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THE 1994 PRACTICE STATEMENT AND TWENTY YEARS ON

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The power of the Court of Appeal to overrule or depart from one of its previous decisions is well known to lawyers in Singapore. A survey of the jurisprudence shows that this power has, in the two decades since the *Practice Statement (Judicial Precedent)* was handed down, been exercised both usefully and appropriately. It confirms what many have suspected for a while now: the Court of Appeal has truly come into its own as arguably the leading exponent of the common law in Asia, with its judges possessing practical and scholarly expertise in equal measure.

I. INTRODUCTION

On July 11, 1994, the following memorable words were uttered in Singapore:

> [I]t is proper that the Court of Appeal should not hold itself bound by any previous decisions of its own or of the Privy Council, which by the rules of precedent prevailing prior to 8 April 1994 were binding on it, in any case where adherence to such prior decisions would cause injustice in a particular case or constrain the development of the law in conformity with the circumstances of Singapore.[1]

By the *1994 Practice Statement*,[2] the Court of Appeal indicated that it would henceforth depart from its prior decisions whenever it appeared right to do so. This power, the court added, would only be exercised sparingly, bearing in mind the danger of retrospectively disturbing contractual, proprietary and other legal rights. In the next two decades the Court of Appeal would act true to its word. It would overrule its previous decisions it thought had been wrongly made. Those cases which stood for an outmoded and anachronistic law were similarly departed from. Every such instance was highly exciting but they happened relatively infrequently, which made the wait for the next all the more suspenseful. With 20 years of jurisprudence under its belt—jurisprudence which has, to many observers, made the Court of Appeal the leading exponent of the common law in Asia—it is an opportune moment to take stock of the operation of the *1994 Practice Statement* and to evaluate its contribution to a refined and influential body of case law.

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1 *Practice Statement (Judicial Precedent)* [1994] 2 SLR 689 (CA) [*1994 Practice Statement*].

2 *Ibid*.

II. The Early Years

The Court of Appeal was bound by its decisions in civil cases immediately prior to the *1994 Practice Statement*, with three exceptions: it could decide which of two conflicting decisions to follow; it could choose not to follow a decision given *per incuriam*; and it could not follow a decision which, although not expressly overruled, could not stand with a decision of the Privy Council on appeal from Singapore.[3] Where criminal cases were concerned, a full Court of Appeal could reconsider an earlier decision if it thought that the law had been misapplied or misunderstood and as a result a person was wrongly sentenced for an offence.[4] So, for example, in 1993 the court in *Chin Seow Noi v Public Prosecutor*[5] declined to follow *Ramachandran a/l Suppiah v Public Prosecutor*,[6] a decision handed down just four months earlier, on the basis that full arguments had not been presented in the prior case on the proper interpretation of s 30 of the *Evidence Act*.[7] Interestingly, the correctness of the holding freshly laid down in *Chin Seow Noi*,[8] that an accused person could be convicted solely on the basis of his co-accused's confession, was itself doubted some years later in *Lee Chez Kee v Public Prosecutor*.[9] One begins to see already the ambulatory (and therefore elementally uncertain) nature of judge-made law.

The *1994 Practice Statement* was introduced shortly after the abolition of all appeals to the Privy Council,[10] and its use was tested almost immediately in several major (but unrelated) criminal cases. In *Public Prosecutor v Tan Meng Khin*,[11] a five-judge[12] Court of Appeal held, *inter alia*, that the phrase "imprisonment for a term of 6 months or upwards" in s 40(3) of the *Penal Code*[13] referred to any offence punishable with a maximum term of imprisonment of six months or more, rather than to offences which had a mandatory minimum sentence of imprisonment of six months or more. In the process the Court of Appeal overruled its earlier judgment in *Public Prosecutor v Fo Son Hing*.[14] *Fo Son Hing* was, of course, a split decision, with L P Thean JA and Goh Joon Seng J in the majority and Yong Pung How CJ dissenting. It was therefore noteworthy that both Thean JA and Goh J assented to the judgment in *Tan Meng Khin* overruling *Fo Son Hing*. Many more authorities were

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3 *Mah Kah Yew v Public Prosecutor* [1968-1970] SLR(R) 851 at paras 10, 12, 13 (HC).

4 *Ibid* at para 14; see also, in England, *Director of Public Prosecutions v Merriman* [1973] AC 584 at 605 (HL); *R v Chard* [1984] AC 279 at 290 (HL); *R v Kelly (No 2)* [2002] 1 Cr App Rep (S) 85 at para 27 (CA); *Grant v Director of Public Prosecutions* [2003] EWHC 130 (Admin) at para 39.

5 [1993] 3 SLR(R) 566 (CCA) [*Chin Seow Noi*].

6 [1993] 2 SLR(R) 392 (CCA).

7 Cap 97, 1990 Rev Ed Sing [*1990 Evidence Act*]. Section 30 of the *1990 Evidence Act* would later be repealed and reproduced as s 258(5) of the *Criminal Procedure Code* (Cap 68, 2012 Rev Ed Sing).

8 *Chin Seow Noi*, *supra* note 5 at para 84.

9 [2008] 3 SLR(R) 447 at para 113 (CA) [*Lee Chez Kee*].

10 Appeals to the Privy Council were officially discontinued on 8 April 1994. See *Judicial Committee (Repeal) Act 1994* (No 2 of 1994, Sing).

11 [1995] 2 SLR(R) 420 (CA) [*Tan Meng Khin*].

12 This was apparently only the second time the Court of Appeal had sat in a quintet; the first occurrence was in *Mok Swee Kok v Public Prosecutor* [1994] 3 SLR(R) 134 (CA). More recently, the Court of Appeal also convened five strong in *Muhammad Ridzuan bin Md Ali v Public Prosecutor* [2014] 3 SLR 721 (CA).

13 Cap 224, 1985 Rev Ed Sing.

14 [1994] 2 SLR(R) 646 (CA) [*Fo Son Hing*].

cited in the former case, which might well have swung the pendulum a certain way. Lawyers will know this already. It is much more reassuring for an appellate court to move off a tracked path where aid in the form of a guiding light is lent by a parallel jurisdiction. One hopes always to marshal logic *and* experience in support.

Hard on the heels of *Tan Meng Khin* came *Public Prosecutor v Manogaran s/o R Ramu*.[15] This time the issue was whether a "cannabis mixture" within the meaning of s 2 of the *Misuse of Drugs Act*[16] was limited to mixtures of two or more separate vegetable matters, or whether it also included mixtures of pure cannabis vegetable matter. The Court of Appeal had earlier held in *Abdul Raman bin Yusof v Public Prosecutor*[17] that it was the former. In *Manogaran* the court revisited the discussion and decided that mixtures of pure cannabis vegetable matter were included too. *Abdul Raman* was therefore overruled.[18] Of some unease was the fact that a span of only three months separated the two decisions. With evident concern for maintaining a balance between certainty and fairness, the court said that it recognised "the importance of ensuring certainty and coherence in the law. Against this, the potential injustice which may be caused by continued adherence to a mistaken decision has to be weighed."[19] This is entirely in keeping with the natural and self-refining method of the common law. Incorrect decisions have to be corrected, which is a primary purpose of the *1994 Practice Statement*. All the same, and without taking too much liberty with the notion, public confidence in the administration of justice requires that the law be settled more often right than wrong, and especially so in the sphere of criminal justice. Innocent missteps in the development of the law start taking on consequences far greater than their individual faults when they begin to happen too frequently. With the Singapore experience having been one of extreme accuracy in decision making, it behoves each and every advocate to provide their utmost assistance in their cases before the Court of Appeal to keep those standards first-rate.

The next significant criminal case in which the Court of Appeal departed from a previous decision was *Abdul Nasir bin Amer Hamsah v Public Prosecutor*.[20] Up until this case it had been the practice to equate a sentence of life imprisonment with 20 years' imprisonment, with the possibility of remission. This was followed by the Prisons Department and had in fact been recognised previously in *Neo Man Lee v Public Prosecutor*.[21] But the Court of Appeal in *Abdul Nasir* discovered the practice to be without legal basis. Life imprisonment should mean imprisonment for the remainder of a prisoner's natural life.[22] This *cause célèbre* showed yet again that the court was willing to move away from an existing interpretation of the law if that interpretation was flawed and unsupportable. No doubt the Court of Appeal will state clearly when a practice or rule is overruled to avoid subsequent issues of

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[15] [1996] 3 SLR(R) 390 (CA) [*Manogaran*].
[16] Cap 185, 1985 Rev Ed Sing.
[17] [1996] 2 SLR(R) 538 at para 32 (CA) [*Abdul Raman*].
[18] *Manogaran*, *supra* note 15 at para 50.
[19] *Ibid* at para 36.
[20] [1997] 2 SLR(R) 842 (CA) [*Abdul Nasir*].
[21] [1991] 1 SLR(R) 918 at para 9 (CCA).
[22] *Abdul Nasir*, *supra* note 20 at para 42.

application,[23] and the *1994 Practice Statement* can usefully be harnessed to that end, as V K Rajah JA stated eloquently in a later case:

> In my opinion, the courts should never shy away from re-examining the interpretation of any statutory provision (or any principle of common law) if it is found that the existing interpretation is not satisfactory or is plainly wrong. The fact that the existing interpretation has been around for a long time does not preclude the courts from re-examining such interpretation, if the doctrine of *stare decisis* is not offended. This court, which stands at the apex of the judicial system in Singapore (and is hence spared from the constraints of *stare decisis*: see [the *1994 Practice Statement*]) is constitutionally charged with the responsibility of departing from any existing interpretation if such interpretation no longer assumes the currency of accuracy or correctness.[24]

III. Innovation and Versatility

It soon became clear in the new millennium that the correction of wayward statements of the law was not all that the *1994 Practice Statement* stood for. Nowhere was its developmental facility exhibited more vividly than in *Xpress Print Pte Ltd v Monocrafts Pte Ltd*.[25] This well-known case concerned an owner's right to support of his land from an adjoining piece of land. For many years, lawyers had cited a dated House of Lords authority, *Dalton v Angus & Co*,[26] for the proposition that the right to support only extended to land in its natural state, and *not* to buildings or things artificially constructed thereon. Such was the law followed and applied by the Court of Appeal of the Straits Settlements in *Lee Quee Siew v Lim Hock Siew*,[27] but in a striking and intuitive move the court in *Xpress Print* overruled that decision, holding instead that a landowner's right to support by neighbouring lands extended to his buildings from the time such buildings were erected.[28] The judges were alive to the modern realities of society: with Singapore's high-intensity land use pattern, the damage from lackadaisical excavation works could be astronomical, not to mention the cost in human lives or injury to property. Even now it is all too easy to forget that the common law in its glacial development seldom sees such an avalanche of change. Plaudits were rightly given and received, and the Court of Appeal had moved into legal developmental mode, taking its place in the select circle of courts which were not just authoritative but truly influential.

Further confirmatory evidence of this impressive step-up was provided by the decision in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*,[29] which will surely be cited in glowing terms for many more years. The Court of

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[23] A clarificatory ruling may be sought, as indicated in *Muhammad bin Kadar v Public Prosecutor* [2011] 4 SLR 791 at para 7 (CA), but many will have come to expect the court's high standards to preclude such a need in all but the most extraordinary of cases.

[24] *Lee Chez Kee*, *supra* note 9 at para 122.

[25] [2000] 2 SLR(R) 614 (CA) [*Xpress Print*].

[26] (1881) 6 App Cas 740 (HL).

[27] (1895-6) 3 SSLR 80 at 90 (CA).

[28] *Xpress Print*, *supra* note 25 at para 50.

[29] [2007] 4 SLR(R) 100 (CA) [*Spandeck*].

Appeal there examined in comprehensive and erudite fashion the judicial and academic opinion on the test for determining a duty of care in negligence. In the result a fresh standard was enunciated: a single two-stage test comprising, first, proximity, and second, policy considerations, preceded by a question of factual foreseeability, to determine the existence of a duty of care regardless of the nature of the damage caused. With the intention being to streamline and reboot the law, earlier Court of Appeal authorities on negligence prior to *Spandeck* must now be read subject to, and in the light of, the latter decision.

The expertise of the Court of Appeal was no longer in question, and it would demonstrate a natural agility in *Ho Soo Fong v Standard Chartered Bank*[30] in discarding a much-criticised rule of causation. There was once a principle that losses stemming from a claimant's own impecuniosity were irrecoverable since they had not been caused by the tortfeasor. Despite the heavy shelling it took (for this was inconsistent with the rule that a tortfeasor took the victim as he found him, as well as the modern causative standard of reasonable foreseeability) the principle had been accepted in *Khushvinder Singh Chopra v Mookka Pillai Rajagopal*.[31] In *Ho Soo Fong* the Court of Appeal held that this was wrong. The much-maligned principle had been abandoned in England and it should be abandoned in Singapore as well. *Khushvinder Singh* was overruled.[32]

The Court of Appeal showed itself equally adept at more quotidian topics such as civil procedure. In *Tan Boon Hai v Lee Ah Fong*,[33] a case on taxation of costs, the court concluded that a registrar's decision on taxation under O 59 r 36 of the *Rules of Court*[34] had to be reviewed on a *de novo* standard, and that the reviewing judge would be unfettered by the exercise of the registrar's discretion in determining the quantum of any item in the bill under review. In so concluding it was necessary to overrule two of the court's previous decisions.[35] Then, in *Keppel Singmarine Dockyard Pte Ltd v Ng Chan Teng*,[36] the Court of Appeal reconsidered the rule laid down in *Ricky Charles s/o Gabriel Thanabalan v Chua Boon Yeow*[37] that an assessment of damages could not be transferred from the District Court to the High Court once interlocutory judgment had been entered in the former court. Following a reasoned discussion it was held in *Keppel Singmarine* that this *could* be done, if sufficient reason was shown and no irretrievable prejudice caused to the defendant. So far as *Ricky Charles* stated to the contrary it was no longer to be followed.[38] Finally, the Court of Appeal in *Mercurine Pte Ltd v Canberra Development Pte Ltd*[39] had to consider the test for setting aside a regular default judgment. It ultimately decided that the inquiry was whether a defendant could "establish a *prima facie* defence in the sense of showing

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[30] [2007] 2 SLR(R) 181 (CA) [*Ho Soo Fong*].
[31] [1999] 1 SLR(R) 130 at para 20 (CA) [*Khushvinder Singh*].
[32] *Ho Soo Fong*, *supra* note 30 at para 65.
[33] [2001] 3 SLR(R) 693 (CA).
[34] Cap 322, R 5, 1997 Rev Ed Sing.
[35] The disapproved cases were *Diversey (Far East) Pte Ltd v Chai Chung Ching Chester* [1992] 3 SLR(R) 420 (CA) and *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 3 SLR(R) 622 (CA).
[36] [2008] 2 SLR(R) 839 (CA) [*Keppel Singmarine*].
[37] [2003] 1 SLR(R) 511 at para 16 (CA) [*Ricky Charles*].
[38] *Keppel Singmarine*, *supra* note 36 at para 34.
[39] [2008] 4 SLR(R) 907 (CA).

that there [were] triable or arguable issues",[40] and *not* whether the defence had a real prospect of success.[41] This meant that yet another of the court's earlier decisions had to go, with *Abdul Gaffer bin Fathil v Chua Kwang Yong*[42] the latest to be declared unsound law.

IV. Difficult Questions Revisited

The later years in the period studied have seen the Court of Appeal grapple with some difficult issues. One of these has been the correct interpretation of s 34 of the *Penal Code*,[43] a provision that reads deceptively well: "When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone."

For decades, debate had surrounded the precise *mens rea* needed to attract liability under s 34. The oft-used hypothetical envisioned two robbers setting out to mug a person (the primary criminal act), with one of the robbers then killing the person in the course of the robbery (this being the collateral criminal act). The latter would naturally face a straightforward charge of murder, but what of the other robber who had *not* committed the fatal deed? When would s 34 operate to ascribe constructive liability for the murderous act of his accomplice? In *R v Vincent Banka*,[44] the Court of Criminal Appeal of the Straits Settlements held that for a person to be liable under s 34 for the criminal act of another, there needed to exist a common intention between them to commit *that* particular criminal act. This meant, in the scenario above, that the robber harbouring only an intention to rob (and not to kill) could not be found constructively liable under s 34 for the murder committed by the other robber.

Then, in 2008, a marked departure from this interpretation was confirmed by the Court of Appeal in *Lee Chez Kee*.[45] Drawing in part on an investigation into the historical underpinnings of the Indian equivalent of s 34, it concluded that the requisite *mens rea* was *not* the common intention to commit the collateral criminal act, but rather a subjective knowledge that the other person might be likely to commit the collateral criminal act in furtherance of the common intention of carrying out the primary criminal act.[46] Returning to our *scène de crime*, therefore, if the robber had known that his partner was prepared to use a loaded gun to violently subdue a struggling victim, he might well be constructively liable for the ensuing homicide.

Lee Chez Kee did not prove to be the last word, however, for the Court of Appeal faced the same issue again just two years later in *Daniel Vijay s/o Katherasan v Public Prosecutor*.[47] Re-examining the authorities, it was of the opinion that a wrong turning in the law had been occasioned by a misreading of a crucial decision in 1972. Properly viewed, *Wong Mimi v Public Prosecutor*[48] had never set out to depart from the law expressed in *Vincent Banka*, such that the correct statement of the requisite

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[40] *Ibid* at para 60.
[41] *Ibid* at para 59.
[42] [1994] 3 SLR(R) 1056 (CA).
[43] Cap 224, 2008 Rev Ed Sing [*2008 Penal Code*].
[44] [1936] 1 MLJ 53 (CCA) [*Vincent Banka*].
[45] *Lee Chez Kee*, *supra* note 9.
[46] *Ibid* at para 253(d). The analysis of V K Rajah JA on this point was concurred in by the other judges.
[47] [2010] 4 SLR 1119 (CA) [*Daniel Vijay*].
[48] [1971-1973] SLR(R) 412 (CCA).

mens rea was, and remained, a common intention to commit the collateral criminal act.[49] So the position seems tolerably settled for now, but some questions linger. *Daniel Vijay* did not squarely address the cogent historical analysis made in *Lee Chez Kee*, which suggested that s 34 at its birth was intended to encapsulate the English position at the time, and while normative arguments were raised and considered carefully in both cases, *Lee Chez Kee* does appear to represent a more contemporary approach. Readers will know that the principal policy argument harnessed in support in *Daniel Vijay* centred on the desirable alignment of the legislative policy underlying s 34 with that of s 396 of the *Penal Code*,[50] which penalises gang-robbery with murder.[51] Legislative consistency and omnipotence (even between the first and last sections of a single Act) is not, however, always to be automatically assumed, perhaps all the more so where a distinguished but admittedly geriatric statute is concerned. To be fair, the latent ambiguity in s 34 might be argued to require acceptance of the interpretation more favourable to an accused person—that is, the *Daniel Vijay* formulation—but that will have to be for a future court to decide.

Important questions of jurisdiction and judicial power have also arisen in the Court of Appeal in recent years. Advocates and solicitors will note with particular interest the case of *Law Society of Singapore v Top Ten Entertainment Pte Ltd*,[52] which concerned the appealability of a High Court judge's orders made under ss 95, 96 or 97 of the *Legal Profession Act*.[53] Holding that any such orders would have been made in the exercise of the judge's disciplinary (and not civil) jurisdiction, the court stated that there could be no right of appeal in the absence of any express provision in the written law.[54] Firm disapproval was registered of the decisions in *Hilborne v Law Society of Singapore*[55] and *Wong Juan Swee v Law Society of Singapore*,[56] both of which had arrived at the opposite conclusion. Another significant case touching on judicial power was *Re Nalpon Zero Geraldo Mario*,[57] where the meaning of inherent jurisdiction was discussed. Earlier decisions, including those of the Court of Appeal, had incorrectly used the phrase "inherent jurisdiction" when in fact they were referring to the exercise of an inherent power. For conceptual clarity, therefore, the Court of Appeal suggested that it might in future be preferable to refer to an exercise of the right to regulate matters properly before a court as the exercise of the court's inherent *powers*, rather than of its inherent jurisdiction.[58]

In line with this zeitgeist of welcome clarification, the Court of Appeal followed up on *Spandeck*[59] with *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd*.[60] All the judges were agreed that the law on occupiers' liability was henceforth to be subsumed under the general law of negligence, and the (by now) familiar *1994 Practice*

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[49] *Daniel Vijay*, *supra* note 47 at para 143.
[50] *2008 Penal Code*, *supra* note 43.
[51] See *Daniel Vijay*, *supra* note 47 at paras 179-184.
[52] [2011] 2 SLR 1279 (CA) [*Top Ten Entertainment*].
[53] Cap 161, 2001 Rev Ed Sing.
[54] *Top Ten Entertainment*, *supra* note 52 at paras 45, 49, 58.
[55] [1977-1978] SLR(R) 342 (PC).
[56] [1994] 3 SLR(R) 619 (CA).
[57] [2013] 3 SLR 258 (CA).
[58] *Ibid* at para 41.
[59] *Spandeck*, *supra* note 29.
[60] [2013] 3 SLR 284 (CA).

Statement was recited alongside a declaration that all prior Singapore authorities relying on the traditional common law rules on occupiers' liability were no longer to be followed.[61] By this decision the law was propelled a significant notch forward, away from a thicket of principles which did not always sit consistently with each other. The favourable reception accorded to the case does justice to what will surely be a lasting and well-cited contribution.

There was also an important decision by the Court of Appeal on costs. *Maryani Sadeli v Arjun Permanand Samtani*[62] contained a confident and informed exposition on the policy of ensuring access to justice, rightly stating as one concomitant result that successful litigants would almost always be unable to fully recover their legal costs. The court therefore held that unrecovered legal costs of previous legal proceedings could not generally be recovered in a subsequent claim for damages even where the defendant in the later proceedings was not a party to the earlier proceedings. Statements suggesting otherwise in an earlier case, *Ganesan Carlose & Partners v Lee Siew Chun*,[63] were doubted. *Maryani Sadeli* is essential reading for all practitioners, who must face these issues daily and explain them sensibly to their clients.

Yet another significant decision was in the area of company law, where the Court of Appeal in *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd*[64] held that a statutory trust was impressed on the assets of a company not upon the presentation of a winding-up application, but only upon the making of a winding-up order.[65] Furthermore, unsecured creditors did *not*, by virtue of the statutory trust, have the necessary standing to avoid unregistered charges over the company's assets.[66] To the extent that an earlier Court of Appeal case, *Ng Wei Teck Michael v Oversea-Chinese Banking Corp Ltd*,[67] had decided otherwise, that was adjudged to be incorrect. Now the issue was not raised in *Sculptor Finance*, but had it been necessary to do so the court would surely have considered whether the device of prospective overruling was to be employed here.[68] Thousands of corporate insolvencies would have been conducted on the basis of the previous decision, and any evidence of an entrenched commercial practice would appear to point powerfully in favour of the prospective application of the law.

Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301[69] is the last case discussed here. It is not a decision in which the *1994 Practice Statement* was directly engaged, but its striking facts do explain why the Court of Appeal was asked to reopen some earlier findings made by two differently constituted Courts of Appeal. Many years ago, the owner of a servient tenement had granted a right of way in favour of four dominant tenements. By the relevant time, Lee Tat and the management corporation of a condominium development ("the MC") had

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[61] *Ibid* at para 100.
[62] [2015] 1 SLR 496 [*Maryani Sadeli*].
[63] [1995] 1 SLR(R) 358 (CA).
[64] [2014] 1 SLR 733 (CA) [*Sculptor Finance*].
[65] *Ibid* at paras 43, 50.
[66] *Ibid* at paras 51-53.
[67] [1998] 1 SLR(R) 778 (CA).
[68] Prospective overruling was recently discussed in Singapore in *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at paras 99-125 (HC).
[69] [2009] 1 SLR(R) 875 (CA) [*Lee Tat (2008)*].

become the owners of two and one of the dominant tenements respectively. They were thus equally entitled to the use of the common right of way. Residents of the condominium began using this right of way to pass to their dominant tenement *and thence to an adjacent piece of land*, which they also collectively owned but was, importantly, *not* one of the original four dominant tenements. The adjacent land was in fact amalgamated with the MC's dominant tenement. In 1992, the Court of Appeal determined that this use was not so excessive as to substantially interfere with Lee Tat's enjoyment of the right of way, and the amalgamation did not therefore extinguish the *MC's* enjoyment to the right of way.[70]

Lee Tat subsequently purchased the servient tenement in 1997 and became its owner. Litigation flared up again in 2004, with one of the key issues being whether Lee Tat could validly object to the residents' use of the right of way to cross over to a non-dominant tenement, *ie* the adjacent piece of land (hereafter known as the "main issue"). A majority of the Court of Appeal in 2005 answered this question in the negative. According to them, the main issue had been decided finally in 1992, meaning that Lee Tat was now estopped under *res judicata* principles from re-opening the same.[71] Chao Hick Tin JA, who dissented, thought that the 1992 Court of Appeal had dealt only with the question of whether the amalgamation had extinguished the MC's right of way, and *not* whether the residents could use the right of way to access the adjacent piece of land.[72]

This was not the end, however, as the matter reached the Court of Appeal again in 2008. In a careful and deliberate judgment, it found that the majority in the 2005 Court of Appeal had been wrong to decide as it did on the *res judicata* issue. Amongst other reasons, it was crucial that Lee Tat had litigated the 1992 proceedings solely in its capacity as the owner of a dominant tenement, whereas by the time of the 2004 proceedings it had also become the owner of the *servient* tenement. This change in status should have allowed Lee Tat to validly question the residents' use of the right of way to access the non-dominant tenement. The true position, in fact, was that the main issue had never been previously decided, and the failure of the majority judges in the 2005 Court of Appeal to recognise this was an egregious error that would lead to grave injustice if allowed to form the basis of an estoppel.[73] Such grave injustice constituting an exception to the *res judicata* principle, the 2008 Court of Appeal went on to consider whether the MC had become disentitled in law to its erstwhile enjoyment of the right of way, due either to the residents' use of the same to cross over to the adjacent piece of land or to the amalgamation of the MC's dominant tenement with the adjacent land. The answer on both grounds was yes.[74]

It would not be right to criticise the course the litigation took. As much as certain errors of law did result in some perceptible injustice, an acute sense of judicial propriety was equally evident in the 2008 Court of Appeal's decision to overturn its previous findings. The entire episode must be viewed with a recognition that the

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[70] *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [1992] 3 SLR(R) 1 at paras 19-24 (CA).

[71] *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157 at paras 14-16 (CA).

[72] *Ibid* at para 74.

[73] See *Lee Tat (2008)*, *supra* note 69 at paras 55, 73, 81.

[74] *Ibid* at paras 92, 93.

public interest in finality of litigation always has to be balanced against the immediate justice of the case. Here it was an egregious error leading to a grave injustice which required the reversal of an earlier decision, but other grounds obviously exist, such as fraud or a breach of natural justice.[75] It is, admittedly, often difficult to predict with useful specificity when a court will reverse a finding it has made earlier in the same or related proceedings. As much as broad principles of fairness and justice are universal and encompassing of a common, abstract awareness, equally the subjective views of individual persons (including even those belonging to the same class) will legitimately differ in focus and emphasis. It should not be surprising that real disagreement will exist amongst senior judges on issues such as these.

Perhaps the end of this thrilling litigation ought to be briefly recounted. After the Court of Appeal handed down its 2008 decision, the MC applied to set it aside for breach of natural justice.[76] It said that it had not been afforded an opportunity to be heard on the abovementioned exception to the *res judicata* principle. In its final take on the matter, the Court of Appeal held in 2010 that there would not be any point in setting aside that part of the impugned decision, as the overall outcome would not have been any different.[77] In any case, reasonably looked at, the MC *had* in fact had the opportunity to address the 2008 Court of Appeal on the exception.[78]

V. Concluding Thoughts

Three closing observations may be stated. First, the *1994 Practice Statement* has not always been cited where the Court of Appeal is overruling or departing from one of its previous cases. This may be a testament to how well it has embedded itself within the consciousness of lawyers in Singapore, obviating the need to harp on the written form of a now implicit and accepted legal practice. It is probably a fair assumption that most legal professionals in Singapore today are very much aware that the Court of Appeal is not bound by its own decisions.[79]

What is also notable is how interstitial revisionism[80] and creative panache have both featured at various times in the Court of Appeal, with the power to overrule past decisions usefully employed in each case. And that is the point. In the right

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[75] See *eg*, *Kenny v Trinity College Dublin* [2008] IESC 18; *R v Bow Street Metropolitan Stipendiary Magistrate*, ex parte *Pinochet Ugarte (No 2)* [2000] 1 AC 119 (HL). More recently, see also *Assange v Swedish Prosecution Authority (Nos 1 and 2)* [2012] 2 AC 471 at 569, 570 (SC), where a failed attempt was made to set aside the decision on the ground that there had been a denial of opportunity to address a dispositive point in the court's reasoning.

[76] *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2011] 1 SLR 998 (CA).

[77] *Ibid* at para 67.

[78] *Ibid* at para 85.

[79] The Court of Appeal did state, in the *1994 Practice Statement*, that it would continue to treat its prior decisions as "normally binding". This is somewhat infelicitously phrased; what was probably meant was that the court would normally *follow* such decisions, with the rule being one not of precedent but of *practice*, as Laws LJ explained in a recent lecture. See John Laws, "Our Lady of the Common Law", Lecture to the Incorporated Council of Law Reporting (1 March 2012) at para 4, online: Courts and Tribunals Judiciary of England and Wales <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lj-laws-speech-our-lady-of-common-law.pdf>.

[80] A phrase coined by Sundaresh Menon CJ in "The Somewhat Uncommon Law of Commerce" (2014) 26 Sing Ac LJ 23 at 35.

hands the *1994 Practice Statement* is a wonderful implement in the judicial armoury, but it remains an implement nonetheless. Important as it may be to understand the nature and creation of this self-granted power,[81] it is equally (if not more) vital to ensure that the changes wrought in the law are in fact beneficial to its development, conducive to its clarity, and necessary in the public interest.

Lastly, it would not perhaps be astonishing to see the *1994 Practice Statement* being invoked more frequently as a result of the creation of the Singapore International Commercial Court. With appeals therefrom to be heard by the Court of Appeal, which may be staffed by foreign judges, the development of the law may take on an outlook even more international than it presently is. Indeed, if an overseas jurist is asked to sit on an appeal on a dispute substantively governed by Singapore law, it may be interesting to see the extent to which his unique experiences bear on the disposition of the matter. For there are, as Sundaresh Menon CJ discussed recently, some significant differences between the commercial law of Singapore and that of England and other parts of the Commonwealth.[82] The careful analytical persuasions of a foreign judge, coupled with the opportunity in the Court of Appeal to convince his fellow judges of those persuasions, may result in further refinement of the common law in Singapore and necessitate departures from existing authorities. This should be welcomed. In the words of Rajah JA, who managed to put it so admirably laconically, the law has got to progressively adapt and advance.[83]

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[81] Interested readers may profitably consult Neil Duxbury's summary of the debate in England (surrounding the introduction of the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 in the House of Lords) in *The Nature and Authority of Precedent* (Cambridge: Cambridge University Press, 2008) at 129 ff.

[82] Some of the more notable points of divergence in contract law were discussed by the Chief Justice extra-judicially in "The Somewhat Uncommon Law of Commerce", *supra* note 80.

[83] *Bachoo Mohan Singh v Public Prosecutor* [2010] 4 SLR 137 at para 86 (CA).