SINGAPORE ACADEMY OF LAW CONFERENCE 2011

DEVELOPMENTS IN SINGAPORE LAW 2006–2010

24 February 2011

Opening Address of Chief Justice Chan Sek Keong

Minister for Law Mr K Shanmugam,

Attorney General Mr Sundaresh Menon,

Fellow Judges,

Participants:

1 It gives me great pleasure to welcome all of you to the Fourth Singapore Academy of Law Conference – a conference to review the more significant developments in Singapore legislation and case-law during the period of 2006–2010.

2 I would like to welcome, in particular, four special guests from abroad, *viz*, Chief Justice James Spigelman of the Supreme Court of New South Wales, Justice Patricia Bergin, Chief Judge in Equity of the Supreme Court of New South Wales, Justice Datuk Sulong bin Matjeraie of the Court of Appeal of Malaysia and Justice Abang Iskandar bin Abang Hashim of the High Court of Malaya. Their presence here today reflects a growing interest among common law judiciaries in the Asia-Pacific region, of which there are not many, to learn about the legal developments in one another's jurisdictions. Not only do we share a common heritage in having the common law as the foundation of our legal systems, but more importantly, our countries share a common future in the peace, progress and

prosperity of this region. So, I thank these judges for being here this morning.

3 This conference is held once every five years. It has now established itself as the premier conference on Singapore law. The Singapore Academy of Law first held this conference in 1995 to cover the period of 1990–1995, when procedural efficiency was the order of the day as the courts were heavily involved in clearing the backlog of cases.

4 During that period, a more important development for the future of Singapore law, however, was the enactment of the Application of English Law Act[1] ("the AELA") in 1992. In spite of its title, the main purpose of the AELA was to repeal s 5 of the Civil Law Act[2], which essentially provided that the courts had to apply the law as administered by the courts of England in any dispute involving an issue of mercantile law, and also to free Singapore courts from relying on the application of English common law unless it had already been accepted as part of Singapore law.

5 English influence, however, has remained strong. Nevertheless, our courts have not been slow to depart from English decisions since the Act was passed. One example would be in the area of calls on performance bonds. In 1995, the Court of Appeal, in *Bocotra Construction Pte Ltd v Attorney-General*[3], introduced the doctrine of unconscionability from Australian law as the basis for restraining unfair calls on performance bonds – a departure from the trite English position, which requires fraud to be clearly established before a call on a performance bond can be restrained. In December 2010, the Court of Appeal held, in *JBE Properties Pte Ltd v Gammon*

Pte Ltd[4], that the local position is now too established to be questioned.

6 Our ultimate objective is to build up a large body of local jurisprudence, so that local decisions can be cited first instead of English decisions. Australia succeeded in doing that many years ago –facilitated by a much larger pool of lawyers working in a much larger economy, most of whom would have been educated in Australian law schools. However, building up a body of local jurisprudence in a small jurisdiction is an immense task that requires a sustained intellectual effort by the courts. It would be easy for our courts simply to continue to apply English decisions; in contrast, it would require a much greater effort to decide when and explain why they should not apply.

7 However, being a small jurisdiction, whatever we do, our image on the radar screen of common law jurisdictions will remain small. To give an example, in 2009, the Court of Appeal decided, in *TQ v TR*[5], to recognise a foreign prenuptial agreement on the division of matrimonial assets made between a Dutch citizen and a Swedish citizen in a local divorce. The court also gave guidance on prenuptial agreements on custody, care and control of children and maintenance. The decision merited a short report in *The Straits Times*. In 2010, the Supreme Court of the United Kingdom also recognised a foreign prenuptial agreement in *Granatino v Rachmacher*[6]. That decision, however, reverberated around the common law world as a landmark decision in matrimonial law. The *Sunday Morning Post* in Hong Kong even had a full page write-up on the case with the heading “UK ruling flags change in divorce deals” and with mention that the decision would “likely influence Hong Kong courts”.

8 In 2000, Lord Woolf, during a visit to Singapore, commented that “so far as procedural justice is concerned, Singapore sets standards to which others aspire”. We still do, but since April 2006, we have also decided, as Prof Michael Hor anticipated, to “re-focus on the law and its internal values – rather than on its management and measurement by external criteria – with an increased attention to the quality of decisions – a fine tuning of the balance between fairness and efficiency.”[7] Much of what you will hear at this conference would be the fruits of this decision. The fine tuning has resulted in slightly longer, but still manageable, appeal hearings. It has also resulted in longer expository judgments; whether such judgments have clarified, improved or confused the law, or broken new grounds, are matters for which our expert speakers will explore and expound at this conference.

9 The majority of the speakers at this conference are specialist academics from our two law schools. This is the first conference in this conference series in which we have speakers from the Singapore Management University Law School. I wish to thank them for their valuable contributions, and trust that many will return as speakers at future conferences. Of course, I must also thank the speakers from the National University of Singapore Law Faculty, which has been the stalwart of this conference series from its inception. I have spoken on many occasions in the past on the debt of the Judiciary, and also the Bar, to the law academics for their contributions. Small as Singapore is as a common law jurisdiction, we do have a sizeable body of respected scholars of international standing in our law schools.

10 Before I conclude, I would like to make a final point. Law academics often see more or less in a judgment than the court has

decided or intended. It is usually not their fault – they are not privy to the deliberations of the court. Let me now give you examples by way of clarification.

11 The first example is from the paper on conflict in land law jurisprudence. In that paper, it is stated:

> Two different attitudes may be discerned in the Singapore cases on collective sales. The first approach articulated by Chan Sek Keong CJ in [the *Phoenix Court* case[8]] is that "[t]he legislative amendments made to the collective sale scheme in 1999 are intended to facilitate – and not to place unnecessary obstacles in the way of – collective sales." Under this approach, the court ought to strive to facilitate the will of the majority to sell the property collectively as long as the sale was not tainted with bad faith. Furthermore, the court should not frustrate the majority's wishes on the grounds of technicalities or procedural irregularities if such matters do not cause prejudice to the minority owners. In contrast, in [the *Horizon Tower* case[9]], V K Rajah JA expressed some doubts as to whether the minority owners' interest has been adequately protected in the statutory scheme. Rajah JA said "it cannot be gainsaid that, in establishing the statutory scheme [of collective sales], Parliament had carefully considered both the rights and financial interests of the objecting subsidiary proprietors". Stemming from this scepticism that the minority owners' interest has been adequately protected, it is unsurprising that Rajah JA listed an extremely comprehensive list of duties that the sales committee must comply with in a collective sale.

12 This passage gives the impression of a divergence of approach between Justice V K Rajah and me on the protection of property rights in en bloc sales. It makes Justice Rajah out as the champion of minority rights (drawing from the *Horizon Tower* case), and me as the champion of majority rights (drawing from the *Phoenix Court* case). However, I should point out that in both cases, the appeal panel consisted of the same three judges and the decisions were unanimous. The passage could also give the impression that the court is inconsistent in its philosophical approach to property rights. The issues in the two cases that were considered, however, were quite different. In the *Phoenix Court* case, the minority objected to the scheme (which had fulfilled all the legislative requirements) on technical grounds, but in the *Horizon Tower* case, the minority objected to the scheme on substantive grounds, *viz*, that the majority was in breach of their fiduciary duties to the minority.

13 The second example is from the paper on the common law of defamation. One passage from that paper reads:

> Malaysia and Hong Kong courts have applied the *Reynolds* privilege[10]. In contrast, the Singapore Court of Appeal in [the *FEER* case[11]] has decided, for the present at least, not to adopt the *Reynolds* privilege for matters of public interest. As a result of the Court of Appeal's decision to maintain *status quo* on the defence of qualified privilege, the Singapore position has effectively *diverged* from England and several parts of the Commonwealth. [emphasis in original]

14 This passage is not quite accurate. The Court of Appeal held that the *Reynolds* privilege did not apply under the common law of Singapore to a foreign defendant as non-citizens do not enjoy

constitutionally protected speech. The court held the *Reynolds* privilege was based on the English courts having elevated the common law right of free speech to a right of a higher legal order as a consequence of the United Kingdom being bound by the European Convention for the Protection of Human Rights and Fundamental Freedoms and the enactment of the Human Rights Act 1998[12] (c 42) (UK). In contrast, freedom of speech in Singapore is also a higher legal order right because it is a constitutional right under Art 14 of the Constitution; however, that provision does not apply to non-citizens or corporations owned by them. FEER was a publication that was foreign-owned – by the defendant. Hence, to allow the defendant to rely on the *Reynolds* privilege would be to wrongly accord the right of free speech of a higher legal order to non-citizens by the backdoor. That was the essence of the court's decision.

15 The Court of Appeal in that judgment also suggested that if the *Reynolds* privilege is not accepted as a defence to liability, it can still be accepted as a mitigating factor in damages. I would have thought that any academic commentator would seize on that suggestion and make a meal of it.

16 A final example arises from the paper that touched on directors' duties and minority oppression. In the last five years, the Court of Appeal gave a series of decisions on disputes of this nature. What the paper did not point out would be that in a number of cases, the court was not so much concerned with the law, the broad principles of which are settled, but with how to provide practical solutions to the parties. In other words, the court had attempted to be solution-oriented rather than doctrine-oriented. In the case of *Sim Yong Kim v Evenstar Investments Pte Ltd*[13]*,* the Court of Appeal went out of its way to set down, in considerable detail, conditions

and directions to ensure that the parties obtained a fair resolution of their dispute, with the possibility of an amicable settlement being left open. Similarly, the court order in *Chow Kwok Chuen v Chow Kwok Chi*[14] was conditional so as to leave the door open for an amicable settlement of the dispute.

17 In its latest decision on company law, the Court of Appeal in *OCBC Bank v TT International Ltd*[15], not only ordered a re-vote on a scheme of arrangement to address the grievances of the creditors that it lacked transparency, it also imposed conditions for sanctioning the scheme after the second vote to allow itself a continuing supervisory role in implementing the scheme. In other words, the court interpreted s 210(4) of the Companies Act[16] broadly to enable it to allow the company to be reorganised in a manner almost resembling a Chapter 11 reorganisation.

18 I think I have said more than enough to encourage the participants today to engage the speakers on their views, so that there can be a lively discussion following their presentations. Many of you may look back in wonder (or distress) at what the courts have done to the law in the last five years. That having been said, a conference of this nature can be a wake-up call to the judges to do better than what they have done in the past.

19 Let me conclude by thanking the organising committee and the staff of the Singapore Academy of Law who have worked so hard to organise this conference, and also the speakers and participants for making this conference possible.

20 I now have great pleasure in declaring open the Fourth Singapore Academy of Law Conference. Thank you.

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[1] Application of English Law Act (Cap 7A, 1994 Rev Ed).

[2] Civil Law Act (Cap 43, 1988 Rev Ed).

[3] *Bocotra Construction Pte Ltd v Attorney-General* [1995] 2 SLR(R) 262

[4] *JBE Properties Pte Ltd v Gammon Pte Ltd* [2010] SGCA 46.

[5] *TQ v TR* [2009] 2 SLR(R) 961.

[6] *Rachmacher v Granatino* [2010] UKSC 42.

[7] See Welcome Reference for the Chief Justice – Response by the Chief Justice, 22 April 2006, at para 4.

[8] *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR(R) 597.

[9] *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109.

[10] Set out in the case of *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

[11] *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 42.

[12] Human Rights Act 1998 (c 42) (UK).

[13] *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827.

[14] *Chow Kwok Chuen v Chow Kwok Chi* [2008] 4 SLR(R) 362.

[15] See Civil Appeal Nos 44 and 47 of 2010.

[16] Companies Act (Cap 50, 2006 Rev Ed). Section 210(4) reads: "… the court may grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just."