HSBC Institutional Trust Services (Singapore) Ltd *v* Chief Assessor
[2013] SGCA 4

Case Number	: Civil Appeal No 80 of 2012
Decision Date	: 17 January 2013
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; V K Rajah JA
Counsel Name(s)	: Tan Kay Kheng, Tan Shao Tong and Novella Chan (WongPartnership LLP) for the appellant; Foo Hui Min, Joanna Yap and Alvin Chia (Inland Revenue Authority of Singapore) for the respondent.
Parties	: HSBC Institutional Trust Services (Singapore) Ltd — Chief Assessor

Revenue Law – Property tax – Annual value

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2012] 3 SLR 933.]

17 January 2013 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of a High Court judge ("the Judge") who held that a portion of the rent of a unit within a shopping centre representing the depreciation of certain asset items in the common area of the shopping centre ("the Asset Items") should be included in the gross rent for the purposes of computing the "annual value" of the unit in assessing property tax. The decision of the Judge was reported in *Chief Assessor v HSBC Institutional Trust Services (Singapore) Ltd* [2012] 3 SLR 933 ("the Judgment"). The sole issue to be determined in the present appeal is whether the Judge was correct to have refused to exclude the depreciation component in the rent paid by a tenant in determining the "annual value" for the purposes of property tax assessment. The answer is, in turn, dependent upon the proper construction of the expression "annual value" as defined in s 2(1) of the Property Tax Act (Cap 254, 2005 Rev Ed) ("the PTA").

Facts

2 The facts are straightforward and undisputed. The appellant, HSBC Institutional Trust Services (Singapore) Limited ("the Appellant"), is the trustee of CapitaMall Trust which owns, *inter alia*, a property known as Bugis Junction ("the Property"). The respondent is the Chief Assessor ("the Respondent").

3 The Property is a shopping centre comprising 180 units which are normally leased to tenants carrying on various types of businesses. The Asset Items consist of escalators, lifts, air-conditioning and fire safety systems installed within the Property. It is common ground that the Asset Items are fixtures. [note: 1]

4 The Appellant's evidence is that a sum calculated at the rate of $0.20 per square foot per month ("the $0.20 psf") was included in each tenant's monthly gross rent. This sum was to represent the annual depreciation of the plant and machinery of the Property including, *inter alia*, the Asset

Items ("depreciation component"), although the $0.20 psf was not separately itemised in each tenancy agreement. This evidence adduced by the Appellant was not challenged by the Respondent (see the Judgment at [19]). The expression "gross rent" refers to the actual sum paid by each tenant, which may include components which are not "rent" *per se* (see below at [15]).

5 The Appellant had sought to exclude the depreciation component in the computation of the annual value of the units in the Property for the purposes of assessment of property tax. However, the Respondent ruled that the depreciation component should not be excluded in the computation of the annual value of the units in the Property for the valuation years of 2004 and 2005 (see the Judgment at [4]). This dispute thus gave rise to the present proceedings.

The proceedings below

6 The Appellant appealed to the Valuation Review Board ("the Board") against this ruling of the Respondent. On 24 May 2011, the Board found for the Appellant and held that the depreciation component of the rent should be regarded as part of the total cost of services. As the depreciation component pertained to services rather than rent, the Board considered it irrelevant that the Asset Items (to which the depreciation component related) were permanent features and an integral part of the Property. The Board thus held that the depreciation component ought to be excluded from the gross rent in the computation of the annual value of each unit of the Property.

7 The Respondent then appealed to the High Court. The Judge reversed the decision of the Board and held that the depreciation component in the gross rent paid by the tenant of each unit had to be included in the computation of annual value (see the Judgment at [43]). She reasoned as follows:

(a) In assessing annual value, the touchstone was whether each component in the gross rent was related to rent or letting ("the touchstone question") (see the Judgment at [20]).

(b) The Board, in focusing on whether the depreciation component was part of the total cost of services, was asking the wrong question. Rather, it should have asked the touchstone question (see the Judgment at [22]).

(c) The touchstone question was in turn determined by whether the machinery or equipment to which the depreciation component in the gross rent related was a part of the property that was assessable to tax ("the threshold question") (see the Judgment at [20]).

(d) Given that property tax was a tax on immovable property, to determine the threshold question, the court would examine if the plant or machinery was so affixed as to become part of the immovable property such that it was assessable to tax under s 6(1) of the PTA (see the Judgment at [30]).

(e) Whether a chattel was so annexed as to become a fixture assessable to tax was governed by either the fixture test or the enhancement test. In the instant case, the application of either test would lead to the same conclusion that the Asset Items were affixed to land so as to become part of the land (see the Judgment at [41]–[42]).

(f) As fixtures, the Asset Items enhanced the value of the building and should be included in the assessment of the annual value. It thus followed that the depreciation component of the gross rent had to do with the letting of the Property, which, in turn, meant that the depreciation component was related to the rent or letting of each unit in the Property (see the Judgment at [43]).

Issues before this Court

8 The following are the issues before this Court:

(a) what is the proper test for excluding an expense amount which has been included in the gross rent when determining the annual value of a property, and in particular the relevance of the fixture test and/or the enhancement test in that regard ("Issue 1"); and

(b) on the application of the test for exclusion elucidated in Issue 1, whether the depreciation component should be excluded from the annual value of each unit in the Property ("Issue 2").

9 These issues will be considered *seriatim*.

The relevant principles

10 As previously stated by this Court in *BCH Retail Investment Pte Ltd v Chief Assessor* [2007] 2 SLR(R) 580 ("*BCH No 2*") (at [18]), "any meaningful analysis of the factual matrix in the present proceedings must commence with conceptual and definitional clarity". We thus begin our discussion with a consideration of the statutory framework for the assessment of property tax and how it has been interpreted in the cases.

11 The charging provision is found in s 6(1) of the PTA, which provides as follows:

6.—(1) As from 1st January 1961, a property tax shall, subject to the provisions of this Act, be payable at the rate or rates specified in this Act for each year upon the annual value of all houses, buildings, lands and tenements whatsoever included in the Valuation List and amended from time to time in accordance with the provisions of this Act.

12 Pursuant to s 6(1) of the PTA, property tax is payable upon the "annual value" as defined in s 2(1) of the PTA, the material part of which reads as follows:

"annual value" —

(*a*) in relation to a house or building or land or tenement, not being a wharf, pier, jetty or landing-stage, means the gross amount at which the same can reasonably be expected to be ***let*** from year to year, *the landlord paying the expenses of repair, insurance, maintenance or upkeep and all taxes (other than goods and services tax)*; ...

[emphasis added in italics and bold italics]

Related to rent or letting

13 Two phrases in s 2(1) of the PTA in particular require further analysis here. The first is the phrase "reasonably be expected to be let from year to year", *ie*, the rent that a hypothetical tenant can reasonably be expected to pay. In *BCH No 2* (at [19]), this Court analysed s 2(1) of the PTA and found that the key focus of "annual value" was on *rent* or *letting*:

19 It will be immediately seen that the definition of "annual value" focuses on the element of rent or letting. Indeed, it is undisputed by either party that the annual value of any given property must include *only* elements of rent or letting. To this end, any expenses that are not related to elements of rent or letting ought *not* to be taken into account in the computation of

annual value. This is not only logical and fair; it is also an elementary, albeit fundamental, starting-point. Indeed, in our view, this concept is so vital that it constitutes the main compass guiding all our subsequent legal navigation. [emphasis in original]

14 Pursuant to *BCH No 2*, if the expense in the present case (*ie*, the depreciation component of the Asset Items) is not related to rent or letting, it will not be taken into account in the computation of annual value. On the other hand, if the depreciation component could be regarded as relating to rent or letting, it will be included in the computation of annual value. This principle was affirmed in *Tan Hee Liang v Chief Assessor and another* [2009] 1 SLR(R) 335 ("*Tan Hee Liang*") (at [40] and [64]). The question whether the expense sought to be excluded related to rent or letting was correctly identified as the touchstone question by the Judge (see the Judgment at [20]).

15 Although the gross rent of a property gives some indication of annual value, and is often "an important factor and/or starting-point" in the assessment of annual value, it is by no means conclusive as the gross rent might contain elements which have nothing to do with rent or letting (see *BCH No 2* at [24]). In fact, the argument for exclusion only arises if an item, extraneous to rent or letting, has been included in the gross rent, for it would be illogical and unprincipled to argue for the exclusion of something from the gross rent which was never included in the gross rent in the first place (see *BCH No 2* at [28]). Where an expense is excludable, however, it can only be excluded if it has been found to be a genuine component of the gross rent, *ie*, when its inclusion in the gross rent is not a sham for the purposes of evading tax liability. Given the fact-sensitive nature of the inquiry, we do not propose to give a definition on what constitutes a sham in this context. There was no issue of a sham transaction in the present appeal as the Respondent accepted that the $0.20 psf representing the depreciation component of the Asset Items had been included in the gross rent which the tenant of each unit of the Property had paid.

16 In cases such as the present where the gross rent levied on the tenant of each unit is a comprehensive sum, *ie*, not itemised into rent proper and other expenses, the problem is compounded. However, this is not fatal to a claim for an expense to be excluded from the gross rent. In *Bell Property Trust Limited v Assessment Committee for the Borough of Hampstead* [1940] 2 KB 543 ("*Bell Property*"), where the court was faced with a gross rent that was expressed as a comprehensive sum, the exclusion of some items of expenditure were allowed. In *BCH No 2*, it was noted (at [37]) that where the components of gross rent have not been specified, the courts have nevertheless been willing to exclude items of expenditure where it is proved that these items are unrelated to rent or letting.

17 The class of what is "not rent or letting" is a potentially open one, given that a negative definition often gives rise to no fixed class. As noted in *Bell Property* (at 552) and *BCH Retail Investment Pte Ltd v Chief Assessor* [2002] 2 SLR(R) 973 ("*BCH No 1*") (at [17]), modern developments could add to the class of "not rent or letting" and the courts should be alive to these developments.

18 Having said this, the notion of depreciation is not a modern development. It has all to do with business and accounting. In order to more accurately reflect the profitability of a business, allowance must be provided for depreciation in respect of things or equipment which have a limited useful life span. In fact, there have been cases excluding depreciation from the computation of annual value (see, *eg*, *Bell Property* and *Chartered Bank v The City Council of Singapore* [1959–1986] SPTC 1 ("*Chartered Bank*")). However, with respect, the decisions in *Bell Property* and *Chartered Bank* do not analyse how depreciation was or was not related to rent or letting, possibly because the parties in those cases agreed that depreciation could be excluded. There was thus no need for the courts in those cases to elaborate on a conceptual basis for the exclusion. We will in a moment consider the

body of case law dealing with the question of exclusion of certain expenses, in order to see if it is possible to come up with a workable test to determine whether an expense, or a sum included in the rent paid by a tenant, is or is not related to rent or letting.

The qualifying words

19 The second phrase in the definition of the expression "annual value" which we wish to examine is "the landlord paying the expenses of repair, insurance, maintenance or upkeep and all taxes (other than goods and services tax)" ("the qualifying words").

20 As explained in *Tan Hee Liang* (at [44]), the function of the qualifying words is to affix on the landlord the responsibility of paying the expenses of property tax, repair, maintenance and insurance. The qualifying words also make it clear that if any component of the rent is specifically intended to cover the landlord's expenses for repair, insurance, maintenance or upkeep and all taxes (other than goods and services tax), these are to be included when determining the annual value of a property.

The case law

21 We will now turn to consider the following pertinent cases: *Pullen v St Saviour's Union* [1900] 1 QB 138 ("*Pullen*"), *Bell Property*, *Chartered Bank*, *BCH No 1*, *BCH No 2* and *Tan Hee Liang*.

22 We first present a brief overview of how the cases interact with each other. *Pullen* held that a sum for maintaining a common staircase, expressed as the cost of services, should be included in the gross value of the tenements. *Pullen* was then overruled by *Bell Property*, which held that the cost of services could, along with other expenses such as depreciation, be deducted from the gross rent for the purposes of calculating the gross value. *Bell Property* was legislatively overruled following the enactment of the Rating and Valuation Act 1961 (c 45) (UK). The Singapore High Court in *BCH No 1* relied on *Bell Property* and *Chartered Bank* for the proposition that the cost of services are deductible from the gross rent when computing the annual value under the PTA. In *BCH No 2*, this Court noted that the earlier cases of *Bell Property*, *Chartered Bank* and *BCH No 1* had used the term "deduction" rather than "exclusion" in working out the correct annual value of the property, although the latter expression, in its view, was the more appropriate terminology. This Court found that in spite of the difference in language, the earlier cases demonstrated a "complete conceptual symmetry with the principle of *exclusion*" (emphasis in original) (see *BCH No 2* at [31]).

23 We will now analyse the cases in chronological order to see what tests were utilised for determining whether an item was "related to rent or letting".

24 In *Pullen*, apart from the payment of rent the tenants paid a further sum each week in respect of the cleaning, lighting and watching of the common staircase, and for removing dust ("the further sum"). The issue before the court was whether the further sum should be included in the gross value of the tenements under s 4 of the Valuation (Metropolis) Act 1869 (c 67) (UK) ("the 1869 UK Act"). Section 4 of the 1869 UK Act provided as follows:

> The term "gross value" means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes, and tithe commutation rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent.

It can be seen that s 4 of the 1869 UK Act bears some similarity to the definition of "annual value" in

s 2(1) of the PTA.

25 The court focused on certain qualifying words in that provision. For ease of reference, the following table shows a comparison of s 4 of the 1869 UK Act and s 2(1) of the PTA, with the respective qualifying words in each provision italicised:

Section 4 of the 1869 UK Act	**Section 2(1) of the PTA**
The term "gross value" means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes, and tithe commutation rentcharge, if any, and if *the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent*. [emphasis added]	"annual value" — (*a*) in relation to a house or building or land or tenement, not being a wharf, pier, jetty or landing-stage, means the gross amount at which the same can reasonably be expected to be let from year to year, *the landlord paying the expenses of repair, insurance, maintenance or upkeep and all taxes (other than goods and services tax)*; ... [emphasis added]

26 The qualifying words in s 4 of the 1869 UK Act which were operative in *Pullen* were "necessary to maintain the hereditament in a state to command that rent" (words which are not found in s 2(1) of the PTA). Darling J reasoned that no tenant would take a tenement in a building of the same character as the property in question, or at least would not have paid the same amount of rent for it, unless the staircase by which he was to reach the tenement was kept reasonably clean and lighted (see *Pullen* at 142). In other words, the maintenance and service of the common staircase was necessary to enable the landlord to command that rent. By operation of the qualifying words in s 4 of the 1869 UK Act, the further sum was included in the calculation of gross value.

27 In *Bell Property*, one argument raised by the appellant was that *Pullen* was incorrectly decided because the qualifying words were not triggered. Counsel urged the court to consider that the common staircase was not part of the hereditament (see *Bell Property* at 642). If this was so, the maintenance of the common staircase would fall outside the ambit of the qualifying words "necessary to maintain the hereditament in a state to command that rent", and the statutory impetus to include that expense in the gross value would be removed. The court agreed with the appellant that *Pullen* had been wrongly decided and allowed the deduction of the cost of repairs to the common parts, implicitly adopting the distinction between the common property and the hereditament (see *Bell Property* at 648). We note that this position is different from that taken by the courts in Singapore, which is that expenses incurred for the repair and maintenance of the common property are to be *included* in annual value (see *Tan Hee Liang* at [63]–[68]). We think that this difference is due to the presence of the phrase "necessary to maintain the hereditament in a state to command that rent" which is found in s 4 of the 1869 UK Act and which is not found in s 2 of PTA.

28 We note that *Pullen* was the subject of much academic criticism for wrongly deciding that the cost of providing services could not be deducted from gross value (see, *eg*, David Widdicombe *et al*, *Ryde on Rating* (Butterworth, 13th Ed, 1976) ("*Ryde on Rating*") at p 490). Following the passage of the Rating and Valuation Act 1925 (c 90) (UK) ("the 1925 UK Act"), a distinction was created between the position in London (governed by s 4 of the 1869 UK Act as interpreted in *Pullen*) and the position outside London (governed by s 68 of the 1925 UK Act). *Pullen* was excluded from operation outside London by a proviso unique to s 68 of the 1925 UK Act (not found in s 4 of the 1869 UK Act)

which expressly stated that expenses attributable to services provided by the landlord, other than repair and maintenance of the hereditament, were not to be taken into account in determining gross value (the proviso is found in the second paragraph of the quoted text):

> "Gross value" means the rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes, and tithe rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent:
>
> Provided that, in estimating the annual rental value of a hereditament to a tenant, *no account shall be taken of any services* which the landlord renders, or procures to be rendered to the tenant (either alone or in common with other tenants of the landlord) *other than the provision of, or repairs to, or maintenance of, the hereditament* ...
>
> [emphasis added]

29 As such, *Ryde on Rating* (at p 491) noted that outside London there was no doubt as to the propriety of excluding from the rent paid any part attributable to services other than repairs and maintenance of the hereditament. *Pullen* was subsequently overruled in *Bell Property* (see *Bell Property* at 646), achieving in London the result arrived at outside London by the proviso to the definition of "gross value" in s 68 of the 1925 UK Act.

30 The court in *Bell Property* therefore drew a bright-line distinction between rent and services and held that the latter was to be excluded from gross value. The reason for this distinction was that rent was charged for the occupation of the heritable subject, while services were not a part of the rateable premises (*Bell Property* at 647). An analogy was drawn to the letting of a furnished flat, where it was well-settled that in determining gross value the cost of the furniture could be deducted from the gross rent. After this was deducted from the gross rent, all that was left of the gross sum was the rent of the house itself, which was rateable, and this was the proper computation of the gross value. Although the court seemed content to regard the furniture as not forming a part of the rateable premises, we note that *Bell Property* did not address the case where the articles and equipment constituting fixtures could enhance the value of the immovable property.

31 Following the rent-services dichotomy, the court held that for the purposes of computing the gross value of the property, the proper method was to determine what portion of the gross rent was actually for rent and what portion was for services, and to deduct the latter value from the gross rent, leaving the balance to represent the true value of the flat (see *Bell Property* at 645). It then allowed deductions for the following sums:

(a) the cost of repairing and maintaining the passages, stairways, lifts, staff-rooms and ornamental grounds;

(b) depreciation of plant, machinery, boilers, refrigerators, wirelesses and of the portions of the building used to house such installations;

(c) the cost of managing and supervising the services provided;

(d) unproductive expenditure on services by reason of vacant flats; and

(e) the landlord's profit on services calculated as 25% of the annual cost of services.

32 The cases after *Bell Property* have adopted the rent-services dichotomy and built upon it to exclude further items which are analogous to services. While the focus of *Bell Property* was on whether expenses on services could be excluded, we note that an exclusion was also allowed for the depreciation of certain asset items (see item (b) in the preceding paragraph), a determination which is germane to the present appeal.

33 In *Chartered Bank*, the Singapore High Court, without reference to *Bell Property*, also arrived at the same conclusion that, *inter alia*, the cost of services and depreciation of equipment could be excluded from a computation of annual value. The appellants there had contended for the following items of expenditure to be deducted from the gross rent to arrive at the correct annual value of the property:

(a) watchmen and cleaning;

(b) lifts;

(c) air conditioning;

(d) common parts;

(e) cost of supervision and services;

(f) the landlord's profit on services at 25% of the total of (a)–(e);

(g) depreciation of equipment; and

(h) unproductive expenditure on services at 5% of the total of (a)–(g).

34 The court in *Chartered Bank* allowed deductions for items (a)–(g), save for item (f) where it found that the figure of 25% was excessive and a lower figure of 15% was substituted. Item (h) was disallowed (meaning that seven items were deducted, not eight as mistakenly stated in *BCH No 2* at [37]). As for item (g), the court agreed that a sum for depreciation should be deducted, but took issue with the computation. It held that depreciation was to be calculated by taking the actual cost of the item when it was installed and dividing it by the number of years representing the estimated useful life of the equipment (see *Chartered Bank* at 4–5).

35 On the face of the judgment in *Chartered Bank*, it appears that the respondent had accepted that deductions could be made for equipment needed to provide the services. The dispute centred instead on calculation, *viz*, the quantum which ought reasonably to be attributable to profit on services, and the appellants' asserted basis for calculating depreciation (see *Chartered Bank* at 4). Therefore, while the court allowed deductions for items (a)–(g), it did not explain why, *in principle*, these deductions should be allowed. We would hasten to add that it appears that the court did not address this issue because the parties seemed to be in agreement and the point was not raised. In view of this, the Judge noted that there was "no trace of an identifiable legal basis" upon which the depreciation component in the present case was excluded from the gross rent in determining annual value (see the Judgment at [48]). In *BCH No 1*, despite the fact that there was no analysis of *Chartered Bank* as to the legal bases for excluding certain items of expenditure for the purposes of determining annual value, the High Court assumed that *Chartered Bank* was an "authority for the proposition that the costs of providing services ... [we]re deductible from the gross rent to compute the annual value" (see *BCH No 1* at [9]). It also noted that the court in *Chartered Bank* had allowed the deduction of amounts representing depreciation of the lifts, air-conditioner and fire extinguishers

(*ibid*).

36 In *BCH No 1*, one element of the gross rent was the tenant's contributions towards the landlord's advertising and promotion ("A&P") expenses. The issue was whether the A&P contributions should be included in the annual value of the property. The court agreed with the analysis in *Bell Property* that rent concerned the "use or occupation of the heritable subject" and that the cost of the provision of other services and amenities had nothing to do with rent (*BCH No 1* at [14]). Rent alone, and not the cost of services, was to be included in the annual value of a property. As A&P contributions were "no different from the provision of the other services" for which deductions were permitted in *Chartered Bank* and *Bell Property*, the court similarly held that the A&P contributions were not to be included in the computation of the annual value (see *BCH No 1* at [16]).

37 We would pause here to observe that, in our view, the deduction of the A&P contributions was correct notwithstanding the recognition that the A&P activities would raise the profitability of the shops and in turn enhance the rent that the landlord would be able to charge on the renewal of the lease (see *BCH No 1* at [17]). This merely shows that the presence of a causal link between a service provided and the rent levied does not *ipso facto* suffice to make the cost of that service related to rent or letting for inclusion in the determination of annual value.

38 The court in *BCH No 2* agreed with *BCH No 1* that the focus of "annual value" in s 2(1) of the PTA was on rent or letting. However, unlike the cases which preceded it, *BCH No 2* did not draw a bright-line distinction between "rent" and "services", but preferred to distinguish between rent or letting on the one hand, and all other expenses which were not related to rent or letting on the other (*BCH No 2* at [19]). This shifted the focus away from the rent-services dichotomy. While the court found (at [31]) that *Chartered Bank*, *Bell Property* and *BCH No 1* were "archetypical examples" of the operation of the principle of exclusion, it is unclear if this amounted to a concurrence that the earlier cases were properly decided in principle, or whether it simply meant that the earlier cases used the correct methodology of exclusion even though they were couched in the language of deduction. The court expressed its views about the earlier cases as follows:

(a) *Bell Property*: taking the factual matrix in the round, it was clear that the items that were deducted had "nothing to do with rent or letting" and were correctly excluded from the gross rent (see *BCH No 2* at [46]). This appears to go beyond approval of merely the methodology.

(b) *Chartered Bank*: a "reasonable reading" of the judgment is that the items concerned were "held by the court there to be unrelated to rental or letting" (see *BCH No 2* at [39]). This statement seems rather circumspect. As noted earlier (see above at [35]), there seems to have been no analysis in *Chartered Bank* as to whether the items related to rent or letting.

(c) *BCH No 1*: A&P contributions had nothing to do with rental or letting and the court in *BCH No 1* was "entirely correct" in excluding the amount of such contributions from the computation of annual value (see *BCH No 2* at [21] and [32]). This is more clearly an approval of the exclusion of the specific item of A&P contributions.

39 The case of *Tan Hee Liang* raised a question mark as to the soundness of *Chartered Bank* as authority for exclusions of the items in that case. In *Tan Hee Liang* (at [35]), it was put to counsel for the Chief Assessor that some of the exclusions allowed in *Chartered Bank* were hardly "services" but resembled maintenance instead, with the corollary that they should have been included in the computation of the annual value by operation of the qualifying words in s 2(1) of the PTA. Following this, counsel for the Chief Assessor urged the court to consider the correctness of *Chartered Bank*. However, there was no need for the court in *Tan Hee Liang* to do so, and the status of *Chartered*

Bank has not been clarified.

40 *Tan Hee Liang* concerned a claim to exclude from the annual value payments that respectively went towards the sinking fund and special levy imposed by the management strata corporation concerned. The Chief Assessor had allowed an exclusion of contributions to the maintenance fund as a special administrative concession (see *Tan Hee Liang* at [85]). The court noted that the sinking fund, maintenance fund and special levy all concerned the maintenance and repair of the common property. As noted above at [27], it was recognised in *Tan Hee Liang* (at [63]–[68]) that "maintenance" in the qualifying words included maintenance of the common property. Therefore, by operation of the qualifying words, expenses incurred for the repair and maintenance of the common property should be included for the purposes of ascertaining the annual value.

41 The court in *Tan Hee Liang* held that the special levy was wholly related to the purposes embodied in the qualifying words and included it as part of the annual value (see *Tan Hee Liang* at [82]). As for the sinking fund, even though it was for major maintenance and repair which might occur in the future, the court declined to exclude it as future maintenance might also preserve or enhance the value of the property (see *Tan Hee Liang* at [55] and [73]). However, the fact that the sinking fund was for potential future maintenance gave rise to an issue with the timing of the utilisation of the funds. The court laid down the principle that inclusion in the assessment of annual value could take place only when the maintenance and repair was in fact effected or where there was specific allocation of the use of the funds (see *Tan Hee Liang* at [73]). Exactly when the specific allocation of funds in the sinking fund for future maintenance took place was a matter left by the court to the Chief Assessor to determine; this issue was therefore remitted to the Chief Assessor.

Issue 1

42 In the light of the foregoing discussion of the case law, we now move on to consider the proper test to adopt to decide whether an item of expense, which has been included in the gross rent paid by a tenant, should be excluded for the purposes of determining the annual value of the property.

The Appellant's case

43 The Appellant argues in favour of the rent-services dichotomy and focuses on the qualifying words to contend that expenses for services which are not enumerated in the qualifying words should be excluded from determining the annual value of the property. [note: 2]

The Respondent's case

44 The Respondent disputes the Appellant's reasoning that cost of services should be excluded from gross rent in the computation of annual value based simply on the fact that s 2(1) of the PTA does not state that these are to be included in annual value. According to the Respondent, that argument cuts both ways. Section 2(1) of the PTA is equally silent on whether cost of services can be *excluded* in fixing annual value and this silence could be interpreted in favour of inclusion. [note: 3]

Our analysis and decision

45 In *BCH No 2*, it was stated (at [38]) that whether an item in the gross rent can be excluded from the determination of annual value will depend on the "precise nature of the item concerned". While this must be true, we are afraid it does not provide much guidance in terms of deciding whether an expense is related to rent or letting.

46 It seems to us that the starting point must be to see whether a particular expense falls within the qualifying words in s 2 of the PTA. This is the first stage. As we held above at [20], the qualifying words are a statutory impetus to *include* in the annual value any component of the gross rent that is to cover the expenses that the qualifying words expressly enumerate, *ie*, the landlord's expenses for repair, insurance, maintenance or upkeep and all taxes (other than goods and services tax). If the expense belongs to one of these categories, it has to be included in determining annual value, and no further question arises.

47 It is only if an expense does not fall within any of the categories in the qualifying words that the test of "rent or letting" comes into play. This is the second stage. In the application of this test, we do not think the rent-services dichotomy adopted in the earlier cases is really that helpful. An item of expense is not automatically excluded when computing the annual value just because it has been incurred for a service. From the qualifying words it is clear that some services will have to be *included* in the annual value. For example, maintenance of the property is a service that has to be included in the annual value. It is not the label of "service" that counts, but whether the expense is, in substance, related to rent or letting. Conversely, as noted above at [15], the gross rent of a property is by no means conclusive in the determination of annual value. While the provision of some services may lead to an enhancement of rent, this does not in itself result in the inclusion of expenses so incurred in determining the annual value (see above at [37]). In our view, where the expense in question forms a part of the gross rent *it must relate to the use or occupation of the heritable subject* if it is to qualify as one relating to "rent or letting" and so be included in the annual value. An example of an expense which has really nothing to do with the use or occupation of premises is the A&P expenses incurred in *BCH No 1*.

48 In this regard, the fixture and/or enhancement tests may be helpful. As the test for "rent or letting" is whether the expense is related to the use or occupation of the heritable subject, it follows that expenses related to fixtures which are components of the heritable subject itself (apart from fixtures falling under s 2(2) of the PTA) are related to rent or letting (see *Chief Assessor and another v First DCS Pte Ltd* [2008] 2 SLR(R) 724 at [46]). We agree with the Judge's reasoning at [25] of the Judgment and would only add one rider to it. It is important not to lose sight of the fact that while a fixture becomes part of the land or enhances the value of the land, the fixture and/or enhancement tests are not the key focus. It is the rent at which the premises or property may reasonably be expected to be let which is the touchstone of s 2(1) of the PTA.

Issue 2

49 We will now examine whether, on the application of the test for exclusion, the depreciation component of the Asset Items should be excluded from the annual value of each unit of the Property.

The Appellant's case

50 The Appellant contends that the depreciation component is not related to rent or letting. While the Appellant does not dispute that the application of the fixture and enhancement tests would result in a finding that the Asset Items constituted fixtures or that they "obviously increased the value of the [U]nits", [note: 4] it argues that the tests are not relevant to a determination of whether the depreciation component should be excluded from the computation of the annual value of each unit. The fixture and enhancement tests are applied to tax fixtures which *enhance* the value of the land. However, depreciation is a distinct concept from enhancement.

51 Furthermore, the Appellant asserts that the gross rent in the present appeal has already included, and was reflective of, the enhanced value brought about by the Asset Items. To include the

depreciation component in the annual value would thus amount to double counting.

The Respondent's Case

52 On the contrary, the Respondent contends that the Asset Items are not exempted from annual value, referring to *First DCS Pte Ltd v Chief Assessor and another* [2007] 3 SLR(R) 326, which held (at [28]) that escalators, lifts and air-conditioning units were not excluded from assessment under s 2(2) of the PTA.

53 In response to the Appellant's argument that enhancement is not equivalent to depreciation, the Respondent contends that the annual value of a property is not dependent on the actual quantum of depreciation as it uses a hypothetical tenant as a yardstick. There is thus no need to ensure a perfect match between the amount of depreciation and the amount of enhancement. [note: 5]

Our analysis

54 The first issue to be determined here is whether the depreciation component comes within the qualifying words. If so, then this expense will be included in the computation of the annual value without more (see above at [46]). Insofar as the Appellant argues that the qualifying words represent a closed list, we agree. However, all that the omission of an expense from that list signifies is that that expense is not *automatically* to be included in the computation of the annual value. If the expense is related to rent or letting, it will nonetheless be included in the annual value at the second stage of inquiry.

55 If depreciation is not a species of maintenance, as we think is the case, then depreciation of fixtures found on the common property, such as the Asset Items, should not automatically be included in the annual value. In *Tan Hee Liang*, the meaning of "maintenance" was discussed as follows (at [56]):

> 56 … We need only add that the meaning of "maintenance" is relatively clear and a broad, commonsensical definition should be adopted. In this regard, *Collins Cobuild English Language Dictionary* (Harper Collins Publishers India Pvt Ltd, 1991) at p 877 pertinently defines "maintenance" as "the activity of keeping something such as a building, vehicle or machine in good condition by regularly checking it and doing necessary repairs". This definition accords with the interpretation given to the meaning of "maintain" in a number of other cases. For example, the House of Lords in *Hamilton v National Coal Board* [1960] AC 633 defined "maintain" in the context of the Mines and Quarries Act 1954 (c 70) (UK) to mean "keep[ing] in proper order by acts of maintenance before the thing to be maintained falls out of condition" (see per Lord Keith of Avonholm at 647).

In sum, maintenance is keeping an item in good repair.

56 In the Judgment, the meaning of "depreciation" was discussed as follows (at [21]):

> 21 Depreciation as defined in the Financial Reporting Standards FRS 16 is the systematic allocation of the depreciable amount of an asset (*ie*, the cost of an asset, or other amount substituted for cost, less its residual value) over its useful life. Put simply, depreciation serves to match a fair proportion of the cost of an asset against income earned by a business in an accounting period as well as reflect the book value of the asset used in the business at each accounting period end. In this case, the Landlord has described depreciation as a "notional

expense" for wear and tear of the asset items that would need to be replaced in the future, and this is usually at the end of the useful life of the asset item. On the matter of depreciation, the Board in its Decision stated (at [14]):

> ... the [Landlord] would have to incur actual and notional expenditure, which refers to depreciation of the equipment. Undoubtedly, these items cannot last forever and not only require maintenance but need replacement due to wear and tear.

In other words, depreciation is a notional expense *which is no less real*, taking into account the wear and tear of an item and its future replacement. Depreciation is not concerned with keeping the item in good repair. It represents the recognition that, even with maintenance, an item which has a certain useful life span will not stay in good repair for an infinite time and will need to be replaced.

57 Depreciation and maintenance can be seen as two sides of the same, gradually corroding, coin. Maintenance tries to preserve the coin and keep it from corroding, while depreciation recognises that the coin will eventually corrode at the end of its useful life and that a new coin will have to be bought. Therefore, while depreciation and maintenance are both responses to the problem of a finite useful life, they are not the same. Depreciation thus cannot be said to be a species of maintenance, and does not fall under the qualifying words.

58 The next issue is whether the depreciation of the Asset Items is related to "rent or letting", *ie*, whether the inclusion of the depreciation component in the gross rent paid by the tenant of each unit related to the use or occupation of the heritable subject. On either the fixture or enhancement test, the Asset Items are fixtures and a part of the "heritable subject" (see the Judgment at [38], [41] and [42]). We also agree with the Judge that the Asset Items are not to be excluded from assessment under s 2(2) of the PTA (see the Judgment at [30]–[33]). The Asset Items clearly and directly enhance the enjoyment of each tenant's occupation of his unit. For the facilities provided by the Asset Items to be so enjoyed by the tenants, two sets of expense would have to be incurred. The first relates to recurrent maintenance and repairs. The second takes into account the fact that each of the Asset Items has a finite useful life span, at the expiry of which it has to be replaced. This latter expense is represented by the depreciation component. While it is true that depreciation is an accounting concept or practice (see the Judgment at [21]), it has its roots in business reality without which there would be under-recognition of the expense of a business and a false picture of the profitability of the business presented. In short, both of these expenses are needed to ensure that the units in the shopping centre (and in turn the tenants) will continue to enjoy the facilities which the Asset Items provide. Accordingly, we hold that the depreciation component represented by the $0.20 psf should be reckoned as relating to the rent or letting of each unit. There is no question of double counting.

When the depreciation component should be included in the annual value

59 Having found that the depreciation component relates to the rent or letting of each unit of the Property and is to be included in the annual value, we now touch on the oblique inquiry as to whether the sum representing the depreciation component should, upon payment by the tenants, be *immediately* included in the assessment of annual value. In *Tan Hee Liang*, it was held (at [80]) that an amount paid into a sinking fund in respect of possible maintenance to be carried out in the future *should not be included* in the determination of the annual value until the amount had been specifically allocated or actually put to its intended effect (see above at [41]). We think that that decision is distinguishable from the present case. *Tan Hee Liang* was concerned with contributions to a sinking fund, which fund by its nature was to be applied to the maintenance of items and facilities *generally*. There was thus an *open-ended* category of potential objects which could be maintained. Seen in that

light, we agree that the sinking fund there could not be said to have been applied towards the maintenance of any particular item or facility until it had actually been specifically allocated or used for such maintenance. In this case, however, the depreciation component pertained only to the Asset Items. We note that the Appellant claimed before the tribunals below that the depreciation component related to not just the Asset Items but other plant and machinery of the Property as well (see above at [4]). Given that the Appellant's arguments only focused on the depreciation of the Asset Items, however, we would regard the other plant and machinery to be *de minimis*, insofar as the depreciation component is concerned. We find therefore that there is here already a fixed class of objects towards which the depreciation component is applied. No question of specific allocation arises in this case. Given also that the Respondent accepted the rate and quantum of depreciation put forward by the Appellant to be fair and reasonable, we do not see any need to remit the matter to the Respondent for determination as was done in *Tan Hee Liang*.

Conclusion

60 In the result, we dismiss the appeal with costs and the usual consequential orders.

[note: 1] Appellant's Case at para 33.

[note: 2] Appellant's Case at para 20 and 26.

[note: 3] Respondent's Case at para 29.

[note: 4] Appellant's Case at para 33.

[note: 5] Respondent Case at para 94.