characterisation, it is the policy alone that is being impugned. The SLA, in formulating policy, is statutorily obliged to have regard to "efficiency and economy and to the social, industrial, commercial and economic needs of Singapore" (s 6(2) of the SLA Act, see [63] above). The balancing of these competing interests is not within the institutional competence of the judiciary (*Lee Hsien Loong* (at [98(b)], see [64] above). Thus, the policy by itself cannot be said to be unreasonable in the *Wednesbury* sense.

70 However, the applicant was not aggrieved by the SLA's policy. The applicant's complaint was that the policy was not publicised, giving it the impression that the publicised policy (that is, DP assessed at DC Table rates) would apply.

71 At common law, there is no legal duty on the part of the Government to publicise the policies which it seeks to implement. In the context of administrative decisions, there is no general rule that reasons must be given (see *e.g. Marta Stefan v General Medical Council* [1999] 1 WLR 1293 at 1300G-H). It was therefore not unreasonable in the *Wednesbury* sense for the SLA not to publicise its policy of assessing DP via a spot valuation at 100% of the land enhancement value. In any case, the applicant's contention was that it was led to believe that the said policy would refer to the DC Table anyway.

72 This leaves me with the last characterisation — that it was unreasonable for the SLA to have applied an undisclosed policy to the applicant's case and thereby neglecting unreasonably to take into account the applicant's legitimate expectation. This issue will be dealt with in the discussion on the law pertaining to substantive legitimate expectations (see [118] – [128] below).

Should the doctrine of substantive legitimate expectations be recognised in Singapore law? If so, can the applicant avail itself of this doctrine?

73 The term "legitimate expectation" was first used by Lord Denning MR in *Schmidt and another v Secretary of State for Home Affairs* [1969] 2 Ch 149 ("*Schmidt*"). The case concerned the Home Secretary's decision to refuse an extension of a foreign student's temporary permit to stay in the United Kingdom. Lord Denning MR rejected the foreign student's contention that he ought to have been afforded a hearing. He held that:

> It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.

74 In the *GCHQ* case, a majority of the House of Lords held that the applicants there had a legitimate expectation that they would be consulted before their rights to unionise were taken away. This duty was however overridden by national security concerns. Lord Diplock held (at 408F – 409A):

> To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:
>
> (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
>
> (b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a "legitimate expectation" rather than a "reasonable expectation," in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a "reasonable" man, would not necessarily have such consequences.

In the same case, Lord Fraser of Tullybelton formulated the doctrine of legitimate expectations on a more general basis which could be construed to include substantive (as opposed to merely procedural) relief (at 401A-B):

> But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law. This subject has been fully explained by my noble and learned friend, Lord Diplock, in O'Reilly v. Mackman [1983] 2 A.C. 237 and I need not repeat what he has so recently said. Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.

75 For the moment, I turn my attention to related cases which granted substantive relief on other grounds. The Court of Appeal case of *Lever (Finance) Ltd v Westminster Corporation* [1970] 3 All ER 496 ("*Lever Finance*") granted relief on the ground of estoppel. In that case, developers applied for and obtained planning permission to build 14 houses on a particular tract of land. A month after this,

the developers' architect made some variations to the plan. One of the houses was to be sited 23 feet away from existing houses (as opposed to 40 feet under the original approved plan). The planning authority's planning officer had lost the file containing the original approved plan and because of this mistakenly told the developer's architect over the telephone that this variation was not material and that no further planning consent was required. The developers went ahead with construction. Sometime later, the planning authority said that planning permission was actually required (after complaints received by the existing residents) and permission was subsequently denied. The developers sought an injunction restraining the authority from serving an enforcement notice requiring them to demolish the half-built house. Lord Denning MR (at 500h–j) held that:

> I know that there are authorities which say that a public authority cannot be estopped by any representations made by its officers. It cannot be estopped from doing its public duty. See, for instance, the recent decision of the Divisional Court in Southend-on-Sea Corpn v Hodgson (Wickford) Ltd. But those statements must now be taken with considerable reserve. There are many matters which public authorities can now delegate to their officers. If an officer, acting within the scope of his ostensible authority, makes a representation on which another acts, then a public authority may be bound by it, just as much as a private concern would be.

76 The House of Lords case of *In re Preston* [1985] 1 AC 835 held that substantive relief could be granted on the basis of abuse of power where the conduct complained about is equivalent to a breach of contract or a breach of representation. The case concerned a taxpayer who alleged that an officer from the Inland Revenue Commissioners ("IRC") had represented to him that the IRC would not raise further inquiries on his tax affairs if the taxpayer withdrew certain claims for interest relief and capital loss. The House of Lords found that no such representation was made. Nevertheless, Lord Templeman said (at 864G) that:

> The court can only intervene by judicial review to direct the commissioners to abstain from performing their statutory duties or from exercising their statutory powers if the court is satisfied that "the unfairness" of which the applicant complains renders the insistence by the commissioners on performing their duties or exercising their powers an abuse of power by the commissioners.

Lord Templeman continued (at 866H – 867B):

> In principle I see no reason why the appellant should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the appellant because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy. There may be cases in which conduct which savours of breach of conduct [*sic*] or breach of representation does not constitute an abuse of power; there may be circumstances in which the court in its discretion might not grant relief by judicial review notwithstanding conduct which savours of breach of contract or breach of representation. In the present case, however, I consider that the appellant is entitled to relief by way of judicial review for "unfairness" amounting to abuse of power if the commissioners have been guilty of conduct equivalent to a breach of contract or breach of representations on their part.

77 Thus, with respect to substantive relief where no existing legal right was alleged to have been infringed, there were at least three doctrines (or variations thereof) at play: legitimate expectation, estoppel and abuse of power. I shall next consider how some common law jurisdictions have dealt with these doctrines.

England

78 *Regina v Secretary of State for the Home Department, Ex parte Ruddock and others* [1987] 1 WLR 1482 ("*Ex p Ruddock*") was the first case to state expressly that the doctrine of legitimate expectation could not be restricted to cases involving the right to be heard. An active and prominent member of the Campaign for Nuclear Disarmament had his phone tapped. He alleged that this was not done in accordance with the criteria for the interception of communications which had been published on six occasions. The court dismissed the application on the facts but relied on Lord Frasier's speech in the *GCHQ* case (see [73] above) in stating (at 1497A – B):

> Whilst most of the cases are concerned, as Lord Roskill said, with a right to be heard, I do not think the doctrine is so confined. Indeed, in a case where ex hypothesi there is no right to be heard, it may be thought the more important to fair dealing that a promise or undertaking given by a minister as to how he will proceed should be kept. Of course such promise or undertaking must not conflict with his statutory duty or his duty, as here, in the exercise of a prerogative power.

79 In the House of Lords decision of *Regina (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2003] 1 WLR 348, a purchaser of a waste treatment plant, with a view to using waste to generate electricity, consulted the county planning officer who said that generating electricity on the plant on a 24-hour basis would not amount to a material change of use requiring planning permission. Some years after the purchase, the purchaser was told that planning permission was actually required. Relief was denied on the facts. Lord Hoffman spoke for a unanimous House of Lords:

> 33 In any case, I think that it is **unhelpful to introduce private law concepts of estoppel into planning law**. As Lord Scarman pointed out in Newbury District Council v Secretary of State for the Environment [1981] AC 578, 616, estoppels bind individuals on the ground that it would be unconscionable for them to deny what they have represented or agreed. But **these concepts of private law should not be extended into "the public law of planning control, which binds everyone"**. (See also Dyson J in R v Leicester City Council, Ex p Powergen UK Ltd [2000] JPL 629, 637.)
>
> 34 There is of course an analogy between a private law estoppel and the public law concept of **a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power**: see R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213. But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote. Public law can also take into account the hierarchy of individual rights which exist under the Human Rights Act 1998, so that, for example, the individual's right to a home is accorded a high degree of protection (see Coughlan's case, at pp 254-255) while **ordinary property rights are in general far more limited by considerations of public interest**: see R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] 2 WLR 1389.
>
> 35 It is true that in early cases such as the Wells case [1967] 1 WLR 1000 and Lever Finance Ltd v Westminster (City) London Borough Council [1971] 1 QB 222, Lord Denning MR used the language of estoppel in relation to planning law. **At that time the public law concepts of abuse of power and legitimate expectation were very undeveloped and no doubt the analogy of estoppel seemed useful.** In the Western Fish case [1981] 2 All ER 204 the Court of Appeal tried its best to reconcile these invocations of estoppel with the general principle that a public authority cannot be estopped from exercising a statutory discretion or performing a public duty.

But the results did not give universal satisfaction: see the comments of Dyson J in the Powergen case [2000] JPL 629, 638. **It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet.**

[emphasis added]

80 The Court of Appeal, in the subsequent case of *South Bucks District Council v Flanagan and another* [2002] 1 WLR 2601 (decided later than the above case but reported earlier), construed the foregoing passage (at [16]) as the House of Lords deciding that "there is no longer a place for the private law doctrine of estoppel in public law or for the attendant problems which it brings with it."

8 1 *The Queen on the application of, Bhatt Murphy (a firm) and others v The Independent Assessor* [2008] EWCA Civ 755 concerned a group of individuals and solicitors who had been denied access to a compensation scheme run by the government. The Court of Appeal denied relief on the facts but Law LJ commented on the underlying basis of the doctrine of legitimate expectation (at [28]):

Legitimate expectation of either kind may (not must) arise in circumstances where a public decision-maker changes, or proposes to change, an existing policy or practice. **The doctrine will apply in circumstances where the change or proposed change of policy or practice is held to be unfair or an abuse of power**: see for example Ex p Coughlan paragraphs 67 ff, Ex p Begbie [2000] 1 WLR 1115, 1129F — H. The court is generally the first, not the last, judge of what is unfair or abusive; its role is not confined to a back-stop review of the primary decision-maker's stance or perception: see in particular Ex p Guinness Plc [1990] 1 QB 146. Unfairness and abuse of power march together: see (in addition to Coughlan and Begbie) Preston [1985] AC 835, Ex p Unilever [1996] STC 681, 695 and Rashid [2005] INRL 550 paragraph 34. But these are ills expressed in very general terms; and it is notorious (and obvious) that the ascertainment of what is or is not fair depends on the circumstances of the case. The excoriation of these vices no doubt shows that the law's heart is in the right place, but it provides little guidance for the resolution of specific instances. [emphasis added]

82 There is no doubt that the doctrine of substantive legitimate expectation is part of English law. The Court of Appeal decision of *Regina (Patel) v General Medical Council* [2013] 1 WLR 2801 ("*Patel v GMC*") is the latest pronouncement on the law as it currently stands in England. The case pertained to a medical doctor who received e-mail assurances that, upon completion of a distance learning pre-clinical course from a particular university, he would be provisionally registered as a doctor with the General Medical Council ("GMC"). The GMC subsequently told the claimant that his primary medical qualification was unacceptable and denied provisional registration. The Court of Appeal granted substantive relief on the ground of substantive legitimate expectation and declared that the GMC was compelled to recognise the claimant's primary medical qualification for the purposes of registration. The court utilised the following framework:

(a) The statement or representation relied upon as giving rise to a legitimate expectations must be "clear, unambiguous and devoid of relevant qualification" (at [40]);

(b) The party seeking to rely on the statement or representation must have placed all his cards on the table (at [41]);

(c) While detrimental reliance is not a condition precedent, its presence may be an influential consideration in determining what weight should be given to the legitimate expectation (at [84]).

(d) The statement or representation must be pressing and focused. While in theory there is no limit to the number of beneficiaries, in reality the number is likely to be small as

(i) It is difficult to imagine a case in which government will be held legally bound by a representation or undertaking made generally or to a diverse class; and

(ii) The broader the class claiming the benefit of the expectation the more likely it is that a supervening public interest will be held to justify the change of position (at [50]).

(e) The burden of proof lies on the applicant to prove the legitimacy of his expectation. Once this is done the onus shifts to the respondent to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation (at [58]); and

(f) The court has to decide for itself whether there is a sufficient overriding interest to justify a departure from what has been previously promised (at [60]). In doing so the court must weigh the competing interests. The degree of intensity of review will vary from case to case, depending on the character of the decision challenged (at [61]).

83 It is clear that the doctrine of substantive legitimate expectation is part of English law. It appears that the doctrine of estoppel has been subsumed under the doctrine of substantive legitimate expectation.

Australia

84 Australia has hitherto not recognised the doctrine of estoppel in the context of public law (*Annetts and another v McCann and others* (1990) 97 ALR 177 at 184, cited with approval in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 72 ALD 613 ("*Ex p Lam"*) at [69])

8 5 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 353 ("*Teoh*") was a High Court of Australia case which held that a legitimate expectation arose from the ratification of an international treaty that had not been implemented by statute. The court held that ratification was not an ineffectual act. It was a positive statement by the executive that its agencies will act in accordance with the treaty.

86 However, the subsequent High Court of Australia case of *Ex p Lam* has cast doubt on *Teoh*. In that case, the applicant was granted a transitional (permanent) visa. He was convicted of trafficking heroin. An officer from the Department of Immigration and Multicultural Affairs advised the applicant that his visa might be cancelled. The applicant was told that he would be provided with an opportunity to comment and was advised of the matters to be taken into account, including the best interests of any children with whom he was involved. The applicant responded and included a statement from the carer of the applicant's children. An officer subsequently wrote to the applicant requesting contact details of the children's carer and stating that the respondent wished to contact the carer in order to assess the applicant's relationship with his children. The applicant duly provided the contact details. However, no further steps were taken to contact the carer and the applicant's visa was subsequently cancelled by the respondent. In four concurring judgments, the applicant's appeal for substantive relief was dismissed. Two of the speeches did not consider the doctrine of legitimate expectation but merely held that there was no denial of procedural fairness on the facts. I turn now to the two speeches which touched on the doctrine.

87 McHugh and Gummow JJ observed that the notion of "abuse of power" as applied in England appeared to be concerned with the judicial supervision of administrative decision-making by the application of certain minimum standards and that it represented an attempted assimilation of doctrines derived from European civil systems (at [73]) into the English common law. However, civil systems are characterised by a close connection between the administrative and judicial functions, with administrative judges having administrative training and being alive to realities of administration (at [74]). Further, Australia has a written federal constitution with separation of power and judicial power does not extend to the executive function of administration (at [76]). In the light of developments in Australian case law of the requirements of procedural fairness, the doctrine of legitimate expectation does not have any distinct role (at [81]). The doctrine should be understood as being synonymous with natural justice as merely indicating "the factors and kinds of factors which are relevant to any consideration of what are the things which must be done or afforded". If natural justice does not condition the exercise of power, the notion of legitimate expectation can have no role to play. Otherwise, the doctrine would "become a stalking horse for excesses of judicial power" (at [82]).

88 Callinan J opined that the expression "legitimate expectation" is unfortunate and misleading. The necessity for the invention of the doctrine is questionable; the law of natural justice has evolved without the need for recourse to any fiction of "legitimate expectation" (at [140]). When Lord Denning MR first articulated the expression, he was doing no more than using it as a synonym for a right or interest. "Legitimate expectation" does not connote a freestanding or new right altogether (at [141]). If "legitimate expectation" were to remain part of Australian law, it would be better if it were applied only in cases where there is an actual expectation (at [145]). On any view, the doctrine of "legitimate expectation" gives rise to only procedural rights and cannot give rise to substantive rights (at [148]).

89 A 3-2 majority of the judges in the High Court of Australia in *Ex p Lam* have thus held, albeit *obiter*, that the doctrine of legitimate expectation is of questionable legitimacy and utility. *Rush v Commissioner of Police* (2006) 150 FCR 165 (at [75] and [82]) and *Habib v Commonwealth (No 2)* (2009) 254 ALR 250 (at [70]) have subsequently confirmed that the doctrine of substantive legitimate expectation is not recognised in Australian law.

Canada

90 The seminal case in Canada is the Supreme Court decision of *Centre hospitalier Mont-Sinaï c Québec (Ministre de la Santé & des Services sociaux)* [2001] 2 SCR 281 ("*Mount Sinai*"). The respondent, Mount Sinai Hospital, originally dealt primarily with tuberculosis patients and only had long-term care facilities. They decided to move from Quebec to Montreal. The hospital had, by that time, both short-term and long-term beds and wanted to alter its permit to reflect this. The ministry promised to alter the permit after the move to Montreal and this was reaffirmed by successive ministers. The hospital moved and applied for its permit to be amended. However, its application was denied on the basis that it was no longer in the public interest to have short-term beds. The court unanimously held that the Minister was compelled to issue the amended permit. There were two speeches. Bastarache J (with whom L'Heureux-Dubé, Gonthier, Iacobucci, and Major JJ concurred) did not touch on the doctrine of legitimate expectation. McLachlin CJC and Binnie J, in *obiter*, held that legitimate expectation cannot be used to ground substantive relief and that the doctrine of estoppel (which has more stringent requirements) should be used to ground substantive relief instead.

91 McLachlin CJC and Binnie J opined that the doctrine of legitimate expectation, as applied in England, performs a number of functions that are kept distinct in Canada (at [24]). The doctrine has, in their view, developed into a comprehensive code that embraces the full gamut of administrative

relief, from procedural fairness to estoppel (not properly so-called) (at [26]). At the high end, this represents a level of judicial intervention that the Canadian courts have considered inappropriate (unless constitutional rights are implicated) (at [27]). Canadian cases have differentiated procedural fairness and legitimate expectation (at [28]). If the courts are to grant substantial relief, more demanding conditions precedent must be fulfilled than are presently required by the doctrine of legitimate expectation (at [32]). There are two further limitations: first, a purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection unless there has been an abuse of discretion (at [33]); secondly, public bodies exercising legislative functions may not be amenable to judicial supervision (at [34]). However, estoppel may be available against a public authority in narrow circumstances (at [39]). In this respect (at [42]),

> It is to be emphasized that the requirements of estoppel go well beyond the requirements of the doctrine of legitimate expectations. As mentioned, the doctrine of legitimate expectations does not necessarily, though it may, involve personal knowledge by the applicant of the conduct of the public authority as well as reliance and detriment. Estoppel clearly elevates the evidentiary requirements that must be met by an applicant.

92 The doctrine of estoppel in the public law milieu, however, requires an appreciation of the legislative intent embodied in the power whose exercise is sought to be estopped. Therefore, circumstances that might otherwise create an estoppel may have to yield to an overriding public interest expressed in the legislative text (at [47]).

93 The latest pronouncement of the law as it currently stands in Canada is contained in the 2013 Supreme Court case of *Agraira v Canada (Minster of Public Safety and Emergency Preparedness)* (2013) CarswellNat 1983. In a unanimous judgment, the court reaffirmed the principle that the doctrine of legitimate expectation cannot give rise to substantive rights (at [97]).

94 To sum up, Canadian law does not grant substantive relief via the doctrine of legitimate expectations. Instead, an applicant seeking substantive relief would have to rely on the doctrine of estoppel.

Hong Kong

95 In *Ng Siu Tung & others v Director of Immigration* [2002] 1 HKLRD 561, the Court of Final Appeal emphatically held that the doctrine of legitimate expectation can be a ground for substantive relief. The case concerned constitutional challenges to certain amendments made to the Immigration Ordinance. There were over 5000 claimants who made applications for legal aid to commence proceedings; in order to reduce the number of cases and costs, several cases were chosen for a determination by the court of the common issues. The government generally represented to the public that it would abide by the decisions of the courts. Some applicants received *pro forma* replies that the government would abide by the decisions of the courts and that it was unnecessary to join in existing proceedings or commence fresh proceedings. The cases were successful in impugning the constitutionality of the amendments. Legislation was then promulgated which prospectively reversed the successful cases. The legislation expressly stated that it did not affect rights of abode which had been acquired pursuant to the judgments. The issue at stake was whether the applicants in the instant case were entitled to the acquired rights of abode, in the sense of them being in the same position as the successful parties.

96 The Court of Final Appeal granted relief on the ground of substantive legitimate expectation but only for the applicants who received specific representations in *pro forma* replies that it was unnecessary for them to join in existing proceedings or commence fresh proceedings. The entire court

agreed that the doctrine of substantive legitimate expectation was part of Hong Kong law.

97 Li CJ, Chan and Riberio PJJ and Sir Anthony Mason NPJ, speaking for a 4-1 majority, utilised the following framework:

> The doctrine of substantive legitimate expectations recognizes that, in the absence of any overriding reason of law or policy excluding its operation, situations may arise in which persons may have a legitimate expectation of a substantive outcome or benefit, in which event failing to honour the expectation may, in particular circumstances, result in such unfairness to individuals as to amount to an abuse of power justifying intervention by the court (at [92]):
>
> (a) A legitimate expectation arising from a promise or representation made by or on behalf of a public authority must be taken into account in the decision-making process so long as to do so falls within the power of the decision-maker (at [92] and [94]).
>
> (b) Generally speaking, a representation must be clear and unambiguous; if a representation is susceptible to multiple interpretations, the interpretation applied by the public authority will be adopted (this interpretation is subject to *Wednesbury* unreasonableness) (at [104]).
>
> (c) The question of whether reliance is required was left open (at [109]). However, no issue as to reliance occurs if the representations are calculated to induce reliance (at [110]).
>
> (d) Unless there are reasons recognised by law for not giving effect to legitimate expectations, then effect should be given to them. Fairness requires the decision-maker to give reasons if effect is not given to the expectation, so that such reasons may be tested in court (at [95]).
>
> (e) Even if the decision involves the making of a political choice with reference to policy considerations, the decision-maker must make the choice in the light of the legitimate expectation of the parties (at [96]). If the decision-maker does not take into account the legitimate expectation, the decision constitutes an abuse of power and will usually be vitiated by reason of failure to take account of a relevant consideration (at [97]).

Singapore

98 *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2011] 3 SLR 94 ("*UDL Marine*") concerned a case where a tenant applied unsuccessfully to its landlord, a statutory board, for the renewal of a lease. The application for leave for judicial review was dismissed on the ground that the respondent's act of not renewing the lease was not susceptible to judicial review because it was exercising its *private* contractual rights not to renew the lease. Lai Siu Chiu J commented, *obiter*, that both parties had not submitted on the issue of legitimate expectation. Nevertheless, she doubted that the doctrine of substantive legitimate expectation was part of Singapore law because of the presence of competing tensions and her concern that the need to check against inconsistent treatment must be balanced against the undesirable effects of excessively fettering administrative discretion (at [65] and [66]).

99 In *Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 ("*Borissik Svetlana*"), the applicant was a joint owner of a semi-detached house who applied for leave for judicial review of the Urban Redevelopment Authority's decision to deny the applicant's application for the construction

of a detached bungalow. Leave was denied on the ground that the applicant had not exhausted all her remedies before applying for judicial review. Tan Lee Meng J nevertheless found, *obiter*, that the applicant could not point to any promise made to her by a person with actual or ostensible authority. Tan J went on to state (at [49]):

> [*De Smith's Judicial Review* (Sweet & Maxwell, 6th Ed, 2007) lists four conditions for the creation of a legitimate expectation, namely that the expectation must be:
>
> (i) clear, unambiguous and devoid of relevant qualification;
>
> (ii) induced by the conduct of the decision maker;
>
> (iii) made by a person with actual or ostensible authority; and
>
> (iv) applicable to the applicants, who belong to the class of persons to whom the representation is reasonably expected to apply.

It is unclear if Tan J was referring to a procedural or substantive legitimate expectation. However, at [46], Tan J said:

> Finally, the applicant's claim that she had a legitimate expectation that the proposal to redevelop No 2 would be approved **will be considered**. [emphasis added]

The above passage seems to suggest that Tan J had procedural, rather than substantive, legitimate expectation in mind.

100 The Court of Appeal case of *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 ("*Yong Vui Kong*") concerned an appellant who was convicted of a drug trafficking offence and sentenced to death. In a concurring judgment, Andrew Phang and V K Rajah JJA addressed the appellant's argument that a legitimate expectation had arisen that it is the President who would make the decision as to whether the appellant would be pardoned. Citing *Regina v Director of Public Prosecutions, Ex parte Kebilene* [2000] 2 AC 326, they held that such a legitimate expectation could not arise on the facts because clear statutory words will override any expectation. In this respect, Art 22P(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) clearly states that the President shall act "on the advice of the Cabinet".

101 Prior case law has thus not addressed, head-on, the issue of whether the doctrine of substantive legitimate expectation is part of Singapore law. Lai J in *UDL Marine* did not have any submissions on this issue before her and doubted that the doctrine existed. Tan J in *Borissik Svetlana* ostensibly had procedural, rather than substantive, legitimate expectation in mind when he cited a framework espoused in the sixth edition of *De Smith*. Andrew Phang and V K Rajah JJA in *Yong Vui Kong* did not address the issue of whether substantive legitimate expectation is part of Singapore law. They dismissed the appellant's argument on the basis that no substantive legitimate expectation could have arisen on the facts.

Summary of respective submissions

102 The applicant here relied chiefly on *Borissik Svetlana* for the proposition that the doctrine of substantive legitimate expectation has received implicit judicial recognition in Singapore. The applicant submitted that Tan J had in that case assumed that judicial review could be used to protection legitimate expectations of substantive benefit. The applicant further contended that a legitimate

expectation arose on the facts. Firstly, the SLA Circulars and the SLA website constituted clear and unambiguous representations that the DP would be computed on the basis of the DC Table. Secondly, in deciding whether to acquire the Land and in determining the appropriate price it was willing to pay, the applicant was induced by the representations. Thirdly, the SLA Circulars and the SLA website were circulated by a person with actual or ostensible authority. Lastly, the applicant belonged to the class of persons to whom the representations were reasonably expected to apply. The applicant also argued that there was no way for it to discover that the SLA had considered directly-alienated land to be an exception to the prescribed method of assessment. There was no publicly available document which stated that directly-alienated land was an exception to the prescribed method of assessment. There was in fact no way for the applicant to find out that the Land was directly alienated to its former owner. The Land Return Clauses in the two lease documents merely state that the DP would be payable in accordance with the DP Clauses. The DP Clause is found in all state leases and there is therefore nothing to disturb the applicant's understanding that the DP would be assessed in accordance with the DC Table.

103 The SLA relied on *UDL Marine* for the proposition that the High Court had, in that case, doubted the existence of the doctrine of substantive legitimate expectation in our law. The SLA, however, conceded that local jurisprudence has not definitively pronounced whether the doctrine of substantive legitimate expectation is part of Singapore law. The SLA submitted that the reasons for and against the said doctrine are finely balanced. In England, the doctrine is hedged with qualifications. Even then, the English approach was categorically rejected by the Australian High Court in *Ex p Lam*, where the court found that the English position did not sit well with the Australian constitutional framework. The SLA also asserted that no expectations whatsoever arose in this case. The threshold for a representation that is clear, unambiguous and devoid of qualification is a high one. Further, the applicant in fact already knew or ought to have known that the DP in its case would be assessed via a spot valuation by the Chief Valuer at 100% in enhancement in land value. There were media releases concerning the redevelopment of a property located at Market Street. Any reasonable developer would have noticed that the leases contained a special covenant — the Land Return Clause — which is not ordinarily found in other State leases.

104 The Attorney-General argued that the doctrine of substantive legitimate expectation should not be adopted in Singapore for three reasons. First, the doctrine was developed in England against the backdrop of the Human Rights Act 1998 and the pressure to assimilate European doctrine into the common law. Second, the underlying rationale of the doctrine is that of abuse of power, which is not principled. Third, the doctrine is inconsistent with the doctrine of separation of powers as enshrined in the Singapore Constitution. In any event, no legitimate expectation arose on the facts. There was no clear, unambiguous or unqualified representation. The SLA Circulars were directed to the general public and did not have the character of a contract. There was also no inducement.

My decision on the doctrine of legitimate expectation

105 The above analysis (at [97] to [100]) shows that case law in Singapore has not addressed directly the issue of whether the doctrine of substantive legitimate expectations is part of Singapore law.

The separation of powers

106 Both the SLA and the Attorney-General placed especial emphasis on the cases of *Ex p Lam* and *Mount Sinai*. I shall deal with both cases in turn.

107 Both the SLA and the Attorney-General relied on *Ex p Lam* for the proposition that the doctrine

of substantive legitimate expectation was influenced by European law and is inconsistent with the Australian Constitution and, more specifically, the separation of powers. As Singapore and Australia both have written constitutions, the reasoning in *Ex p Lam* also applies to Singapore.

108 As a preliminary matter, I note that this line of reasoning was present in only McHugh and Gummow JJ's speech and thus did not command the assent of the majority of the court. Gleeson CJ and Hayne J, in separate speeches, did not consider the question of whether the doctrine of substantive legitimate expectation ought to be part of Australian law. Callinan J opined that the said doctrine is not part of Australian law but did not cite the Australian Constitution and the separation of powers as a reason for this holding (see [87] above). This line of reasoning was also not adopted by the Canadian Supreme Court in *Mount Sinai.*

109 Secondly, although European law may have influenced English law, is the English system of government, with its unwritten Constitution, fundamentally different from the Singaporean and Australian systems of government with their written Constitutions? Implicit in the SLA's and the Attorney-General's argument is that a written constitution is a pre-requisite for the separation of powers. According to this argument, the written constitutions of Australia and Singapore explicitly demarcate the powers that are to be allocated to the legislative, executive and judicial branches respectively and it would therefore tantamount to judicial overreach for the judiciary to enforce substantive legitimate expectations. However, it is clear that the UK system, despite the absence of a written constitution, also recognises the separation of powers. In the House of Lords decision of *Regina v Secretary of State for the Home Department, Ex parte Fire Brigades Union and others* [1995] 2 AC 513 ("*Ex p Fire Brigades*"), Lord Keith of Kinkel said (at 567D – E):

> **It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain.** Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed. *This requires the courts on occasion to step into the territory which belongs to the executive, to verify not only that the powers asserted accord with the substantive law created by Parliament but also that the manner in which they are exercised conforms with the standards of fairness which Parliament must have intended.* Concurrently with this judicial function Parliament has its own special means of ensuring that the executive, in the exercise of delegated functions, performs in a way which Parliament finds appropriate. [emphasis added in bold and in italics]

110 As a side-note, this case was decided when the House of Lords was still functioning as a court of law, 14 years before the establishment of the Supreme Court of the United Kingdom in 2009 which formalized the separation of the legislative and the judicial functions of the House of Lords in order to comply with the European Convention on Human Rights. In this respect, I refer to a consultation paper entitled *Constitutional Reform: A Supreme Court for the United Kingdom* (July 2003, CP11/03) (available at http://webarchive.nationalarchives.gov.uk/+/http:/www.dca.gov.uk/consult/supremecourt/supreme.pdf last accessed 28 October 2013) (at para 3):

> **It is not always understood that the decisions of the 'House of Lords' are in practice decisions of the Appellate Committee and that non judicial members of the House never take part in the judgments. Nor is the extent to which the Law Lords themselves have decided to refrain from getting involved in political issues in relation to legislation on which they might later have to adjudicate always appreciated.** The fact that the Lord Chancellor, as the Head of the Judiciary, was entitled to sit in the Appellate and Judicial

> Committees and did so as Chairman, added to the perception that their independence might be compromised by the arrangements. *The Human Rights Act, specifically in relation to Article 6 of the European Convention on Human Rights, now requires a stricter view to be taken not only of anything which might undermine the independence or impartiality of a judicial tribunal, but even of anything which might appear to do so.* [emphasis added in bold and in italics]

111 It cannot be argued, therefore, that the doctrine of substantive legitimate expectation should not be law in Singapore simply because Singapore has a written constitution while England, which recognises the doctrine, does not. Instead, this issue should be looked at from first principles.

112 If private individuals are expected to fulfil what they have promised, why should a public authority be permitted to renege on its promises or ignore representations made by it? If an individual or a corporation makes plans in reliance on existing publicized representations made by a public authority, there appears no reason in principle why such reliance should not be protected.

113 The upholding of legitimate expectations is eminently within the powers of the judiciary. In the context of private law, this is expressed through the enforcement of contracts (which upholds bargains freely made) and the equitable doctrine of estoppel (which upholds the reliance interest of a representee if a representor resiles from his representation inequitably). However, in the public law sphere, in deciding whether a legitimate expectation ought to be upheld, the court must remember that there are concerns and interests larger than the private expectation of an individual or a corporation. If there is a public interest which overrides the expectation, then the expectation ought not to be given effect to. In this way, I believe the judiciary can fulfil its constitutional role without arrogating to itself the unconstitutional position of being a super-legislature or a super-executive.

114 In my view, there ought to be no difference in principle between procedural and substantive legitimate expectations. The reasons enumerated above do not distinguish between the procedural and the substantive and apply equally to both.

115 In practice, it may be difficult to distinguish between the procedural and substantive. This was acknowledged in *Mount Sinai* (at [35]):

> In affirming that the doctrine of legitimate expectations is limited to procedural relief, it must be acknowledged that in some cases it is difficult to distinguish the procedural from the substantive. In Bendahmane v. Canada, supra, for example, a majority of the Federal Court of Appeal considered the applicant's claim to the benefit of a refugee backlog reduction program to be procedural (p. 33) whereas the dissenting judge considered the claimed relief to be substantive (p. 25). A similarly close call was made in Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System), [1996] 3 F.C. 259 (T.D.). An undue focus on formal classification and categorization of powers at the expense of broad principles flexibly applied may do a disservice here. The inquiry is better framed in terms of the underlying principle mentioned earlier, namely that broad public policy is pre-eminently for the Minister to determine, not the courts.

116 The SLA and the Attorney-General referred, in particular, to [27] and [28] of *Mount Sinai* to buttress their argument that the doctrine of legitimate expectation should not be recognised in Singapore. The two paragraphs cited are as follow:

> 27 In ranging over such a vast territory under the banner of "fairness", it is inevitable that sub-classifications must be made to differentiate the situations which warrant highly intrusive relief from those which do not. Many of the English cases on legitimate expectations relied on by the

respondents, at the low end, would fit comfortably within our principles of procedural fairness. At the high end they represent a level of judicial intervention in government policy that our courts, to date, have considered inappropriate in the absence of a successful challenge under the Canadian Charter of Rights and Freedoms.

28 Canadian cases tend to differentiate for analytical purposes the related concepts of procedural fairness and the doctrine of legitimate expectation. There is, on the one hand, a concern that treating procedural fairness as a subset of legitimate expectations may unnecessarily complicate and indeed inhibit rather than encourage the development of the highly flexible rules of procedural fairness: D. Wright, "Rethinking the Doctrine of Legitimate Expectations in Canadian Administrative Law" (1997), 35 Osgoode Hall L.J. 139. On the other hand, there is a countervailing concern that using a Minister's prior conduct against him as a launching pad for substantive relief may strike the wrong balance between private and public interests, and blur the role of the court with the role of the Minister.

117 The two paragraphs, read in isolation, seem to suggest that substantive relief is denied as a matter of course because of a perceived need to rein in inappropriate judicial intervention and that the doctrine of legitimate expectations has no place in Canadian law. The procedural aspect of the doctrine is better analysed as a matter of procedural fairness, while the substantive aspect is better analysed as a matter of promissory estoppel. However, at [31], McLachlin CJC and Binnie J stated:

It is difficult at one and the same time thus to lower the bar to the application of the doctrine of legitimate expectation (for good policy reasons) but at the same time to expand greatly its potency for overruling the Minister or other public authority on matters of substantive policy. One would normally expect more intrusive forms of relief to be accompanied by more demanding evidentiary requirements.

The court proceeded to state that promissory estoppel is available against a public authority. Promissory estoppel is to be preferred to legitimate expectations because the requirements for granting relief under promissory estoppel are more stringent than those for legitimate expectations (at [42]):

It is to be emphasized that the requirements of estoppel go well beyond the requirements of the doctrine of legitimate expectations. **As mentioned, the doctrine of legitimate expectations does not necessarily, though it may, involve personal knowledge by the applicant of the conduct of the public authority as well as reliance and detriment.** Estoppel clearly elevates the evidentiary requirements that must be met by an applicant. [emphasis added]

118 The difference between the two doctrines would therefore appear to be the requirements of proof of an applicant's personal knowledge together with actual reliance and detriment. The Canadian court was therefore not denying substantive relief altogether but was amenable to granting it in a less liberal fashion, with an applicant having to prove certain matters to the satisfaction of the court.

The doctrine and its requirements

119 In my opinion, the doctrine of legitimate expectation should be recognised in our law as a stand-alone head of judicial review and substantive relief should be granted under the doctrine subject to certain safeguards. Having regard to the case law from the various common law jurisdictions and applying some commonsensical principles, I believe the doctrine can operate effectively and fairly in the following manner without the court overstepping its judicial role:

(a) The applicant must prove that the statement or representation made by the public authority was unequivocal and unqualified;

(i) If the statement or representation is open to more than one natural interpretation, the interpretation applied by the public authority will be adopted; and

(ii) The presence of a disclaimer or non-reliance clause would cause the statement or representation to be qualified.

(b) The applicant must prove the statement or representation was made by someone with actual or ostensible authority to do so on behalf of the public authority;

(c) The applicant must prove that the statement or representation was made to him or to a class of persons to which he clearly belongs;

(d) The applicant must prove that it was reasonable for him to rely on the statement or representation in the circumstances of his case.

(i) If the applicant knew that the statement or representation was made in error and chose to capitalize on the error, he will not be entitled to any relief;

(ii) Similarly, if he suspected that the statement or representation was made in error and chose not to seek clarification when he could have done so, he will not be entitled to any relief;

(iii) If there is reason and opportunity to make enquiries and the applicant did not, he will not be entitled to any relief.

(e) The applicant must prove that he did rely on the statement or representation and that he suffered a detriment as a result;

(f) Even if all the above requirements are met, the court should nevertheless not grant relief if:

(i) Giving effect to the statement or representation will result in a breach of the law or the State's international obligations;

(ii) Giving effect to the statement or representation will infringe the accrued rights of some member of the public;

(iii) The public authority can show an overriding national or public interest which justifies the frustration of the applicant's expectation.

Application of the doctrine's requirements to the facts

120 I shall first deal with the statements or representations set out in the SLA website. The use of the website is governed by its Terms of Use (see [9] above) which explicitly state that "the SLA does not make any representations or warranties whatsoever" including "any representations or warranties as to the accuracy, completeness, reliability, timeliness, currentness, quality or fitness for any particular purpose of the Contents of this Site". The representations set out in the SLA website were therefore qualified and cannot found a claim for substantive relief under the doctrine of legitimate

expectation. Faced with such a wide disclaimer, the applicant should have written to the SLA to confirm its alleged understanding of how the policy would work in practice and, more specifically, how it would impact the particular transaction that the applicant was contemplating getting into. It did not do so and cannot now claim relief under the doctrine.

121 I next consider the SLA Circulars. The SLA Circulars were circulated to the public at large. However, realistically speaking, the only people who would have read (or would be expected to read) the SLA Circulars were property developers or their advisors. The applicant, a property developer, is clearly within the class of persons that the SLA Circulars were targeted at.

122 The SLA Circulars did contain unequivocal and unqualified statements or representations. The 2000 SLA Circular stated that the "determination of DP will be based on the published [DC Table] rates". The 2007 SLA Circular reiterated this by its statement that the "determination of DP will still be based on the published [DC Table] rates". Both circulars also enumerated certain exceptions to the applicability of DC Table: where the use as spelt out in the particular title restriction does not fit into any of the use groups and where the lease tenure is upgraded (only the 2000 Circular). The two Circulars stated that the SLA reserves the right to determine if title restrictions should be lifted. However this does not mean that the SLA also reserves the further right to deviate from the DC Table if title restrictions are indeed lifted. Both Circulars did not state that there might be other unpublished exceptions or policies.

123 There was no dispute that the SLA Circulars and the SLA website were published by or with the authority of the SLA.

124 The applicant must prove that it was reasonable for him to rely on the statement or representation. The applicant must also prove that he did rely on the statement or representation and that he suffered a detriment as a result. The applicant averred that it had relied upon the representation in the SLA Circulars that DC Table rates would apply in purchasing the land. It would appear therefore that reliance was placed on the SLA's publications and if the applicant now has to pay a much higher DP than was represented, there would definitely be detriment caused to the applicant. However, was it reasonable for the applicant to have relied on the SLA's publications in the circumstances of this case?

125 The Land Return Clause (present in the leases of both Plots) (see [4] above) provided that the applicant as lessee was obliged to notify the lessor, the Singapore Government, if the land in question was not used for the purposes specified. Upon notification, the Government would have a year to decide whether or not to buy over the land at Land Acquisition Act (Cap 152, 1985 Rev Ed) rates. Such rates might turn out to be lower than the price which the land would have fetched in the market, simply because potential purchasers would have paid a higher price in the anticipation of getting approval for a change of the use of the land or for an increase in the plot ratio. In particular, s 33(5)(*e*) of the Land Acquisition Act explicitly states that:

> the market value of the acquired land shall be deemed not to exceed the price which a bona fide purchaser might reasonably be willing to pay, after taking into account the zoning and density requirements and any other restrictions imposed by or under the Planning Act (Cap. 232) as at the date of acquisition and any restrictive covenants in the title of the acquired land, and **no account shall be taken of any potential value of the land for any other use more intensive than that permitted by or under the Planning Act as at the date of acquisition.** [emphasis added]

The applicant in purchasing the Land took upon itself the risk of compulsory acquisition which, if it

had occurred, could have resulted in a huge loss.

126 The SLA furnished evidence that the Land Return Clause was present in only 242 State leases, representing only 1.25% of the total number of State leases. The applicant, an experienced property developer, would have known that the Land Return Clause was peculiar and atypical of State leases. The applicant tried to understate this by arguing that the Land Return Clause merely referred back to the DP Clause for the computation of the DP payable and that it was therefore unaware of the significance of the Land Return Clause. I was not convinced by this. The Land Return Clause should have alerted an experienced property developer like the applicant to the fact that the Land was not under a "normal" State lease.

127 It was widely reported in the local media in 2008 that Capitaland had to pay a DP equivalent to 100% of the enhancement in land value to redevelop the Market Street Car Park. At the hearing, the applicant tried to downplay this by saying that it understood 100% of the enhancement in land value to mean 100% of the enhancement in land value as indicated by the DC Table (because the convention after the 2007 SLA Circular was to charge 70%, an increase from the 50% payable under the 2000 SLA Circular). I accept that the local media reports did not state the method upon which the 100% enhancement in value was calculated. However, the press release by Capitaland on 3 January 2008 (almost two years before Lot 1338M was acquired), stated that the said redevelopment was subject to two conditions, one of which was "the payment by the lessee (CCT) of 100% of the enhancement in land value as assessed by the Chief Valuer in a spot valuation".

128 Considering the evidence cumulatively, the irresistible inference is that the applicant ought to have known that the DP for the Land would not be assessed according to the DC Table. At the very least, the applicant should have written to the SLA to ask if DC Table rates would be applied to State leases which contain the Land Return Clause, especially in the light of the widely-reported Market Street Car Park redevelopment. In fact, the applicant started construction work sometime after 8 April 2011 and before the SLA letter dated 29 November 2011, where the SLA first approved the lifting of title restrictions and stated that the DP would be assessed at 100% of the enhancement in land value in a spot valuation. The construction costs could very easily have been incurred for nothing had the SLA not given approval for the lifting of title restrictions in the first place.

129 As an experienced property developer going into a multi-million dollar transaction, it was therefore not reasonable for the applicant to have relied solely on the SLA's publications in the circumstances of this case. It was in the business of making money from land development. It had many professional advisors and could have easily checked with the SLA on what the DP would be if it decided to buy the Land and embark on its redevelopment plans. In any case, the SLA had made it clear in its correspondence with the applicant that the DP was assessed without reference to the DC Table.

130 Assuming that the applicant had satisfied the first five requirements (which it clearly had not) for invoking the doctrine of legitimate expectation to claim relief, there would still be the safeguards in the sixth requirement to consider. As the SLA has rightfully pointed out, it is under a statutory duty to "optimise land resources" (s 6(1)(*a*) of the SLA Act) and to "have regard to efficiency and economy and to the social, industrial and commercial and economic needs of Singapore" in the carrying out of its functions (s 6(2)(*a*) of the SLA Act). Its statutory duty would encompass getting the best returns for the State when it deals with State land. This would in turn benefit the public at large. It is therefore unacceptable in the circumstances here to argue that the State's finances would not suffer as much as the applicant's if the SLA were to make an exception for this case and not apply its unpublished policy relating to directly-alienated State land to the Land here. The overriding public interest must therefore prevail over the financial interests of a commercial enterprise like the

applicant in this case.

Conclusion and costs

131 The applicant has failed to show irrationality on the part of the SLA or to establish a legitimate expectation on the facts of this case. Accordingly, its application for judicial review on these grounds is dismissed.

132 The applicant is to pay the costs of the SLA and of the Attorney-General, such costs to be agreed or taxed. The parties may also agree that the costs be fixed by me. In that event, I will fix the amount of costs after hearing their submissions on the appropriate quantum to award.