Lye Lin Heng's Landlord and Tenant Law in Singapore (2nd ed) BY **LYE** LIN HENG, **KOH** SWEE YEN AND ELAINE **CHEW** [Singapore: LexisNexis, 2020. lvii + 337 pp. Softcover + eBook: S$160.50]

The landscape for Singapore textbooks has seen nothing less than a sea change since Singapore's independence from the British. Especially after the launch of Academy Publishing, the publishing division of the Singapore Academy of Law in 2007, law students and practitioners now enjoy access to a cornucopia of titles ranging from core subjects such as contract and tort to specialist topics such as the subject of this review. The first edition of this text was published in 1990, as the third volume in the second phase of what was known as the Singapore Law Series. The first phase began in 1976 (not 1978 as the Editor's Foreword in the first edition of this text suggests) with three books – S Jayakumar's *Constitutional Law*, Kenneth Wee Kim Seng's *Family Law*, and Koh Kheng Lian's *Criminal Law* – and was intended to provide an introductory survey of the main areas of Singapore law. This phase eventually saw the publication of seven volumes in total before the Singapore Law Series kicked up a gear and expanded its objective towards providing outlines of selected areas of Singapore law. It is arguable that the first two volumes in this second phase – WJM Ricquier's *Land Law* (1984) and Chin Tet Yung's *Evidence* (1988) – still covered core areas of practice, but the textbooks published in this second phase were markedly different from those in the first. The texts in the first phase were plainly embryonic in nature, almost in the nature of teaching accessories rather than the textbooks that today's law students and practitioners would be familiar with. They were pithy, the shortest – Myint Soe's *Banks and Banking* (1978) – was a mere 48 pages, whereas the longest – Jayakumar's *Constitutional Law* (1976) – was only 190 pages because it included documentary materials. The texts published in the second phase were all significantly more substantial and can be considered to have inaugurated the modern Singapore law textbook. Lye Lin Heng's *Landlord and Tenant* (1990) was the third volume in this second phase and unfortunately the last. Unlike its stablemates, its subject matter was unabashedly specialist, albeit one of tremendous importance given the ubiquity of the lease in Singapore law. After all, more than 80% of Singaporeans live in HDB flats, all leasehold. Prior to the publication of this second edition, only one of the three volumes published in this second phase of the Singapore Law Series – Ricquier's *Land Law* – had been blessed with new editions, the industrious and learned author having now gifted Singapore with five editions of his text as of 2017. It is thus with great satisfaction that we welcome the much belated second edition of Professor Lye Lin Heng's pioneering text, with Koh Swee Yen and Elaine Chew joining as co-authors. Although it comes some thirty years after the first edition, and is thus indubitably belated, its timing could not have been more propitious, save perhaps for one small regret. The publishers no doubt must have wished to have been able to list Koh Swee Yen as Senior Counsel (she took silk in 2021) on its cover. Nevertheless, this second edition has come just as leases have hit the spotlight thanks to the Covid-19 pandemic that struck our shores shortly before publication. Despite the government's timely interventions – through, *inter alia*, the Covid-19 (Temporary Measures) Act 2020 (No 14 of 2020, Sing) – many disputes involving leases will likely rear their head in the coming years given that rent is one of the most significant overheads of any business and

many businesses have been through two very difficult years. This new edition will no doubt go some way towards helping resolve many of these disputes – whether through guiding judicial-decision making or by shepherding parties to negotiated or mediated settlements.

Apart from thoroughly updating the text, this second edition has seen some structural changes from the first edition. Part IV of the first edition on Rent Control and De-Control has been removed as rent control laws were abolished almost two decades ago in 2001. In its place is a new Part IV on Special Leases, which sees two brand new chapters – Chapter 11 on Leases from the HDB – Public Housing and Chapter 12 on Green Leases, the latter happily marrying Lye Lin Heng's first love (leases) with her new love (environmental law). Capping off an already impressive contribution is a Supplement on the Covid-19 Pandemic's Impact on Landlord-Tenant Obligations, which deals with the government's interventions between the time Covid-19 arrived on our shores and the book's publication. All the new materials are to be welcomed, particularly the Supplement but it is a shame to see the old chapters on rent control completely excised. This reviewer rather wishes that the old material could have been summarised and reorganised as a chapter on Regulation of the Lease. Perhaps a future edition could salvage some of this old material and address the merits and demerits of statutory regulation in a more general fashion. With the abolition of rent control, Singapore law now does not regulate the leasehold relationship much, a *laissez-faire* state whose desirability is open to debate, especially given the authors' objective "that lawyers and judges will view the lease with a fresh and critical eye, mindful of the urban environment that is Singapore today and freed from medieval shackles." (at vi). A critical comparative eye could be cast across the Commonwealth to consider whether some regulation should be introduced in Singapore, and in what sectors. Indeed, some of the existing material in the Supplement could fit in neatly in such a chapter should the authors see fit to include one in the next edition. After all, many of the interventions seek to protect tenants by limiting landlords' rights – albeit temporarily. This would very much fit the authors' progressive attitude towards the leasehold relationship.

Instead, the authors have very much limited their attention to particular possibilities of legal reform in specific sections of their text. In some instances, these possibilities are laid out without any clear expression of which path the authors thought best suited Singapore's local conditions. Consider, for example, a major progressive theme of the text – the contractualisation of the lease, *ie* the application of contractual principles to leases on the premise that leases are *both* estates *and* contracts. As the authors rightly observe (at p 117), the presumption that leasehold covenants are independent is inconsistent and entirely opposite to the general presumption in contract law that obligations are interdependent. In other words, in any contract other than a lease, a breach of obligation X by party A will generally excuse party B from non-performance of obligation Y. The authors consider a range of reforms across the common law world but eventually conclude that "[a]s the law now stands in Singapore, … it would not be wise for a tenant to withhold rent or service charges where his landlord has not complied with his covenants, particularly a covenant to repair." (at p 118). It appears implicit that the authors consider the current state of the law to be unsatisfactory but there is no explicit indication of how they consider the law should develop. It is not clear, for example, whether they consider that it is

open to the Singapore courts to reverse this longstanding presumption, if necessary, prospectively as is open to them. Alternatively, or cumulatively, if statutory reform is to be preferred, which among the range of options laid out do the authors consider best suit Singapore?

The contractualisation – or to be more precise, recontractualisation since the lease originated in contract – of the lease is a consistent theme in numerous chapters throughout the text. This is unsurprising. It was a feature of the first edition and a very successful one indeed. As the lead author remarked in her Preface (at vi), her call to contractualisation was heeded by Warren Khoo J in *Tan Soo Leng David v Lim Thian Chye Charles* [1998] 2 SLR 923. This central thesis of the text bears setting out in some detail. As the text explains (at p 5):

> A clear distinction can be drawn between persons who *purchase* leasehold interests (such as purchasers of flats built by the Housing and Development Board ('HDB'), who are given 99-year leases) and those who *lease* premises for various terms. In the former, the primary consideration is a substantial lump-sum payment (the purchase price), with rent only as a nominal sum to be paid periodically (usually annually). Concepts of real property law (such as the passing of risk to the purchaser upon the signing of the contract for sale) should and must dominate [in cases of the former] since its essence is the purchase of real property. This is very different from the typical landlord and tenant relationship [epitomised in cases of the latter] where rent is the primary consideration and the rights and obligations of the parties are usually spelt out in considerable detail in the tenancy agreement or lease.

In her Preface to this second edition, we learn that this approach is greatly inspired by American influences from her research at Harvard Law School. There is perhaps much to be said for casting our sights beyond Commonwealth cases, especially the English ones that are a fixture of our case law, yet one cannot help but caution against reliance on an American jurisprudence that is deeply affected by legal realism: the emphasis of policy in legal realism marks the concomitant retreat of doctrine, arguably unnecessarily politicising the judicial process, vividly demonstrated by recent controversies in the appointments of United States Supreme Court Justices. More recent American scholarship suggests that even Americans consider that some rethinking of realism is in order: Henry E Smith, "Property as the Law of Things" (2012) 125 Harv. L. Rev. at p 1691.

It is also unfortunate that although Aedit Abdullah's case comment on *Tan Soo Leng David v Lim Thian Chye Charles* [1998] 2 SLR 923 is cited, there is no attempt to address his criticism of this approach. As the learned author (now judge) explained, the proposed approach "creates too much uncertainty: extreme cases are easily disposed of, but intermediate ones are not. Uncertainty would not be welcome by someone who needs to know whether a lease and contract can be terminated. It is submitted that no distinction should exist between different types of leases." ("Repudiation of Leases" [1998] Sing. J.L.S. 438 at p 444). There are also other problems with contractualisation that this reviewer has previously pointed out: see Kelvin F.K. Low, "Leases and the fixed maximum duration rule yet again, but with a twist" (2011) 127 L.Q.R. 31 at p 34:

> Whereas it is undoubted that the *contractual* aspect of a lease may be frustrated or terminated following a repudiatory breach, the effect of frustration or repudiatory breach on the leasehold *estate* is far less obvious. Neither frustration nor the acceptance of a repudiatory breach has the usual effect of divesting vested property rights either at common law or in equity. It is not apparent why it should be different where the contract *is* a lease. Nor has it been clarified whether such contractual doctrines can be applied to cases where there exists only privity of estate between landlord and tenant – presumably it cannot.

A realist judge in America may not be concerned with such niceties but the Singapore courts still primarily reason in doctrinal terms. Accordingly, some attempt is surely needed to explain why contractual doctrines appear to operate differently in the context of leases than it does in cases of other contracts. The authors may also wish to refer to the debate between Lord Millett (against contractualisation) and Sir David Neuberger (as his Lordship then was) (for contractualisation) in the 25th Blundell Lectures in 2000, available at https://www.falcon-chambers.com/images/uploads/news/BLUNDELL_Repudiation_of_Leases-Debate%28002%29b.pdf. Reliance (at pp 4-5) has also been placed on the difficult case of *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406, in which Lord Hoffmann appears to recognise a purely contractual lease in the context of a tenancy by estoppel. However, Amy Goymour has convincingly explained how this contractual lease has, like all other leases, aspects of an estate as well once it is viewed through the lens of relativity of title: see "*Bruton v London & Quadrant Housing Trust*: Relativity of title, and the regulation of the 'proprietary underworld'" in Simon Douglas, Robin Hickey and Emma Waring (eds), *Landmark Cases in Property Law* (Hart Publishing, 2015) at p 151.

The practical effects of contractualisation also justify a more cautionary approach. Although theoretically egalitarian (repudiatory breach is available both to tenants and landlords) or perhaps even favouring proletariat tenants (it is difficult to envisage how frustration could possibly operate in favour of landlords), practical reality demonstrates that contractualisation has overwhelmingly operated in favour of capitalist landlords. Until very recently, when it appears that Lai Siu Chiu SJ recognised that a lease was frustrated owing to a once-in-a-century pandemic in *Dathena Science Pte Ltd v Justco (Singapore) Pte Ltd* [2021] SGHC 219, there was not a single successful plea of frustration across the Commonwealth despite the House of Lords acknowledging the possibility of frustration as long ago as in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675. Lai Siu Chiu SJ's reasoning in respect of frustration is bizarre and out of step with other Commonwealth decisions: apparently a mere four months delay in physically handing over the premises sufficed to frustrate a two-year lease (at [183]-[188]). The landlord's attempts to negotiate an alternative arrangement to supersede the original lease (essentially a surrender and a new grant of different premises) when the delay triggered a dispute with the tenant was held by her Honour to symbolise evidence of the landlord's own recognition of the lease's frustration (at [187]-[188]), adding to a series of cases that run counter to the courts' avowed proclamations to encourage alternate dispute resolution: *cf. EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2012] 1 SLR 32. If failed attempts at negotiating a settlement when a dispute arises are to be held against

certain parties – whether landlords or purchasers – with respect to their legal rights or remedies, perhaps lawyers need to advise their clients to be careful of initiating or engaging in such negotiations? This singular (and curious) decision must also be weighed in balance against cases elsewhere. The narrowness of frustration is such that some tenants in England do not even bother to plead it despite the severity of the pandemic: see *London Trocadero (2015) LLP v Picturehouse Cinemas Ltd* [2021] EWHC 2591 (Ch). In Hong Kong, despite most commercial and residential leases being very short, all pleas of frustration of leases both in this current pandemic and during SARS in 2003 have failed at the date of writing: see *eg*, *The Center (76) Ltd v Victory Serviced Office (HK) Ltd* [2020] HKCFI 2881; *Sunbroad Holdings Ltd v A80 Paris HK Ltd* [2021] HKCFI 1422; *Holdwin Ltd v Prince Jewellery and Watch Co Ltd* [2021] HKCFI 2735. There is also a very real practical constraint to pleading frustration. When the Covid-19 pandemic first struck, few expected it to last as long as it has. Pleading frustration at that point would have been foolhardy at best. But a successful plea two years on provides little comfort to a tenant considering the damage that would have been wrought to a tenant's business barring state intervention imposing a moratorium on landlords' rights – there was no such intervention in Hong Kong, unlike Singapore and England. Relief following frustration, it must be recalled, is restitutionary in nature, not compensatory.

Although the concept of repudiatory breach has been successfully invoked once by a tenant (*Hussein v Mehlman* [1992] 2 EGLR 87), most cases of repudiatory breach see the landlord taking advantage of the concept to obtain superior remedies in a falling market than permitted under the supposedly archaic land law rules. This is true of the Canadian (*Highway Properties Ltd v Kelly, Douglas & Co Ltd* (1971) 17 DLR (3d) 710) and Australian (*Progressive Mailing House Property Ltd v Tabali Property Ltd* (1985) 57 ALR 609) originators of contractualisation and likewise true of Singapore's leading case in favour of contractualisation, *Tan Soo Leng David v Lim Thian Chye Charles* [1998] 2 SLR 923. *Hussein v Mehlman* [1992] 2 EGLR 87 was a case involving egregious conduct on the part of the landlord. In most other cases, repudiatory breach appears unavailable to the tenant: *cf. Nynehead Developments v RH Fibreboard Containers* [1999] 1 EGLR 7. The *Highway* to a tenant's contractual hell appears to be paved with *Progressive* intentions, at least outside of America. Legal transplants, much like organ transplants, are a tricky affair: Mindy Chen-Wishart, "Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding?" (2013) 62 I.C.L.Q. 1. Dislodged from its realist American roots, contractualisation appears to be operating very differently in doctrinal Commonwealth soil. Instead of providing relief to tenants (whether through frustration or repudiatory breach), it appears to be arming landlords with rights that they could have bargained for but did not.

As an alternative to the authors' suggestion that premiums (single payment) and rent (regular payment) be regarded as demarcating some sort of bright line between the lease as estate and the lease as contract, the manner in which the consideration for the leasehold estate is arranged may perhaps be regarded as merely a commercial arrangement between the parties that reflects their respective interests and bargaining positions. Buyers and sellers are free to agree to payment arrangements as they wish. A buyer may be expected to pay upfront and undertake the credit risk of the seller. However, the seller may wish to extend credit to a buyer for various

reasons. Outside of the leasehold context, the reasons for doing so broadly fall into one of two categories: either (i) increase the volume of sales or (ii) boost the overall sale price. Such extension of credit may take the form of regular instalment payment (less risk) or a deferred lump sum payment (greater risk). This is as true of a leasehold estate as it is of widgets. It is important to recall that although periodic leases require periodic payments of rent, periodic payments of rent in a fixed term tenancy do not make said tenancy a periodic lease. In a periodic lease, the landlord extends the lease at the end of each period: the grant is potentially perpetually executory. In a fixed term lease, the demise at the outset is for the full term: the grant is, barring rights of extension, always executed from the outset of the lease. The former requires the consent of *all* parties at the end of each period; the latter cannot be cut short except by any party who is empowered to do so. The difference is particularly telling in cases of co-ownership. Even though we speak of notices to quit in the context of periodic leases, technically the rule is concerned with extension, not termination. Hence, the refusal by a single joint landlord to extend the lease will bring a periodic lease to an end: *Hammersmith and Fulham LBC v Monk* [1992] 1 AC 478. By contrast, since all co-owners must act as one, a power to terminate cannot be exercised by a single co-owner alone.

Where a landlord has agreed to periodical payment (*ie* rent) for a lease and reserved for himself a right of re-entry, then in a falling market, he must choose either to keep the lease afoot and sue periodically as the rent falls due (*ie* keep his cake) or forfeit the lease and release the tenant from future obligations (*ie* eat his cake). If he so wishes, he could in theory (as banks do in practice in loan agreements) provide for the acceleration of future obligations upon certain breaches (*eg* contumelious breaches of the rent obligation). If he does not, whether because he was not properly advised or because the tenant balked when confronted with such a clause, it is not obvious why the courts should come to his rescue and permit him to have his cake and eat it in the name of the lease as contract. The possibility of a wily landlord drafting such a clause even if the project of contractualising the lease should falter reinforces the desirability of a chapter considering the regulation of certain lease arrangements. After all, in the great majority of cases, landlords (particularly in Singapore with the prevalence and dominance of Real Estate Investment Trusts (REITs) in the context of commercial leases) enjoy vastly superior bargaining power to most tenants (though there are exceptions).

Finally, the authors may wish to address one niggling issue (at least to this reviewer) unrelated to leases *per se*. In common with most pre-2019 Singapore land law texts, the present text presents the estate in perpetuity as a colonial invention (at p 15). However, recent research suggests that the so-called estate in perpetuity was not so much a colonial creation under the Crown Lands Ordinance as a post-colonial reinvention in 1961 after Singapore attained internal self-government following a misunderstanding of how words of limitation worked under said Ordinance: Tang Hang Wu and Kelvin F.K. Low, *Tan Sook Yee's Principles of Singapore Land Law* (4th ed, 2019) at pp 44-45. The misunderstanding is entirely understandable given the obscurity of words of limitation to modern legal minds and, to be fair, it is entirely unclear why our erstwhile colonial masters had decided to include the entirely redundant and ineffectual words "for ever" in the standard Crown grants of fee simple of the day. Nevertheless, this revelation resolves some

difficult puzzles such as whether escheat or *bona vacantia* applies should such an estate be disclaimed in circumstances where disclaimers are permitted – typically insolvency.

Singapore is privileged to have as many texts on land law as she does, despite a dearth of scholars working in the field, all of consistently high quality. The foregoing case against contractualisation is presented as food for thought with the objective of encouraging the authors (or at least some of them) to produce a third edition, hopefully in a shorter time frame than that between the first and this second edition. This reviewer once feared that Professor Lye's specialist text was lost to the profession after so many years had passed without it being updated. So, it gives me great pleasure to see that she has managed to cajole two promising young co-authors to join her in this second edition, who will no doubt in turn ensure that future editions will be produced for years to come. In the meantime, this edition, meticulously and thoughtfully updated, is to be thoroughly welcomed and whilst belated, could not have come at a more opportune and necessitous time.

KELVIN F.K. **LOW**
Professor
Faculty of Law, National University of Singapore