Lives in the Law: Essays in Honour of Peter Ellinger, Koh Kheng Lian & Tan Sook Yee BY DORA NEO, TANG HANG WU AND MICHAEL HOR, eds. [Singapore: Faculty of Law, National University of Singapore and Academy Publishing, 2007. xxviii + 263 pp. Hardcover: S$53.50]

A *Festschrift*, to the unfamiliar, is a book honouring a respected academic. Derived from German, the word is likely to be unfamiliar to the Singaporean legal fraternity. *Lives in the Law* is the first *Festschrift* to be published in Singapore honouring a legal academic. The editors have not, however, been content with achieving a first in Singapore. As the editors wryly observe in their Preface (at p. xi), what had initially germinated as plans for three separate *Festschriften* evolved into "the first collection to honour three [legal academics] in one go", thus achieving another first, this time internationally. Although the undertaking spans less than 300 pages in all, the colossal nature of it is evident from a quick perusal of the acknowledgments (at p. xiv).

Lives in the Law is divided into three parts, in addition to a Foreword by Chan Sek Keong C.J. and a Preface by the editors. Part 1 honours Emeritus Professor Peter Ellinger and is scrupulously assembled by Associate Professor Dora Neo. Part 2 honours Emeritus Professor Koh Kheng Lian and is meticulously edited by Professor Michael Hor. Part 3 honours Professor Tan Sook Yee and is painstakingly compiled by Associate Professor Tang Hang Wu. The *Festschrift* is very much an intimate little book and I seek the excuse of the reader in maintaining that tone by referring to its honourees, each of whom was my teacher, my mentor or my colleague at some point, by their first names. That Peter, Kheng Lian and Sook Yee were chosen to be the first legal academics in Singapore to be honoured by their colleagues should come as no surprise to the legal fraternity. Peter is a giant in the field of banking law both locally and internationally and was the first Emeritus Professor to be appointed by the Faculty of Law at the National University of Singapore. Kheng Lian was a graduate of the pioneer batch of law students, together with such luminaries as Chan Sek Keong C.J. and Professor Tommy Koh, from the Law Faculty at the then University of Malaya in 1961. She conceived the *Singapore Law Series* of textbooks, which will be familiar to many older graduates. She can also be justifiably credited with being midwife to the modern Singaporean legal textbook. Her mastery of and contribution to the development of Singaporean criminal law is only matched by her recent energies in the field of environmental law. Sook Yee, in addition to

being the unparalleled authority on Singaporean land law, was also instrumental in the administration of the Faculty of Law as its Dean from 1981 to 1987, a period of growth, transformation and consolidation. She was transformational before the word came to be popularised as an adjective.

As researchers, teachers, colleagues and administrators, Peter, Kheng Lian and Sook Yee have touched the lives of countless academics and students. Speaking for myself and—I suspect—many of their former students, I was therefore most fascinated by the three biographical chapters in honour of each of them, which are supplemented in the Foreword and Preface with further tidbits and nuggets of personal notes on each. Having been taught by Peter and Sook Yee and been colleagues with all three for a number of years, I still learnt a great deal about each of them through these various chapters. In addition to the biographical chapters (by Associate Professor Dora Neo and Professor Leong Wai Kum of the National University of Singapore and Professor C.L. Lim of the University of Hong Kong), each of the three is further honoured by three substantive chapters on his or her respective pet areas of law. For Peter, this covers the areas of banking and commercial law; for Kheng Lian, criminal law and environmental law; and for Sook Yee, property law and the law of equity and trusts. It will be a lawyer with a very narrow practice, therefore, that does not have anything to learn from this *Festschrift*. That seems unlikely in a small jurisdiction such as Singapore.

Singapore's economy, both historically and presently, is highly dependent on entrepôt trade. Letters of credit, in turn, have been described as "the lifeblood of international commerce" (see *e.g.*, *Themehelp Ltd. v. West* [1996] 1 Q.B. 84 (C.A.) at 106). The first substantive chapter in honour of Peter, "Exemption Clauses and the Issuing Bank's Liability to the Applicant in Documentary Letter of Credit Transactions" by Associate Professor Dora Neo, provides a detailed contractual analysis of two commonly encountered types of exemption clauses used in letter of credit transactions: first, clauses that exclude the issuing bank's liability for the default of its correspondent banks and secondly, clauses that allow the issuing bank to pay on the letter of credit even when non-conforming documents are presented. Focusing on the former for the purposes of this review, she concludes that such clauses are of limited effect. They may provide limited protection to issuing banks from claims by applicants for losses but they will not allow an issuing bank to seek reimbursement from the applicant. They are also unlikely to withstand judicial scrutiny pursuant to the *Unfair Contract Terms Act* (Cap. 396, 1994 Rev. Ed. Sing.) where the issuing bank has itself been negligent. Indeed, she suggests that such clauses may fail scrutiny even where the issuing bank is itself is "innocent" as the courts are likely to abhor the legal result that will follow, which is in effect a legal "black hole" of liability. The correspondent bank, if negligent, may be liable to the issuing bank but will not be so liable to the applicant in contract for lack of privity. If regarded as effective, the issuing bank will not itself be liable to the applicant and hence will have no incentive to sue the correspondent bank (indeed, it might arguably have suffered no loss). She concludes that issuing banks who wish to bolster the chances that their exemption clauses will pass muster should take advantage of the recent relaxation of the privity rule via the *Contracts (Rights of Third Parties) Act* (Cap. 53B, 2002 Rev. Ed. Sing.) to provide the applicant with a direct right of action against the correspondent bank. It is entirely plausible that a court may sympathise with an applicant who has no

direct cause of action against a negligent correspondent bank and the courts do make an effort to avoid the awkward conclusion that the party who suffers the loss has no claim but the party with the right of action suffers no loss. However, it is doubtful if this is a legitimate consideration in assessing the reasonableness of an exemption clause between applicant and issuing bank. It will admittedly ease the court's decision if the applicant had a direct cause of action against a negligent correspondent bank but it remains to be seen whether a correspondent bank will easily or cheaply be persuaded to undertake such personal liability to an applicant.

The second substantive chapter in honour of Peter, entitled simply "Recharacterisation", is contributed by Professor Richard Hooley of King's College London and Cambridge University on the important subject of recharacterisation, a process by which the courts recharacterise a transaction labelled by the parties as "A" as being substantively something else, "B", instead. It should be mandatory reading for all transactional lawyers given the importance of the subject, which has been given impetus in more recent years in *Agnew v. Commissioner of Inland Revenue* [2001] 2 A.C. 710 (P.C.) and *In re Spectrum Plus Ltd. (in liquidation)* [2005] 2 A.C. 680 (H.L.). Not only are these important cases discussed, the relationship with the doctrine of sham and the process of contractual interpretation is also studied by Professor Hooley.

"Legal Issues in Electronic Security in the Banking and Finance Industries" by Associate Professor Daniel Seng studies the shortcomings in the laws and regulations in regulating the financial sector's embrace of modern technology. The importance of this subject cannot be gainsaid and this chapter sets out clearly and concisely the main issues regulators ought to be concerned with. Although its focus is on the laws and regulations in place in Singapore, it also draws upon developments and legislation from the United States, the European Union, Australia and Hong Kong.

The first substantive chapter in honour of Kheng Lian by Associate Professor Lye Lin Heng is entitled "Capacity Building in Environmental Law". Environmental law is, of course, the latest subject to capture Kheng Lian's attention and passion. As a relatively new area of the law, particularly in Singapore, this chapter will likely prove a valuable historical resource to the early years in the evolution of its study. This in turn is tied inextricably to the establishment of the Asia-Pacific Centre for Environmental Law (APCEL) and to Kheng Lian, who was its first director. It is not often that one gets a snapshot of the first steps taken by the pioneers of a particular area of law towards its development and this chapter does precisely that, easing the efforts in research of others following in Kheng Lian's and the author's footsteps.

The remaining two substantive chapters honouring Kheng Lian focus on the subject of her first love—criminal law. Professor Michael Hor examines the recent amendments to the *Penal Code* (Cap. 224, 2008 Rev. Ed. Sing.) (then merely proposed) whilst Professor Stanley Yeo studies the law of consent under the *Penal Code*. The former, entitled "Changing Criminal Law—Singapore Style", is a fascinating study of the recent reforms of the *Penal Code*. The comments and criticisms are, as is usual for Professor Hor, penetrating without being stinging. In short, a reader comes away with the conclusion that the amendments may be described (with less finesse) as well-intentioned without being as well-thought out as they could have been. To focus on what has proven to be the most controversial of the amendments, or more accurately, omission from amendment—the failure to decriminalise consensual gay

sexual intercourse—it is observed that the Hart-Devlin debate that raged in the United Kingdom as to the role of government in regulating private morals "does not even arise" (at p. 124). The retention of the offence whilst the government declares publicly that it will not enforce it also raises serious questions. Quite apart from whether or not it will bring the law into disrepute, it raises the question as to whether and how far offenders may be able to take refuge in this officially declared policy. There is also no study of the constitutionality of the offence, a telling omission in the light of last year's decision by the Delhi High Court in *Naz Foundation (India) Trust v. Government of N.C.T. of Delhi* (2009) 160 Delhi Law Times 277 on the equivalent provision in the *Indian Penal Code 1860*, No. 45 of 1860.

The latter chapter, "Constructing Consent under the *Penal Code*", elucidates the important concept of consent that is left undefined in the *Penal Code*. Drawing heavily from both Kheng Lian's work as well as that of the framers of the *Indian Penal Code* (Thomas Babington Macaulay, *A Penal Code: Prepared by the Indian Law Commissioners, and Published by Command of the Governor General of India in Council* (London: Pelham Richardson, Cornhill, 1838)), Professor Yeo demonstrates that the concept as it exists in the Code evinces the principle of "individualistic libertarianism" and is thus very different from that which exists under the English common law. The Singaporean courts are accordingly taken to task for applying a foreign concept of consent in relying upon English cases. Perhaps the local criminal law jurisprudence will benefit from its own *United Overseas Bank Ltd. v. Chia Kin Tuck* [2006] 3 S.L.R. 322 (H.C.) at 331, wherein V.K. Rajah J. (as he then was) was highly critical of counsel's "[c]opious and unnecessary references … to English authorities" in the context of land law, given that Singapore's land registration system is derived from Australia and not England. The publication of Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (Singapore: LexisNexis, 2007), briefly mentioned (at p. 186), will likewise go some way towards correcting this reflexive reliance on English authorities.

The final part of the *Festschrift* is dedicated to the maven of Singaporean property law, Sook Yee. The first of the three substantive chapters is by Associate Professor Barry Crown. Taking "A Hard Look at *Bahr v. Nicolay*", he considers that the *in personam* exception to indefeasibility developed in Australasian Torrens jurisprudence was a development of necessity which has exposed the concept of indefeasibility to the risk of "death by a thousand cuts". In the author's view, this same position need not be followed in Singapore, and his view has been vindicated by the controversial Singapore Court of Appeal decision of *United Overseas Bank Ltd. v. Bebe bte Mohammad* [2006] 4 S.L.R. 884 (C.A.) [*Bebe*], a discussion of which has been included at the end of the chapter as an addendum. Much ink has been spilt on the subject and it suffices to mention that it cannot be disputed that the present instability in the concept of the *in personam* exception is undesirable. However, I am of the view that the concept is capable of being rescued from its instability and fits within the statutory framework in a way that is both consistent with the objectives of the drafters of the Torrens legislations and without any undue rigidity that may hinder the resolution of novel situations that may arise (see Kelvin F.K. Low, "The Nature of Torrens Indefeasibility: Understanding the Limits of 'Personal Equities"' (2009) 33 Melbourne U.L. Rev. 205). Nor am I convinced that the exception has clearly been codified in Singapore, though it is conceded that the case is arguable (see Kelvin

F.K. Low, "The Story of 'Personal Equities' in Singapore: Thus Far and Beyond" (2009) 1 Sing. J.L.S. 161). *Bebe* was a poor case to test the limits of the exception as the respondent had to rely on an uncertain and overbroad view of the exception in order to succeed and it is unsurprising that she failed in the result.

In "Choses in Action: Still More Contract Than Property?", Professor Tan Yock Lin ponders the nature of the chose in action, which lies somewhere in the borderlands between property and obligation. He closely studies numerous rules surrounding the assignability of choses in action, such as the rule in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [1998] 1 W.L.R. 896 (H.L.) that a right to rescind cannot be assigned independently of the subject-matter of the right, the general rule derived from *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.* [1994] 1 A.C. 85 (H.L.) that an anti-assignment clause can be effective to prohibit assignment of a chose in action, as well as the rule that burdens cannot be assigned, and concludes that they are hardly as secure as they are commonly assumed to be. It is perhaps unfortunate that in the course of doing so, he fails to distinguish between the numerous confusing uses of the word "property". There is hardly a more poorly defined concept than property in the common law. At times used in contradistinction to obligation (where it may be deduced to be a reference to rights exigible against the world at large in relation to a thing), it is also sometimes used to simply denote rights that are valuable. A law student may be forgiven for being utterly confused by the idea that a chose in action, which is undoubtedly classified as an obligation, is also property if he were not told that there are different classifications at work here. It is even less helpful that assignability is often mistaken as either a sufficient or necessary indicia of property (without defining which definition of property is being used). Choses in action, whilst assignable, clearly do not possess the characteristic of exigibility that is the hallmark of property rights as distinguished from obligations. Likewise, certain tangible things may be subject to legal restrictions on transferability but rights in such things do not as a result cease to be property rights. It is seriously arguable that assignments of choses in action operate much like trusts (see, *e.g.*, Chee Ho Tham, "The Nature of Equitable Assignment and Anti-Assignment Clauses" in Jason W. Neyers, Richard Bronaugh & Stephen G.A. Pitel, eds., *Exploring Contract Law* (US and Canada: Hart Publishing, 2009) at 283) and are more properly regarded as dealings in rights to rights rather than property rights (property) or obligations (contract) (for greater detail of which, see Ben McFarlane, "Equity, Obligations and Third Parties" (2008) 2 Sing. J.L.S. 308). The insistence on employing the traditional twofold classification of rights forces us to try to fit the square peg of an assignment of a chose in action into the round holes of either property or obligations. Viewed thus, the rules surrounding assignability are more comprehensible. For example, the restriction on assignments of rights of rescission becomes less an issue of champerty or an application of the *numerus clausus* principle but more the simple recognition that a right to a right cannot logically be created independently of the subject-matter right.

The final substantive paper, "Reflections on Teaching Equity and Trusts", by Associate Professor Tang Hang Wu, is a fascinating study in motivating students. It should be required reading for all new law teachers, not least because the author is both well-regarded *and* popular as a teacher, a relatively rare confluence. Certain subjects are traditionally poorly regarded by students because they are complex, are

littered with counter-intuitive rules and/or deal with situations that are unfamiliar and alien to them. Students can intuitively grasp the idea that people should keep their promises (contract) or compensate for harm they carelessly inflict on others (tort). They have far greater difficulty grasping concepts such as the relativity of title, the nature of equitable interests or the rule against perpetuities. We normally like that which we are good at and are good at what we like, and it is difficult to be good at something that is difficult to comprehend and which we find alien. This leads to a downward spiral that starts from difficulty in comprehension to dislike of the subject, to even more confusion, to hatred, and eventually to despair. By this point, even the instructor begins to partake in the gloom. As the paper demonstrates, contrary to an increasingly popular if somewhat misguided notion, the solution is to teach the students *more*, by going beyond a simple study of the rules themselves into a study of their objectives. Complex rules cannot be simplified for ease of consumption without distortion, nor should they be; but a consideration of their aims and objectives often makes the bitter pill easier to swallow. Students tend to be more willing to learn difficult and complex rules if they understand the point in doing so.

Lives in the Law contains something for everyone. Former students and colleagues of Peter, Kheng Lian and Sook Yee will find their biographies fascinating and perhaps even nostalgic. It is difficult to imagine a Singaporean lawyer whose practice is insulated from the insight to be gained from a chapter (or two) of the *Festschrift*, given the range of topics from banking law and criminal law to environmental law and property law. Foreign lawyers and academics will likewise find much to ponder over in the diverse chapters as few chapters (if any) are uniquely Singaporean. *Lives in the Law* is worthy of the academics it seeks to honour and that is no mean feat. The editors are to be heartily congratulated.

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