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# CUTTING THE APRON STRINGS: THE LOCALISATION OF SINGAPORE'S LAND AND TRUST LAW

This article discusses the changes made to Singapore's land and trust law by the Application of English Law Act 1993. The focus is on the effects of the "repeal" of the Second Charter of Justice, which imported English common law and pre-1826 English statutes into Singapore. The first part of the article discusses the provisions of the new Act, which replace the pre-1826 English statutory provisions. The second part discusses cases where English statutory provisions have not been replaced by new local legislation.

## I. Introduction

THE Application of English Law Act[1] is undoubtedly one of the most important pieces of legislation to be passed by the Singapore Parliament in recent years. The Act is certainly of greatest importance for its repeal of section 5 of the Civil Law Act,[2] which provided for the ongoing reception of English statutory law in the field of mercantile law. However, the Act has implications for all other areas of law too, and indeed it would not be going too far to say that it affects the very foundations of the Singapore legal system. In this article the focus is on the effects of the Act on land law and trusts only, although it will also be necessary to touch briefly on the changes effected by the Act to what perhaps may be termed the general jurisprudence of the Singapore legal system.

The Act is very ambitious in its scope. Few lawyers would have been surprised at the decision to repeal section 5 of the Civil Law Act. This is a provision which has long been seen as an anachronism in the context of Singapore's existence as an independent country. What was not so widely predicted, however, was that the Act would also do away with the Second Charter of Justice – formerly one of the pillars of the Singapore legal system. The central question to be explored in this article is the effect on Singapore property law of the "repeal" of the Second Charter.[3]

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1 No 35 of 1993.

2 Cap 43, 1994 Rev Ed.

3 Technically speaking, the Act does not repeal the Second Charter of Justice, but it is clear that its provisions no longer apply in Singapore. S 5(1) provides, "Except as provided in this Act, no English enactment shall be part of the law of Singapore." S 3 makes

### A. *Common Law*

Section 3 of the Act provides for the continuing application of English common law in Singapore.[4] Although the section now provides a firm statutory basis for the importation of English common law into Singapore, it is by no means free from difficulties of interpretation. However, these are not restricted to the field of land law and trusts, but cover rather the entire area of Singapore law. In the circumstances, it is not proposed to analyse here in any detail the effects of section 3 of the Act, although it will be necessary to touch upon its provisions in the consideration of certain aspects of property law.[5]

### B. *Second Schedule*

Apart from introducing the principles of common law and equity into Singapore, the Second Charter has traditionally been understood as introducing into Singapore the English statute law which was in existence in 1826. Section 5 of the Application of English Law Act states that, except as provided in the Act, no English enactment shall be part of the law of Singapore. It was therefore necessary to make some arrangements to replace the English statutes which had previously been imported into Singapore under the Second Charter.

As the explanatory statement to the Application of English Law Bill[6] makes clear, the Act is not intended to reform the substantive law of Singapore. It "seeks to remove the uncertainty as to the extent of the applicability of English law to Singapore, particularly in regard to statute law". It was therefore necessary to re-enact those statutes formerly brought in under the Second Charter.

In theory, this could have been done simply by listing the English statutes (as was indeed done mainly in relation to commercial statutes in the First Schedule). However, many of these statutes are very old, written in archaic English and not easily accessible.[7] It obviously seemed more satisfactory to re-enact them in modern language. The problem, however, is that, by rewording the statutes, one runs the risk of inadvertently altering their legal effect.

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arrangements for the application of the common law of England which supersede those provided by the Second Charter.

4 At least to the extent that it had already been received prior to the commencement of the Act.

5 See, *eg*, *infra* at notes 42 and 59.

6 Bill No 26/93.

7 See the remarks of the Minister for Law (Professor S Jayakumar) when moving the second reading of the Application of English Law Bill in Parliament (*infra*, note 20).

The second problem is that, as the explanatory statement says, there was some uncertainty as to exactly which statutes previously applied in Singapore by virtue of the Second Charter. By "repealing" the Charter and re-enacting these old English statutes, Parliament has taken a view as to which statutes were previously in force in Singapore, but there can be no guarantee that the view taken is the correct one. There is the risk that a statute may have been overlooked. If indeed that has occurred, then the statute in question has now been repealed automatically by the Act with possibly unforeseen consequences.

It is proposed to deal first with the problem created by the redrafting of the old English statutes. The new statutory provisions are set out in the Second Schedule to the Act. Not all the provisions call for comment, and attention will be focused here on those sections which may present difficulties or which may arguably change the law.

## II. Redrafted Statutes

### A. *Contracts which Require Evidence in Writing*

Section 4 of the Statute of Frauds 1677, which required certain contracts to be evidenced in writing, is now replaced by a new section 6A of the Civil Law Act. At first sight the new section does not appear to effect any change in the law, in that it seems to be simply a reworking of the old section in modern English. However, a difficulty may occur in connection with the law relating to part performance.

The courts of equity mitigated the severity of section 4 of the Statute of Frauds by allowing a contract to be enforced in spite of the absence of a written memorandum where it had been partly performed. The basis of the court's jurisdiction is expressed in the statement that equity will not allow a statute to be used as a cloak for fraud.[8] However, it should be noted that "fraud" in the equitable sense has a much wider meaning than it has at common law or indeed in everyday speech.[9]

The difficulty is that what the courts of equity were saying in effect is that they would ignore the clear provisions of the statute when they felt that it was necessary to do so in the interests of justice. This attitude is not so surprising as it seems when one remembers that the modern doctrine of the supremacy of Parliament was not so clearly established in the seventeenth century when the Statute of Frauds was enacted. It is, of course,

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[8] See Meagher, Gummow & Lehane, *Equity Doctrines and Remedies* (3rd ed, 1992), paras 1220 *et seq*.

[9] See ICF Spry, *Equitable Remedies* (3rd ed, 1984), at 244.

quite inconceivable that the courts today would treat a modern enactment in such a cavalier fashion.

However, doubts have been expressed for many years as to the propriety of a doctrine which allows the courts to grant specific performance in circumstances where the clear language of the statute states that the contract should be unenforceable. In *Maddison* v *Alderson*,[10] which was decided by the House of Lords in 1883, Lord Blackburn expressed his doubts as to the doctrine of part performance:

> Notwithstanding the very high authority of those who have decided these cases, I should not hesitate if it was res integra in refusing to interpolate such words, or put such a construction on the statute. But it is not res integra and I think that the cases are so numerous that this anomaly, if as I think it is an anomaly, must be taken as to some extent at least established. If it was originally an error it is now I think communis error and so makes the law.

While it may have been too late even a hundred years ago to set aside the established interpretation of the Statute of Frauds, the situation is obviously different once the court is confronted with a new statute. One year after *Maddison* v *Alderson* was decided, the Conveyancing and Law of Property Act 1884 of Tasmania was enacted. Section 36 states as follows:

> (1) No action may be brought upon any contract for the sale or other disposition of land, or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorized.
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> (2) This section applies to contracts whenever made, and does not affect the law relating to part performance or sales by the Court.

The technique of re-enacting the Statute of Frauds with an explicit saving clause for the law of part performance has been adopted in all the Australian jurisdictions where the original statute no longer applies.[11] This model has

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[10] (1883) 8 App Cas 467, 489.

[11] See Conveyancing Act 1919 (as amended) (NSW), s 54A; Property Law Act 1958 (Vic), ss 53-55; Law of Property Act 1936 (SA), s 26; Instruments Act 1958 (Qld), s 126 and Property Law Act 1974 (Qld) ss 6 and 59; Imperial Acts (Substituted Provisions) Ordinance 1986 (ACT), Sch 2, Part 11, para 4.

been followed too in England,[12] New Zealand,[13] and Hong Kong.[14] A slightly different technique has been adopted in British Columbia, where the Statute of Frauds has been repealed and replaced by legislation, which provides for contracts relating to land to be proved by some writing or by acts of acquiescence or reliance.[15] By way of contrast, other Canadian provinces which have re-enacted the Statute of Frauds in modern language, have done so without expressly saving the law of part performance.[16] Nevertheless, it appears to be assumed in those provinces that the law of part performance still applies.[17]

The law of part performance is comprised within the "common law of England (including the principles and rules of equity)" which was "part of the law of Singapore immediately before the commencement of the Act."[18] As such, it would certainly remain part of the law of Singapore were it not for the clear language of the new section 6A of the Civil Law Act, which appears on its face to abolish the doctrine. The question which arises is whether Parliament, by re-enacting the provisions of section 4 of the Statute of Frauds as section 6A of the Civil Law Act, intended to preserve the doctrine of part performance. If one were to assume that that was indeed the intention of Parliament, then one might reach the conclusion that it was somewhat unfortunate that the draftsman did not follow the model provided by the English, Australian and Hong Kong provisions noted above, so as to provide clearly for the law of part performance to be preserved in Singapore.

In favour of the view that part performance remains part of the law of Singapore, it can perhaps be argued that it was not the intention of Parliament

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12 See Law of Property Act 1925, s 40. This section is virtually identical in wording to the Tasmanian provision. It was repealed by the Law of Property (Miscellaneous Provisions) Act 1989.

13 Contracts Enforcement Act 1956, s 2.

14 Conveyancing and Property Ordinance, Cap 219, s 3.

15 See the Law and Equity Act, RSBC 1979, c 224, s 54 (enacted by the Law Reform Amendment Act 1985, s 7). Prior to 1985, the situation in British Columbia was the same as in the other Canadian provinces mentioned below, which have their own Statute of Frauds.

16 See, *eg*, Statute of Frauds, RSO 1990, c S19, s 4; Statute of Frauds, RSNB 1973, c S-14, s 1; Statute of Frauds, RSNS 1989, c 442, s 7. Prior to 1985, British Columbia had similar legislation; see Statute of Frauds, RSBC 1979, c 393, s 1.

17 See, *eg*, *Taylor* v *Rawana* (1990) 74 OR (2d) 357 and *Von Richter* v *Flett Estate* (1987) 77 NBR (2d) 401. So far as the present writer has been able to discover, the question of the continuing validity of the law of part performance has not been raised in these provinces. However, they have re-enacted the statute by incorporating into their domestic legislation an enactment of the same name as the original 1677 statute and containing similar provisions but in modern English. In such circumstances, it is perhaps not too difficult to find a legislative intention to continue the accepted interpretation of the 1677 Act, despite its re-enactment in a modern statute.

18 See s 3(1) of the Application of English Law Act (*supra*, note 1).

in passing the Application of English Law Act to change the law, but rather to restate it in a more accessible form. It should therefore be assumed that in restating section 4 of the Statute of Frauds, Parliament did not intend to change its accepted interpretation, including the rule that the section is subject to the equitable doctrine of part performance.

The difficulty with this argument, however, is that there are quite clearly occasions when the Act does change the law. If one limits the perspective only to the field of property law, one example would be the law relating to forfeiture of a lease for non-payment of rent. As is pointed out below,[19] the new statutory regime differs in significant respects from that which obtained prior to the passing of the Act. Perhaps in cases where the language of the Act is ambiguous, a case might be made for favouring the interpretation which does not change the law. However, where the language of the Act is clear, there is no reason to ignore it in favour of the old law. Moreover, if one adopts a historical interpretation and says that new sections must be interpreted in exactly the same way as those they replace, the object of the new legislation is defeated to a significant extent. In every case one must return to the old English statutes to work out from them the correct meaning to be attributed to the new statute passed by the Singapore Parliament. The Minister for Law, Professor S Jayakumar, stated, in moving the second reading of the Bill, that one of the problems which the new law was intended to solve was the fact that "many [of the English statutes] are also inaccessible and unavailable to the general public and even to lawyers. Moreover, the language of these ancient statutes is archaic and very difficult to understand."[20] How is this problem solved if in every case one must return to the ancient statutes to work out what the new law means, even where the language of the new provision is perfectly clear?[21] The conclusion must therefore be that section 6A of the Civil Law Act should be given its natural meaning and thus be taken to have abolished the doctrine of part performance.

There is little reason to feel concern at the passing of the law of part performance. There is still a considerable measure of uncertainty in the law as to exactly what acts are sufficient to constitute part performance.[22]

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[19] See *infra*, discussion, at note 31 *et seq*.

[20] *Singapore Parliamentary Debates, Official Report*, vol 61, col 610.

[21] See Interpretation Act (Cap 1, 1985 Rev Ed), s 9A (inserted by the Interpretation (Amendment) Act (No 11 of 1993)) on the validity of referring to the Minister's speech as an aid to interpretation.

[22] *Steadman* v *Steadman* [1976] AC 536 marks a significant departure from the requirements laid down by the House of Lords decision of *Maddison* v *Alderson* (1883) 8 App Cas 467. However, the different approaches of their Lordships in *Steadman* v *Steadman* make it difficult to state the law with certainty. In particular, their Lordships differed as to whether the acts relied on must point to a contract in respect of land. However, in the first instance

This uncertainty only increases the problems inherent in the inflexibility of the remedy available when a claim of part performance is made. The doctrine emerged to mitigate the severity of the formality requirements laid down by the Statute of Frauds. Clearly a party may act to his detriment in reliance on an oral and unenforceable contract. However, the doctrine of part performance deals with the potential injustice caused by the statute by either granting the full remedy of specific performance of the contract or by denying the plaintiff any relief at all. Nowadays the courts have at their disposal a more flexible technique in the shape of proprietary estoppel, which enables them to fashion an appropriate remedy to satisfy the equity that has arisen and which is available in many cases which would not satisfy the requirements of part performance. Moreover, a remedy based on proprietary estoppel would not necessarily lead to the enforcement of the contract and therefore would not run counter to the language of the statute. It may be of interest to note that in England itself the law of part performance was abolished in 1989.[23]

### B. *Trusts Concerning Land*

The language of new section 6B of the Civil Law Act, which is inserted by the Application of English Law Act to replace sections 7, 8 and 9 of the Statute of Frauds, will be familiar to all trusts lawyers. It is virtually identical to that of section 53 of the English Law of Property Act 1925, which was the subject of exhaustive analysis in a string of stamp duty and income tax cases reported in the 1960s and early 1970s.[24] Previously there have been doubts as to whether these cases represent the law in Singapore given the differences in wording between section 53 and sections 7, 8, and 9 of the Statute of Frauds.[25] The new section 6B may perhaps serve as an object lesson in the difficulties that may arise if the courts adopt what has been termed here a "historical" interpretation of the new legislation.

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judgment of *Re Gonin* [1979] Ch 16, the view was taken that the acts of part performance must indeed indicate the existence of a contract in relation to land.

23 See Law of Property (Miscellaneous Provisions) Act 1989, which repeals s 40 of the Law of Property Act 1925 (*supra*, note 12). S 2 of the 1989 Act lays down formality requirements for contracts for the sale of land stricter than those of the Statute of Frauds. Failure to comply with the requirements means that no contract comes into existence, as opposed to the rule under the Statute of Frauds under which a contract came into existence, but was unenforceable.

24 See *Grey* v *Inland Revenue Commissioners* [1960] AC 1; *Oughtred* v *Inland Revenue Commissioners* [1960] AC 206; *Vandervell* v *Inland Revenue Commissioners* [1967] 2 AC 291; *Re Vandervell's Trust (No 2)* [1974] Ch 269.

25 For a full discussion of these problems see Battersby, "Some Thoughts on the Statute of Frauds in Relation to Trusts" (1975) 7 Ottawa LR 483.

Subsection (2) of section 6B, like section 53(1)(c) of the English Law of Property Act, refers to the "disposition of an equitable interest or trust". Section 9 of the Statute of Frauds referred to "grants and assignments of any trust or confidence". The word "disposition" is arguably wider than "grant or assignment", so at first sight it seems that the law has been changed as a result of the enactment of the new section. This question was considered by the English courts in *Grey* v *Inland Revenue Commissioners*,[26] which concerned a stamp duty avoidance scheme. Hunter owned 18,000 shares of £1 each which he wanted to give to his children. His ultimate goal was to put the shares in six trusts, one trust for each of his children, so that each child would get 3,000 shares. Obviously he could have just transferred the shares to trustees and declared the trusts, but clearly that would have given rise to *ad valorem* stamp duty on the value of all 18,000 shares.

The following procedures were therefore adopted. On 1st February 1955, Hunter, as settlor, transferred 18,000 shares of £1 each to Grey and others as nominees for himself. Grey and the others were the trustees of six settlements, which Hunter had previously created for his children. On 18th February 1955 Hunter orally directed the trustees to divide the 18,000 shares into six parcels of 3,000 shares each and to appropriate the parcels to the trusts of the six settlements, one parcel to each settlement. On 25th March 1955 the trustees executed six deeds of declaration of trust (which Hunter also executed in order to testify to the oral directions previously given by him) declaring that since 18th February 1955, they held each of the 3,000 shares on the trusts of the relevant settlement. The Commissioners of Inland Revenue assessed the deeds of declaration of trust to stamp duty on the basis that the oral declaration did not effectively create trusts of the shares, so that it was the subsequent deeds that created trusts of the shares and were subject to *ad valorem* stamp duty as instruments transferring an interest in property. They were not exempt as merely confirming an earlier effective oral declaration.

In the Court of Appeal, Lord Evershed MR was of the view that the word "disposition" should be construed as equivalent to the words "grant or assignment" because, in his opinion, section 53 of the Law of Property Act was a consolidation of the Statute of Frauds. According to Lord Evershed, what Hunter did was not an assignment of his interest but rather a declaration of new trusts.[27] His oral declaration was therefore effective and no written assignment was required.

This view was rejected by the House of Lords, who held that the word

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[26] [1958] Ch 690 (CA); [1960] AC 1 (HL).

[27] [1958] Ch 690, 714-5. For the view that Hunter's oral declaration was indeed an "assignment" within the meaning of section 9 of the Statute of Frauds, see Battersby, *op cit*, *supra*, note 25, at 487-488.

"disposition" should be given its natural meaning and should not be limited by reference to the language of the Statute of Frauds, because the Law of Property Act did not consolidate that statute.[28] The oral direction that Hunter gave to his trustees on 18th February amounted to a disposition of an equitable interest or trust subsisting at the time of the disposition. Therefore it was ineffective, but the transaction was nevertheless effective, because the deeds executed on 25th March had the effect of transferring the equitable interests. These deeds were therefore subject to *ad valorem* stamp duty.

It is to be hoped that, should a similar case arise in Singapore, the courts would follow the decision of the House of Lords. If, however, a historical interpretation of the new Act were to be adopted, then it would become necessary to determine the meaning of the phrase "assignment" as used in the Statute of Frauds. The Application of English Law Act is not a consolidating statute in the sense in which this expression is used in England. In any event it is by no means clear that the English courts would nowadays adopt Lord Evershed's approach towards the interpretation of consolidation statutes.[29] *Grey* v *Inland Revenue Commissioners* is of interest, however, in the present context as an illustration of the uncertainty that would be caused in the law were the courts to attempt to interpret the new statute so as to make it accord with the English statutes it has replaced.

### C. *Relief against Forfeiture for Non-payment of Rent*

Equity has long provided tenants with relief against forfeiture of their leases in appropriate cases. In the case of forfeiture for breach of any covenant *other* than one relating to the payment of rent, the matter is now dealt with by section 18 of the Conveyancing and Law of Property Act.[30] In the case of forfeiture for non-payment of rent, the matter is still subject to the equitable jurisdiction of the court, but the Landlord and Tenant Act 1730 restricted the court's power to grant relief from forfeiture by imposing certain time limits.

In England, the provisions of the Landlord and Tenant Act 1730 were superseded by the Common Law Procedure Act 1852, which governs actions for relief from forfeiture for non-payment of rent in the High Court. Curiously, England has a different – but similar – set of provisions governing relief from forfeiture for non-payment of rent, when the action is brought

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[28] Although the provisions of s 53 of the Law of Property Act are obviously derived from the Statute of Frauds, the direct link between the two enactments was broken by the changes introduced by the Law of Property (Amendment) Act 1924.

[29] See, *eg*, *Maunsell* v *Olins* [1975] AC 373; *Farrell* v *Alexander* [1977] AC 59.

[30] Cap 61, 1994 Rev Ed.

in the County Court. These are to be found in the County Courts Act 1984. Not surprisingly, the draftsman of the Application of English Law Act chose the more modern and more detailed County Court provisions as his model when drafting the new section 18A of the Conveyancing and Law of Property Act to replace the 1730 Act. However, it might be argued that he should have adopted instead the provisions used for High Court actions in England, as these are much closer to those of the 1730 Act.

The new section 18A is considerably more detailed than the provisions it replaces. There are some minor differences in the new time limits as compared with those previously in force. Previously, the tenant was entitled to have the possession proceedings stayed if he paid all the rent arrears and costs before the date of judgment.[31] The new section 18A provides for a similar right of automatic termination of the possession proceedings, but only if the tenant pays all the rent arrears and costs within the time prescribed for acknowledging service of the writ by which the proceedings for possession were commenced. However, the tenant is not really disadvantaged by this change in procedure, because section 18A(3) provides that, where the court is satisfied that the landlord is entitled to forfeit the lease, it must postpone the execution of any possession order for a minimum of four weeks, and has discretion to extend this period further. The tenant has an automatic right to relief if, within the period thus fixed by the court, he pays all rent arrears and costs due.[32] If, however, he fails to pay within this period, the possession order becomes enforceable and, if the order remains unreversed, the tenant is thereafter barred from all relief.[33]

This marks a significant deterioration in the tenant's position as compared with that which obtained under the 1730 Act. Under the 1730 Act, the court retained a discretionary power to grant relief where the tenant tendered payment of all arrears and costs after the granting of the possession order, provided application for relief was made within six months of the execution of the judgment for possession.[34]

The new section 18A of the Conveyancing and Law of Property Act mirrors the position which used to obtain in County Court proceedings in England (but not in High Court proceedings). The inability of the courts to grant discretionary relief after the County Court time limits had expired led to most unfortunate results in the English case of *Di Palma* v *Victoria Square Property Co Ltd*.[35] The United Kingdom Parliament amended the

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[31] Landlord and Tenant Act 1730, s 4.

[32] *Supra*, note 30, s 18A(5).

[33] *Supra*, note 30, s 18A(7).

[34] *Supra*, note 31, s 3.

[35] [1986] Ch 150. A 99-year lease of a flat contained a covenant by the tenant to pay a service charge by way of additional rent to the annual rent of £10. A dispute arose as to how much was due by way of additional rent. The landlords brought proceedings in the County Court,

County Court provisions[36] by the Administration of Justice Act 1985,[37] which gives the County Court the same power that the High Court previously had to grant discretionary relief within six months of the recovery of possession. Unfortunately this amendment has not been adopted by the draftsman of the Application of English Law Act.

Where a lease is forfeited, any subleases created out of it automatically come to an end.[38] However, under the 1730 Act, a sublessee or mortgagee had the same right of applying for relief against forfeiture of the head lease as had the tenant under the head lease.[39] However, it is doubtful whether the new section 18A of the Conveyancing and Law of Property Act applies to sublessees and mortgagees. Section 18A follows the English County Court provisions in speaking simply of "lessees". However, the English Act has a definition section[40] which defines "lessee" to include "the persons deriving title under a lessee". This definition was not incorporated in the new section 18(A). Since section 18A forms part of the Conveyancing and Law of Property Act, one looks to the definition section of this Act, but unfortunately there is nothing in section 2 of this Act to support the view that "lessee" includes "sublessee" and "mortgagee".[41]

It should be borne in mind that the provisions of section 18(6) of the Conveyancing and Law of Property Act, which provide for protection of sublessees where a head lease is forfeited for breach of a covenant, do not apply to the case of forfeiture for non-payment of rent. It can be argued that, where forfeiture is sought for non-payment of rent, the original equitable jurisdiction to grant relief from forfeiture is preserved intact in the case of a sublessee or a mortgagee. The right to relief from forfeiture is part of the "common law of England (including the principles and rules

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claiming arrears of rent and possession of the flat pursuant to a forfeiture clause in the lease. The judge found that the landlords were entitled to £299 arrears of rent, and he ordered that, unless the tenant paid the arrears by a specified date, she should give possession of the flat to the landlords. The tenant failed to pay and the landlords were granted a warrant for her eviction, which was duly executed by the County Court bailiffs. Within hours of being evicted, the tenant paid the arrears into court and the landlords took the money out. It was held that, under the provisions of the County Courts Act 1984 as they then stood, the courts were powerless to grant relief from forfeiture of a lease (which was worth approximately £30,000) for failure to pay £299 on time.

36 See now County Courts Act 1984, s 138(9A)-(9C).

37 Administration of Justice Act 1985, ss 55(1-4), 67(2), Sch 8, Pt III.

38 *Great Western Railway Company* v *Smith* (1876) 2 ChD 235, 253.

39 *Supra*, note 31, s 2. See *Doe d Wyatt* v *Byron* (1845) 1 CB 623.

40 *Supra*, note 36, s 140.

41 S 2 does not define "lessee". It defines "under-lessee" to include "any person deriving title under or from an under-lessee". It should also be noted that s 18(7) defines "lessee" to include an "under-lessee" for "the purposes of this section". This tends to suggest that "lessee" does not include "under-lessee" in other sections.

of equity)", which "was part of the law of Singapore immediately before the commencement" of the Application of English Law Act. It therefore continues "to be part of the law of Singapore".[42] The 1730 Act merely imposed certain time limits restricting the power of equity to grant relief from forfeiture. Therefore, in contrast to the position which prevailed previously, the sublessee and the mortgagee are now free from the time limits laid down by statute. If this view is correct, they are curiously in a better position to obtain relief from forfeiture than the head lessee.

### D. *Accumulations*

The Accumulations Act 1800 is now replaced by a new section 69A of the Conveyancing and Law of Property Act. In England, the Accumulations Act was replaced by section 164 of the Law of Property Act 1925, which is almost identical to the 1800 Act. The new section 69A is derived from this section except that it also contains the amendments introduced by the English Perpetuities and Accumulations Act 1964.

It is not proposed to discuss these provisions in detail, as directions to accumulate income are not very common in Singapore. However, it is interesting to note that the extra periods of accumulations permitted by the English 1964 Act were adopted by the draftsman of the Application of English Law Act. This is worthy of comment for two reasons. First, because it amounts to a law reform measure and thus marks an exception to the general character of the legislation, which is not really intended to reform the law, but rather to clarify to what extent English law applies in Singapore. Second, because Singapore is one of the last jurisdictions to retain the rule against perpetuities in its original common law form. Now that the parliamentary draftsman's attention has been drawn to the English Perpetuities and Accumulations Act 1964, one may perhaps be forgiven for expressing the hope that the rule against perpetuities may be amended in Singapore too.

### E. *Co-owners*

The new section 73A of the Conveyancing and Law of Property Act calls for a brief comment. This replaces provisions formerly found in the Administration of Justice Act 1705, which enable one co-owner[43] to sue the other co-owner for receiving more than his share or proportion of any rents or profits arising from the property. Before this Act was passed, there were difficulties at common law in one co-owner suing another.

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[42] *Supra*, note 1, s 3(1).

[43] Whether a joint tenant or a tenant-in-common.

In contrast to the position which prevails in England under the Law of Property Act 1925, co-owners do not hold their interest on trust for themselves under a trust for sale. In other words, it is quite possible in Singapore for two people to hold land as co-owners without any intervention of equity. In such circumstances there is no authority to enable one to turn to equity where one co-owner receives more than his share of the profits. It was therefore desirable to deal with this problem by statute.

## III. Omitted Statutes

As a result of the Application of English Law Act, pre-1826 English statutes no longer have force of law in Singapore. As has been seen, some of these statutes cover important ground and their provisions have been re-enacted in the Second Schedule to the Act.

Professor S Jayakumar, the Minister for Law, said in introducing the second reading of the Bill, "Past judicial decisions have authoritatively held that certain pre-1826 English statutes, for example, the Statute of Frauds 1677, have been received in Singapore. However, the problem is that it is not possible to say with certainty what other pre-1826 English statutes which have not been considered by our courts remain receivable."[44]

The Act has removed this problem, but it was obviously a major difficulty for the draftsman. He had no choice but to take a view on which statutes had been received in Singapore in deciding what provisions to include in the Second Schedule. It is interesting to speculate on whether he may inadvertently have left out a statute. However, even if this were to be the case, it would be very unfair to criticise him. Fortunately, the United Kingdom Parliament was not as prolific in previous centuries as it is today. Nevertheless, there is an extraordinarily large number of statutes which potentially could have been received under the Second Charter. To illustrate the size of the problem, one may look at the publication *Statutes At Large*, which reproduces all the United Kingdom statutes for the period in question. At a rough count, there are approximately 50,000 pages of legislation passed by the United Kingdom Parliament prior to 1826.

The present writer has certainly not checked through all 50,000 pages of the *Statutes at Large* to see if any of them could possibly be relevant in Singapore. However, it is possible to identify a few English statutes, which have not been covered by the draftsman of the Act. It must be stressed that this is not an exhaustive list of what might be termed "missing" statutes. It is not unlikely that over the years more cases will be discovered of statutes which have been repealed inadvertently, and no doubt it will be

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[44] *Singapore Parliamentary Debates, Official Report*, vol 61, col 609.

necessary to deal with these cases by amending legislation or by creative judicial lawmaking.

### A. *Charities*

The first possible omission is the Statute of Charitable Uses 1601. The substantive provisions of this Act have been superseded by subsequent legislation, but the preamble is still of relevance because it contains a long list of purposes which are charitable in the eyes of the law. In fact, it was on the basis of this list that Lord Macnaghten in *Commissioners of Income Tax* v *Pemsel*[45] enunciated his famous fourfold classification of charity: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion and trusts for other purposes beneficial to the community.

The question which arises now is whether the repeal of the preamble to the Statute of Charitable Uses has brought about the demise of this classification of what is charitable. If it has, the consequences are quite alarming, because there is no other source to define what is a charity. Section 2 of the Charities Act[46] states rather unhelpfully that "charitable purposes" means "purposes which are exclusively charitable according to the law of Singapore".

A similar problem has arisen in England, where section 38(1) of the Charities Act 1960 also repealed the preamble. However, the situation there is slightly different in that section 38(4) of the English Act states: "Any reference in any enactment or document to a charity within the meaning, purview and interpretation of the Charitable Uses Act 1601, or of the preamble to it, shall be construed as a reference to a charity within the meaning which the word bears as a legal term according to the law of England and Wales."

This is a rather obscurely worded section, but it can be read as a legislative endorsement of the case law which has developed on the subject of what is a charity.[47] In practice the English courts have continued to follow the case law which developed from *Commissioners of Income Tax* v *Pemsel*.[48] It is submitted that one cannot read the definition of "charitable purposes" in the Singapore Charities Act as having the same effect as section 38(4) in England, because this definition was originally enacted before the repeal of the preamble.[49] Nevertheless, it can be argued that the case law built

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[45] [1891] AC 531.

[46] No 22 of 1994.

[47] See Marshall, "The Charities Act, 1960" (1961) 24 MLR 444.

[48] *Supra*, note 45. See, *eg*, *Incorporated Council of Law Reporting* v *Attorney-General* [1972] Ch 73; *Inland Revenue Commissioners* v *McMullen* [1981] AC 1.

[49] It was originally enacted as part of the Charities Act (No 20 of 1982).

up on the basis of the preamble still remains good law. The reason for this is that the preamble to the Statute of Charitable Uses can be seen as having legislative force in a technical sense only. It was not an operative part of the statute and was not intended to effect a change in the law. It was simply a statement of the reasons for the legislation and this statement happened to contain a list of certain objects which the legislature considered to be charitable. The case law which developed from the preamble should therefore be seen as deriving its force from the common law and not as a form of statutory interpretation. If this is correct, all that has actually happened with the passing of the Application of English Law Act is that the legislative source for the inspiration of the judges has been removed. The common law which they developed, however, still remains intact and continues in force in Singapore by virtue of section 3 of the Application of English Law Act.

### B. *Quia Emptores 1290*[50]

This statute serves as a good example of how difficult it is in common law countries to separate land law from its legal history. Although enacted over 700 years ago, one of the leading textbooks on English land law describes it as "one of the pillars of the law of real property".[51] Here, the main textbook on land law refers to the statute as "a necessary part of the foundation of land law in Singapore."[52] Nevertheless, the statute has ceased to be part of Singapore law with the coming into force of the Application of English Law Act. As a result, one is now faced with the difficult task of working out what has happened to the structure of Singapore land law following upon the removal of one of its foundations.

Prior to the statute of Quia Emptores, a common method of alienation was by way of subinfeudation. The king might grant to A, A might grant to B and B might grant to C. A and B would then be mesne lords, and if A was not rendered his services by B, he could proceed against the land by distraining on C, who had in turn a remedy against B. To a modern lawyer, this seems a rather cumbersome method of alienation, but it was popular in an age where land was almost the only form of capital wealth, as it enabled the vendor to take payment in the form of a continuing right to rent or services charged on the land.[53] The alternative method of alienation was that of substitution, which is still used today, in which C replaces B as A's tenant. The disadvantage of this method in feudal times was that

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50 18 Edw 1, St 1, c 1

51 Megarry and Wade, *Law of Real Property*, (5th ed, 1984), at 30.

52 Tan Sook Yee, *Principles of Singapore Land Law* (1994), at 6.

53 Megarry and Wade, *op cit, supra*, note 51, at 28.

the lord might be saddled with a bad tenant who was unfit to perform the service due or who might even be an enemy of his.[54]

By the thirteenth century, the personal relationship of lord and tenant had become less important. This situation was recognised by Quia Emptores, which prohibited alienation by subinfeudation, and which permitted the tenant in fee simple to alienate the land by substitution without the lord's consent. The new tenant was to hold the land by the same services as the previous one. The statute only applied to grants in fee simple[55] and the result was therefore that no new tenures in fee simple could be created except by the Crown.

From this excursus into legal history one can readily see why the statute of Quia Emptores is said to be one of the pillars of land law. It forms the basis for the essential principle that land held in fee simple may be alienated without restriction and that there can only be one estate in fee simple in any one piece of land. However, Quia Emptores no longer forms part of the law of Singapore. It would seem to follow from this that the restriction on creating new fee simple estates has now gone. In theory, A, the owner of the fee simple in Blackacre in Singapore, can now grant it to B in fee simple in return for the performance of services. This is an intriguing possibility, but it flies in the face of commercial reality. The notion of subinfeudating land today in return for services is too absurd to merit serious consideration. A slightly more realistic example might be the case where A grants Blackacre to B in fee simple in return for the annual payment of a sum of money. Although this is a more sensible illustration of subinfeudation, it is difficult to see what practical advantages this method would offer over the existing device of the rentcharge. Indeed, rentcharges have never been used widely in Singapore, and the possible existence of a slightly more cumbersome and untested means of achieving the same goal is unlikely to prove attractive.[56] The conclusion must be that, whatever the theoretical interest in the possibilities of subinfeudation, it is extremely unlikely ever to occur in practice.

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54 AWB Simpson, *A History of Land Law* (1986), at 53. For a full discussion of the restraints on alienation during the thirteenth century, see Pollock & Maitland, *The History of English Law Before the Time of Edward I* (2nd ed, 1898), Vol 1, at 329 *et seq*.

55 It remained possible, therefore, for a tenant in fee simple to grant a fee tail or a life estate to another to hold of him as lord. This is, of course, still the law in Singapore in the case of a grant of a life estate. The fee tail was abolished in 1886 by what is now s 51 of the Conveyancing and Law of Property Act (Cap. 61, 1994 Rev Ed).

56 It should perhaps be noted that the rentcharge differs slightly from the example of subinfeudation given in the text. In the case of subinfeudation, it would be possible for A to grant Blackacre in fee simple to B in return for the payment of $X per year, and for B to grant Blackacre in fee simple to C in return for the payment of $Y per year. Both sums would be secured on the land. In the case of the rentcharge, however, although one could have more than one rentcharge secured on the land, only the owner of the fee simple

A more serious problem arises from the second aspect of Quia Emptores – the free alienation of land held in fee simple. Today all land in Singapore is held of the State,[57] and it is surely quite inconceivable that the State would seek to raise the point that its consent was needed to effect a conveyance of freehold land. However, the issue might come before the courts indirectly. In a falling market, a purchaser might seek to escape from a contract which had become unprofitable by arguing that the vendor could not deduce a good title because he was unable to obtain the consent of the superior lord, the State, to the conveyance of the fee simple. The argument would be that since it is Quia Emptores which permitted the free alienation of freehold land,[58] the "repeal" of this statute in Singapore means that consent of the superior lord must be obtained to any conveyance of such land. The fact that such an argument could well be advanced is quite alarming, as if it were successful it would have incalculable effects on the property market.

One approach is to say that, if Quia Emptores is no longer part of the law of Singapore, the courts should apply the common law as it prevailed prior to the enactment of this statute. In fact, it appears that from the mid-thirteenth century onwards the fee simple had become freely alienable.[59] Quia Emptores 1290 therefore simply confirmed the existing legal position. The principle that the fee simple is freely alienable should now apply therefore as a matter of common law. However, while such an approach might indeed be possible in England were the statute to be repealed there, the situation must be different in Singapore, where statute precedes common law and where the common law only applies to the extent that statute so provides. Under section 3(1) of the Application of English Law Act, "The common law of England ... so far as it was part of the law of Singapore immediately before the commencement of this Act, shall continue to be part of the law of Singapore." The thirteenth century common law rules on the alienability of the fee simple were not part of the law of Singapore

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for the time being in Blackacre would be liable under the rentcharges. In practice, however, this is a distinction without any real difference. Since in the case of subinfeudation the money is charged on the land, the person who is in actual occupation will for all practical purposes be compelled to pay the money, if the person ultimately liable fails to do so.

57 The rights of the British Crown in respect of land in Singapore passed to the State of Singapore under Art 160 of the Constitution of the Republic of Singapore (1992 Rev Ed).

58 Strictly speaking it is Quia Emptores together with certain later statutes which permitted free alienation. Quia Emptores did not bind the Crown and therefore tenants-in-chief (who held directly of the Crown) still could not alienate without consent. They acquired this right subject to the payment of a reasonable fine in 1327 by 1 Edw 3, St 2, c 12. The Tenures Abolition Act 1660 abolished this fine. However, since none of these statutes now applies in Singapore, this is merely a historical quibble.

59 See Simpson, *op cit, supra,* note 54, at 54.

immediately before the commencement of this Act, because at that time this question was governed in Singapore by the statute of Quia Emptores.

The position must therefore be that there is now a lacuna in Singapore law on the question of the alienability of the fee simple. In these circumstances, the courts must fashion an appropriate rule and public policy would surely dictate that the fee simple should be freely alienable. The same result can be achieved on more technical grounds. The fee simple is the greatest interest that a person can own in land in Singapore. Lesser interests, such as the estate in perpetuity granted under the State Lands Act[60] and the leasehold estate,[61] can be alienated freely. It would be paradoxical therefore if the fee simple could not be alienated freely. Nothing in the Application of English Law Act militates against this conclusion. Although the Act failed to re-enact the provisions of Quia Emptores, this should not be taken as indicating a legislative intention to reverse the rules which flow from this statute. That would amount to a revolution in Singapore's land law, which should not come about merely as a result of a side-wind.[62]

In conclusion, a rather lengthy and somewhat tortuous legal analysis leads one to the view that the basic structure of Singapore land law remains intact. However, it cannot be said that the contrary view is completely untenable. To clarify matters, the simple solution would be a short enactment stating in modern language the basic principles laid down seven hundred years ago in Quia Emptores. An example of such legislation is to be found in the statute book of the Australian Capital Territory, which contains the following provision:[63]

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60 Cap 314, 1985 Rev Ed.

61 Subject, in this case, to the possibility that the lease may contain a covenant against assignment.

62 An alternative argument may perhaps be made where land is registered under the Land Titles Act (Cap 157, 1994 Rev Ed). In such a case, the registered proprietor has an indefeasible title under s 46, and holds the land "free from all encumbrances, liens, estates and interests whatsoever". If the necessity to obtain the consent of the State to the transfer of the fee simple is characterised as an encumbrance, it may be said that the State's rights in this regard no longer apply once the land has been registered. The difficulty with this argument, however, is that under s 46(1)(a) the registered proprietor's title is nevertheless subject to "any subsisting exceptions, reservations, covenants and conditions, contained or implied in the State grant or State lease thereof". The phrase "State grant" is not defined in the Land Titles Act, but it would normally be understood as a reference to a grant made under the State Lands Act (Cap 314, 1985 Rev Ed). It is not clear, however, that the phrase can be limited to grants made under this Act. It is certainly arguable that the phrase is sufficiently wide to cover grants in fee simple made by the State or its predecessors in title. If so, the need to obtain the consent of the State to a transfer of the fee simple can be seen as one of the "subsisting exceptions, reservations, covenants and conditions ... implied in the State grant".

63 Imperial Acts (Substituted Provisions) Ordinance 1986, Sch 2, Part 2, para 1. See also the Imperial Acts Application Act 1969 (NSW), s 36. A slightly different technique has been

> Land held of the Crown in fee simple may be conveyed in fee simple without licence or fine, and the person to whom land is so conveyed holds the land of the Crown in the same manner as the land was held before the conveyance took effect.

### *C. Formal Demands for Rent*

At common law, a lease cannot be forfeited for nonpayment of rent unless a formal demand is made. Therefore, every professionally drafted lease contains a forfeiture clause which allows the landlord to forfeit on breach of the covenants – including the covenant to pay rent – without the necessity of making a formal demand for the rent.

A formal demand for rent must be made at a convenient time before sunset on the day when the rent is due. It must be made on the land and at what the old books called the most "notorious" place of it.[64] Therefore, if there is a house on the land, the demand must be at the front door, though it is not necessary to enter the door, even if it is open. The exception is where the lease specifies a place for paying the rent, in which case the demand must be made at that place. A demand must actually be made in fact, even if there is no person on the land ready to pay it. Since the tenant has until the end of the day to pay, the demand must be made towards the end of the day and the person making the demand should remain there until sunset.

Given all these extraordinary conditions which have to be satisfied before a lease can be forfeited, it is hardly surprising that all well drafted leases remove the need to make a formal demand. The question arises, however, what happens where the lease in question does not exclude the need to make a formal demand. Under section 2 of the Landlord and Tenant Act 1730, there is no need to make a formal demand before forfeiting the lease when six months' rent is due and unpaid and any goods available for distress are insufficient to cover the arrears.

The 1730 Act is no longer law in Singapore and, unfortunately, the matter is not covered by the Application of English Law Act. The omission is perhaps surprising, because the other matters dealt with by the 1730 Act have been covered by the new section 18A of the Conveyancing and Law of Property Act, which is derived from section 138 of the English County Courts Act 1984. Section 139 of the same English Act now covers the ground formerly dealt with by section 2 of the 1730 Act.[65]

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adopted in New Zealand where Quia Emptores is listed in the First Schedule to the Imperial Laws Application Act 1988 as an enactment which is still in force in New Zealand.

64 See the notes to *Duppa* v *Mayo* (1669) 1 Wms Saund 282 *et seq* for a full description of the rules relating to formal demands for rent.

65 See also Common Law Procedure Act 1852, s 210.

It is unlikely that many problems will arise in practice. In the first place, all professionally drafted leases contain forfeiture clauses which remove the need to make a formal demand for rent. In the second place, where a lease is registered under the Land Titles Act,[66] section 93 of this Act removes the need to make a formal demand.

There are, nevertheless, cases where laymen draft their own leases without the help of lawyers. In such cases the lease will certainly not contain a clause removing the need to make a formal demand, unless the layman has copied a good precedent. Since, however, in all likelihood, a layman drafting his own lease would not put in a forfeiture clause either, one may say that the problem is unlikely to arise even here.[67] But it is difficult to be sure of this. If the lease contains language to the effect that the tenant cannot remain at the premises unless he pays rent, the courts might well construe this as a forfeiture clause. It would then be necessary to make a formal demand to forfeit the lease. Be that as it may, it is undesirable for a legal system to contain traps for the unwary layman. The simple solution to the problem would be to re-enact in modern language the relevant provisions of section 2 of the 1730 Act. A more radical solution, which is surely justified in the circumstances, would be to follow the lead of the Land Titles Act and to remove the need to make a formal demand in all leases.[68]

## IV. Conclusion

As has already been stated, the Application of English Law Act has implications for every area of Singapore law. However, this article has limited its attention to land law and trusts. It is hoped that this detailed study of the effect of the Act on a relatively narrow field will be of interest to property lawyers. However, it is only right to point out that shining a spotlight on a small area inevitably fails to give one an accurate picture of the territory as a whole.

For over 150 years many aspects of the legal system were clouded with doubts resulting from the unclear relationship between Singapore law and English law. The Act has swept away the vast majority of these problems. However, given the wide range of the Act and the scale of the problems

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66 Cap 157, 1994 Rev Ed.

67 In the absence of a forfeiture clause, the landlord cannot forfeit the lease for non-payment of rent (unless the tenant's obligation is expressed as a condition), so the need to make a formal demand for rent before forfeiture becomes irrelevant.

68 In the absence of legislation, one wonders whether the courts would be prepared to make use of their powers under s 3(2) of the Application of English Law Act (*supra*, note 1) and declare that the common law rules relating to formal demands are not applicable to the circumstances of Singapore and its inhabitants and therefore should no longer apply.

that had to be dealt with, it is inevitable that difficulties will emerge in various areas with the passing of time. This was recognised by the draftsman himself, who provided in section 8 for a simplified amendment procedure to remove any difficulties that might arise in relation to the English statutes specified in the First Schedule, which mainly deal with commercial law. Section 8 does not apply to the matters dealt with in this article, as it was presumably felt that any amendments here should be subject to the normal parliamentary procedures. The Act has set the stage for the development of an autochthonous Singapore legal system. It is to be hoped that parliamentary time will be made available as and when the need arises to iron out any difficulties that may become apparent, so that this development can take place as smoothly as possible. Whatever the future holds, the Act has already done much to make Singapore law more certain in all fields, and should, for that reason, be welcomed.

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