**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2019] SGHCR 03**

Originating Summons No 251 of 2018

Between

United Overseas Bank Limited

… *Plaintiff*

And

(1) Homely Bath Services & Trading Pte Ltd
(2) Skillmax Precision Technologies (S) Pte Ltd

… *Defendants*

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# JUDGMENT

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[Credit and security] – [Mortgage of real property] – [Mortgagee's rights]

[Landlord and tenant] – [Recovery of possession] – [Tenant's rights]

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# United Overseas Bank Ltd
# v
# Homely Bath Services & Trading Pte Ltd and another

**[2019] SGHCR 03**

High Court — Originating Summons No 251 of 2018
Elton Tan Xue Yang AR
11, 24 April, 15, 30 May, 18, 25 June, 2 November 2018

24 January 2019 Judgment reserved.

**Elton Tan Xue Yang AR:**

## Introduction

1 When a registered proprietor of land fails to repay a loan that is secured by a mortgage on the property, the mortgagee may bring an action for possession to realise its security. The action may, in turn, be contested by a tenant who intervenes in the proceedings to protect his occupancy. The court is faced with competing property claims from parties who are connected only by their contractual dealings with the proprietor and who might never have become acquainted but for the proprietor's default in payment.

2 To resolve the dispute, the court must consider the contractual and statutory allocation of property rights amongst the parties. This rests in large part on the order of creation as between the mortgage and the lease. If the property is tenanted at the time of the mortgage, the proprietor can only offer to

the mortgagee an incomplete legal estate as security, since he has ceded exclusive possession to his tenant. Similarly, a proprietor of mortgaged property can only confer on a tenant a qualified set of rights to possession, profit and enjoyment of the land. All of this boils down to the somewhat quotidian notion that one cannot give what one does not have. The proprietor cannot confer on either the tenant or the mortgagee a greater right than he himself possesses.

3 The facts of the present case bring the above considerations into focus. The tenant, which has been in continuous occupation of the mortgaged property since 2011, was served a notice to deliver up vacant possession of the property after the landlord company was wound up. Out of the three tenancy agreements between the tenant and landlord, the second tenancy agreement predated the mortgage and it contained an option for the tenant to renew the lease. The third tenancy agreement post-dated the mortgage and purports to allow the tenant to remain in possession until 31 March 2020. The tenant resists the mortgagee's action for possession on the basis that the latter has allegedly authorised, consented to or acquiesced in the tenancies. Out of the considerable amount of case law on tenants' challenges to mortgagee applications that was brought to my attention, it appeared that there were only two relevant local authorities, both of which were decided almost 30 years ago and only one of which was directly applicable. In these grounds, I therefore take the opportunity to identify and organise the key principles for application.

## Facts

### *The parties*

4 The plaintiff is United Overseas Bank Limited ("UOB"). The first defendant, Homely Bath Services & Trading Pte Ltd ("the Landlord"),



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mortgaged to UOB its registered estate and interest in four separate units – all of which are commercial properties – as security for the repayment of certain loans. A winding up order was issued against the Landlord on 8 September 2017. The Landlord has not participated in these proceedings.

5 The second defendant, Skillmax Precision Technologies (S) Pte Ltd ("the Tenant"), is a precision engineering company. It is not disputed that since 2011, the Tenant has had its functioning office and production site at 20 Woodlands Link #05-27 Singapore 738733 ("the Unit").[1] The Unit is one of the four units mortgaged by the Landlord to UOB.

***Tenant's occupation of the Unit***

6 The Tenant first entered into occupation of the Unit in 2011, following a tenancy agreement dated 15 March 2011 ("the 1st TA") with the Landlord. The 1st TA was for a term of 36 months from 1 April 2011 to 31 March 2014.[2]

7 On 21 March 2014, the Tenant and the Landlord signed a second tenancy agreement ("the 2nd TA") in respect of the Unit, likewise for a period of 36 months. The tenancy period began on 1 April 2014, which was the day immediately following the expiry of the 1st TA, and ended on 31 March 2017.[3]

8 In early 2015, the Landlord made a refinancing request to UOB in respect of loan facilities that it had obtained from another bank. Crucially, UOB

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1 Affidavit of Madasamy Sankaralinga Murugan dated 17 October 2018 ("Madasamy (17 October 2018)") at para 4.

2 Madasamy (17 October 2018) at para 6(a); affidavit of Madasamy Sankaralinga Murugan dated 20 June 2018 ("Madasamy (20 June 2018)") at pp8–12.

3 Madasamy (17 October 2018) at para 6(b); Madasamy (20 June 2018) at pp13–18.



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accepts that a copy of the 2nd TA was provided to it by the Landlord at the time the refinancing request was made.[4] On 24 April 2015, UOB issued the Landlord with a letter of offer ("the Letter of Offer") which incorporated, amongst other things, UOB's Standard Terms and Conditions Governing Credit Facilities (which was revised by way of a subsequent letter of offer dated 30 June 2015).[5] The offer of banking facilities was duly accepted by the Landlord on 27 April 2015.[6] On 27 May 2015, UOB and the Landlord executed a mortgage in respect of two units, one of which was the Unit, with the Landlord as mortgagor and UOB as mortgagee ("the Mortgage").[7] The terms of the Mortgage incorporated the covenants and conditions set out in the Memorandum of Mortgage numbered MM I/94778S ("the Memorandum of Mortgage").[8] There were two other mortgages over the remaining two units.[9]

9 The Tenant and the Landlord entered into a third tenancy agreement on 5 February 2017 ("the 3rd TA"). Again, the agreed tenancy period was for 36 months. The tenancy would commence on 1 April 2017 (*ie,* the day immediately following the expiry of the 2nd TA) and end on 31 March 2020.[10] According to UOB, it only became aware that the Unit was tenanted when one of the Landlord's staff informed UOB sometime in end October or early November 2017 about this. Prior to that, UOB had not been notified of the 3rd TA and was

4 Affidavit of See Yen Nee dated 1 August 2018 ("See Yen Nee (1 August 2018)") at para 18.

5 Affidavit of See Yen Nee dated 1 March 2018 ("See Yen Nee (1 March 2018)") at para 3 and pp99–145.

6 See Yen Nee (1 March 2018) at p117.

7 See Yen Nee (1 March 2018) at pp19–26.

8 See Yen Nee (1 March 2018) at p20 and p62–97.

9 See Yen Nee (1 March 2018) at pp5–6.

10 Madasamy (17 October 2018) at para 6(c); Madasamy (20 June 2018) at pp19–24.



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not aware of its terms.[11] Nor had UOB consented to the Landlord entering into the 3rd TA with the Tenant.[12]

***Action for possession***

10 On 8 September 2017, a winding up order was made against the Landlord and the Official Receiver was appointed as liquidator.[13] When this came to UOB's attention, its solicitors issued a letter of demand to the Landlord on 19 September 2017, recalling all the facilities granted to the Landlord and demanding full payment of the outstanding sum of $687,697.63 as at 19 September 2017 and accrued interest.[14] On 6 December 2017, UOB's solicitors served notice on the Landlord to deliver vacant possession of the four mortgaged units,[15] and also on the occupiers of each of those units.[16]

11 Upon receiving the notice, the Tenant wrote to UOB, expressing its interest in purchasing the Unit. In the course of several letters, it explained that it had been in occupation of the Unit since 2011 and that it had invested substantial sums to set up heavy machinery and electrical systems in the Unit. If it were required to move out, the Tenant's survival as a going concern would be threatened and its customers, some of which needed daily support for their production plants, would likewise be affected.[17] UOB nevertheless replied that it would be exercising its right to take vacant possession of the Unit.[18]

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11 Affidavit of See Yen Nee dated 27 June 2018 at para 10; See Yen Nee (1 August 2018) at para 26.

12 See Yen Nee (1 August 2018) at para 27.

13 Madasamy (17 October 2018) at para 7.

14 See Yen Nee (1 March 2018) at paras 4–6.

15 See Yen Nee (1 March 2018) at para 6 and pp156–157.

16 See Yen Nee (1 March 2018) at pp162–165.



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12 On 1 March 2018, UOB filed Originating Summons No 251 of 2018 ("the Action"), commencing proceedings under O 83 r 1(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules of Court") to seek delivery of vacant possession of the four mortgaged units as well as repayment of the sums owed.

***Tenant's application to intervene***

13 At the first hearing on 11 April 2018, counsel for the Tenant, Ms Suja Thomas, appeared before me to express the Tenant's intention to contest the part of the Action that sought delivery of vacant possession of the Unit. No representative from the Landlord attended this or any subsequent hearing. As the Tenant was not a party to the proceedings at the time (only UOB and the Landlord were), it subsequently filed an uncontested application in Summons No 2839 of 2018 to intervene and be added as a second defendant. I allowed the application on 25 June 2018.

14 Once the Tenant became a party to the Action, it filed Summons No 3117 of 2018, seeking discovery of various documents and correspondence pertaining to the Mortgage. One of the Tenant's primary arguments in the application was that as a non-party to the contractual relationship between UOB and the Landlord, it was not in possession of the documentary evidence it needed to demonstrate that UOB had consented to the Tenant's occupation. On 19 September 2018, I ordered discovery of most of the categories of documents sought. I agreed with the Tenant that the documents were *prima facie* relevant and that there was a marked asymmetry of information between the parties such

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17 See Yen Nee (1 March 2018) at pp195–200.

18 Affidavit of Madasamy Sankaralinga Murugan dated 6 July 2018 at pp56–57.



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that an order for discovery would promote the fair and just disposal of the matter. UOB and the Tenant then proceeded to file their affidavits and submissions in the Action. The substantive hearing of the Tenant's challenge took place before me on 2 November 2018. At the hearing, Mr Ushan Premaratne, counsel for UOB, informed me that UOB would only be asking for orders in relation to the Unit and not the other units referred to in the Action. I will therefore only consider the Action insofar as it relates to the Unit.

**Parties' submissions**

15 The flow of the Tenant's primary arguments is as follows. To begin, UOB is bound to honour the 2nd TA pursuant to s 46(1) of the Land Titles Act (Cap 157, 2004 Rev Ed) ("the LTA"). The Tenant explains that UOB had "full knowledge of the prevailing tenancy at the time (i.e. the 2nd TA) and all the terms therein".[19] It points out that UOB had admitted that a copy of the 2nd TA was provided by the Landlord to UOB at the time the Landlord made its re-financing request (see also [8] above).[20] Relying on s 89 of the LTA and the High Court's decision in *Singapore Finance Ltd and another v Matterhorn (Pte) Ltd and others* [1989] 2 SLR(R) 105 ("*Matterhorn*"), the Tenant further argues that UOB's actions in accepting the Unit as security and in securing its interest with a document titled "Legal Assignment of Rental Proceeds/Charge over Rental Account" (which I will refer to in the interests of brevity as "the Assignment of Rental Proceeds") were "positive steps emanating from [UOB] from which it is possible to infer [UOB's] consent or acquiescence to not just the 2nd TA but all future tenancies". It emphasises that the Assignment of Rental

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19 2nd Defendant's written submissions dated 31 October 2018 ("2nd Defendant's Submissions") at paras 48(a) and 51.

20 2nd Defendant's Submissions at para 50.



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Proceeds pertained not only to rental proceeds under the 2nd TA but also "all future tenancy agreements".[21]

16 Having reached this interim conclusion, the Tenant then observes that cl 5(b) of the 2nd TA[22] grants the Tenant an option to renew the tenancy for a further 12 months from 31 March 2017 ("the Option to Renew"). (The parties accept that the clause should be titled "Option to Renew" rather than "Option to Review".) It states:

> **OPTION TO REVIEW**
>
> If the Tenant shall be desirous of continuing the tenancy hereby created for a further term of twelve (12) months at the expiration of the term hereby granted in this Agreement, shall give to the Landlord two (2) months' notice in writing prior to the expiration date of this Agreement indicating the Tenant's desire and if there shall not at any time of such request be existing breach or non-observance of any of the stipulations on the part of the Tenant herein contained, then, the Landlord will let the property to the Tenant for the further term of twelve (12) months from the 31st of March 2017, at a rental to be agreed based on the prevailing market rent but otherwise containing the like condition, covenants and stipulations as are herein contained with the exception of this option to renew.

The Tenant submits that the 3rd TA is a renewal of the 2nd TA pursuant to the Option to Renew.[23] It reasons that since UOB was "well aware of all the details of the 2nd TA, and had accepted and consented to the same", UOB was bound by the 3rd TA since that agreement came about as a result of the Tenant's exercise of the Option to Renew.[24]

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21 2nd Defendant's Submissions at paras 48(b), 54 and 84.

22 Madasamy (20 June 2018) at p16.

23 2nd Defendant's Submissions at para 47.

24 2nd Defendant's Submissions at para 98.



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17 Finally, the Tenant submits that in any event, cl 8 of the Letter of Offer does not require the Landlord to seek UOB's prior written consent for its entry into the 3rd TA (whether as a renewal of the 2nd TA or as a fresh tenancy agreement). Clause 8 only requires the Landlord to obtain such written consent if it was changing the use of the Unit from "owner-occupation" to "investment", and in the transition from the 2nd to the 3rd TA there was no such change of use since the Unit was still being used for investment. The Tenant argues that cl 1.8 of the Memorandum of Mortgage (which UOB relies upon to support its position that the 3rd TA is not binding on UOB, given that the 3rd TA was created without UOB's written consent) must be "read in conjunction" with cl 8 of the Letter of Offer. When those clauses are read together, it "becomes clear" that the requirement of written consent as set out in cl 1.8 of the Memorandum of Mortgage applies only in a situation where the mortgagor of an owner-occupied property leases out the property, and not in a situation such as the present case where the mortgagor (*ie,* the Landlord) "simply renews a pre-existing lease which has already been consented to or expressly/impliedly authorised by [UOB] and/or carries on using the property as investment".[25]

18 UOB rejects the Tenant's case at all three levels. First, it maintains that it did not consent to the 2nd TA or any subsequent tenancy agreements. It accepts that if it had expressly or impliedly authorised or consented to the 2nd TA, it would be bound by the 2nd TA.[26] However, UOB merely had knowledge of the 2nd TA and this was not sufficient to ground any finding that it had consented to or acquiesced in the 2nd TA under s 89 of the LTA.[27] It denies that the

25 2nd Defendant's Submissions at paras 74–75.

26 Plaintiff's skeletal written submissions dated 31 October 2018 ("Plaintiff's Submissions") at para 37.

27 Plaintiff's Submissions at paras 35–36.



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Assignment of Rental Proceeds can be regarded as a "positive act indicating consent or acquiesce[nce to] the tenancy agreements entered into between the [Landlord and Tenant]", or otherwise provides any support for the Tenant's argument that it consented to the 2nd and/or 3rd TA.[28]

19 UOB further submits that the 3rd TA is not a renewal or extension of the 2nd TA. Rather, the 3rd TA is a "separate and independent tenancy agreement from the 2nd TA". UOB refers to various parts of the Option to Renew clause in the 2nd TA to demonstrate that the 3rd TA did not fall within its scope.[29] Finally, it contends that there is no legal basis for the Tenant's "strained attempt" to argue that cl 1.8 of the Memorandum of Mortgage must be read together with cl 8 of the Letter of Offer. In making that argument, the Tenant is "conflating the obligations of [the Landlord] as borrower under the Letter of Offer with its obligations as mortgagor under the mortgage".[30]

**Issues and approach**

20 In evaluating the parties' submissions, I have come to the view that the manner in which the parties approached the inquiry was erroneous. There were two aspects of error. First, there was an insufficient appreciation of the important distinction that the law draws between a lease that predates and one that postdates the mortgage. The nature of the tenant's rights as against the mortgagee depend crucially on which side of the distinction the case falls. This led to the application of the wrong test to the tenancy agreements. Second, there was an incorrect understanding of consent and authorisation within the meaning

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28 Plaintiff's Submissions at paras 44 and 46.

29 Plaintiff's Submissions at paras 27–32.

30 Plaintiff's Submissions at para 52.



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of s 89(1)(*a*) and (*b*) of the LTA. In particular, the two limbs of the provision were conflated and it was not understood in conjunction with s 23 of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) ("the CLPA"). The overall result was that the parties directed a substantial amount of argument at the question of whether UOB had authorised, consented to or acquiesced in the 2nd TA when, as will be explained, this was not a coherent inquiry nor was it consistent with statute.

21 Part of the difficulty lay in the fact that there is little local case law on the rights as between tenants and mortgagees. As mentioned at [3] above, counsel's research yielded only two local cases of significance, both of which were authored several decades ago and only one of which – Thean J's decision in *Matterhorn* – was directly on point. In the following section, I will discuss the available local and foreign cases and organise them into the appropriate statutory categories. I will then distil from the cases a set of principles which can be placed into a framework for application.

## Tenants challenging mortgagees' right to possession

### *Mortgagee's right to possession*

22 In the vast majority of mortgagees' applications under O 83 of the Rules of Court, the only disputing parties are mortgagee and mortgagor. The mortgagee (typically a bank or other financial institution) asserts both a contractual and a statutory right against the mortgagor. The contractual right is asserted pursuant to a facility letter or agreement between the parties, which typically provides that a failure by the mortgagor or other person (as borrower) to pay instalments for the repayment of the facilities granted or interest thereon constitutes an event of default. Upon such default, the mortgagee is entitled to



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demand that the whole or any part of the facilities that remains outstanding and unpaid, together with interest, be due and payable immediately. The statutory right rests on the existence of a mortgage and is founded on s 75(1) of the LTA, which establishes the mortgagee's right to enter into possession of the mortgaged property upon the mortgagor's default:

> **Entry into possession**
>
> **75.**–(1) If default is made in payment of the interest, principal or other money, secured by a mortgage or charge, or in payment of any part thereof, the mortgagee or chargee shall, as against the mortgagor or chargor and those claiming through or under him, be *entitled to enter into possession of the mortgaged or charged land* and to receive the rents and profits thereof. [emphasis added]

23 As mentioned, the mortgagee's assertion of its contractual and statutory rights occurs in practice by way of an application under O 83 of the Rules of Court. As expressed in O 83 r 1(1), that Order applies, *inter alia,* to any action by a mortgagee for the payment of moneys secured by the mortgage and for delivery of possession to the mortgagee by the mortgagor. In the application, the mortgagee would typically seek payment of the outstanding amounts owed by the mortgagor under the facility agreement as well as delivery of vacant possession of the mortgaged property.

24 The courts' approach in relation to such applications has been robust. It is now well established that where a mortgagee is entitled to possession under the mortgage, the court has no jurisdiction to refuse an order for possession: *Hong Leong Finance Ltd v Tan Gin Huay and another* [1999] 1 SLR(R) 755 ("*Hong Leong*") at [10]. The sole exception to this principle is the court's jurisdiction to grant a short adjournment to afford the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying it. But the court cannot grant the adjournment if there is no reasonable prospect that such payment can



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be made: *Hong Leong* at [12]. More recently, in *Pereira, Dennis John Sunny v United Overseas Bank Ltd* [2018] 1 SLR 31 at [19], the Court of Appeal confirmed that there is no exception to the general principle other than that identified in *Hong Leong*. It further held (at [23]) that this applied not only to mortgagees' applications against mortgagor-borrowers, but also to their applications against guarantors, since in both cases the mortgagee was acting to enforce its rights under the mortgage.

***Procedural safeguards***

25 The necessary parties in a mortgagee's action for possession are, naturally, the mortgagee and mortgagor, by virtue of the fact that the rights and obligations of these parties are most immediately at issue in the action. In contrast, a tenant is not a natural party to the action. Often the mortgagee may be unaware of the tenant's existence, especially where the mortgagor did not seek the mortgagee's consent before leasing the property. But of all these parties, the tenant's interests are perhaps most directly implicated in the action because it is in occupation and hence liable to be evicted. The law therefore contains procedures aimed at raising tenants' awareness of such actions and providing an avenue for their participation in the proceedings.

26 It has been observed that the rules in O 83 are "not meant to provide a complete procedural code for mortgage actions"; rather, their purpose is "to provide additional protection for defendants": *Singapore Civil Procedure 2019* vol 1 (Chua Lee Ming ed) (Sweet & Maxwell, 2019) ("*Singapore Civil Procedure*") at para 83/0/2. In my view, however, the protection offered by the procedural requirements in O 83 extends not merely to defendants. The procedures also establish safeguards for occupiers – such as tenants – who may



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otherwise remain unaware of the mortgage action and therefore unable to challenge it.

27 O 83 r 3(4) requires the mortgagee, when it claims delivery of possession, to provide in its supporting affidavit particulars of every person who to the best of the mortgagee's knowledge is in possession of the mortgaged property. To accomplish this, the mortgagee must make sufficient enquiry of the occupants of the premises and give notice to these occupiers before seeking an order for possession. The importance of this requirement was highlighted by Joseph Grimberg JC in *Mohamed Said bin Ali v Ka Wah Bank* [1989] 1 SLR(R) 689. The defendant bank sought possession of the mortgaged property and obtained judgment in default. A writ of possession was then served on the plaintiff tenants. There was a total of 17 persons living on the premises, all members of a family, and they had been in occupation since before the war. Two years later, a second writ of possession was issued. The plaintiffs sought declarations that they were lawful tenants and that the orders for possession were not binding on them. One of the issues before Grimberg JC was whether the plaintiffs ought to have been given notice of the mortgage action. He found (at [9]) that the defendant's supporting affidavit in the mortgage action, in which an officer of the defendant had stated that the property was used as a warehouse for storage of motor vehicle spare parts and there were no persons residing there, was "clearly wrong". No proper inquiry had been made by the defendant or its solicitors as to whether the premises were occupied. Grimberg JC's statement of the law (at [10]) is clear and emphatic:

> In my judgment, *it is at least desirable if not incumbent upon a mortgagee plaintiff in a mortgage action, in order to give efficacy to O 83 r 3(4),* ***to make due inquiry concerning the occupancy of the mortgaged premises****. If there are occupants they must be given notice if a mortgage action is commenced, and they* ***must be told in that notice that they may apply to be***



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> ***joined as defendants***. *If the occupants are identifiable the notice should be addressed and delivered to them; where the occupants cannot be identified a notice should be given by affixing it to a suitable part of the mortgaged property.* In stipulating these measures, I am guided by the note to O 88 r 2-7/3 of the English Rules of the Supreme Court. The fact that notice has been given should be brought to the attention of the court in the affidavit filed in support of the claim for possessory relief by the mortgagee. *These steps should enable a court, in making an order for possession against a mortgagor in default, to* ***determine whether that order should be enforceable against occupants of the mortgaged property*** *particularly, as is here the case, if the occupants claim protection under the provisions of the Act by virtue of tenancies which pre-existed the mortgage.* The requirement of notice is consonant with the principle, long accepted in Singapore in disputes between landlord and tenant, that ***an occupier ought not to be affected by an order for possession unless he has had notice of it, and an opportunity of being heard*** — see *Tan Joo Eng v Siang Heng Co Ltd* [1957] MLJ 18. … [emphasis added in italics and bold italics]

28 Compliance with the requirement to give notice has been said to benefit the mortgagee plaintiff "because it is better that, if there are third parties in occupation who wish to oppose the making of a possession order, they should appear and be dealt with at the application for the making of the order". That would avoid the delay that would result where these third parties subsequently apply to set aside the possession order: *Singapore Civil Procedure* at para 83/3/8. But there is an additional, more serious consequence, of a failure to give notice. In *Standard Chartered Bank v Chip Hong Machinery (S) Pte Ltd and another* [1990] 2 SLR(R) 679, the tenant was not notified of the proceedings and an order for delivery of possession was made. The tenant applied to set aside the writ of possession on, *inter alia,* the ground that the writ of possession was obtained irregularly since notice of the proceedings under O 83 had not been given to it. Punch Coomaraswamy J held (at [12]) that "as a rule, writs of possession obtained irregularly ought to be set aside almost, if not altogether, as of right". The exception to the rule was "very exceptional cases where it is clear



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that setting aside the writ of possession would be an exercise in futility, [since] the court ought not to act in vain". On the facts, Coomaraswamy J found that the tenant had no defence to the claim for possession since it was an unincorporated society and therefore could not hold a tenancy.

29 I now turn from the procedural aspects of tenants' challenges to mortgagee applications to how the law resolves the apparent clash of substantive rights.

***Competing rights and the statutory solution***

30 The interposition of a tenant in a mortgagee's action for possession introduces a new set of rights and obligations that does not have an obvious connection to the mortgagee-mortgagor relationship. The tenant's intervention poses a challenge to the mortgagee's ability to realise its security by obtaining vacant possession of the property, which it might then sell in order to recover as much of the outstanding sum as possible.

*Mortgagor's right to create lease*

31 Because a mortgagor remains the registered owner of the property and has the right to possession, he retains the ability to lease out the property: Tan Sook Yee, Tang Hang Wu and Kelvin FK Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) ("*Tan Sook Yee*") at para 18.159. This is recognised in s 23(1) of the CLPA, which establishes that a mortgagor of land while in possession may make an occupation lease of the mortgaged land or any part thereof for any term not exceeding 3 years.

32 Importantly, s 23(1) is qualified by s 23(11), which provides that s 23 applies only if and as far as a contrary intention has not been expressed by the



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mortgagor and mortgagee in the mortgagee deed, or otherwise in writing, and that s 23 has effect subject to the terms of the mortgage deed or of any such writing and the provisions therein. In other words, the mortgagee's right to lease applies only to the extent that the parties have not agreed to the contrary: *Standard Chartered Bank v Paisley Park (S) Pte Ltd* [1994] 1 SLR(R) 26 ("*Paisley Park*") at [6].

33 The terms of the agreement between mortgagor and mortgagee may, of course, also permit the mortgagor to grant leases. However, where the terms of the mortgage impose conditions on the grant of leases by the mortgagor (for instance, a requirement that written consent must first be obtained from the mortgagee, as was the case in *Paisley Park*), those conditions must be met or the mortgagee will not be bound by the lease: *Fisher and Lightwood's Law of Mortgage* (Wayne Clark ed) (LexisNexis, 13th Ed, 2010) ("*Fisher*") at para 29.20. That is entirely consonant with s 23(11) of the CLPA.

34 As further discussed at [42] below, the mortgagor's ability to grant a lease of mortgaged property pursuant to a contractual right (*ie,* as permitted under the terms of the mortgage) or statutory right (*ie,* under s 23(1) of the CLPA) represents an exception to the general rule that a lease granted after a mortgage will not bind the mortgagee. The other exception, which concerns the express or implied consent of the mortgagee to the lease, lies at the heart of the Action before me.

*Order of creation, qualified by consent*

35 The statutory framework draws a distinction between situations where the lease predates the mortgage, and where the mortgage predates the lease. As suggested at [2] above, the nature of the tenant's rights as against the mortgagee



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and *vice versa* depends, in large part, on the order of creation. This has less to do with the maxim *qui prior est tempore, potior est jure* ("he who is first in time is stronger in law") – which is an organising principle that ranks equal and competing equitable rights – than it does with the more commonplace idea that one cannot impart what one does not have. A registered proprietor who has leased the property to a third party no longer has a right to exclusive possession to the property at the time he mortgages it (since that right, as an essential characteristic of a lease, now belongs to the third party). Similarly, a proprietor with a mortgage on his property can only confer on a prospective tenant an estate that is subject to the rights of the mortgagee.

(1) Lease before mortgage

36 Section 46(1) of the LTA confers on "any person who becomes the proprietor of registered land" an indefeasible title, meaning that he holds the land "free from all encumbrances, liens, estates and interests except such as may be registered or notified in the land-register". A "proprietor" is defined in s 4(1) of the LTA as any person who appears from the land-register to be the person entitled to an estate or interest in the land, and a mortgagee is expressly identified as one such person. The indefeasibility of the proprietor's title is, however, subject to the exceptions stated in s 46(1)(i)–(vii). These exceptions are popularly known as "overriding interests". Out of the list of overriding interests, what is relevant for present purposes is s 46(1)(vi) which provides that short term tenancies (*ie,* tenancies which do not exceed seven years and which hence cannot be registered under s 87(2)(*a*) of the LTA) will bind the proprietor:

> (vi) the rights of any person in occupation of the land under a tenancy *when the proprietor became registered as such*, being a tenancy the term of which does not exceed 7 years and could



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> not have been extended by exercise of the option of renewal to exceed an aggregate of 7 years; … [emphasis added]

Such tenancies are not registrable because the land register would otherwise be clogged up by them if there was a general requirement of registration. At the same time, they are accepted as an exception to indefeasibility because "a simple inspection of the premises would reveal the presence of the short term occupier": *Tan Sook Yee* at para 14.33.

37 The effect of s 46(1)(vi) is that if a mortgage is created over premises that are subject to a short term tenancy, the tenant's rights will override the mortgagee's, insofar as those rights are inconsistent. An example can be found in the English case of *Woolwich Building Society v Dickman* [1996] 3 All ER 204 ("*Woolwich*"). In that case, the defendant purchased a flat and granted a tenancy. He then applied for a loan from a building society, making it clear that the property was occupied. Due to a mistake, the society treated the application as one in which the tenants had no formal legal tenure. When the defendant later defaulted in repayment and the society brought proceedings for possession of the property, the tenants resisted the possession order. Waite LJ, giving the principal judgment of the Court of Appeal, drew a distinction between a case "where, after the grant of a mortgage explicitly excluding any power of leasing by the mortgagor without the consent of the mortgage … the mortgagor had granted a … tenancy of the premises" without first seeking the necessary consent; and a case "where the tenancy was already in existence at the date of grant of the mortgage". Waite LJ found that *Woolwich* was the latter case. It was "inescapable that the society derive[d] its right to claim possession of the flat from the mortgage" and it was therefore unable to deny the rights and interests of the tenants, whose tenancy remained an overriding interest: at 211.



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38 The priority of the tenancy over the mortgage, however, will not persist where the tenant consents to the grant of the mortgage: *Fisher* at para 29.16. In *Woolwich*, the tenants signed written consents to the effect that their rights of occupancy were subordinated to the rights of the society as mortgagee. Waite LJ held (at 210) that the consents constituted an express agreement that the tenants' rights of occupation were subjected to the possessory rights of the society (although he went on to find that the consents could have no effect on the mandatory rights (*ie,* the overriding interests) the tenants enjoyed under s 70(1)(g) of the Land Registration Act 1925 (c 21) (now contained in Schedule 3 para 2 of the Land Registration Act 2002 (c 9)), since the consents were not expressed on the register).

(2) Mortgage before lease

39 Where a mortgage predates a lease over property, the tenant's rights are necessarily subordinate to the mortgagor's. The reason is that the mortgagor, having granted the mortgagee a security interest over his estate, no longer has an unqualified right to and control over the property. As observed in *Fisher* at para 29.18, the mortgagor is unable to confer upon the tenant a greater right than he himself possesses. Hence, where the mortgagor purports to grant a lease without the privity of the mortgagee, the lease may be enforceable as against the mortgagor but not against the mortgagee. The position in principle has been reflected in statute. Section 89(1) of the LTA states:

> **Leases of mortgaged land**
>
> **89.**—(1) A lease of registered land which is subject to a mortgage shall not bind the mortgagee unless –
>
> (*a*) the lease is *expressly or impliedly* ***authorised****, either by the mortgage or by law*; or
>
> (*b*) the mortgagee ***consents*** to the lease.



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[emphasis added in italics and bold italics]

40 The rule in s 89(1) is usefully illustrated in *Win Supreme Investment (S) Pte Ltd v Joharah bte Abdul Wahab (Sjarikat Bekerjasama Perumahan Kebangsaan Singapura, third party)* [1996] 3 SLR(R) 583 ("*Win Supreme*"). A company mortgaged two lots of land to a bank as security for a loan. Without having obtained the written consent of the bank as required under the terms of the mortgage, the company agreed to lease a block on the land to a co-operative society, which in turn leased a flat within the block to the defendant's father. Chao Hick Tin J (as he then was) found that the lease might be enforced as a contract as between the company and the society, but could not bind the bank as mortgagee. The bank "would be entitled to obtain possession of the flat as against [the company] and all persons claiming under [the company]", and would also be "entitled to exercise its power of sale as a mortgagee": at [21]. In *Win Supreme*, at about the time the bank demanded that the defendant deliver up possession of the flat, the bank sold the property to the plaintiff. Chao J held (at [25]) that it did not make any difference that the property had been sold by the mortgagee bank and it was the plaintiff purchaser that was seeking possession, since the plaintiff "would have acquired what the [bank] was entitled to sell". Since the lease did not bind the bank, it likewise would not bind the plaintiff.

41 An interesting wrinkle in the facts of *Win Supreme* was that before the bank sold the property to the plaintiff, both the bank and the plaintiff were aware that the defendant was occupying the flat (the general manager of the plaintiff gave evidence that before the transaction took place, he had inspected the premises and found occupants; and he further said that the purchase was without vacant possession): at [14]. Although the point does not appear to have been taken up in argument, the result in *Win Supreme* suggests that it is the



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authorisation or consent of the mortgagee (rather than the party to whom the mortgagee transfers its rights and interests) that is relevant. Even though the plaintiff knew about the lease when it decided to purchase the property, there was no suggestion that it might have authorised or consented to the lease such that it would be bound by the lease.

42 Sections 89(1)(*a*) and (*b*) identify two exceptions to the general rule that a lease granted after a mortgage will not bind the mortgagee. The first concerns express or implied authorisation of the lease, either by the terms of the mortgage or as a matter of law. These matters have been discussed at [31]–[32] above. The second exception is the express or implied consent by the mortgagee to the lease.

43 In *Stroud Building Society v Delamont and others* [1960] 1 All ER 749 ("*Stroud*") at 751 (cited with approval by L P Thean J (as he then was) in *Matterhorn* at [16]–[17]), Cross J explained the consequences of a mortgagee consenting to a tenancy:

> … When a mortgagor has granted a tenancy which is not binding on the mortgagee the latter can, *instead of treating the tenant as a trespasser,* ***consent to treat him as his own tenant*** or he may ***act in such a way as precludes him from saying that he has not consented to take him as a tenant***. Such an acceptance by the mortgagee of the mortgagor's tenant, whether express or implied, or operating by way of estoppel, must, I think, *amount to a* ***creation of a new tenancy*** *between the parties*. The tenancy between the mortgagor and the tenant is not one which is merely voidable by the mortgagee if he chooses not to accept it, but which he can confirm by waiving his right to avoid it. It is a nullity as against the mortgagee and so, *if the mortgagee is to lose his right to treat the mortgagor's tenant as a trespasser, it must be because the tenant has become the mortgagee's tenant under a new tenancy*. … [emphasis added in italics and bold italics]



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In other words, if the mortgagee has consented, whether expressly or impliedly, to the tenancy created after the mortgage, the mortgagee is disentitled from seeking to dispossess the tenant as a trespasser because the parties are taken to have entered into a fresh tenancy. Accordingly, in determining whether the mortgagee has so consented, the cases have focussed on whether the mortgagee has, by word or deed, treated the tenant as its own. Cross J's *dicta* has subsequently been affirmed by courts of higher authority, as will be discussed.

44 The cases reveal that this inquiry is inevitably fact-specific, although it is possible to distil key principles and outline the general approach that the courts have taken. As the question of consent is central to the parties' arguments before me, I will review the key cases (both local and foreign) before summarising these principles. I begin with the English case law before moving to local jurisprudence.

(A) ENGLISH CASES

45 In *Parker and others v Braithwaite and another* [1952] 2 All ER 837 ("*Parker*"), the mortgage contained the usual exclusion of the mortgagor's power to lease except with the written consent of the mortgagee, which was a building society. The mortgagor nevertheless proceeded to let four rooms in the property to a tenant. Subsequently, the society was informed by its agent about the tenancy. The agent also told the society that he had entered into an agreement with the mortgagor for his collection of rent and payment of the mortgage repayments to the mortgagee out of the rent. Following a dispute regarding the amount of rent chargeable, the mortgagee took out proceedings for possession of the property.



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46 Danckwerts J found (at 839) that the rent was collected by the agent as agent of the mortgagor, rather than of the society, and that the society had not given permission to represent in any way to the tenant that the mortgagor had permission to create a tenancy of the property in her favour. All that could be said was that for a period of about eight months, the society refrained from treating the tenant as a trespasser and ejecting her from the property. After reviewing previous cases that did not express a conclusive view on the circumstances in which a mortgagee would be precluded from treating the tenant as a trespasser, Danckwerts J agreed (at 841) with the following views of Monroe J in *Re O'Rourke's Estate* (1889) 23 LR Ir 501 ("*O'Rourke*"):

> I certainly ***cannot infer the creation of a new tenancy*** *between the tenant and the mortgagee* ***merely because the mortgagee takes no active steps to disavow a tenancy*** *created by the mortgagor.* The mortgagor, while in possession, and bound to keep down the interest on his mortgage, is at liberty to manage the lands as he pleases. It is not for the mortgagee to interfere with that management unless he chooses to go into possession. He treats the tenancy as one binding on the mortgagor, but *in no way binding upon himself if he find it afterwards for his interest to repudiate it.* [emphasis added in italics and bold italics]

47 Danckwerts J further referred to an unreported 1952 decision by Harman J in *Bradford Permanent Building Society v Cholmondeley*, where the agent of the building society had similarly acted in more than one capacity, and the society had stood by for up to 18 months without claiming to treat the tenant as a trespasser, even though it knew of the tenancy through the agent. Harman J had not found the society to be thereby prevented from enforcing its legal right to possession. Danckwerts J concluded as follows (at 841):

> The result of those authorities seems to me to be this. It is not to be denied that *there may be cases where a mortgagee may so conduct himself as to confirm in some way a tenancy which has been created by the borrower in favour of a short-term tenant.* It, no doubt, ***depends on the circumstances of the particular***



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> ***case whether that recognition of a tenancy has occurred****, so that the mortgagee is bound to treat the tenancy as lawful against him and cannot evict the tenant,* but otherwise it seems to me that, where the statutory power of leasing is exercisable only with the written consent of the mortgagee, a tenancy created by the mortgagor without that consent is not binding on the mortgagee. In the circumstances of the present case ***the mere refraining by the building society from taking action to evict the tenant and doing nothing for some eight months cannot amount to such recognition of the tenancy as to deprive them of their right to recover possession*** *of the property, not only against the borrower, but also against the tenant who holds only by such right as the borrower would give her.* [emphasis in italics and bold italics]

In the circumstances, he found that there was no answer to the society's claim to possession and therefore allowed it.

48 In *Taylor v Ellis and another* [1960] 2 WLR 509 ("*Taylor*"), the surviving mortgagor purported to grant a tenancy in circumstances where it was unclear if the mortgagee had given written consent as was required under the terms of the mortgage. Both the surviving mortgagor and the mortgagee then passed away, following which the mortgagee's personal representative sought possession of the property. The first question Cross J considered was whether the plaintiff or defendant bore the burden to establish that the mortgagee had given his consent in writing: at 512. Cross J found that the burden lay on the defendant tenant, since the courts were generally not in favour of imposing on any party the burden of proving a negative. Accordingly, "where the provision in the mortgage is that a lease will only be binding on the mortgagee if he consents thereto in writing the defendant would have to show that there had been a consent in writing". In the absence of any evidence that the mortgagee had given written consent, Cross J found that the tenancy was not binding on the plaintiff.



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49 Cross J then considered whether the mortgagee had become bound by the tenancy due to the fact that the tenant had been allowed to remain in occupation of the property "for a great many years". Citing *O'Rourke* and *Parker*, he held that it was "quite wrong to infer merely from the fact that the mortgagee allowed the tenant to remain in possession, having knowledge of the tenancy … that the mortgagee consented to take the tenant as his tenant": at 513. The fact that the mortgagee had not gone into possession did not entail that he was "in any way waiving his right to treat the tenant as a trespasser": at 514.

50 In *Stroud,* which was another decision of Cross J, the borrower entered into an oral agreement to create a tenancy without first having obtained the consent in writing of the mortgagee, which was a building society. When the borrower was adjudged bankrupt, the society served a notice on the tenant to deliver up possession. The tenant did not comply with the notice and the society took no steps to enforce it. After the borrower's bankruptcy, the tenant paid rent to the trustee in bankruptcy. The society then appointed its secretary as receiver of the income of the mortgaged property. The receiver gave the tenant notice of his appointment and requested her to pay all rent in respect of the tenancy to him. The tenant wrote to the society's solicitors, seeking the terms and conditions of the tenancy, and the solicitors replied that they understood from the society that the terms of the tenancy were the same as those between the tenant and the borrower. The tenant proceeded to pay rent to the society. Several months later, the society's solicitors sent the tenant a notice to quit which referred to the tenant's "possession of the premises … which [the tenant held] as tenant of the [building society]". When the tenant did not give up possession, proceedings for possession were commenced.



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51 Cross J found (at 752A) that the correspondence between the society and the tenant on the terms of the tenancy "indicate[d] that both parties thought that a new tenancy between the society and [the tenant] would result from her payment of rent", even though as a matter of law it would not. He surmised that "looking at the facts as a whole", the "right inference to draw from all the facts" was that the society had consented to accept the borrower's tenant as its tenant, notwithstanding that the society had never appreciated that they had the right to treat the tenant as a trespasser: at 752I.

52 In *Chatsworth Properties Ltd v Effiom* [1971] 1 All ER 604 ("*Chatsworth*"), the mortgagors similarly created a tenancy in breach of a covenant in the legal charge that was made in favour of the plaintiff mortgagees (although in this case the tenancy was created only after the mortgagors had already defaulted in their payment obligations). The mortgagees appointed a receiver to receive the income, rents and profits of the premises. On the same day, the mortgagee's solicitors wrote to the tenant, informing him of the appointment of the receiver and requiring him to "take notice that henceforth [he] should not pay any sums to [his] former landlords … but to [the receiver] or to whom he shall direct". The receiver continued for a time to collect rent from the defendant tenant. Eventually, the mortgagees commenced proceedings to claim possession of the premises against the tenant. The judge refused to make such an order and the Court of Appeal affirmed the decision.

53 Salmon LJ, giving the principal judgment of the Court of Appeal, held as follows (at 606):

> … In my view the plaintiffs *so conducted themselves that they are precluded from denying that they accepted the defendant as their tenant.* The inference which I draw from the facts is that they *did indicate to him that they were accepting him as the tenant,* that *he so understood what they told him* and that ***any***



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> ***ordinary man would, in all the circumstances, have understood the same thing***. [emphasis added]

The language of the letter from the mortgagee's solicitors played a central role in Salmon LJ's analysis. He found (at 607) that "any reasonable man" who received such a letter would understand the reference to the mortgagors as the "former landlords" to mean "not only that [the mortgagors] had ceased to be his landlords but that the plaintiffs, on behalf of whom the letter was written, were his landlords and that they had appointed [the receiver] to collect the rents from him on their behalf". Accordingly, "a fresh tenancy had indeed been created between the plaintiffs and the defendant; at any rate the plaintiffs [were] precluded from denying that they [had] become the defendant's landlords".

54 *Mann v Nijar and another* [1998] All ER (D) 771 ("*Mann*") is another decision of the Court of Appeal. The borrower purchased a property with the aid of a loan secured by a mortgage over the property. The mortgagee bank was aware that the borrower had borrowed the money in order to convert the premises into about 17 flats and bed-sits with a view to letting them. However, the borrower had not obtained the bank's consent in writing to the grant of the tenancy to the plaintiff. The borrower ran into financial difficulties and she surrendered the property to the bank, which appointed receivers. The property was then sold to the defendants, which proceeded to occupy the flat leased by the plaintiff whilst the plaintiff was abroad. The plaintiff claimed for damages and for breach of an implied covenant of quiet enjoyment of the flat. The judge found that the tenancy was binding on the bank and therefore on the defendants.

55 The Court of Appeal dismissed the appeal. Referring to *Parker*, *Taylor* and *Stroud*, Ward LJ held that knowledge of the tenancy alone was not sufficient to ground a finding that the mortgagee had impliedly consented to the tenancy.



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According to Ward LJ, "one can formulate the question in these terms:- *Looking at all the facts in order to get a picture as a whole has the mortgagee accepted the tenant as his own?*" [emphasis added]. On the facts, none of the parties had appreciated that under s 109(2) of the Law of Property Act 1925 (c 20) (which is *in pari materia* to s 29(2) of the CLPA), a receiver appointed by a mortgagee is deemed to be the agent of the mortgagor, rather than the mortgagee; and therefore as a matter of law, the bank could not be regarded as having recognised the tenant's position by its appointment of a receiver to collect rent. The bank, however, had been under the impression that it had impliedly consented to the tenancy. Ward LJ surmised as follows:

> … For my part I am quite satisfied that the Bank knew of this tenancy; that they were at first not certain whether they were bound by it or not but that there was a risk that they might be; that they were aware that the acceptance of rent by them from the tenant would give rise to a fresh tenancy; that they decided not to challenge the plaintiff's status as tenant but to accept him as their tenant because the difficulties in evicting him were more troublesome than a diminution in the price of the property by £5,000 which would be the cost of acknowledging him to be their tenant; that they instructed the receivers to collect the rent; that because each of them remained in blissful ignorance of the effect of section 109(2) of the 1925 Act, both the receivers and the Bank believed that rent was being collected on the Bank's behalf. The result is that *the Bank created – or must be held to have created – a new tenancy with the Plaintiff. That they regarded the plaintiff as their tenant is made plain by the correspondence leading to the exchange of contracts with the appellants' unequivocal confirmation of their awareness that the property was tenanted.* In my judgment th[e] facts overwhelmingly point to a fresh tenancy between the Bank and the plaintiff which is thus binding upon the appellant. [emphasis added]

Ward LJ drew an analogy to *Stroud*, where the mortgagee had likewise been operating under the erroneous assumption that its appointment of a receiver precludes it from continuing to treat the tenant as a trespasser, and both parties thought that a new tenancy between the mortgagee and tenant would result from



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the tenant paying rent (see [51] above). Applying Cross J's approach in *Stroud*, Ward LJ then dismissed the appeal.

(B) SINGAPORE CASES

56 The decision of the Singapore Court of Appeal in *Rimmon Watch Pte Ltd v Great Pacific Finance Ltd* [1989] 1 SLR(R) 66 ("*Rimmon Watch*") concerns a mortgagee's consent to a second tenancy that was purportedly created pursuant to an option to renew in the first. The mortgaged premises were let by the mortgagor to the appellant tenant for a term of 36 months. It was not disputed that the mortgagor had sought the respondent mortgagee's consent for that tenancy; the question concerned the scope of the mortgagee's consent. In January 1985, the mortgagor wrote to the mortgagee to inform the latter that it was renting the premises to the tenant "with effect from 22 January 1985 for a period of three years", and sought its consent. The mortgagee replied that it had "no objection to [the mortgagee] letting out the above premises to [the tenant] for three years on condition that the monthly rental be paid direct to us". It also sought "a copy of the lease agreement for [its] record". The mortgagor forwarded the mortgagee's letter to the tenant, notifying the tenant that it had obtained consent for the lease. Separately, the mortgagor told the mortgagee that it would be forwarding a copy of the lease agreement "in due course". Crucially, however, it did not do so until late December 1985.

57 In December 1987, the tenant exercised an option to renew contained in the tenancy agreement. That option permitted the tenant to renew the tenancy for a further term of five years, subject to the same terms and conditions of the original tenancy agreement. The mortgagee commenced proceedings against the mortgagor and the tenant, seeking declarations that the option to renew was not binding on the mortgagee and that it was entitled to obtain possession upon



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the expiry of the original tenancy agreement. The judge found in favour of the mortgagee and the tenant appealed.

58 Before the Court of Appeal, the tenant argued that the mortgagee must have consented to the option to renew since it was contained in the tenancy agreement, in relation to which the mortgagee had given its consent. When the mortgagee consented to that tenancy, it had not asked to see a copy of the agreement and must therefore be taken to have accepted all the covenants and conditions contained within. Wee Chong Jin CJ rejected the submission, finding (at [6]) that "this fact, without more, [did] not necessarily give rise to the inference that [the mortgagee] impliedly consented to the whole of the terms of the tenancy". It was necessary to determine "whether the option to renew was within the terms of the initial consent": at [8]. After considering the letters exchanged, Wee CJ held (at [15]):

> In our opinion, the terms of the correspondence show that the consent given by the respondents on 25 January 1985 was for the grant of a tenancy to the appellants for a term of three years. *The consent granted by the respondents was not a blanket consent and could not be construed as such*. In our view, the terms of the correspondence do not justify an inference that the tenancy, which the mortgagor was authorised by the respondents to create, was a tenancy for a term of 36 months which contained no further term conferring on the appellants an option to renew and the respondents were not under any legal obligation to inquire what the other conditions and covenants were. [emphasis added]

59 Wee CJ went on to reject the tenant's further argument that by accepting the rent from the tenant for the period as from April 1985, the mortgagee had agreed to the option to renew. Although the mortgagee received a copy of the tenancy agreement in December 1985, it had not been aware of the option until the second half of 1987 when it was contemplating a sale of the property. Wee CJ found (at [16]) that it therefore could not be said that "by necessary



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implication, the respondents had accepted the option", since the mortgagee's "consent was not for a tenancy for a term of three years capable of being extended by way of an option to a further term of five years". The appeal was thereby dismissed.

60 About six months later, *Matterhorn* came before Thean J in the High Court. In that case, the mortgagor let the building out to the defendant tenants without having obtained the prior written consent of the plaintiff mortgagees, as required under the mortgages. When the mortgagor defaulted in payment, the mortgagees obtained an order against the mortgagor for delivery of vacant possession. They then took out a writ of possession against all the tenants (there were 12 in total), who resisted the writ.

61 It was not disputed between the parties – and Thean J also agreed – that knowledge *per se* on the part of the mortgagees that the mortgagor had let out parts of the building to the tenants was not sufficient to constitute consent to the letting, so as to preclude the mortgagees from treating the tenants as trespassers: at [7]. The true question was whether the mortgagees had, by their conduct, acquiesced in or consented to such letting (Thean J did not refer to s 78(1) of the Land Titles Act (Cap 157, 1985 Rev Ed), which is now s 89(1) of the LTA (reproduced at [39] above), but the language of consent and acquiescence that he used reflect the terms of the provision). Thean J found that the mortgagees knew at all material times that the mortgagor would be letting out parts of the building to tenants, but did not know precisely who the tenants were and which parts of the building they occupied until their representatives had carried out an inspection of the building just before the commencement of proceedings: at [13]–[14].



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62 Thean J then referred to *Stroud* and *Chatsworth* and observed (at [19]) that in both of these cases, the mortgagees or their agents had "done *some positive acts* and by these acts indicated that they had accepted the mortgagor's tenant or had consented to the tenancy created, in consequence of which a fresh tenancy was created between the tenant and the mortgagees" [emphasis added]. However, on the facts of *Matterhorn*, the situation was different:

> … neither of the plaintiffs had done anything to indicate that they had consented to the tenancies or accepted the defendants or any of them as tenants. They *merely stood by passively*. It was argued on behalf of the defendants that the plaintiffs knew that the building was to be let out to diverse tenants; they knew of the creation of tenancies in favour of the defendants; *though consent for such tenancies had not been given they had stood by and let the tenants incur expenses in fitting up the premises*; they have therefore by necessary inference acquiesced in the tenancies and are precluded from treating the defendants as trespassers. This argument I am unable to accept. I do not think that there are sufficient primary facts before me from which I can reasonably draw the inference as urged upon me. In my judgment, *the conduct of the plaintiffs fell short of constituting or amounting to any consent of or acquiescence in the tenancies created.* ***To constitute such consent or acquiescence there must be some positive acts emanating from the plaintiffs or their agent from which one can reasonably infer that they have consented to or acquiesced in the tenancies.*** In this case, there were none. [emphasis added in italics and bold italics]

Thean J then cited *O'Rourke*, *Parker* and *Taylor* with approval, and concluded (at [23]) that it would be "quite wrong to infer from the evidence" that the mortgagees had consented to treat the mortgagor's tenants as their tenants, since the mortgagees had "done nothing on their part to indicate in the slightest way that they acquiesced in or consented to the tenancies". Hence, they were not precluded from treating the mortgagor's tenants as trespassers.



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(3) Summary and a framework

63 Drawing together the threads of the above discussion, it is possible to distil the following principles that should apply when determining whether a lease binds a mortgagee, such that the mortgagee is precluded from treating the tenant as a trespasser. It is useful to organise these principles into a framework for orderly application:

(a) The starting point is to ascertain the order of creation of the mortgage and lease – specifically, whether the lease predates the mortgage or the mortgage predates the lease. The reason that the order of creation is crucial is that the mortgagee or tenant (as the case may be) can only acquire from the mortgagor such property rights as was still the mortgagor's to give at the time that the mortgage or tenancy was created.

(b) If the tenancy predates the mortgage, the mortgagee's rights will be subject to those of the tenant, who has an overriding interest under s 46(1)(vi) of the LTA. It remains open, however, for the tenant to agree to subordinate its rights to those of the mortgagee, in which event the priority of the lease over the mortgage will not persist.

(c) If the mortgage predates the lease, the lease will be subject to the mortgage and will not bind the mortgagee: s 89(1) of the LTA. This means that the mortgagee may regard the tenant as trespasser and lawfully evict him (although the tenant may perhaps maintain a remedy as against the mortgagor).

(d) The position in (c) is subject to a number of important exceptions. A lease granted by the mortgagor after the creation of the



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mortgage will nevertheless be effective as against the mortgagee where:

(i) The lease was created in the exercise of the mortgagor's statutory power under s 23(1) of the CLPA, and (crucially) there is no contrary intention expressed or qualifying term contained in the mortgage deed or of any such writing, as provided in s 23(11) of the CLPA. The lease will therefore be "authorised … by law" and binding on the mortgagee under s 89(1)(*a*) of the LTA.

(ii) The lease was created pursuant to a contractual power or entitlement within the agreement between mortgagor and mortgagee. This is often accompanied by a contractual requirement that the mortgagor first obtain the mortgagee's consent in writing. The burden of showing that the mortgagee has given its consent in writing lies on the tenant: *Taylor* at 512. In these circumstances, the lease is "authorised … by the mortgage" and binding on the mortgagee under s 89(1)(*a*) of the LTA.

(iii) The mortgagee has either expressly or impliedly consented to the lease under s 89(1)(*b*) of the LTA. Where such consent has been given, the mortgagee and tenant are regarded as having created a new tenancy: *Stroud* at 751; *Chatsworth* at 607; *Matterhorn* at [19].

(e) In order to determine whether the mortgagee has impliedly consented to the lease under (d)(iii) above, the question for the court is whether (to use the language of Ward LJ in *Mann*) "[l]ooking at all the



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facts in order to get a picture as a whole … the mortgagee [has] accepted the tenant as his own". The perspective that is applied is whether an "ordinary person" or "reasonable man" would have understood the mortgagee to have accepted the tenant as such: *Chatsworth* at 606–607.

(f) The mortgagee's consent cannot, without more, be inferred from the following:

(i) The mortgagee's knowledge of the lease: *Taylor* at 513; *Matterhorn* at [7].

(ii) The mortgagee taking no active steps to disavow a tenancy or to evict the tenant, even if this inactivity lasts for a substantial period: *Parker* at 841; *Taylor* at 513. The fact that the mortgagee "merely stood by passively" whilst the tenant "incur[red] expenses in fitting up the premises" is insufficient to support an inference that the mortgagee acquiesced in the tenancy: *Matterhorn* at [19].

(iii) The mortgagee's appointment of a receiver to demand and recover rent from the tenant. Under s 29(2) of the CLPA, the receiver is deemed to be the agent of the mortgagor, rather than the mortgagee. The mortgagee can therefore, through the medium of receivership, get the benefit of a tenant's rent while remaining at liberty to treat him as a trespasser (see [55] above). A mortgagee that expresses acceptance of or consent to the tenancy because it was labouring under the misconception that this was an unavoidable consequence of its appointment of a



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receiver will nevertheless be precluded from treating the tenant as a trespasser: *Stroud*; *Chatsworth*; *Mann*.

(g) In order for the mortgagee to have consented to or acquiesced in the tenancy, there must have been some positive acts emanating from the mortgagee or its agent from which one can reasonably infer that the mortgagee consented to or acquiesced in the tenancy: *Matterhorn* at [19].

64 While *Matterhorn* suggests that implied consent cannot be inferred from silence alone and some "positive acts" are needed, I prefer the view that this is a general but not a universal rule. In this regard, an analogy can usefully be drawn to the doctrine of acceptance by silence in contract law. While it is generally true that "some objective manifestation of assent or acceptance is required", "one *cannot* lay down an inflexible or blanket rule to the effect that silence can *never* constitute acceptance" [emphasis in original]: *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 03.133–03.134. The reason is that "[i]t is always a question of fact whether silent inactivity after an offer is made is tantamount to acceptance": *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 328 at [51] (recently affirmed by the Court of Appeal in *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd and another appeal* [2018] 1 SLR 50 at [51]). In the same way, in the context of mortgagee-tenant relationships, it may – in exceptional circumstances – be reasonable to infer a mortgagee's consent or acquiescence to the tenancy from its silent inactivity alone. It is at the very least inarguable that the mortgagee's conscious passivity is part of the matrix of facts which (applying Ward LJ's *dictum* in *Mann*) one must "[l]ook at … in order to get a picture as a whole".



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## Application to the facts

65 In the present case, it is the 3rd TA rather than the 2nd TA that is most obviously relevant, since the Tenant's contention is that UOB is "bound to honour the 3rd TA until [31 March] 2020", which is the date of expiry of the 3rd TA. However, given the nature of the Tenant's arguments – particularly, its contention that the 3rd TA is a renewal of the 2nd TA – it is necessary to review the effect that the 2nd TA has (if any) on the legal position between the parties.

### *The relevance of the 2nd TA*

66 As framed by the parties, a key aspect of the dispute is whether UOB consented to the 2nd TA. The Tenant contends that (a) UOB is "bound to honour the 2nd TA" under s 46(1) of the LTA; and (b) by accepting the Unit as security and securing its interest with the Assignment of Rental Proceeds, UOB took "positive steps … from which it is possible to infer its consent or acquiescence to not just the 2nd TA but all future tenancies" (see [15] above). UOB takes the position that despite its knowledge of the 2nd TA, it had not consented to it or otherwise taken any positive steps such that it should be taken to have accepted that tenancy.

67 In my view, it is both conceptually incoherent and a misapplication of statute to ask whether UOB had "expressly or impliedly authorised" or "consent[ed]" to the 2nd TA under s 89(1) of the LTA. That inquiry only makes sense if the party that has allegedly authorised or consented to the agreement is in both a factual and a legal position to do so. In the present case, the 2nd TA was already in existence at the time the refinancing request was made (see [8] above). UOB was in no position to consent to or authorise what was in essence a *fait accompli*, and had no pre-existing legal entitlement to do so. The only



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question for UOB was whether it would choose to become proprietor or not, and if it did, its rights and interests would be subject to those of the Tenant. It is therefore fallacious to ask whether UOB had consented to or authorised the 2nd TA. In addition, the inquiry is premised on a misreading of s 89(1), which states on its face that it concerns "[a] lease of registered land *which is subject to a mortgage*" [emphasis added]. For these reasons, I decline to approach the dispute in the manner that parties have done.

68 Applying the framework outlined at [63] above, the starting point is to observe that the 2nd TA predates the Mortgage. Accordingly, insofar as the 2nd TA is concerned, the only question is whether UOB's rights as proprietor are subject to the Tenant's rights under the 2nd TA. This must be answered in the affirmative given s 46(1)(vi) of the LTA, which provides that the rights of the proprietor are "subject to … the rights of any person in occupation of the land under a tenancy when the proprietor became registered as such" (see [36] and [63(b)] above). Specifically, this must mean that UOB is bound by such rights of the Tenant as are contained in the 2nd TA, including the Option to Renew (which is further discussed below). As Mr Premaratne fairly accepted at the hearing before me, there is no dispute – unlike in *Rimmon Watch* – that UOB was in possession of the 2nd TA at the time of the Mortgage (see [8] above) and it therefore cannot deny that it knew of the terms of the 2nd TA, including the Option to Renew.

### *The binding effect of the 3rd TA*

69 The 3rd TA, which came into existence after the creation of the Mortgage, may possibly bind UOB in two ways. First, if the 3rd TA came about as a result of the Tenant's exercise of the Option to Renew within the 2nd TA, then UOB may be regarded as having authorised the 3rd TA under s 89(1)(*a*) of



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the LTA (*ie,* authorisation of a lease by the terms of the mortgage: see [63(d)(ii)] above). When I asked Mr Premaratne whether, if the 3rd TA constituted a renewal of the 2nd TA under the Option to Renew, UOB should be taken to have authorised or consented to the 3rd TA (assuming, of course, that UOB was bound by the 2nd TA), Mr Premaratne agreed. He is undoubtedly correct. Second, UOB may be bound by the 3rd TA if it consented to the 3rd TA under s 89(1)(*b*) of the LTA. I will take each of these possibilities in turn.

*Whether the 3rd TA is a renewal of the 2nd TA*

70 It is useful to reproduce the Option to Renew again:

> If the Tenant shall be desirous of continuing the tenancy hereby created for a *further term of twelve (12) months* at the expiration of the term hereby granted in this Agreement, shall *give to the Landlord two (2) months' notice in writing prior to the expiration date of this Agreement* indicating the Tenant's desire and if there shall not at any time of such request be existing breach or non-observance of any of the stipulations on the part of the Tenant herein contained, then, *the Landlord will let the property to the Tenant for the further term of twelve (12) months from the 31st of March 2017*, at a rental to be agreed based on the prevailing market rent but otherwise containing the like condition, covenants and stipulations as are herein contained *with the exception of this option to renew*. [emphasis added]

71 There are three notable features of the Option to Renew:

(a) The renewed tenancy will be for a further period of 12 months from the expiry of the 2nd TA (*ie,* until 31 March 2018).

(b) In order to renew the 2nd TA, the Tenant must give the Landlord notice in writing two months before the expiry of the 2nd TA.



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(c) Apart from the amount of rental to be paid, the renewed tenancy will contain the same conditions, covenants and stipulations as the 2nd TA with the exception of the Option to Renew.

72 None of these features are consistent with the 3rd TA. In relation to the period of renewal, one would expect that if the 3rd TA were a renewal of the 2nd TA, the period of lease would be 12 months. But the agreed tenancy period in the 3rd TA is three times that – it provides for a lease of 36 months, commencing on 1 April 2017 and ending on 31 March 2020 (see [9] above). It is also notable that the 1st and 2nd TAs likewise provide for tenancy periods of 36 months each (see [6]–[7] above). Against this, the Tenant refers to *Rimmon Watch* and argues that the case "does not rule out the proposition that where the mortgagee has had sight of a tenancy agreement and has accepted the terms and consented to the same, a renewal of the lease for a period different from what is stipulated in the Option to renew (subject of course to Section 23, CLPA) could still be within its initial consent and/or impliedly authorized in the mortgage".[31] This is true but does not take the Tenant very far. I will set out my findings on whether UOB consented to the 3rd TA in the following section.

73 Regarding the requirement of notice, as UOB pointed out,[32] the Tenant did not disclose any such notice within its affidavits. The Tenant did not even claim that it had provided such a notice to the Landlord. If a notice to renew had indeed been issued, one would expect at the very least that the Tenant would have some record of this, as the issuer of the notice, but nothing of the sort was proffered to the court. Finally, as regards the terms of a renewed lease, I note

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31 2nd Defendant's Submissions at para 97.

32 Plaintiff's Submissions at para 32(d).



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that the 3rd TA contains an "Option to Review" clause that is worded identically to the Option to Renew in the 2nd TA (including an incorrect reference to "31st of March 2017" as the commencement date of the renewed lease). That is plainly inconsistent with the stipulation in the Option to Renew that any renewed tenancy would not contain such a renewal clause.

74 In pursuing the Tenant's argument, Ms Thomas referred me to a decision of District Judge Foo Tuat Yien (as she then was) in *Bougainvillea Realty Pte Ltd v Siong Hoe International (Pte) Ltd* [2004] SGDC 31 ("*Bougainvillea*"). It is not necessary to elaborate on the facts of *Bougainvillea* save to say that the dispute centred on whether the defendant tenants had agreed to the renewal of their tenancy on the terms of the original tenancy or if parties were still negotiating the terms for the renewal of the tenancy. According to Ms Thomas, *Bougainvillea* supports the proposition that "[w]hen there is no option to renew, and the original parties to the existing lease are in any kind of negotiation to enter into a further lease of the property, intending for the same to be effective at the end of the existing lease, the courts refer to that as a renewal".[33] Ms Thomas relied on [2] of *Bougainvillea*, which merely outlines the defendants' argument that after the original tenancy expired, the parties had "only agreed in principle on a 2 year renewal of the lease at a revised rental and service charge [but] had yet to commit themselves by executing the tenancy renewal agreement, as they were still negotiating the terms of the lease". I fail to see how that paragraph or any other part of *Bougainvillea* yields the legal proposition advocated by Ms Thomas. DJ Foo made no such finding in her judgment. That is unsurprising when one considers that the question of whether such a further lease should properly be considered a "renewal" of the previous lease had

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[33] See also 2nd Defendant's Submissions at para 45.



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simply not been in issue in *Bougainvillea*. And even if I accept that a further tenancy that contains terms differing from those of the original tenancy, or which are still the subject of negotiation, can be regarded as a "renewal" of the original tenancy, none of this ultimately assists the Tenant. The only relevant meaning of a "renewal" for present purposes is that which is framed by the Option to Renew. As I have explained, the terms of the 3rd TA and the manner of its creation sit ill at ease with the requirements of the Option to Renew. I am therefore unable to find that the 3rd TA is a "renewal" of the 2nd TA within the meaning of the Option to Renew.

75 For the foregoing reasons, I disagree with the Tenant's submission that the 3rd TA came about as a result of its exercise of the Option to Renew. I accept UOB's argument that the 3rd TA is a "separate and independent tenancy agreement from the 2nd TA".[34]

*Whether UOB consented to the 3rd TA*

76 Even if the 3rd TA cannot be considered a renewal of the 2nd TA pursuant to the Option to Renew, it remains possible that UOB consented to the 3rd TA such that it is bound by it under s 89(1)(*b*) of the LTA. As summarised at [63(e)] above, the true question is whether, looking at all the facts, one can reasonably infer that UOB accepted the Tenant as its own tenant. Such an inference can be drawn from "positive steps" taken by UOB or its agent which indicate consent or acquiescence.

77 Because the Tenant directed its argument to whether UOB had consented to or acquiesced in the 2nd TA (rather than the 3rd TA), it did not point

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[34] Plaintiff's Submissions at para 28.



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to anything said or done by UOB that specifically related to the 3rd TA. Nonetheless, it submitted that "[UOB's] actions in accepting the [Unit] as security and in securing its interest with [the Assignment of Rental Proceeds] of not just the rental proceeds of the 2nd TA *but also of all future tenancy agreements* at the time it granted the said financing were positive steps emanating from [UOB] from which it is possible to infer its consent or acquiescence to not just the 2nd TA *but all future tenancies*" [emphasis added].[35] I will address this argument to the extent that it refers to UOB's acceptance of the Unit as security and the Assignment of Rental Proceeds as evidence of UOB's consent to or acquiescence in the 3rd TA (as one of such "future tenancy agreements").

78 I begin with the somewhat trite observation that the conduct relied on by the Tenant took place before the creation of the 3rd TA. The type of consent that the Tenant refers to is therefore not the sort of retrospective consent that was at issue in the cases described at [45]–[62], but rather what appears to be prospective consent to the 3rd TA and all future tenancy agreements. It is difficult to see how UOB's decision to accept the Unit as security for the facilities granted to the Landlord can be regarded as evidence of such general and unqualified consent. All that can properly be said is that UOB, which had before it a copy of the 2nd TA at the time the refinancing request was made (see [8] above), accepted that its security would be subject to the Tenant's rights and interests as contained in the 2nd TA, which would include the Option to Renew. As I have explained, the 3rd TA is not a renewal of the 2nd TA under the Option to Renew. Nothing in UOB's decision to accept the Unit as security therefore

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35 2nd Defendant's Submissions at para 48(b).



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suggests that it consented to giving the Landlord a general discretion to create fresh tenancies of the Unit.

79 Nor am I persuaded that the Assignment of Rental Proceeds supports the Tenant's case. The Tenant places great emphasis on the fact that the Assignment of Rental Proceeds applies "not just [to] current but also future rental income from the [Unit]".[36] It argues that "[i]n requiring that future rental proceeds be assigned and charged to [UOB] as security for the grant of the mortgage loan in 2015, [UOB] by implication consented to/authorised future tenancy agreements which would give rise to such rental proceeds, as absent such consent/authorization, the assignment and charge of future rental proceeds would be meaningless, and the [Assignment of Rental Proceeds] would be ineffective as consideration for [UOB's] grant of financing in 2015".[37]

80 I cannot accept the submission. To begin, UOB's entitlement to rental proceeds under the Assignment of Rental Proceeds is unaffected by the issue of UOB's consent or otherwise to any tenancy agreements for the Unit. Under cl 3 of the Assignment of Rental Proceeds, the Landlord assigned to UOB all of its present and future rights, title and interest in and to all benefits under and arising out of the "Tenancy Agreements for the Property" and the "Rental Proceeds from the Property, together with the entitlements and rights to receive such Rental Proceeds, whether now or in the future".[38] The term "Tenancy Agreements" is broadly defined as "all present and future contracts, leases, rental agreement, tenancy agreement, licences, lettering agreements or

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36 2nd Defendant's Submissions at para 60.

37 2nd Defendant's Submissions at para 62.

38 See Yen Nee (1 August 2018) at p37.



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documents … which are entered into by or on behalf of the [Landlord], in respect of the occupation, use or possession of the Property or any part thereof", and "Rental Proceeds" means "all monies payable to the [Landlord] or its nominee under the Tenancy Agreements whether now or in the future". There is no requirement that UOB must have consented to the "Tenancy Agreements" for it to be entitled to the "Rental Proceeds".[39] The Assignment of Rental Proceeds operates as a continuing security for the Landlord's "payment and repayment of [the sums due from or owing or payable by the Landlord to UOB]" (see cl 4.1 of the Assignment of Rental Proceeds)[40] and nothing in the instrument suggests that the operation of this security should be premised on UOB's consent to the tenancy agreements.

81 The point is put beyond any doubt when one examines cl 8(c) of the Assignment of Rental Proceeds:

> **8. CONTINUING OBLIGATIONS**
>
> Notwithstanding this Assignment, the [Landlord] agrees and declares that notwithstanding any acceptance by [UOB] of any Rental Proceeds and other moneys payable under the Tenancy Agreements:-
>
> …
>
> (c) *[UOB]* ***shall not be bound by or treated as having consented to any of the Tenancy Agreements*** *which [UOB]* ***has not expressly and specifically consented to in writing***.
>
> [emphasis added in italics and bold italics]

The clause makes it clear that one cannot infer UOB's consent to any tenancy agreement from the operation of the Assignment of Rental Proceeds alone. UOB cannot be regarded as having given such consent unless it has "expressly and

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[39] See Yen Nee (1 August 2018) at p35.

[40] See Yen Nee (1 August 2018) at p38.



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specifically consented … in writing" to a tenancy agreement. There is no dispute that UOB has not provided such express written consent (I will further consider the issue of written consent below). Having considered both the purpose and the content of the Assignment of Rental Proceeds, I accept Mr Premaratne's submission that the Assignment of Rental Proceeds should not be taken as "blanket consent" by UOB to all future tenancy agreements.

82 In the circumstances, I am not satisfied that UOB has expressly or impliedly consented to the 3rd TA under s 89(1)(*b*) of the LTA. None of the acts that the Tenant refers to can be regarded as "positive acts" from which UOB's consent to or acquiescence in the 3rd TA can reasonably be inferred.

***The requirement of written consent***

83 UOB argues that any consent given by UOB to the 3rd TA must be in writing, and on the facts there was no such written consent. The Landlord's failure to obtain such written consent is not only a breach of the terms of the Mortgage, entitling UOB to take possession of the Unit, but also entails that the 3rd TA is not binding on UOB.[41] UOB relies in this regard on cl 1.8 of the Memorandum of Mortgage:

> No Parting with Possession or Disposal
>
> Not, without the ***prior written consent*** of [UOB], to *sell, transfer, lease, let, license, part with or share or agree to part with or share possession* of the [Unit] or *otherwise dispose of or cease to exercise direct control* over the [Unit] nor accept the surrender of any lease, tenancy or licence.
>
> [emphasis added in italics and bold italics]

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41 Plaintiff's Submissions at para 52; affidavit of Boey Mo Liang Kenneth dated 26 October 2018 at para 17.



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84 It should be highlighted that the contractual requirement of written consent does not pose an insurmountable obstacle to the Tenant's attempt to resist the Action. When I asked Mr Premaratne whether consent that was not given in writing (and which therefore did not satisfy the requirement under cl 1.8) could nevertheless be valid for the purposes of s 89(1) of the LTA, Mr Premaratne agreed. This must be correct given the cases described at [42]–[59] above, where the court considered whether the mortgagee had impliedly consented to the tenancy notwithstanding that it had not given written consent under the terms of the mortgage. Put another way, the question as to whether the mortgagee has given written consent as required under the terms of the mortgage only concerns the mortgagee's "authoris[ation of the tenancy] … by the mortgage" under s 89(1)(*a*) (see [63(d)(ii)] above). That is only one of several exceptions to the general rule, as enacted in s 89(1) of the LTA, that a lease of registered land which is subject to a mortgage shall not bind the mortgagee.

85 As described at [17] above, the Tenant relies on cl 8 of the Letter of Offer to say that there is, in fact, no requirement of written consent. That requirement only applies where the Landlord seeks to change the use of the Unit from "owner-occupation" to "investment", and in the present case there was no such change of use. Clause 1.8 of the Memorandum of Mortgage must be "read in conjunction" with cl 8 of the Letter of Offer, such that the requirement of consent in cl 1.8 applies only in a situation where the mortgagor of an owner-occupied property leases out the property, and not where the mortgagor "simply renews a pre-existing lease which has already been consented to or expressly/impliedly authorised by [UOB] and/or carries on using the property as investment". Clause 8 states:

> PROPERTY USAGE



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> (i) You shall at all times use and occupy the [Unit] for your own business use and/or investment and for no other purpose except with the prior written consent of [UOB].
>
> (ii) Where the [Unit] is for *owner-occupation*, for so long as the banking facilities are still outstanding with [UOB], you shall seek [UOB's] prior written consent if *you intend to rent out, sublet, license or part with possession* of the [Unit] or any part thereof, failing which [UOB] shall have the right to recall, cancel and/or vary the terms of the banking facilities without notice to you. You shall give [UOB] a copy of the proposed tenancy agreement for [UOB's] consideration.
>
> (iii) Where the Property is held for *investment*, you shall inform [UOB] in writing *if you intend to occupy the [Unit] instead*.
>
> …
>
> [emphasis added]

86 I do not accept the Tenant's argument. In my judgment, there is no inconsistency between cl 8 of the Letter of Offer and cl 1.8 of the Memorandum of Mortgage, such that the meaning of the latter is qualified by the former. The Landlord will need to seek UOB's written consent in order to (a) effect any intended change in property usage; and (b) part with his right to exclusive possession through the creation of a lease. Accordingly, where the Landlord intends to create a second tenancy of the Unit on the heels of an ongoing tenancy, it would need to seek UOB's written consent, not because it is changing the use of the Unit but because it is alienating or continuing to alienate its right to exclusive possession. That understanding of cl 1.8 is entirely consonant with the commercial underpinnings of the mortgage arrangement. The disposal of the Landlord's rights to a tenant would potentially affect the value of the security. It is therefore easy to understand why UOB would desire control over such an event and require the formality of writing to avoid uncertainty.

87 In addition, the Tenant's interpretation of cl 1.8 of the Memorandum of Mortgage would essentially render the clause otiose, because the Landlord



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would not need UOB's written consent to create further tenancy agreements in respect of the Unit (given that there is no change in use). That interpretation seems even more implausible when one considers that cl 1.8 of the Memorandum of Mortgage is essentially replicated in cl 10 of the Letter of Offer, *ie,* the very same agreement where cl 8 is found. It is unlikely in the extreme that parties would have inserted a superfluous clause into their commercial agreement.

88 Ms Thomas further argued that cl 1.8 of the Memorandum of Mortgage does not apply because the 3rd TA is a "renewal" of the 2nd TA, and such a renewal does not fall within the scope of the phrase "to sell, transfer, lease, let, license, part with or share or agree to part with or share possession of the [Unit] or otherwise dispose of or cease to exercise direct control over the [Unit]" within cl 1.8. Given that I have found that the 3rd TA is not a renewal of the 2nd TA, it is unnecessary for me to make any finding on Ms Thomas' argument. But I have serious doubts as to its correctness. The fact that a lease is created pursuant to an option to renew – such that it can be construed as a "renewal" of the existing lease – does not take anything away from the fact that it is nevertheless a "lease" of the Unit. To characterise it as a "renewal" takes nothing away from what the further tenancy fundamentally is. And such a "lease" would fall amply within the scope of cl 1.8.

**Conclusion**

89 For the foregoing reasons, I find that UOB is not bound by the 3rd TA. I reject the Tenant's contention that UOB is bound to honour that tenancy such that the Tenant may remain in possession of the Unit until the expiry of the tenancy on 31 March 2020. I will hear counsel on the specific orders to be made in the Action and also on costs.



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Elton Tan Xue Yang
Assistant Registrar

Mr Ushan Premaratne and Mr Kenneth Yap (KhattarWong LLP) for the plaintiff;
Ms Suja Susan Thomas (Ignatius J & Associates) for the second defendant.

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