Per Ah Seng Robin and another *v* Housing and Development Board and another [2014] SGHC 270

Case Number	: Originating Summons No 440 of 2014
Decision Date	: 22 December 2014
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: Kirpal Singh s/o Hakam Singh (Kirpal & Associates) for the applicants; Dhillon Dinesh Singh and Teh Shi Ying (Allen & Gledhill LLP) for the first respondent; Khoo Boo Jin, Ang Ming Sheng Terence and Kanesh Balasubramaniam (Attorney-General's Chambers) for the second respondent.
Parties	: ROBIN PER AH SENG — TEE BEE KIAW — HOUSING AND DEVELOPMENT BOARD — ATTORNEY-GENERAL'S CHAMBERS

Administrative Law – Judicial Review

Administrative Law – Natural Justice

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 188 of 2014 was dismissed by the Court of Appeal on 30 November 2015. See [2015] SGCA 62.]

22 December 2014

Tay Yong Kwang J:

Introduction

1 This originating summons ("OS 440/2014") was brought by the applicants, Robin Per Ah Seng ("Mr Per") and Tee Bee Kiaw ("Mdm Tee") (referred to collectively as "the Applicants"), for leave to file an application for a quashing order in respect of four decisions made by the respondents, the Housing and Development Board ("HDB") and the Minister for National Development ("the Minister") (referred to collectively as "the Respondents"). The Minister was represented by the Attorney General. Three of the four decisions were made by HDB while one was made by the Minister. The decisions sought to be impugned by the Applicants were as follows:

(a) HDB's notice of intention dated 6 October 2010, served pursuant to ss 56(1)(h) and 56(3) of the Housing and Development Act (Cap 129, 2004 Rev Ed) ("the Act"), to compulsorily acquire the Applicants' 4-room flat in Bukit Batok ("the Property");

(b) HDB's decision under s 56(5) of the Act to reject the Applicants' appeal;

(c) the Minister's decision under s 56(6) of the Act to reject the Applicants' further appeal; and

(d) HDB's notice of vesting dated 20 April 2011, issued pursuant to s 57 of the Act.

The parties agreed to have the present application heard on a consolidated basis, where the application for leave would be heard together with the substantive merits of the case.

2 The parties first came before me on 31 October 2014. After hearing the parties' submissions, I adjourned the hearing for the Applicants to request, on an urgent basis, the record of changes in the Applicants' address with the Immigration and Checkpoints Authority ("ICA"). The ICA provided the details on 5 November 2014 and the parties appeared before me again on 6 November 2014. After hearing further arguments concerning the information provided by the ICA, I dismissed the present application on the basis that it was made beyond the three-month period set out in O 53 r 1(6) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("RC") and also that the Applicants failed on the substantive merits of the case. The Applicants have appealed against my decision. I now set out the grounds for my decision.

The facts

The purchase and the subletting of the Property

3 The Applicants purchased the Property on 1 October 2007 for $368,000 under the HDB's Public Scheme. A concessionary interest rate loan was provided by HDB in the amount of $288,000.

4 On 21 January 2009, the Applicants entered into a corporate tenancy agreement with Offshore Construction Specialist Pte Ltd ("Offshore Construction") for the subletting of two bedrooms at a rate of $2,050 per month. The period of the lease was 24 months commencing on 1 February 2009 and ending on 31 January 2011.

The inspection of the Property

5 On 23 December 2009, HDB received an anonymous tip-off alleging that the Applicants were subletting the entire flat. The informant also claimed that the Applicants were residing in a condominium known as the Blue Horizon.

6 On 25 May 2010, officers from the HDB conducted an inspection of the Property. During the inspection, a signed statement was obtained from one Mr Sayeh Dedi Mahdy ("Mr Sayeh"), an employee of Offshore Construction residing in the Property at that point in time. For ease of reference, the contents of the statement are reproduced below:

1. I have rented the above flat from the owners since Feb 2009 till date.

2. I am occupying the flat with 2 other flatmates.

3. The monthly rental is paid by my employer.

4. The monthly utilities bills are paid by my employer.

5. The owners did not reside in the flat.

Apart from the signed statement, the HDB officers also took photographs of the living room, the three bedrooms and the kitchen. Coloured copies of those photographs were tendered by Mr Khoo Boo Jin ("Mr Khoo") from the Attorney-General's Chambers ("AGC") at the hearing on 31 October 2014.

7 Mr Wong Yew Wah ("Mr Wong"), one of the HDB officers who conducted the inspection, filed an affidavit with the following observations concerning the state of the Property:

(a) there were ashtrays containing cigarette butts on the table in the living room;

(b) there was a strong smell of smoke;

(c) Mr Sayeh and his two flatmates each occupied a bedroom in the Property;

(d) the bedrooms were sparsely furnished and each bedroom contained only a single bed;

(e) there were no personal effects in any of the rooms to suggest that a family of three had resided in it; and

(f) the tenants hung their laundered marine uniforms in front of the fridge and above the kitchen cabinets.

The letter of intention

8 Based on the evidence it had gathered thus far, HDB was of the view that there were sufficient grounds to establish that the Applicants were not residing in the Property. A letter of intention dated 17 July 2010 ("the letter of intention") was sent by post to the Applicants with the following contents:

> Our investigations revealed that you have sublet your flat to Mr Sayeh Dedi Mahdy ... and his 2 flatmates from the month of Feb 09 without HDB's prior written consent and that you and your family are not in continuous physical occupation of the flat. This is a breach of the terms of the flat lease and an infringement under section 56(1) of [the Act].
>
> ... The HDB is thus intending to **compulsorily acquire** your flat for the infringement under s 56(1)(h) of the [the Act]. All payments received by the HDB from you shall be strictly on a without prejudice basis and all our rights of action against you are hereby strictly reserved. In the meantime, please take immediate steps to evict the unauthorised occupiers/unauthorised sub-tenant from your flat.
>
> [emphasis in original]

It was not disputed that the Applicants failed to respond to the letter of intention.

The notice of intention

9 Given the lack of response from the Applicants, HDB proceeded to serve a notice of intention by pasting it on the main door of the Property on 6 October 2010. The relevant portions of the notice are set out below:

> Please take notice that pursuant to Section 56(1)(h) of [the Act], the [HDB] intends to compulsorily acquire the above flat on the ground that you have sublet your flat without obtaining prior written consent of HDB.
>
> The [HDB] has further decided that the compensation payable for the acquisition of the above flat shall be the sum of $286,500.00. ...
>
> Your attention is drawn to sub-sections (4), (5) and (6) of Section 56 of [the Act]. The sub-sections are printed overleaf for your information. **YOUR ATTENTION IS ALSO DRAWN TO THE NOTE PRINTED OVERLEAF.**

[emphasis in original]

As discussed above, this notice of intention dated 6 October 2010 was one of the decisions being challenged by the Applicants.

The letter of objection to HDB

10 On 28 October 2010, the Applicants sent a letter of objection to HDB pursuant to s 56(4) of the Act. The Applicants made the following points in the letter of objection:

(a) The Applicants had entered into a corporate tenancy agreement with Offshore Construction and the particulars of the subtenants were registered with HDB.

(b) The Applicants did not sublet the entire Property to the tenants.

(c) The Applicants continued to reside in one of the common bedrooms in the Property.

(d) The Applicants had stayed temporarily at the first Applicant's mother's flat to take care of her due to her poor health after the demise of his father.

(e) The Applicants shuffled between the mother's flat and the Property and there was never any intention to "vacate the room [in the Property] without living there".

(f) The Applicants did not permit any of the occupiers to live in their bedroom. The room was left unlocked and the Applicants "did not give explicit permission to the occupier sleeping in the room that was kept for our own occupation".

(g) The Applicants were negotiating for the termination of the tenancy agreement and for all occupiers to vacate the flat.

11 The Applicants also enclosed a copy of the tenancy agreement and the registration of the particulars of the occupiers.

The rejection by HDB

12 In a letter dated 29 November 2010, HDB informed the Applicants that their appeal was unsuccessful. The Applicants were also informed that under s 56(6) of the Act, HDB would proceed to vest legal ownership of the Property in itself in the event that no further appeal was made to the Minister within 28 days from the date of service of the letter of rejection. Apart from that, HDB further emphasised that subletting of the whole flat without HDB's prior approval was an infringement of the lease and the Act. In this respect, HDB stated that proprietors "who commit the infringement are liable to have their flat compulsorily acquired".

The letter of appeal to the Minister

13 By way of a letter dated 27 December 2010, the Applicants exercised their right of further appeal to the Minister under s 56(6) of the Act. In this letter, the Applicants stated that the breach was a one-off incident and that they did not commit the breach with the intention of taking advantage of government-subsidised flats for personal financial gain. The Applicants emphasised that they had purchased the Property from the resale market and that no government grant had been obtained for the purchase. Apart from that, the Applicants stated that they had rectified the breach

immediately by terminating the tenancy and that the occupiers had since vacated the Property. The Applicants also mentioned that they would accept any form of penalty on account of the breach but the compulsory acquisition of the Property was "too harsh". Finally, the Applicants appealed for compassion in the hope that the Minister would take into consideration the reason behind their temporary move to the mother's home due to her poor health.

The rejection by the Minister

14 By way of a letter dated 14 March 2011, HDB informed the Applicants that their appeal to the Minister under s 56(6) of the Act was unsuccessful. It was further stated that steps would be taken to vest legal ownership of the Property in HDB. The Applicants were also informed that they had to return vacant possession of the Property to HDB within 30 days of the service of the notice of vesting.

The vesting of the Property in HDB

15 Subsequently, HDB lodged the relevant instrument with the Registrar of Titles on 7 April 2011 and title of the Property was vested in HDB on 11 April 2011. On 29 April 2011, HDB served the notice of vesting on the Applicants, informing them that title in the Property had vested in HDB on 11 April 2011. The Applicants were told to remove all furniture and belongings from the Property. It was also stated that HDB would take possession of the Property on the expiry of 30 days from the date of the notice. As discussed above, this notice was also one of the decisions sought to be challenged by the Applicants.

The appeals by the Member of Parliament

16 Meanwhile, after the Applicants received the letter of rejection dated 14 March 2011 (see [14] above), they proceeded to seek help from a Member of Parliament ("the MP"). There were multiple exchanges of letters between the MP, HDB and the Applicants. The contents of these letters written by the MP on behalf of the Applicants were largely similar. In fact, the arguments raised in these letters were largely consistent with the position that the Applicants had adopted in their appeal letters to HDB and the Minister. For the purposes of the present application, it is only necessary to highlight two additional points that surfaced in the course of these exchanges.

17 First, in a letter written by the MP to HDB dated 24 February 2012, it was highlighted that Mr Per had parked his car at a condominium known as The Jade as Mdm Tee's sister had a unit there. A letter dated "5 October 2011-10", purportedly written on behalf of MCST 2923 (*ie*, the MCST of The Jade), was enclosed with the MP's letter. The letter from MCST 2923 stated as follows:

> We would like to confirm that the vehicle car number SJH 4098G was parking at our Premises, The Jade from August 2008 to August 2010.

The writer of the letter was not identified.

18 Second, in the same letter from the MP dated 24 February 2012, a letter from one Mr Cahya Adi Kurniawan ("Mr Cahya"), an employee of Offshore Construction who had resided in the Property, was enclosed. In that letter, it was stated that the Property had three bedrooms, out of which only two bedrooms were leased to Offshore Construction. Mr Cahya alleged that the HDB officers conducting the inspection had claimed to be from the "Environment Department". Mr Cahya further stated that they had informed the HDB officers that they were occupying the whole flat as they were operating under the impression that the inspection was for the purpose of assessing whether the number of

persons staying in the Property was acceptable for occupational health. Mr Cahya reiterated that only two rooms were leased to Offshore Construction. This letter from Mr Cahya was dated 5 November 2011.

The appointment of solicitors

19 HDB maintained its position that the Minister's decision was final and that no further appeal was allowed under the Act. On 24 January 2013, HDB sent a final reminder letter to the Applicants, informing them that HDB would proceed to recover vacant possession of the Property. HDB eventually recovered possession of the Property on 26 April 2013. This was followed by a letter dated 31 May 2013, in which HDB attached a completion account setting out the compensation sum awarded, the amount applied towards the discharge of the outstanding mortgage and the amount refunded to the Applicants' CPF accounts.

20 The Applicants proceeded to instruct Kirpal & Associates ("the Solicitors") and a letter dated 14 June 2013 was sent to HDB by the Solicitors, requesting HDB to hold its hands as full instructions were being taken. This was followed by another series of exchanges between HDB and the Solicitors. Although most of the substantive arguments remained unchanged, as will be seen subsequently, the Solicitors adopted a more legalistic approach in its exchanges with HDB. The basis and legality of HDB's decision were called into question and it was stated that legal proceedings would have to be commenced in the event that HDB refused to withdraw its earlier decision. Further discussions and interviews were conducted between HDB and the Applicants. HDB also sought further evidence from the Applicants. These include, among other things, scanned copies of the Applicants' passport.

21 Nevertheless, nothing came out of the exchanges between the Solicitors and HDB. On 4 April 2014, HDB sent a letter to the Solicitors, informing them that HDB was unable to withdraw the notice of intention and the notice of vesting. On 15 May 2014, the Applicants commenced this originating summons.

The parties' arguments

22 At the outset, all parties were in agreement that the subject matter of the present application was susceptible to judicial review and that the Applicants had sufficient interest in the matter. I set out below a summary of the salient arguments presented by each party.

The Applicants' arguments

23 In relation to the issue of whether the application was filed out of time, the Applicants relied on two main arguments. First, it was submitted that for the purpose of computing the three-month timeframe set out in O 53 r 1(6) of the RC, reference must be taken from the final rejection letter sent by HDB on 4 April 2014. On this basis, it was argued that the present application, having been commenced on 15 May 2014, was within the three-month timeframe.

24 Second, the Applicants argued that they were able to account for the delay to the satisfaction of the court on the facts of the present case. It was submitted that the Applicants had taken conscientious and concerted efforts to resolve the matter and that there was no lapse, neglect or inaction in the conduct of the appeals to HDB and the Minister. It was emphasised that the Applicants honestly believed that the outstanding matter could be resolved and that they were ignorant of the legal steps required. The Applicants also highlighted that HDB, in the course of replying to the letters sent by the Solicitors, made multiple requests for the Applicants to "hold their hands". It was submitted that as a matter of logic and fair play, the Respondents should be barred from raising any

issue of delay.

25 In relation to the substantive merits of the case, the Applicants relied on the three grounds of review set out in the Court of Appeal decision of *Attorney-General v Venice-Simplon Orient Express Inc Ltd* [1995] 1 SLR(R) 533 ("*AG v Venice-Simplon*"), namely, illegality, irrationality and procedural impropriety.

26 On the ground of illegality, the Applicants submitted that HDB bore the burden of establishing the precedent fact that the Applicants had sublet their entire flat without the consent of HDB. It was argued that HDB had failed in this respect. The Applicants also highlighted that the notice of intention served by HDB was defective as there was a lack of particulars concerning the allegations made against the Applicants. More importantly, it was submitted that the Respondents had misdirected themselves in law and on the facts of the present case. First, the Applicants argued that they had entered into a corporate tenancy agreement with Offshore Construction, which was approved by HDB. On that basis, it was argued that there was no subletting of the entire Property, as alleged by HDB. Second, the Applicants submitted that any breach on their part was only a contractual breach, as opposed to a statutory breach. Third, the Applicants highlighted the fact that HDB's decision to compulsorily acquire the Property was based on the lack of continuous occupation by the Applicants. It was argued that the requirement for continuous occupation was not provided for in s 56(1)(*h*) of the Act and there was no statutory presumption that any failure to continuously occupy the Property would amount to illegal subletting. The Applicants submitted that, in any event, there was no evidence to suggest that they had not been in continuous occupation of the Property. With reference to foreign case authorities, it was argued that occupation, in the strict legal sense, did not require actual continuous physical presence. In this regard, the Applicants submitted that a sufficient measure of control to prevent strangers from interfering would suffice. It was therefore argued that there was insufficient evidence to establish that the Applicants had failed to continuously occupy the Property.

27 With regard to the ground of irrationality, the Applicants mostly relied on the arguments raised in relation to the ground of illegality. It was submitted that the Respondents' main contention that the Applicants had sublet the Property without HDB's consent could not stand as HDB had approved the corporate tenancy in relation to the subletting of the two bedrooms. The Applicants further argued that the Respondents' "obsession with the notion of continuous physical occupation ... being synonymous with illegal subletting" was a misdirection and error in law and on the facts.

28 Finally, on the ground of procedural impropriety, the Applicants submitted that the Respondents had breached the rules of natural justice. The discussion on the ground of procedural impropriety was, unfortunately, rather haphazard with multiple overlapping points. The gist of the Applicants' case appeared to revolve around the non-disclosure of the following evidence:

(a) the private investigation report;

(b) the anonymous tip-off;

(c) the inspection of the Property; and

(d) the written statement by Mr Sayeh.

It was argued that the non-disclosure on the part of the Respondents prevented the Applicants from commenting on or rebutting the adverse evidence relied upon by the Respondents. Apart from that, the Applicants also raised the issue of Mr Sayeh's written statement as being hearsay evidence. It

was submitted that the statement by Mr Sayeh was not inconsistent with the Applicants' position that they had entered into a corporate tenancy agreement with Offshore Construction. There were also some brief arguments on whether the Applicants had "confessed" to the breach and the weight to be attributed to Mr Cahya's statement. With respect, I was unable to appreciate how these arguments were relevant to the ground of procedural impropriety. The Applicants also argued that their failure to update Mr Sayeh's particulars with HDB did not justify the compulsory acquisition of the Property. It was submitted that the Applicants had a legitimate expectation of receiving only a penalty of up to $3,000 for such non-compliance. Once again, I was unable to follow the Applicants' arguments as the Respondents' basis for the compulsory acquisition was evidently *not* the Applicants' failure to update Mr Sayeh's particulars with HDB.

HDB's arguments

29 On the issue of whether the application was filed out of time, HDB highlighted that there was a substantial delay of more than three years. It was further submitted that the Applicants had failed to adequately account for the substantial delay in making the present application. In this regard, HDB argued that the absence of wilful delay, or the demonstration of diligence and earnestness in appealing to HDB, could not amount to a sufficient basis for an extension of time to be granted. HDB emphasised that it had repeatedly informed the Applicants that the Minister's decision was final. On this basis, HDB sought to argue that a claimant should not be allowed to get around the time limit by writing a fresh letter to the authority and then characterising any reply from the authority as a fresh decision. It was further argued that a consultative process was an inherent feature of a public statutory body such as HDB and that any continuous engagement with members of the public such as the Applicants should not be construed as an implied waiver of the three-month time limit. In response to the Applicants' argument that they were ignorant of the law, HDB submitted that Mr Per was a grassroots leader and had a reasonable level of political awareness, as demonstrated in the appeal letters submitted to HDB and the Minister. HDB further argued that in any event, the Solicitors were appointed in June 2013 and the Applicants must have been informed about the three-month time limit then. With regard to the Applicants' submission that the time limit should commence on 4 April 2014, HDB counteracted that there was no "main catalyst" to justify it being regarded as a fresh decision. Finally, HDB also argued that allowing the Applicants to review the decisions in spite of the substantial delay would give rise to prejudice and detriment.

30 On the ground of illegality, it was argued that HDB had not exceeded the scope of its powers under s 56(1)(*h*) of the Act in issuing the notice of intention to compulsorily acquire the Property. First, HDB submitted that a dynamic construction of s 56(1)(*h*) should be adopted for the purpose of giving effect to the legislative intention behind the provision. It was argued that the primary legislative intent behind the provision was to empower HDB to compulsorily acquire flats that were not used for the purposes of occupation and residence. Second, HDB argued that in the interpretation of s 56(1)(*h*), weight should be given to the established application of a statutory provision in practice. On this basis, it was submitted that it has been HDB's "invariable practice" to rely on s 56(1)(*h*) of the Act when dealing with owners who failed to be in continuous physical occupation of the flat. Third, in relation to the Applicants' argument that the breach was contractual in nature, HDB contended that this did not, in any event, preclude HDB from exercising its discretion in determining which limb of s 56(1) to rely on for the purpose of compulsorily acquiring the Property. Finally, HDB submitted that the court should have regard to the official statements and guidelines released by HDB in so far as they are useful and persuasive in identifying the specific manner of behaviour that s 56(1)(*h*) will apply to.

31 In relation to the ground of irrationality, HDB first argued that the policy requiring owners to be in continuous physical occupation of their flats was not irrational. It was further submitted that based

on the facts and evidence available in the present case, it was neither irrational nor unreasonable for HDB to have arrived at the view that the Applicants were in breach of s 56(1)(*h*) of the Act.

32 On the ground of procedural impropriety, HDB submitted that the requirement of procedural fairness was heavily dependent on the facts of the case, which turned largely on the nature of the adjudicating body and the governing statute. HDB relied mainly on the assertion that the Applicants had understood the gist of the evidence against them. In support of this proposition, HDB referred to the appeal letters written to HDB and the Minister, where the Applicants had made meaningful and focused representations to address the allegations made against them. HDB argued that the level of disclosure was sufficient and that there was no procedural unfairness. Apart from that, HDB also relied on other considerations, such as the need for confidentiality and public interest in allowing HDB to carry out its investigative functions effectively, to justify its decision not to disclose all available evidence to the Applicants. It was further argued that HDB had, in any event, provided sufficient reasons. This was evinced in the appeal letters written by the Applicants, where they had understood the nature of the allegations against them and the rationale behind HDB's decision to compulsorily acquire the Property.

The Minister's arguments

33 At the outset, I note that there was a significant degree of overlap between HDB's arguments and those of the Minister. I will therefore only set out the arguments which were raised by AGC only.

34 AGC started off by pointing out that the Applicants did not seek any relief or remedy in respect of the vesting of the Property in HDB and the cancellation of the Applicants' mortgage by the Registrar of Titles on 11 April 2011. It was argued that even if all the quashing orders sought by the Applicants were granted, the application would still be "futile" unless there was some way of "unwinding" the transactions completed before 2014.

35 With regard to the issue concerning the three-month time limit set out in O 53 r 1(6) of the RC, AGC argued that the courts have granted an extension of time only in "exceptional circumstances", such as where it was unclear to the aggrieved party which event was the final decision to challenge. It was submitted that this was not met on the facts here. AGC argued that the Applicants had, on their own accord, chosen to rely on non-statutory avenues, such as the appeal made through the MP, in the belief that such avenues would yield favourable results. As a result of the Applicants' own decision, the three-month time period had long expired. It was also argued that by making such non-statutory appeals to HDB and the Minister, the Applicants were effectively seeking the Respondents' indulgence to consider such appeals. In this respect, AGC argued that it was absurd for the Applicants to now suggest that the Respondents had contributed to the delay.

36 In relation to the ground of illegality, AGC first pointed out that the Applicants had "parted with the possession of the whole flat" as evidenced by the Applicants' own admission that they were not in continuous physical occupation of the Property. In response to the Applicants' arguments that there was no unauthorised subletting of the entire flat, AGC relied on the following chain of logic. AGC referred to HDB's terms and conditions for the subletting of bedrooms, wherein it was stated that HDB's general consent was premised on, among other things, the owners and all authorised occupiers continuing to reside in the flat at all times during the period of subletting. Given that the Applicants had failed to reside in the Property, HDB's general consent for the subletting of the bedrooms was not applicable. The subletting of the bedrooms in the Property was therefore unauthorised subletting of the entire flat.

37 On the ground of irrationality, AGC submitted that there was ample basis for HDB and the

Minister to arrive at the decision for the Property to be compulsorily acquired under s 56(1)(*h*) of the Act. In response to the Applicants' argument that the tenancy agreement was only in relation to the two bedrooms, AGC submitted that the intention of the parties was an important consideration in determining the relationship of landlord and tenant. It was further argued that the intention of the parties must be gleaned not from the mere words of the agreement but from its substance and the conduct of the parties, together with the surrounding circumstances of the case. AGC submitted that on the facts of the present case, the Applicants had sublet the entire flat.

38 With regard to the ground of procedural impropriety, AGC submitted that there was no statutory requirement for HDB to disclose to the affected owner all the grounds or evidence relied upon by HDB. It was further argued that HDB had, in any event, disclosed the gist of its case to the Applicants at a very early stage (*ie*, in its letter of intention dated 17 July 2010). AGC submitted that the Applicants had a fair opportunity to put forward their own case and to correct or contradict HDB's case against them. Finally, it was also argued that even if there had been insufficient disclosure, the application should still be dismissed as any further disclosure would not have made a difference given that the Applicants could not have presented any ground-breaking evidence or submissions and would still lose the case.

The decision of the court

The three-month time period in O 53 r 1(6) of the RC

39 An application for leave to apply for a quashing order must be made within three months from the date of the decision or proceeding sought to be quashed, unless the delay is accounted for to the satisfaction of the court. This requirement is set out in O 53 r 1(6) of the RC, which states as follows:

> 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.
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> [emphasis added]

In addressing the question of whether an application for leave to apply for a quashing order should be dismissed on account of delay, there are two issues that have to be dealt with. First, there is a need to ascertain when the three-month period is taken to have commenced. Second, after having done so, in the event that the application for leave is made after the three-month period, the issue then is whether the applicant has accounted for the delay to the satisfaction of the court.

40 In relation to the first issue, the Applicants have sought to argue that the three-month period should only start running from 4 April 2014, the date on which HDB had sent its final rejection letter. I was unable to accept this argument for the following reasons.

41 In the Court of Appeal decision of *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2007] 2 SLR(R) 568 ("*Teng Fuh Holdings*"), it was held that the three-month period starts to run from the date on which the right to seek relief arises. In that case, the applicant sought to rely on a

rejection letter sent by the Ministry of Law in response to an appeal by the applicant for its land to be returned. The Court of Appeal rejected the applicant's argument and made the following observations at [17]–[18]:

> 17 As we see it, the date must relate to the proceeding, and it should be the *date on which the right to seek relief arises*. In the situation where a declaration is issued for the acquisition of the appellant's land, the appellant's right to apply to quash the declaration arises on the *date of the declaration and time must run from that date*. ...
>
> 18 However, the rule allows for some flexibility. It allows the time of filing to be extended where the delay is "accounted for to the satisfaction of the Judge to whom the application is made." The onus is on the applicant to account for the delay.
>
> [emphasis added]

42 Applying the principles set out above, the three-month period in the present case should run from the date of the rejection letter by the Minister (*ie*, 14 March 2011). The statutory framework set out in s 56 of the Act is such that the decision of the Minister is final and that there is to be no further appeal from the Minister's decision. On that basis, the date on which the Minister rejected the Applicants' appeal would be the date on which the Applicants' right to seek relief arose. There was no other statutory avenue for a further appeal against the Minister's decision and the Applicants' only legal recourse would be to commence judicial review proceedings.

43 In any event, it is noted that HDB proceeded to vest the Property in itself and subsequently issued a notice of vesting on 20 April 2011. This is the latest decision sought to be impugned by the Applicants. Even if the three-month period is taken to have commenced from this date, the present application was still filed more than three years later.

44 Apart from that, the Applicants' argument that time should start to run from the date of HDB's rejection letter dated 4 April 2014 was also untenable as the effect of adopting such an approach would be to render the three-month limit under O 53 r 1(6) ineffectual. Any potential applicant would be able to get around the three-month limit by writing to the decision-making authority and then characterising any reply from that authority as a fresh decision from which the three-month period is taken to have commenced. As discussed above, the applicant in *Teng Fuh Holdings* attempted to mount a similar argument but this was rejected by the Court of Appeal.

45 The Applicants have also relied on the High Court decision of *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2011] 3 SLR 94 ("*UDL v JTC*") in support of their argument that time should start running from HDB's final rejection letter. In that case, the tenant's lease was due to expire and it had written to the landlord to renew the lease. The landlord informed the tenant on 20 November 2009 that it would not be renewing the lease. The tenant then wrote multiple letters to the landlord and the Economic Development Board ("EDB"). On 19 May 2010, the landlord wrote to the tenant to inform it that after evaluating the tenant's business plans, the landlord and EDB were unable to support the tenant's application for renewal of the lease. In relation to the issue of whether the application was made beyond the three-month period stipulated in O 53 r 1(6) of the RC, Lai Siu Chiu J held that time started running from the *second* rejection letter (*ie*, 19 May 2010) as opposed to the *first* rejection letter (*ie*, 20 November 2009). It was observed that the tenant's right to seek relief only arose at the time of the second rejection letter. Lai J was of the view that although the landlord had indicated in the first rejection letter that its decision was final, its conduct after that letter "suggested that it was open to reconsidering its decision". A clear indication of the landlord's willingness to reconsider its decision was found in a letter sent by the landlord after the first rejection

letter, where it had stated that the landlord and EDB would jointly review the tenant's business plans and give their joint assessment in due course.

46 In my judgment, the facts of the present case were significantly dissimilar. Unlike the case in *UDL v JTC*, HDB had, on multiple occasions, informed the Applicants that the Minister's decision was final and not open to review or challenge. Up to the point in time when the Solicitors were instructed by the Applicants, there was no reason to suggest that HDB was open to reconsidering its decision. This is a significant difference from the factual matrix in *UDL v JTC*. Apart from that, it must be recognised that *UDL v JTC* was a case involving the renewal of a lease. After the first rejection letter was sent by the landlord, the only semblance of finality in the landlord's decision was the indication in the letter that its decision was final. This can be contrasted with the facts of the present case where there exists a clear statutory framework setting out the entire appeal process. In this regard, s 56(6) of the Act expressly states that "the decision of the Minister shall be final and not open to review or challenge on any ground whatsoever". This was the basis on which HDB maintained its position that it was unable to consider the Applicants' repeated appeals. In the present case, there was no indication to suggest that HDB was open to reconsidering its decision. Therefore, the three-month period must be taken to have commenced from the date of the Minister's rejection. As mentioned above at [43], even if time is taken to have started running from the date HDB served the notice of vesting, the application would still be out of time given that it was commenced more than three years later.

47 Having found that the application was made after the three-month period set out in O 53 r 1(6) of the RC, the remaining question was whether the Applicants had accounted for the delay to the satisfaction of the court. In this regard, the Applicants relied on a few arguments which I will address individually.

48 First, the Applicants argued that they had taken conscientious and concerted efforts to resolve the matter and that there was no lapse, neglect or inaction in their conduct of the appeals to HDB and the Minister. In my view, the fact that the Applicants had complied with the timelines vis-à-vis the statutory avenues of appeal was of limited relevance to the issue of whether the application for leave to commence judicial review proceedings was unduly delayed. In fact, HDB had repeatedly informed the Applicants that it was not in a position to consider their appeals given that the Minister's decision was final. In such circumstances, even if it were accepted that the Applicants had pursued the statutory avenues of appeal expeditiously, that would not provide any justification why the present application was only taken out three years after the Applicants had exhausted their rights to appeal under the statutory framework.

49 The Applicants also sought to rely on the High Court decision of *Chai Chwan v Singapore Medical Council* [2009] SGHC 115, where Belinda Ang Saw Ean J held that the delay was satisfactorily accounted for given that the applicant had formed a view of the subject matter giving rise to the application for judicial review only after the disclosure of certain information by the respondent. In fact, it was observed (at [20]) that the applicant only realised that he was charged with a different case from that originally alleged against him after he was notified of the charges.

50 The facts in the present case were clearly different. There was no reason to suggest that the Applicants only formed a view of their case more than three years after the Minister had rejected their appeal. As reflected in their multiple letters of appeal to both HDB and the Minister (which were drafted more than three years ago), the Applicants clearly knew the grounds HDB was relying on and the broad allegations that were made against them. The Court of Appeal in *Teng Fuh Holdings* held that the applicant had not accounted for the delay as it had "the interest, the knowledge and the means to have acquired the information to make its application long before it filed the same in September 2005". The facts in the present case were more akin to those in *Teng Fuh Holdings*, where

the Applicants were aware of the facts necessary to commence judicial proceedings long before the application was actually taken out.

51 Apart from that, the Applicants have also relied on the fact that HDB had continued engaging them and had even requested the Applicants to "hold their hands". It was argued that as a matter of logic and fair play, the Respondents should be barred from raising any issue of delay now. In my view, HDB's engagement with the Applicants was a matter of courtesy and should not be construed legalistically as either an extension of the three-month period or a reconsideration of the original decision. In this respect, the Applicants had even gone to the extent of approaching the MP to write appeal letters to HDB on their behalf. In the circumstances, it would be unreasonable to expect HDB to remain completely silent and not engage the Applicants at all. In fact, HDB's replies to the Applicants and the MP's letters must be read in the context of its repeated assertions that the Minister's decision was final and not open to review or challenge. HDB had reminded the Applicants on multiple occasions that no further appeal was allowed under the Act and that it was not in a position to consider the Applicants' appeal. In this regard, I accept HDB's submission that as a public agency, it was proper for HDB to respond to any further queries from the Applicants in relation to the compulsory acquisition of the Property. Of course, it may be prudent for public agencies that are placed in similar situations in the future to expressly state that such engagement was made on a without prejudice basis and should not be construed as a reconsideration of the original decision.

52 With regard to HDB's request that the Applicants "hold their hands" and the further engagement between the parties after the appointment of the Solicitors, I am of the view that HDB's conduct must be viewed with the context in mind. Prior to the appointment of the Solicitors, the general tenor of the appeal letters written by the Applicants and the MP was for HDB and the Minister to reconsider the decision to compulsorily acquire the Property. Further evidence, such as Mr Cahya's statement and the letter from the MCST, were provided to HDB for the purpose of seeking a reversal of the decision. After the Solicitors were appointed, it was apparent that there was a change in tack by the Applicants. In the first substantive letter dated 9 July 2013, written by the Solicitors on behalf of the Applicants, it was stated as follows:

> As such, kindly let us have the ***basis of your assertion that our clients had sublet out their entire flat*** .
>
> Further, in your letter of 17 July 2010, you have indicated that your "*investigations*" had revealed that our clients had sublet their flat. Kindly confirm the ***basis and particulars of those investigations*** .
>
> You have also informed our clients that you had "*engaged the services of a private investigator to investigate on the Flat*". Kindly let us have ***a copy of the Report from the Private Investigator*** .
>
> Please let us have your response on the above by close of business Monday 15 July 2013. Please let us know if you are prepared to withdraw your Notice and Vesting Order against our clients, ***failing which, our clients would have to seek redress through the Courts*** , which we trust will not be necessary.
>
> In the interim, kindly hold your hands in the matter.
>
> [emphasis added in bold italics]

As opposed to the earlier appeal letters written by the Applicants and the MP, it appears that the

Solicitors were then attempting to challenge the basis and legality of HDB's decision and the allegations made against the Applicants. It was also expressly stated that the Applicants would have to commence legal proceedings if the decision to compulsorily acquire the Property was not withdrawn. In the circumstances, HDB's response to the Solicitors' position must be seen in the context of both parties attempting to settle the outstanding dispute without having to resort to legal proceedings in court. Furthermore, it must not be overlooked that the Minister's decision was final and shall not be open to review or challenge on any ground whatsoever. The Minister's decision to dismiss the Applicants' appeal was made more than three years ago. The Applicants' attempt to "revive" the decision for the purpose of avoiding the three-month period is therefore without merit.

53 Finally, I note that the Applicants have also attempted to account for the delay on the basis of their ignorance of the legal steps required. In *Teng Fuh Holdings*, the Court of Appeal held that the applicant had not accounted for the delay because it had the interest, the knowledge and the means to have acquired the information to make its application long before it filed the application for leave. Therefore, even if it were accepted that the Applicants in the present case may not have had the actual knowledge about the need to commence judicial review proceedings within the three-month period set out in O 53 r 1(6) of the RC, there was no reason to suggest that the Applicants did not have the interest or the means to acquire such knowledge. In fact, the Court of Appeal's observations in *Teng Fuh Holdings* was made in the context of the applicant's complaint that it was not aware of the occurrence of a material fact (*ie*, the land being rezoned), which happened sometime after the decision sought to be impugned was made. Even then, the Court of Appeal rejected the applicant's argument on the basis that the information concerning the rezoning of the land was already in the public domain since 1993. I am therefore of the view that ignorance of the three-month period in O 53 r 1(6) of the RC is not a sufficient basis for the court to grant an extension of time.

54 For the reasons set out above, I was not satisfied that the Applicants had accounted for the delay, especially when the length of the delay was significant given that the present application was only taken out three years after the date of the latest decision sought to be challenged. On this basis, the application for leave was dismissed. Given that parties have made extensive submissions on the substantive merits of the Applicants' case, I will also make a few observations on the main arguments put forward by the parties..

55 Before moving on to the substantive arguments, I note that Mr Khoo had raised a preliminary objection concerning the quashing orders sought by the Applicants. It was argued that the remedies sought by the Applicants were "futile" in so far as the quashing orders did not seek to "unwind" the vesting of the Property in HDB and the cancellation of the mortgage. While the quashing orders could have been drafted in a more comprehensive manner, it was reasonably clear that the Applicants were seeking to quash the decision to compulsorily acquire the Property. For the avoidance of doubt, I asked counsel acting on behalf of HDB, Mr Dhillon Dinesh Singh ("Mr Dhillon"), about the status of the Property. Mr Dhillon informed me that the Property was still vacant and had not been transferred or resold to any other proprietor. The decision to compulsorily acquire the Property would therefore still be reversible from a practical perspective.

56 In fact, while it is observed that the Applicants had specifically sought to challenge four decisions of the Respondents, the Applicants had approached the substantive merits of the case on the basis that the Minister had simply adopted the position taken by HDB. The Applicants submitted that the arguments made in relation to HDB's decisions were therefore applicable to the Minister's decision as well. Therefore, with the exception of certain specific issues where a distinction has to be drawn between HDB and the Minister, I have approached the Applicants' arguments on the basis that they were directed collectively at the Respondents.

The substantive merits

57 At the outset, I note that s 56(6) of the Act incorporates what is commonly referred to as a finality clause:

> Any appeal by any owner or interested person aggrieved by the decision of the Board shall be made to the Minister within 28 days after the date of service of such decision on the owner or interested person and *the decision of the Minister shall be final and not open to review or challenge on any ground whatsoever*.
>
> [emphasis added]

The Respondents have not attempted to raise any arguments concerning the effect of this clause on the scope of review to be undertaken by the court. In the course of the hearing, counsel for the Applicants, Mr Kirpal Singh ("Mr Kirpal"), submitted that the decisions could be challenged on the three grounds of illegality, irrationality and procedural impropriety. The Respondents addressed the Applicants' submissions within the framework of these three grounds of review.

Illegality

58 In the House of Lords decision of *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] 1 AC 374 ("the *GCHQ* case"), Lord Diplock made the following observations on the ground of illegality:

> By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute by those persons, the judges, by whom the judicial power of the state is exercisable.

This was cited with approval by the Court of Appeal in *AG v Venice-Simplon* at [10].

59 It is undisputed that HDB's decision to compulsorily acquire the Property was based on s 56(1)(*h*) of the Act, reproduced as follows:

> **Board may compulsorily acquire property sold subject to the provisions of this Part**
>
> 56.—(1) The Board may compulsorily acquire any flat, house or other living accommodation sold subject to the provisions of this Part, whether before or after 2nd June 1975 —
>
> …
>
> (*h*) if the owner thereof *assigns, underlets or parts with the possession of the same or any part thereof* without obtaining the prior written consent of the Board as required by the lease;
>
> …
>
> [emphasis added]

The parties were in agreement that the Applicants did not assign any part of the Property and that "underlet" in s 56(1)(*h*) of the Act meant "sublet".

60 In relation to the ground of illegality, the crux of the Applicants' case was that HDB had erred in law when it relied on the Applicants' break in continuous occupation of the Property as a basis for the compulsory acquisition. It was argued that HDB had misdirected itself when it regarded the Applicants' failure to reside in the Property as a factor that "converted the legal subletting into an illegal one".

61 The grounds set out in s 56(1)(*h*) of the Act are not wholly disjunctive. There may, in certain circumstances, be a degree of overlap between the grounds of subletting without prior written consent of HDB and the parting with the possession of the flat. In that regard, I cannot accept the Applicants' attempt to draw a clear line between the grounds set out in s 56(1)(*h*) of the Act. In fact, the establishment of one ground may be regarded as evidence giving rise to a finding on another ground. For instance, a proprietor who has failed to continuously occupy the flat may be regarded as having parted with the possession of the flat without the prior written consent of HDB. Such a finding may also be evidence that the proprietor had illegally sublet the flat without HDB's prior written consent.

62 In the present case, the evidence pointed to the fact that the Applicants had not been residing in the Property at the material time. This may give rise to the finding that the Applicants had parted with the possession of the Property without the prior written consent of HDB. The fact that the Applicants were not residing in the Property may also be a ground for establishing that they had sublet the Property without the prior written consent of HDB. In this regard, there are two different ways of approaching this issue.

63 First, as Mr Khoo had submitted at the hearing on 31 October 2010, the general consent granted by HDB is conditional upon the fulfilment of specific requirements, such as the owners being in continuous occupation of the flat. In a document titled "Terms and Conditions for Subletting of Bedrooms", which was published on HDB's website, it was expressly stated that:

> **3.2 Registration of Subletting of Bedroom(s) & Provision of Subtenants' Particulars**
>
> a. Owners need not seek HDB's approval to sublet bedroom(s). However, with effect from 1 Feb 2010, owners are required to register the subletting with HDB within 7 days from the commencement date of subletting. Owners must also notify HDB of the subsequent renewal and termination of the subletting and/or changes to their subtenants or subtenants' particulars within 7 days from the date of occurrence of these respective events. For existing cases where tenancies commenced before 1 Feb 2010, owners are given a 6-month grace period from 1 Feb 2010 to register the subletting with HDB.
>
> …
>
> **3.6 Physical & Continuous Occupation of Flat**
>
> The owners and all authorized occupiers *must continue to reside in the flat at all times during the period of subletting*.
>
> [emphasis added in italics]

On the facts of the present case, it was undisputed that the Applicants have not sought specific consent from HDB with regard to the corporate tenancy agreement entered into with Offshore Construction. In other words, the Applicants were relying on HDB's general consent for owners to sublet the bedrooms in their flats. This consent was, however, conditional upon the owners and all authorised occupiers continuing to reside in the flat "at all times during the period of subletting".

Therefore, in the event that the owners and all authorised occupiers were not residing in the flat, HDB's general consent would not be applicable and the owner will be regarded as having sublet the flat or any part thereof without obtaining the prior written consent of HDB for the purposes of s 56(1)(*h*) of the Act.

64 Second, while the Applicants have attempted to rely on the corporate tenancy agreement to justify that they had only sublet two bedrooms as opposed to the entire Property, the written terms set out in the tenancy agreement were not conclusive of the arrangement between the relevant parties. In *Goh Gin Chye and another v Peck Teck Kian Realty Pte Ltd and another* [1987] SLR(R) 195, the Court of Appeal made the following observations on the characterisation of a lease:

> … Firstly, the intention of the parties is an important consideration in determining the relationship of landlord and tenant, as in all other contractual relationships, but in every case the intention "must be sought not from the mere words of the agreement but from its substance and from the conduct of the parties and the surrounding circumstances". …

It is acknowledged that the principles set out above were applied in the context of determining whether the parties had entered into a tenancy or a licence. If the words of the tenancy agreement were conclusive as to the arrangement entered into between the landlord and the tenants, owners of HDB flats would be able to circumvent the subletting regulations by entering into agreements which are not reflective of the actual arrangement with the tenants. Such an approach would wholly defeat the purpose behind the regulations. In the circumstances, an approach which takes into account the conduct of the parties and the surrounding circumstances, as opposed to the mere words of the agreement, would be more appropriate as it would comport with the legislative intent behind the existing statutory framework. Therefore, I could not accept the Applicants' argument that they had not illegally sublet the flat on the sole basis that the corporate tenancy agreement had been "approved" by HDB. Looking at the evidence as whole, I was not satisfied that HDB had misdirected itself in arriving at the conclusion that the arrangement between the parties was for the subletting of the entire Property, as opposed to only the two bedrooms. In the circumstances, HDB had not committed any error of law in relying on the fact that the Applicants had illegally sublet the entire Property without its written consent.

65 Further, it must not be overlooked that one of the grounds in s 56(1)(*h*) of the Act is the parting with the possession of the flat or any part thereof without obtaining the prior written consent of the Board. As compared to the analysis above in relation to the illegal subletting of the flat, the fact that the Applicants were not in continuous occupation of the Property was directly relevant to the issue of whether they had parted with the possession of the Property for the purpose of s 56(1)(*h*) of the Act.

66 In the light of the above reasons, while it is accepted that the requirement of "continuous occupation" was not expressly stated in s 56(1)(*h*) of the Act, it is a legitimate factor which can be taken into account for the purpose of establishing the grounds set out in that specific subsection. I am therefore of the view that HDB had not misdirected itself on the law when it regarded the Applicants' failure to continuously occupy the Property as a relevant factor for the purpose of compulsorily acquiring the Property under s 56(1)(*h*) of the Act.

67 Apart from that, I note that the Applicants have also relied on the argument that the Respondents had failed to establish the precedent fact under s 56(1)(*h*) of the Act. While this argument was not fully dealt with by the parties, it appears to me that the Applicants were relying on the point that the grounds in s 56(1)(*h*) had to be objectively justified with reference to the evidence available. It was further argued that the Applicants had been in continuous occupation of the

Property and that they had not sublet the entire Property to Offshore Construction.

68 In *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525, the Court of Appeal accepted that the scope of review to be undertaken by the court would vary depending on whether the discretion granted to the decision-making authority was conditional upon the establishment of an objective jurisdictional or precedent fact. In the event that such a precedent fact has to be established, the court will have to contend itself with the issue of whether the evidence justifies the decision reached by the decision-making authority. This can be contrasted to a situation where no such precedent fact exists and the scope of review is thereby limited to the three established heads of review, namely, illegality, procedurally impropriety and irrationality. The Applicants appeared to have subsumed their arguments concerning the precedent fact under the ground of illegality.

69 On the issue of whether the decision was justified on the basis of the evidence available, I was of the view that the grounds in s 56(1)(*h*) have been objectively established. First, with reference to the signed statement by Mr Sayeh, it stated unequivocally that the Applicants were not residing in the Property at the point in time. Although the Applicants have tried to disparage Mr Sayeh's statement by relying on the subsequent explanation given by Mr Cahya, looking at the evidence as a whole the allegations made by Mr Cahya in relation to the HDB inspection were no more than a mere afterthought which was not backed by any objective evidence whatsoever. It bears noting that Mr Cahya's statement was only produced more than a year after HDB had carried out the inspection on the Property. At the point in time when the statement was produced, Mr Cahya had already been evicted from the Property, as the Applicants had stated in their letter of appeal to the Minister dated 27 December 2010. More significantly, Mr Cahya's statement was only produced after the Minister's rejection of the Applicants' appeal, which was the final stage in the statutory appeal process. The statement by Mr Cahya first made its appearance as an enclosure in the MP's letter dated 24 February 2012. There was no attempt to account for the delay. Further, the allegations made by Mr Cahya in his statement were not backed by any evidence at all. In the circumstances, the statement by Mr Sayeh was a more reliable and contemporaneous reflection of the situation in the Property at the material time.

70 Apart from Mr Sayeh's statement, Mr Khoo also tendered coloured copies of the photos taken by the HDB officers during the inspection on 25 May 2010. The photos showed that the single bedroom purportedly occupied by the Applicants and their daughter was sparsely furnished and only had a single bed. As observed by Mr Wong, one of the HDB officers who had conducted the inspection, there were no personal effects in the bedroom to suggest that a family of three was residing there. In fact, one of the occupiers had moved into the bedroom that was purportedly occupied by the Applicants' family. This was, in fact, implicitly acknowledged by the Applicants in their appeal letter to HDB. The reason provided by the Applicants was that they had left the door to their bedroom unlocked and that they had not given permission for the occupier to move into their bedroom. I found it hard to believe that the Applicants would leave their bedroom unlocked if they had really been residing in the Property. After all, there were foreign male workers residing in the Property. They were not family or friends. There was only a single bed in that sparsely furnished bedroom where two adults and a child were purportedly residing in. The explanation provided by the Applicants on this issue bordered on being ridiculous.

71 Quite apart from the objective facts in the form of Mr Sayeh's statement and other evidence gathered during the inspection of the Property, the Applicants went so far as to acknowledge, in their appeal letters to HDB and the Minister, the fact that they had not been residing in the Property. In the first appeal letter addressed to HDB dated 28 October 2010, the Applicants stated as follows:

> It was for this reason that we shuffled from our flat and my mother's house and decided to temporarily stay over at her flat to take care of her. There is never any intention to vacate the room without living there.
>
> ...
>
> It was in those circumstances that we put up with her. It was not a permanent arrangement. We would ultimately return to occupy the whole of our own flat.

In relation to the issue of the subtenant utilising their bedroom, the Applicants provided the following explanation:

> We have not permitted any of the occupiers to live in our bedroom. The room was left unlocked. We did not give explicit permission to the occupier sleeping in the room that was kept for our own occupation. Even if he has gone into the room to sleep there it did not mean that we have rented the room to him. We were too trusting not to have the room locked up believing that the occupiers would not infringe our living space.

As I have already mentioned above, I found the Applicants' explanation to be contrived.

72 In the second appeal letter addressed to the Minister dated 27 December 2010, the Applicants stated that the breach was a one-off incident and that they had rectified the breach immediately by terminating the tenancy agreement with Offshore Construction. The Applicants also took the position that the penalty of compulsory acquisition of the Property was "too harsh" and that they would accept any form of penalty on account of the breach.

73 Therefore, even if the grounds in s 56(1)(*h*) of the Act were regarded as precedent facts, they have been established on the evidence before me. The Applicants were clearly not residing in the Property. As discussed above, this gave rise to the finding that they had either sublet the entire Property or parted with the possession of the Property without the written consent of HDB. On that basis, HDB did not misdirect itself on the law and the Applicants' challenge on the ground of illegality must fail.

74 In arriving at this conclusion, I also took into account the fact that there were multiple inconsistencies in the Applicants' account of events. For instance, in the first and second letters of appeal addressed to HDB and the Minister respectively, the Applicants took the position that they were not residing in the Property. The Applicants explained that they had to stay over at the mother's place as a result of her poor health and that it was only a temporary arrangement. This was also the position adopted in the MP's letter dated 11 June 2012 where it was stated that Mr Per "was staying over at his mother's flat from end of 2009 till the end of 2010".

75 Subsequently, HDB sought clarification on where the Applicants' family were "residing during the period from April 2010 to July 2010". The Applicants were also requested to provide HDB with any relevant supporting evidence. In a reply by the Solicitors dated 21 February 2014, it was stated as follows:

> **Our clients confirm that during the period of April to July 2010, they were residing at their HDB flat at address listed above** [*ie*, the Property]**.**
>
> Our clients are prepared to furnish you with a Statutory Declaration confirming the same. Further, they have been well advised of the penalties of making a false declaration.

This was a complete about-turn from the Applicants original position that they had been residing at the mother's flat from "end of 2009 till the end of 2010".

76 Apart from that, as mentioned at [2] above, I adjourned the hearing on 31 October 2014 for the Applicants to request, on an urgent basis, the record of changes in the Applicants' address with the ICA. In the response by ICA, it was stated that the Applicants' address on record from 5 November 2007 to 16 December 2010 was a HDB flat in Hougang. The parties were in agreement that the reference to the HDB flat in Hougang was the mother's flat. The Applicants amended their address on record to the Property only on 17 December 2010. This was after the Applicants were informed by HDB on 29 November 2010 that their appeal under s 56(4) of the Act had been rejected. After amending their address to that of the Property, the Applicants exercised their rights to a further appeal to the Minister by way of a letter dated 27 December 2010. While the Applicants have attempted to explain this lapse on the basis that they had overlooked the need to update their addresses, the information provided by ICA concerning the change in address was, at the very least, consistent with the other evidence discussed above. In the final analysis, I was of the view that there existed more than sufficient evidence to justify the views and the decisions taken by the Respondents.

Irrationality

77 The ground of irrationality, also referred to as *Wednesbury* unreasonableness, finds its origins in the English decision of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223, where Lord Greene MR provided a summary of the applicable principles:

> ... The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. ...

The threshold for judicial intervention on the ground of irrationality is relatively high. As Lord Diplock had observed in the *GCHQ* case (at 410), it applies only 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.

78 Although the Applicants had relied on irrationality as a separate ground of review, the submissions were similar to those raised under the ground of illegality. The first argument relied upon by the Applicants was:

> The Applicants humbly submit that the decision of the HDB and Minister falls under the said category [*ie*, *Wednesbury* unreasonableness]. The HDB's and Minister's main contention that the Applicants had rented out their flat without HDB's written consent clearly cannot stand on the basis that the HDB had approved the corporate tenancy in relation to the subletting of two (2) bedrooms by the Applicants. We submit that the approvals are fatal to the HDB's case.

This appeared to be no more than a replication of the argument raised under the ground of illegality. As discussed above, HDB's approval of the corporate tenancy agreement was irrelevant to the issue of whether the Applicants had sublet or parted with possession of the entire Property without HDB's

consent.

79 Second, it was submitted that the Respondents had seriously misdirected themselves on the law and on the facts in so far as the appropriate test under s 56(1)(*h*) was concerned. There was, however, no attempt to further elaborate on how this argument was different from that raised under the ground of illegality. I took the Applicants to mean that the Respondents had applied the wrong test under s 56(1)(*h*) of the Act given that they had relied on the Applicants' failure to continuously occupy the Property as a ground for the compulsory acquisition. As discussed above, the Applicants' failure to continuously occupy the Property was a relevant factor leading to the establishment of the grounds set out in s 56(1)(*h*) of the Act. In applying the principles of *Wednesbury* unreasonableness, this was not a case where the Respondents had taken into account matters which they ought not to take into account.

80 Third, the Applicants argued that the Respondents' "obsession with the notion of continuous physical occupation as being synonymous with illegal subletting" was a misdirection and error in law and on the facts. Similarly, this issue has been dealt with above under the ground of illegality.

81 For these reasons, the Applicants' challenge on the ground of irrationality failed.

Procedural impropriety

82 The final ground of review relied upon by the Applicants was procedural impropriety. It is accepted that procedural impropriety, as a ground for judicial review, includes the failure to observe either the basic rules of natural justice or the procedural rules that are expressly laid down in the legislative instrument by which jurisdiction is conferred. The gist of the Applicants' case was that HDB had failed to disclose the evidence it had relied on in arriving at its decision. As mentioned at [28] above, this included the private investigation report, the anonymous tip-off, the inspection of the Property and the written statement by Mr Sayeh. At the hearing on 31 October 2014, Mr Dhillon accepted that the private investigation report and the anonymous tip-off were not disclosed to the Applicants to date.

83 I will first deal with the issue of whether there was any breach of the procedural rules set out in s 56 of the Act. The relevant subsections governing the procedure which have to be complied with are set out below:

> (3) Where the Board intends to exercise its powers of compulsory acquisition conferred by this section, the Board shall serve a *notice in writing* on the owner of the flat, house or other living accommodation ... stating the *intention of the Board to acquire the premises and the compensation to be paid therefor*.
>
> (4) Any owner or interested person who objects to a proposed acquisition by the Board may, within 28 days after the service of a notice referred to in subsection (3), submit in writing to the Board precisely the grounds upon which he objects to the acquisition and the compensation offered by the Board.
>
> (5) The Board shall consider the objection and may either disallow it or allow it either wholly or in part, and shall serve the owner or interested person by post or otherwise with a *written notice of its decision*.
>
> (6) Any appeal by any owner or interested person aggrieved by the decision of the Board shall be made to the Minister within 28 days after the date of service of such decision on the owner or

interested person and the decision of the Minister shall be final and not open to review or challenge on any ground whatsoever.

[emphasis added]

The Respondents have complied with all procedural requirements set out in s 56 of the Act. It was not disputed that the notice of intention under s 56(3) and the written notice of HDB's decision under s 56(5) of the Act were served on the Applicants. It was also undisputed that the Applicants had exercised their right to appeal to HDB and the Minister under s 56(4) and s 56(6) respectively. The Act is silent on the disclosure of evidence in so far as s 56(3) of the Act only requires HDB to state its intention to acquire the premises and the compensation to be paid therefor. In this respect, it is clear that HDB has complied with the procedural rules expressly laid down in s 56 of the Act. Therefore, the Applicants' contention that HDB failed to disclose the evidence it had relied on has to find its basis on a breach of the rules of natural justice, to which I shall now turn.

84 In *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR(R) 802 ("*Kay Swee Pin v SICC*"), the Court of Appeal observed that a duty to act in accordance with natural justice is nowadays considered as a duty to act fairly. The content of this duty varies with the circumstances of the case and much would depend on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates (see *Manjit Singh s/o Kirpal Singh and another v Attorney-General* [2013] 2 SLR 844 ("*Manjit Singh v AG*") at [88], citing *Lloyd v McMahon* [1987] AC 625 at 702).

85 With reference to the statutory framework set out in s 56 of the Act, I was unable to accept the Applicants' argument that the rules of natural justice required all evidence relied upon by HDB and the Minister to be disclosed. While it may be a denial of justice not to disclose specific material relevant to the decision thereby depriving the applicant of an opportunity to comment on such material (see *Kay Swee Pin v SICC* at [7]), that does not necessarily lead to the conclusion that all evidence will have to be disclosed regardless of the circumstances of each case. In determining whether a failure to disclose evidence amounts to a breach of natural justice, the court will have to take into account other countervailing factors, such as the need to protect confidentiality.

86 *De Smith's Judicial Review* (Sweet & Maxwell, 7th Ed, 2013) states at para 7–059:

> ... Briefly, there are cases where disclosure of evidential material might inflict serious harm on the person directly concerned ...; where disclosure would be a breach of confidence or might be injurious to the public interest (e.g. because it would involve the revelation of official secrets, inhibit frankness of comment and the detection of crime, and might make it impossible to obtain certain classes of essential information at all in the future) ...

It was further observed at para 8–020 that modifications of the disclosure requirements have also been deemed acceptable for the protection of other facets of public interest, including:

> ... the internal workings of the decision-maker; the sources of information leading to the detection of crime or other wrongdoing; sensitive intelligence information; and other information supplied in confidence for the purposes of government, or the discharge of certain public functions.

87 While the Applicants have cited numerous case authorities in support of the proposition that a tribunal has to disclose all relevant evidence to the affected party, I note that the cases mostly involved disciplinary proceedings where the tribunals were exercising quasi-judicial functions. Given

that the present statutory framework was clearly different, I did not find those cases to be particularly helpful in so far as the content of the duty to act in accordance with the rules of natural justice varies with the context of each case.

88 It was acknowledged by the Court of Appeal in *Manjit Singh v AG* that what is fair must depend on the object of the process at the stage in question. Under s 56 of the Act, an owner who is aggrieved by HDB's decision to compulsorily acquire his or her property has the right to appeal to HDB and the Minister. In this respect, both stages of appeal do not involve any oral hearing in so far as the owner is expected to tender his or her submissions in writing to the respective decision-maker. The level of disclosure required to fulfil the object of this entire appeal process would be for the aggrieved owner to know the gist of the case against him or her so as to be to make meaningful representations. In other words, the aggrieved owner must be informed of the case that he or she is expected to answer.

89 On the facts of the present case, there was sufficient disclosure on the part of HDB such that the Applicants knew the case that they had to answer. In the letter of intention dated 17 July 2010, HDB informed the Applicants of the following facts:

> Our investigations revealed that you have sublet your flat to Mr Sayeh Dedi Mahdy ... and his 2 flatmates from the month of Feb 09 without HDB's prior written consent and that you and your family are not in continuous physical occupation of the flat. This is a breach of the terms of the flat lease and an infringement under section 56(1) of the [Act].

The Applicants clearly knew the gist of the case against them, as evidenced in the appeal letters addressed to HDB and the Minister. In the first appeal letter to HDB dated 28 October 2010, the Applicants explained that they had only sublet the two rooms, as opposed to the entire Property. The Applicants also knew about the allegation that they had not been residing in the Property, given their specific explanation on why they had to vacate the Property and stay with the mother. More importantly, the Applicants also knew about the inspection carried out by HDB and the evidence that had been gathered against them. The Applicants gave a specific response to the allegation that their bedroom was left unlocked and that one of the occupiers had utilised the bedroom that was supposed to be occupied by the Applicants and their daughter. The Applicants relied on the explanation that they were too trusting not to lock their bedroom and that they did not give the occupier permission to sleep in the bedroom. Based on this letter of appeal, it was apparent that the Applicants knew, not only the gist of the case against them, but also the adverse evidence gathered by HDB in the course of the inspection.

90 In the second letter of appeal to the Minister dated 27 December 2010, the Applicants stated that the compulsory acquisition of the Property would be too harsh and that they would accept any form of penalty on account of their breach. While Mr Kirpal attempted to rely on the fact that the Applicants did not include any particulars of the "breach" that they had admitted to committing, I was unable to accept his argument given that the breach had already been particularised in the earlier exchange of letters and the Applicants' letter of appeal to the Minister was clearly drafted with reference to those letters. Quite apart from the fact that the Applicants clearly knew the case made against them, they also demonstrated some degree of knowledge regarding the policy reasons behind the relevant HDB's rules and regulations. In the letter of appeal to the Minister, the Applicants stated as follows:

> The breach was an one-off incident. We did not commit the breach with the intention of *taking advantage of the government subsidized flat for personal financial gain*. The flat was purchased by us from the open market. No government grant was obtained for the purchase.

> We understand that there are *good policy reasons behind the rules and regulations*. However there are circumstances which are deserving of a certain degree of compassionate [*sic*]. ...
>
> [emphasis added]

Therefore, looking at the facts as whole, it was clear that the Applicants were sufficiently apprised of the case and the evidence against them.

91 With regard to the anonymous tip-off, there was a sufficient countervailing reason to justify non-disclosure. As discussed at [86] above, one of the factors that the court can take into account would be the sources of information leading to the detection of wrongdoing and information supplied to the authorities in confidence. The rules of natural justice do not require the disclosure of the source of the anonymous tip-off. Imposing an extensive duty of disclosure will only discourage members of the public from stepping forward with information leading to the detection of wrongdoing. In fact, there was no reason why the Applicants should know the source of the information in order to respond to the allegations effectively. With regard to the content of the tip-off, as discussed above, the Applicants clearly knew about the allegation that they were not residing in the Property at the material time. HDB's refusal to disclose the anonymous tip-off was therefore justified on the facts here.

92 In relation to the private investigation report, I am similarly of the view that the non- disclosure was justified. The contents of the private investigation report fell within the category of information which may lead to the internal workings of the decision-maker being revealed to the public. Mr Khoo submitted that it would not be in the public interest for the investigative methods adopted by HDB to be released in the public domain. It was argued that HDB had limited resources to dedicate for the purposes of investigating such breaches and revealing the methodology behind such investigations will hamper the effectiveness of future investigations. To put it simply, Mr Khoo was of the view that errant owners may be able to game the system in future if such information was disclosed. On the facts of the present case, HDB's refusal to disclose the private investigation report was justified. In any case, the Applicants knew about the allegation that they were not in continuous occupation of the Property for the purpose of making meaningful representations. As evidenced in the letters of appeal addressed to HDB and the Minister, the Applicants were clearly told of the case they had to meet and of the allegations made against them. Finally, the Applicants clearly had knowledge concerning the inspection of the Property and the statement provided by Mr Sayeh, as evidenced by their targeted and specific response to these issues in the appeal letters addressed to HDB and the Minister. For the reasons above, there was no breach of the rules of natural justice in relation to the disclosure of evidence.

93 Apart from the issue concerning the disclosure of evidence, the Applicants also asserted that there was procedural impropriety in the Respondents' "dealing, adducing and considering" the conflicting evidence. In brief, the Applicants took the position that the Respondents gave undue weight to the evidence and allegations against the Applicants and failed to consider the evidence in favour of the Applicants. I have already dealt with the evidence relied upon by the Respondents in addressing the issue of whether the precedent fact was objectively established. There existed sufficient reasons to justify why Mr Sayeh's statement was preferred to Mr Cahya's statement. Apart from that, there was no evidence to suggest that HDB had either failed to consider the conflicting evidence or heard one side of the story without hearing the other side.

94 The Applicants also referred to the "flaw" in the recording of the statements during the inspection of the Property. It was submitted that there were two other employees present during the inspection and that HDB failed to provide any explanation for its failure to obtain statements from

those two employees. There is no rule or procedure governing the way in which HDB is to conduct its investigations and inspections. There was no evidence to suggest that the inspection was improper or that Mr Sayeh was coerced into giving the written statement. In the circumstances, I did not find anything amiss in the HDB officers recording only Mr Sayeh's statement as opposed to recording statements from all three occupiers.

95 The Applicants also referred to the doctrine of legitimate expectations in support of the proposition that they should only be subjected to a penalty of up to $3,000, as opposed to the compulsory acquisition of the Property. The decision to compulsorily acquire the Property was clearly not in relation to the Applicants' failure to update the details of Mr Sayeh with HDB. It was in relation to the Applicants' breach of s 56(1)(*h*) of the Act. Given that the representation was only in relation to the failure to update the details of the tenant, as opposed to a breach under s 56(1)(*h*) of the Act, the Applicants' argument on legitimate expectations was therefore without merit.

Conclusion

96 For the above reasons, I dismissed the application for leave to commence judicial review proceedings. I did not grant leave to the Applicants as they were way out of time and failed to account satisfactorily for the delay in commencing the present application. I was also of the view that the Applicants could not succeed on the substantive merits of their case. I ordered the Applicants to pay costs of $15,000 to AGC. I also ordered the Applicants to pay costs of $15,000 and disbursements amounting to $7,000 to HDB.