Attorney-General *v* Aljunied-Hougang-Punggol East Town Council
[2015] SGCA 60

Case Number	: Civil Appeal No 114 of 2015; Summons No 258 of 2015; Summons No 268 of 2015; Summons No 269 of 2015
Decision Date	: 27 November 2015
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: Aurill Kam, Nathaniel Khng and Germaine Boey (Attorney-General's Chambers) for the appellant; Peter Cuthbert Low, Terence Tan and Christine Low (M/s Peter Low LLC) for the respondent.
Parties	: ATTORNEY-GENERAL — ALJUNIED-HOUGANG-PUNGGOL EAST TOWN COUNCIL

Civil Procedure —Parties —Joinder

Statutory Interpretation —Construction of Statute

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2015] 4 SLR 474.]

27 November 2015 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 Town Councils are a somewhat unique feature of our system of local government, established to control, manage, maintain and improve the common property of our public housing estates. Almost 80% of the population of Singapore reside in or own homes in housing estates built and managed by the Housing and Development Board ("HDB"), a statutory board established in 1960 and charged with the responsibility of addressing and meeting the housing needs of the general population of Singapore. Historically, the HDB was also responsible for the maintenance and management of the common property of these housing estates. By common property, in broad terms, we refer to those parts of the estate that are not encompassed within each individual unit, such as corridors, stairs and lifts. Town Councils were formed in 1989 to take over these functions from the HDB and in order to perform these functions, they clearly required funding. Such funds were to be raised from various sources, including conservancy and service charges imposed on residents as well as grants-in-aid made by the Minister of National Development ("the Minister"). These matters are provided for in the legislation that was passed for this purpose, namely, the Town Councils Act (Cap 329A, 2000 Rev Ed) ("TCA"). The TCA also deals with another important issue, namely, the obligation of Town Councils to manage their finances in accordance with the broad principles laid down in the TCA as well as the more detailed provisions contained in the Town Councils Financial Rules (Cap 329A, R 1, 1998 Rev Ed) ("TCFR"). But what if a Town Council fails to act in accordance with these principles or to comply with the detailed stipulations? What remedies avail an interested party in such a situation? Who may apply for relief in such circumstances and what are the limits of the court's power to act? These are the questions that lie at the heart of this appeal, which was brought against the decision of a High Court Judge ("the Judge") that is reported as *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474.

2 We reserved judgment after hearing the parties on 3 August 2015. Having considered the matter, we now give our judgment. We allow the appeal in part, for the reasons and on the terms that follow.

Background facts

3 The appellant is the Attorney-General acting on behalf of the Government in respect of a matter falling within the remit of the Ministry of National Development ("MND"). The HDB has also applied to be joined as a co-plaintiff/co-appellant in these proceedings. The HDB too is represented by the Attorney-General in this appeal. The respondent is the Aljunied-Hougang-Punggol East Town Council ("AHPETC"). On 1 October 2015, by virtue of the Town Councils (Declaration of Towns) Order 2015 (GN No S 577/2015), AHPETC was renamed as Aljunied-Hougang Town Council to reflect the change in the area of the Town. This, however, does not affect the present appeal as there was no order for the dissolution of AHPETC. For the purpose of this judgment, we will continue to refer to the respondent as AHPETC.

An overview of the TCA and the TCFR

4 As this appeal revolves around the lapses of a Town Council in relation to the management of its finances, it would be helpful, before we turn to the specific facts of this case, to provide a brief description of how Town Councils are funded, how those funds are regulated by the TCA and the TCFR, and to identify the main requirements of the TCA and the TCFR that are in issue here.

5 To perform its duties and functions under the TCA, a Town Council is empowered to levy conservancy and service charges on its residents every month (s 39 of the TCA). The amounts so collected are supplemented by grants-in-aid made by the Minister from time to time, typically on an annual basis (s 42 of the TCA). The Town Council is also empowered to raise loans for specific purposes as well as to invest its funds (ss 40 and 41 of the TCA). These are the primary sources of a Town Council's funds, though there are others, such as fines collected by the Town Council for any infringements by the residents (ss 46 and 49 of the TCA).

6 All money received by a Town Council by virtue of the TCA and all liabilities falling to be discharged by a Town Council are to be paid into and out of a "Town Council Fund" which the Town Council shall establish (ss 33(1) and (2) of the TCA). The Town Council Fund consists of separate funds for different types of properties, such as residential and commercial, and these are further split into operating funds for short-term expenses and sinking funds for long-term expenses (ss 33(3) and (4) of the TCA; rr 3 and 4 of the TCFR). A portion of the conservancy and service charges, grants-in-aid and any interest received by a Town Council must be transferred into the sinking fund every quarter of every financial year (r 4(2B) of the TCFR). This is to ensure that there will be sufficient funds available, when required, for major cyclical upgrading and maintenance works such as repainting of the common property or upgrading of lifts. Proper accounts and records are required to be kept in respect of these funds as well as the transactions and affairs of the Town Council generally (s 35(*a*) and (*b*) of the TCA).

7 A Town Council is not allowed to disburse any money out of the Town Council Fund except for the purposes specified in the TCA (s 33(6) of the TCA). It is also required to do all things necessary in order to ensure that all payments out of its moneys are correctly made and properly authorised and that adequate control is maintained over the assets of the Town Council and over any expenditure it incurs (s 35(*c*) of the TCA). Aside from this, a Town Council is also obliged to comply with the financial rules set out in the TCFR. Part IV of the TCFR, for example, deals with expenditure and payments and it covers details such as the authority to sign cheques and incur expenditure on behalf

of the Town Council (rr 33 and 34 of the TCFR).

8 To ensure that its finances are in order, every Town Council is required to prepare and submit its financial statements annually (s 36 of the TCA), and its accounts are required to be audited by the Auditor-General or such other auditor as may be appointed by the Minister (s 38 of the TCA). Other checks (such as surprise examinations of safes, cash-boxes, drawers or other receptacles for money (r 114 of the TCFR)) and procedures (such as procedures for quotations and tenders (rr 73 and 74 of the TCFR)) are also put in place to prevent loss and wrongful use of funds.

9 The foregoing requirements are unsurprising since they pertain to a public body that has control over and custody of public funds for specified purposes.

The breaches by AHPETC in this case

10 For the purpose of the present appeal, we are primarily concerned with the following requirements that were imposed on AHPETC:

(a) to do all things necessary to ensure that all payments out of its moneys are correctly made and properly authorised and that adequate control is maintained over the assets of, or in custody of, the Town Council and over the expenditure incurred by the Town Council (s 35(*c*) of the TCA); and

(b) to make transfers to the sinking fund within one month from the end of each quarter of each financial year (r 4(2B) of the TCFR).

11 Against that background, we set out a chronology of the key events that led to this appeal.

12 Like all Town Councils, AHPETC was obliged under the TCA to submit audited financial statements with the auditor's observations report (if any) for each financial year to the Minister within five months of the end of the financial year so that these could be presented to Parliament. AHPETC was late in submitting these statements for two consecutive financial years –FY 2011/2012 and FY 2012/2013. AHPETC's audited financial statements and auditor's observations reports which were eventually issued for these financial years contained various disclaimers by its auditors. In essence, the auditors stated that they were unable to express an opinion as to the validity of certain receivables, expenses and payments; the completeness of AHPETC's related party disclosures; and the accuracy of the cash and bank balances in the bank accounts. They also noted AHPETC's failure to comply with the requirement to make quarterly sinking fund transfers. Arising from these events, the Deputy Prime Minister and Minister for Finance, upon the request of the Minister, exercised his powers under s 4(4) of the Audit Act (Cap 17, 1999 Rev Ed) on 19 February 2014 and directed the Auditor-General to conduct an audit into the financial accounts, records and books of AHPETC for FY 2012/2013 ("the Audit").

13 The Minister decided in the circumstances that the grants-in-aid that would otherwise have been payable to AHPETC for FY 2014/2015 (typically paid in or around April or May of each year), should be withheld pending the completion of the Audit. When informed of this development, AHPETC responded, telling the MND, among other things, that it would not be able to fulfil one of its obligations under the TCFR for the first quarter of FY 2014/2015 if the grants-in-aid were withheld. The obligation in question was that arising under r 4(2B) of the TCFR which required that a stipulated portion of the conservancy and service charges, grants-in-aid and interest received be transferred by every Town Council to its sinking fund every quarter – see [6] above. Upon being apprised of AHPETC's position, the Minister offered to disburse half of the grants-in-aid subject to certain

conditions. It appears that these conditions were not acceptable to AHPETC. As a result, the grants-in-aid were not made, and consequently, AHPETC has not, since FY 2011/2012, been able to make the transfers into its sinking fund in a timely fashion, and further, had not made the transfer for the fourth quarter of FY 2014/2015 (which was due on 30 April 2015) at the time of the hearing. We digress to observe that the key conditions that the Minister wished to impose were for AHPETC and its chairman to provide explanations or assurances as to AHPETC's financial status and its ability and willingness to comply with the financial rules under the TCA and the TCFR before disbursing the grants-in-aid.

14 On 9 February 2015, the Auditor-General released its report on the Audit ("the Auditor-General's Report"). This identified several lapses in AHPETC's governance and its compliance with the TCA and the TCFR. The major lapses included the following:

(a) AHPETC had failed to effect transfers into the sinking fund bank accounts as required by the TCFR.

(b) AHPETC did not have adequate oversight of related party transactions. These were transactions with third parties in which the key officers of AHPETC had ownership interests. As a result, it was thought that the integrity of such payments was open to question.

(c) AHPETC did not have a system in place to monitor arrears of conservancy and service charges accurately even though these constitute a major part of a Town Council's revenue stream. The specific concern raised was that in the absence of a reliable system, there would be no assurance that arrears are properly collected and applied in accordance with the applicable legal framework.

(d) AHPETC had poor internal controls over its assets and expenditures. The main concern here was that AHPETC failed to comply with the stipulated safeguards and checks, such as performing monthly bank reconciliations on a timely basis, following the rules on approval of procurement and segregating the duties within the payment process. As a result of this, there was a risk of AHPETC losing valuables and cheques in its possession, incurring unnecessary expenditure and making wrong payments for goods and services.

(e) AHPETC did not have a proper system to safeguard documents and maintain proper accounts and records as required by the TCA.

15 The report concluded that unless the weaknesses were addressed, there could be no assurance as to the accuracy or reliability of AHPETC's financial statements, or that public funds were being spent, accounted for and managed properly.

16 Before the Judge, and similarly before us as well, the parties agreed that:

(a) AHPETC had breached the TCA and the TCFR in the ways specified in the Auditor-General's Report. At the hearing before us, Mr Peter Low, counsel for AHPETC, alluded to the fact that steps have since been taken by AHPETC to comply with the TCA and the TCFR, but he confirmed that not all of the lapses have been rectified.

(b) AHPETC has a duty to ensure that payments made to third parties are properly made and duly authorised, and hence it has a duty to look into past payments it made to third parties to ascertain if they were properly made or duly authorised and, if not, to take steps to recover such payments.

(c) AHPETC had not, at the time of the hearing before the Judge, made the sinking fund transfers for the third and fourth quarters of FY 2014/2015. The transfer for the third quarter of FY2014/2015, which should have been made by 31 January 2015, was eventually made on 8 July 2015. Hence, at the time the parties were before us, only the sinking fund transfer for the fourth quarter of FY 2014/2015, which should have been made by 30 April 2015, remained outstanding.

17 Parliament convened on 12 February 2015 to discuss the findings of the Auditor-General's Report. Shortly thereafter, on 20 March 2015, the MND commenced proceedings before the High Court and sought the following orders:

1. A declaration that the Government through the Ministry of National Development ("MND") has a legal or alternatively, equitable interest in the grants-in-aid disbursed or to be disbursed by MND ("the Grants") to the Defendant (and its predecessor, Aljunied-Hougang Town Council ("AHTC")) under section 42 of the [TCA];

2. A declaration that the Government through the MND has an interest:

a. In ensuring that the Defendant does all things necessary:

i. to administer and apply moneys held by the Defendant (and previously by AHTC) under the [TCA] ("Town Council Moneys") (including but not limited to the Grants and service and conservancy charges) in accordance with law and the [TCA]; and

ii. so that all payments of Town Council Moneys are correctly made and properly authorised, adequate control is maintained over Town Council Moneys and over expenditure incurred by the Defendant and all payments of Town Council Moneys are lawfully made; and

b. In ensuring that:

i. if the Defendant (or AHTC) has made any payment of Town Council Moneys that is not correctly made, not properly authorised or not lawfully made, the Defendant takes all necessary steps to recover such Town Council Moneys; and

ii. if there has been any breach of duty or unlawful conduct by any person acting for the Defendant (or AHTC) or its agents, the Defendant takes appropriate action in respect of such breach(es) or conduct;

2A. A declaration that the Defendant has failed to make timely transfers (in respect of the first and second quarters) or any transfer (in respect of the third and fourth quarters) to the bank account of the Defendant's sinking funds for FY 2014/15 as required by [r 4(2B)(*a*) of the TCFR].

3. Independent accountant(s) of the Defendant be appointed for such period as may be ordered herein and/or pending the fulfilment of the conditions in Annex A hereto ("the Independent Accountant(s)") on terms *inter alia* that the Independent Accountant(s):

a. Shall co-authorise and co-sign all payments of the Defendant in excess of S$20,000 from segregated bank accounts (for sinking funds and operating funds respectively) to be established by the Defendant ("the Special Accounts") into which Grants payable for financial years 2014/15 and 2015/16 will be paid by MND to the Defendant;

b. May do all things necessary to ensure that proposed payments out of the Special Accounts are correctly made, properly authorised and lawfully made, adequate control is maintained over Town Council Moneys and over the expenditure incurred by the Defendant, including but not limited to requiring the Defendant to produce satisfactory assurance and supporting evidence in respect of such payments;

c. May:

i. do all things necessary to identify whether payments of Town Council Moneys by the Defendant (or AHTC) have been correctly made, properly authorised and lawfully made (including but not limited to taking accounts and directing inquiries of payments made to any persons related to the Defendant (or AHTC)) and/or whether there has been any breach of duty or unlawful conduct by any person acting for the Defendant (or AHTC) or its agents; and

ii. with leave of Court, demand, collect, get in, receive (and if necessary commence legal proceedings for the recovery of) all Town Council Moneys incorrectly, improperly or unlawfully paid out and/or take appropriate action in respect of breach(es) of duties or unlawful conduct by person(s) acting for the Defendant (or AHTC) or its agents;

d. May disclose to MND (or such other persons as may be directed by the Court) information obtained by the Independent Accountant(s) in the course of their work;

e. May at any time seek such further directions or orders from this Honourable Court as the Independent Accountant(s) consider appropriate or necessary;

f. May at any time appoint such other person(s) as the Independent Accountant(s) deem appropriate or necessary to assist in or facilitate the doing of such acts and things necessary for the purposes described in (a)–(e) above;

g. Whether, by themselves, their agents or servants or otherwise, be at liberty and be permitted to do all such acts and things necessary for the purposes described in (a)–(e) above; and

h. Shall have such other powers as ordered by this Honourable Court;

…

Decision of the court below

18 The Judge dismissed the MND’s application in its entirety. He divided the orders sought into three broad categories, namely:

(a) orders pertaining to the grants-in-aid that have yet to be disbursed by the Minister to AHPETC (see prayer 3(a) and the first part of prayer 3(b) above);

(b) orders regulating the application of the Town Council’s funds (consisting of all funds actually in the custody of AHPETC including but not limited to grants-in-aid and conservancy and service charges) and extending to the investigation and recovery of any sums found to have been improperly paid out (see prayer 3(b) and prayers 3(c) to (h)); and

(c) the declarations set out in prayers 1, 2 and 2A.

19 The Judge's reasons may be summarised in broad terms. First, in relation to the orders pertaining to the grants-in-aid that have yet to be disbursed (at [18(a)] above), the Judge held that since s 42 of the TCA empowered the Minister to impose conditions on the grants-in-aid, it was neither necessary nor appropriate for the court to be asked to make orders imposing any such conditions.

20 Second, the Judge refused to grant the orders sought in relation to the appointment of independent accountants to regulate the use of the funds in AHPETC's custody and to investigate and recover the sums that might have been paid out improperly (at [18(b)] above) because he held that MND did not have a right to those reliefs. The MND advanced various bases to support its contention that it was entitled to the reliefs it sought. It argued that it had a statutory right to such reliefs under s 21(2) of the TCA; in the alternative, it claimed that it was entitled to those reliefs pursuant to a statutory interest under the TCA, a beneficial interest under a *Quistclose* trust, and/or a legal interest pursuant to a contractual mandate that it possessed over the grants-in-aid. The Judge rejected all of the alternative bases advanced by the MND.

21 Third, the Judge refused the declarations sought in prayers 1 and 2 as he found that the MND had not established its interest in the "Town Council Moneys", that is, the funds that were in the custody of AHPETC. The Judge also refused the declaration sought in prayer 2A on the basis that it would not be of any use to the MND. But the Judge also observed that the *HDB* as opposed to the MND would be entitled to bring an application to the court under s 21(2) of the TCA and to obtain at least some of the reliefs sought. At the time of the hearing before the Judge, the HDB was not a party to the proceedings.

22 The MND filed its appeal on 29 May 2015.

Application to join the HDB

23 On 22 June 2015, the HDB applied to be joined as a co-plaintiff/co-appellant. It did so on the basis that *if* the Judge was correct to hold that the MND is not entitled to rely on s 21(2) of the TCA and that the only reason the reliefs in this case could not be granted is because the HDB was not a party, *then* it should be joined as a proper party.

24 On 16 July 2015, AHPETC applied to strike out the HDB's joinder application pursuant to O 18 r 19 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). This was fixed for hearing at the same time as the substantive appeal.

Application to make new points on appeal and adduce fresh evidence

25 On 13 July 2015, AHPETC applied to introduce evidence which pertained to events that occurred after the judgment was released on 27 May 2015. The new evidence related to the following three new points that had not been raised in the court below:

(a) that AHPETC had submitted its audited financial statements for FY 2013/2014 to the MND on 30 June 2015;

(b) that AHPETC had made the sinking fund transfer for the third quarter of FY 2014/2015 on 8 July 2015 (see [16(c)] above); and

(c) that AHPETC's managing agent (*ie*, FM Solutions and Services Pte Ltd ("FMSS")) had intimated that it did not wish to proceed with any ongoing projects with AHPETC after the expiry of its existing agreement on 14 July 2015.

Issues before this Court

26 The issues before us may be stated in broad terms as follows:

(a) whether leave should be granted for AHPETC to raise the new points on appeal and to adduce the relevant evidence;

(b) whether the HDB should be joined as a party;

(c) whether the MND and/or the HDB is (or are) entitled to the reliefs sought under s 21 of the TCA; and

(d) whether the MND is entitled to the reliefs sought under one or more of the alternative legal bases it relies upon.

27 The consideration of these issues will give rise to sub-issues. For instance, in relation to issue (c) above, it will be relevant to consider who has standing to seek relief under s 21 of the TCA, and also, if standing is established, what, if any, reliefs or remedies the court may and should grant. We will deal with the relevant sub-issues as we set out our reasons.

Our decision

Should leave be granted for AHPETC to raise new points on appeal and adduce fresh evidence?

28 We consider that leave should be granted for AHPETC to introduce the three new points on appeal as well as adduce the fresh evidence in support. AHPETC had, in compliance with O 57 r 9A(4)(*b*) of the ROC, stated, in the Respondent's Case, its intent to apply for leave to introduce these points and adduce the fresh evidence in support. It had also filed a summons for leave to adduce fresh evidence by way of affidavit.

29 The new points relate to events which occurred after the judgment was released and they are relevant insofar as they might show that the reliefs sought by the MND are no longer called for. The present case can be distinguished from two previous cases where leave to introduce new points on appeal was denied (see *Feoso (Singapore) Pte Ltd v Faith Maritime Co Ltd* [2003] 3 SLR(R) 556 at [32]; *Ng Bok Eng Holdings Pte Ltd and another v Wong Ser Wan* [2005] 4 SLR(R) 561 at [35]). In those cases, the new point on appeal could have been (but was not) raised at the trial or hearing below. As a result, it was thought that the opposing party would be prejudiced if the new point was allowed to be taken at the appeal. The circumstances are plainly different here.

30 We also see no reason to reject AHPETC's application for leave to adduce fresh evidence in support of the three new points. The fresh evidence consists essentially of the affidavit of Ms Sylvia Lim Swee Lian, dated 13 July 2015, exhibiting a copy of AHPETC's 2013/2014 Annual Report, which included its audited accounts for FY 2013/2014, as well as a copy of AHPETC's instruction to its bankers to transfer the sum of about $4.46m to its sinking fund. In the affidavit, Ms Lim also deposed that, in light of the sudden demise of Mr Danny Loh Chong Meng, the managing director of FMSS, on 27 June 2015, FMSS had intimated that it did not wish to proceed with any ongoing projects with AHPETC after the expiry of its existing agreement on 14 July 2015. Ms Aurill Kam, counsel for the MND

and the HDB, did not object to the contents of this affidavit; indeed Mr Han Kok Juan had filed an affidavit in reply dated 23 July 2015 on behalf of the MND. Even though Ms Kam objected to Ms Lim's further affidavit filed on 31 July 2015, which was a response to Mr Han's reply affidavit, on the basis that its contents were irrelevant and that the affidavit had been filed late, we do not think that this can or should affect our decision to allow AHPETC to adduce the fresh evidence contained in Ms Lim's affidavit dated 13 July 2015.

31 Accordingly, we grant leave for AHPETC to raise the three new points on appeal and to adduce the evidence it has put forward in support of those points.

Should the HDB be joined as a party?

32 We turn to the next issue, to which there are two aspects. As we have already noted, AHPETC applied to strike out the HDB's application to be joined as a party. It is not evident to us why AHPETC did this. The substantive merits of the HDB's application would have had to be determined and AHPETC would in any event have had the opportunity to oppose the application. In the circumstances, it seemed to us that this was an unnecessary step. More fundamentally, it was flawed. The striking out application was brought under O 18 r 19 of the ROC which applies only to pleadings (including an originating summons seeking relief) and any endorsement of a writ. It does not apply to a summons in a pending cause or matter. This is evident from O 18 r 19, read with O 1 r 4, which provide:

> **Striking out pleadings and endorsements (O. 18, r. 19)**
>
> **19.**—(1) The Court may at any stage of the proceedings order to be struck out or amended any *pleading* or the *endorsement of any writ* in the action, or anything in any pleading or in the endorsement, on the ground that —
>
> (*a*) it discloses no reasonable cause of action or defence, as the case may be;
>
> (*b*) it is scandalous, frivolous or vexatious;
>
> (*c*) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (*d*) it is otherwise an abuse of the process of the Court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(*a*).
>
> (3) *This Rule shall, as far as applicable, apply to an originating summons as if it were a pleading*.
>
> **Definitions (O. 1, r. 4)**
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> **4.**—(1) In these Rules, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, namely:
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> ...
>
> "originating process" means a writ of summons or an originating summons;

> *"originating summons" means every summons for the commencement of proceedings other than a writ of summons;*
>
> *"pleading" does not include an originating summons, a summons or a preliminary act*;
>
> ...
>
> "summons" means every summons in a pending cause or matter;
>
> ...
>
> "writ" means a writ of summons.
>
> [emphasis added]

33 Order 18 r 19(1) specifically states that it applies only to "any pleading or the endorsement of any writ". While "pleading[s]" are defined in O 1 r 4 to exclude both originating summons *and* summons, O 18 r 19(3) states in clear terms that the rule shall apply to "an originating summons as if it were a pleading". The logical conclusion is that O 18 r 19 does not apply to a summons in a pending cause or matter. There is nothing in our case law or the leading textbooks (see, *eg*, Jeffrey Pinsler, *Singapore Court Practice* (LexisNexis, 2014) ("*Singapore Court Practice*") at para 18/19/3 on "[w]hat may be struck out" and *Singapore Civil Procedure vol 1* (GP Selvam gen ed) (Sweet & Maxwell, 2015) ("*Singapore Civil Procedure*") at para 18/19/1 on "[e]ffect of rule") to even suggest that it is possible to extend the rule to permit an application to be made to strike out a summons in a pending cause or matter. Having regard to the plain words of the relevant provisions as we have set them out above, we consider it obvious why that is so.

34 For this reason, we dismiss AHPETC's striking out application. The real issue, as we have noted, is whether leave should be granted for the HDB to be joined.

35 As to that, we found one aspect of the application to be unusual and we raised this with Ms Kam as a preliminary point. The application was made on a *conditional* basis. As originally framed, the application was for the HDB to be joined as a party *in the event* that we disagreed with the MND that it has the requisite standing and the entitlement to the various reliefs it is seeking and further *if* we agreed with the Judge that the only reason the reliefs could not be granted is because the HDB (rather than the MND) is the proper party to bring the action. In our judgment, the conditional nature of the HDB's application for joinder was untenable. If at the end of the proceedings as they were originally constituted (without the HDB being a party), we were to conclude that the MND was not entitled to the orders sought, that would be the end of the matter. There would simply be no need or occasion for us to go on to consider whether the HDB or some other person would instead be entitled to the same or similar reliefs and ought therefore to have been joined as a party. Furthermore, the HDB's application in its original form was premised on it being found to be *entitled* to the orders sought but for the fact that it had not been joined as a party. But that is to put the cart before the horse. Until the HDB is joined as a party, there is no reason for us to even consider whether it would be entitled to the orders sought. For these reasons, we indicated at the start of the hearing that we were not prepared to entertain the HDB's application on this basis and invited it to decide whether it wished to apply unconditionally to join as a party. Ms Kam then informed us that the HDB should be taken to be making an unconditional application to be joined as a party to the action and the appeal.

36 We accordingly turn on this basis to the question of whether the HDB should be joined as a party in these proceedings. Order 15 r 6(2)(*b*) of the ROC sets out the court's power in the event of

a nonjoinder of parties. It reads:

> (2) Subject to the provisions of this Rule, at any stage of the proceedings in any cause or matter, the Court may, on such terms as it thinks just and either of its own motion or on application —
>
> ...
>
> (*b*) order any of the following persons to be added as a party, namely:
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in the cause or matter may be effectually and completely determined and adjudicated upon;
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

37 The HDB relied on O 15 r 6(2)(*b*)(i) of the ROC as well as on the inherent powers of the court in seeking to be joined as a party in these proceedings.

38 To rely on O 15 r 6(2)(*b*)(i), the applicant must show that his presence is "necessary for the purpose of adjudication", and that includes cases where "he has rights which may be affected by the outcome in the proceedings" (Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2013) at para 07.020). A *plaintiff* will be added only if it is "necessary to enable the question at issue to be determined" (*Singapore Civil Procedure* at para 15/6/3; see also *Singapore Court Practice* at para 15/6/8). Here, we are not satisfied that the HDB should be joined as a party on this basis. The presence of the HDB is not necessary for the question or issue in dispute to be determined, which is whether the MND is entitled to the reliefs sought. Indeed, this point was implicitly and perhaps unwittingly conceded by the HDB when it took the position before us, in order to justify the conditional nature of its joinder application, that the question of whether the MND is entitled to the reliefs sought can be dealt with *separately* as an "anterior question" before we consider whether the HDB should be joined as a party. This shows that even the HDB did not consider that it *had* to be added as a party for the question or issue in dispute to be determined.

39 As mentioned earlier, the HDB also relied on the inherent powers of the court in seeking to be joined as a party. However, there is no need for us to consider whether the court's inherent powers should be invoked because we consider that the HDB can be joined as a party under O 15 r 6(2)(*b*)(ii) of the ROC. An applicant relying on that provision would have to first establish that the question or issue between one of the parties and the proposed new party is linked, factually or otherwise, to the relief or remedy claimed in the cause or matter (see *Lim Meng-Eu Judy v RSP Investments (S) Pte Ltd* [1998] 2 SLR(R) 525 ("*Lim Meng-Eu Judy*") at [13]). As to this, it is difficult to argue otherwise. The claims arise out of the same set of facts and the reliefs sought by the new party, the HDB, against AHPETC are substantially the same as those sought by the MND. However, that is not the end of the matter because this is subject to the overriding consideration that it must be "just and convenient" to order a joinder (*Lim Meng-Eu Judy* at [13]). This requires the court to take into account the interests of the existing parties to the action (*Chan Kern Miang v Kea Resources Pte Ltd* [1998] 2 SLR(R) 85 ("*Chan Kern Miang*") at [24]) as well as that of the party to be joined (*Tan Yow Kon v Tan Swat Ping and others* [2006] 3 SLR(R) 881 at [44(a)]; *Alliance Entertainment Singapore Pte Ltd v Sim*

Kay Teck and another [2007] 2 SLR(R) 869 at [67]). The lateness of the application would go towards the assessment of whether it is "just and convenient" to order a joinder (*Chan Kern Miang* at [23]–[29]).

40 We first observe that there is nothing to prevent the joinder of a party simply because the matter is at the stage of an appeal. The provision is wide enough to allow the court to entertain an application "at any stage of the proceedings", and we can see no reason why this should be read narrowly to exclude applications that are brought at the stage of an appeal (see also *Chan Kern Miang* at [19]; *Odex Pte Ltd v Pacific Internet Ltd* [2008] 3 SLR(R) 18 at [76]). Hence, we do not consider that the application is necessarily foreclosed by its lateness alone.

41 AHPETC's objection is primarily based on the prejudice that it says it will suffer as a result of the lateness of the application. It is a fact, as we have already observed, that the HDB's application was only brought at the stage of the appeal. However, this merely recites the fact of delay without addressing the critical question of prejudice, which is not to be automatically assumed. It bears emphasis that this was not a case like *Chan Kern Miang*, where it was noted that the plaintiff would have to revise its statement of claim and "literally start all over again" after evidence had been led from all but one of its witnesses (at [23]). Here, only very limited changes would have to be made to the originating summons in order to reflect the joinder of the HDB, namely, to replace "the Government through the MND" with "the HDB" in prayer 2 and to add "HDB and" before "MND" in prayer 3(d) (see [17] above). The factual substratum remains the same. There is no need for discovery. Moreover, as noted at [16] above, there is no dispute that AHPETC is in breach of material obligations under the TCA and the TCFR. The crux of the dispute concerns the question of whether the MND or the HDB are parties who can seek relief in these circumstances and what, if any, relief we can grant. These are almost entirely questions of statutory construction which specifically relate to one key provision, namely s 21 of the TCA. Any new arguments on this issue that AHPETC wishes to make in light of the HDB's addition as a party can be fully ventilated before us with AHPETC suffering no real prejudice as a result. Moreover, it would be a waste of time and expense if we were to dismiss the joinder application and conceivably require the HDB to initiate fresh proceedings that would give rise to the same or similar issues. In our judgment, there is no conceivable prejudice that is caused to AHPETC as a result of the HDB being joined that cannot be compensated by a suitable costs order. We are satisfied therefore that it is just and convenient for the HDB to be joined in these proceedings.

42 In the circumstances, we grant the application for the HDB to be joined as a party pursuant to O 15 r 6(2)(*b*)(ii) of the ROC. We also allow the consequential amendments to be made to the originating summons (see [41] above).

Is (or are) the MND and/or the HDB entitled to rely on s 21 of the TCA?

43 The primary argument mounted by the MND and the HDB before us is that each of them is entitled to apply to the High Court under s 21(2) of the TCA for an order compelling AHPETC to comply with the provisions of the TCA and the rules in the TCFR that govern Town Council finances. In particular, they focus on AHPETC's non-compliance with s 35(*c*) of the TCA and r 4(2B) of the TCFR. We will turn to the details of what those provisions require of AHPETC and how they relate to AHPETC's breaches of the TCA and the TCFR shortly. We begin with our analysis of the statutory framework.

44 Much was said by both parties about the debates that took place in Parliament at the time when the Town Councils Bill (Bill No 9 of 1988) ("Town Councils Bill") was tabled. Both parties as well as the Judge placed significant emphasis on these debates. With respect, we do not consider that

there is much in them that can help us in relation to the issues that are before us. Importantly, the debates are conspicuously silent on the specific issue that is now before us, which is the ambit of s 21 of the TCA and the specific sub-issues that arise, which are as follows:

(a) Who are those who come within the provision and can therefore bring an application for relief? This goes to the issue of standing.

(b) What are the types of reliefs that may be granted? This goes to the powers of the court when faced with such an application.

45 We begin by setting out s 21 of the TCA which is the provision pursuant to which the present application was brought:

Duties of Town Council

21.—(1) A Town Council shall, for the purposes of the residential and commercial property in the housing estates of the Board within the Town —

(*a*) control, manage and administer the common property of the residential and commercial property for the benefit of the residents of those estates;

(*b*) properly maintain and keep in a state of good and serviceable repair the common property of the residential and commercial property;

(*c*) contribute such sum towards the premiums to be paid by the Board for the insurance of the common property of the residential and commercial property against damage by fire as the Minister may, by notice in writing to the Town Council, determine;

(*d*) where necessary, renew or replace any fixtures or fittings comprised in the common property of the residential and commercial property;

(*e*) provide essential maintenance and lift rescue services to the residents of the residential and commercial property;

(*ea*) properly maintain and keep in a good and serviceable repair (including landscaping of) the facilities within the Town that is outside the common property of the residential and commercial property in the housing estates of the Board within the Town, where the facilities are erected, installed or planted by the Town Council with the approval of the Minister and the consent of the owner of the property on which the facilities are erected, installed or planted;

(*f*) comply with the provisions of this Act and the rules made thereunder; and

(*g*) comply with any notice or order served on it by any competent, public or statutory authority requiring the abatement of any nuisance on the common property of the residential and commercial property or ordering repairs or other work to be done in respect of the common property.

(2) Where a requirement or duty is imposed on a Town Council by this section, the Board or any person for whose benefit, or for the benefit of whose flat that requirement or duty is imposed on the Town Council, may apply to the High Court for an order compelling the Town Council to carry out the requirement or perform the duty, as the case may be.

(3) On an application being made under subsection (2), the High Court may make such order as it thinks proper.

46 Both parties relied on the Parliamentary debates in an attempt to demonstrate the legislative intent underlying s 21 of the TCA. AHPETC focused on the following passages from the debates during the second reading of the Town Councils Bill (*Singapore Parliamentary Debates, Official Report* (29 June 1988) vol 51 at cols 408–409 and 441–444):

Dr S. Vasoo (Bo Wen): ...

The other aspect which I would like to raise concerns the monitoring of the work of the Town Council. To what extent would the work of the Town Council be monitored? Is the Town Council going to be answerable to a supervisory body? If this is the case, to what extent would the supervisory body be controlling the Town Council? I realize that in setting up the Town Council the end objective is to enable the Town Council to function independently I hope that the Town Council will be allowed to function as independently as possible and they should be made accountable to the residents who support the Town Council.

...

The other important area of concern is that in the event of the mismanagement of Town Council through no fault of the residents, would such Town Council be helped by the Government so that the service and maintenance that are accorded would still be carried out. There may be circumstances that are beyond the control of the residents. Residents may be cooperative and supportive of the Town Council but somehow there may be errant Town Councillors and managers of Town Councils who mismanage the funds of the Town Council for which residents have no control. I am wondering whether Town Councils facing this setback or crisis, which is unanticipated, could be helped by the Housing Board in the event that there is a need to do so.

...

The Minister for National Development (Mr S. Dhanabalan): ...

The Member for Bo Wen made an important point. Who will monitor the Town Councils and whether, in the course of monitoring, the Town Councils will be closely controlled by the Government?

That is not the intention. The intention is to give the Town Councils as much latitude as possible for them to manage their areas. Broad principles, of course, will have to be laid down, as the Bill itself now stipulates, in terms of how they manage their finances, publication of accounts and so on. But the Town Councils will be given a lot of latitude to employ the kind of people who are necessary, to pay them the kind of fees that are necessary to get the work done. The allowances for Chairman and for Town Councillors may be prescribed by the Minister. But if the full-time workers, for example, if the Chairman of a Town Council or a Town Councillor becomes a full-time Councillor, then I think it is up to the Town Council to work out what is necessary. We would not intervene in it. And if disparities arise, it will arise because of the Town Councils themselves making the decision. I think the Member for Bo Wen expressed some fear that there may be disparities and I take it that behind that fear is the idea that perhaps Government should stipulate what the fee should be. Well, we cannot have it both ways. If the Government intervenes too much to fix the salaries and fees in every respect, then the Government will be

accused of interfering and controlling the Town Councils too much. If you allow Town Councils to decide these things for themselves, of course, some disparities may arise. But I think we should take the risk of allowing such disparities to arise rather than be too close in our control of Town Councils. Basically, the idea is to allow Town Councils to make the decisions as to the kind of services they should buy and what they should pay for these services, whether the payments are to companies or to individuals.

...

When the Town Councils are set up, the whole idea is to rest the responsibility of the management of the funds as well as the estate with the Town Council. If a Town is mismanaged and HDB as the lessor finds that it has to move in, then there are provisions in the law for HDB to move in. But there is no question of the Government coming in to bail the Town Council out, in the sense that if funds are mis-spent, or if there is mismanagement, or people have lent to Town Councils and these borrowings have been mis-spent and the lender cannot recover, that the Government will come in and make good. If the Government is going to stand here as a safety net, then that will only encourage more mismanagement.

The whole idea of this exercise is for people to be careful in the choice of their MPs as well as in the choice of the Councillors, in the sense that if the MP is good, he could choose good, honest, competent Councillors to help him. It is important that people realize that they have to live with the consequences of their choice. *If they elect an MP who chooses a bunch of crooks to help him and together they run through the coffers in no time and leave the constituents in the lurch, well, they have to take the consequences*. The Government is not going to come in and say, "We will take over now and make good all the losses." At the time when the HDB comes in, of course, whatever they collect from that point on will have to be used to manage the constituency, to provide the services in the constituency. And what has been mis-spent in the past, well, it is a loss. I think the responsibility and the onus must be very clear, and very clearly laid on the Chairman as well as on the Town Council as a whole. I think that is an important principle that we should not deviate from. If the Government holds out that this is an experiment, if you make a mess of it, we are going to come in and pick up the pieces, then I think we are not going to start off this whole project on the right basis. We should make the responsibility very clear.

...

[emphasis added]

47 The same passages were also relied upon by the MND and the HDB, but on top of that, they also drew our attention to other parts of the debates. In particular, they placed emphasis on the following (*Singapore Parliamentary Debates, Official Report* (28 June 1988) vol 51 at cols 378–381 and 388; *Singapore Parliamentary Debates, Official Report* (29 June 1988) vol 51 at cols 428, 433–434 and 442–443):

The Minister for National Development (Mr S. Dhanabalan): ...

This Bill represents the result of nine months of intensive work by officers of 10 Government Ministries and Departments and the Chairmen of the three Ang Mo Kio Town Councils. *They have come up with this framework which incorporates the necessary powers and latitudes for the effective functioning of Town Councils with sufficient in-built safeguards to protect the interest of the residents.*

...

The First Deputy Prime Minister and Minister for Defence (Mr Goh Chok Tong): ...

This Bill will contribute to the attainment of the two philosophical objectives.

First, it transfers some power from the HDB to the MPs and grassroots leaders. *It gives them, and the residents, greater power and responsibility to manage their own affairs and to participate in their estate's development*.

Second, because MPs will have increased authority and responsibility, voters will be more likely to vote carefully and sincerely, and to choose honest and effective MPs.

...

This Bill gives more power and responsibility to MPs, and also to the grassroots leaders who become Town Councillors. *After the Bill is passed, they, and not the HDB, will be responsible* for *managing the social and physical environment of their constituencies*.

...

A central agency must be strict and must be uniform in its decisions. It cannot exercise flexibility nor make quick decisions at the constituency level. ...

... The grassroots leaders, most of whom live in the constituency and know it well, and the MPs, who have been elected by the people to represent and look after them, can recommend to HDB what they want, but do not have the final say as to what goes in into the constituency. They must pass every request to HDB, even trivial matters like installing benches in void decks for old folks or putting up poles for bird singing. They have neither the power to decide nor the responsibility for making things work.

HDB, on the other hand, has all the power to decide, but not the speed of decision-making ... This is not a criticism of HDB or HDB staff, but a recognition of the problem arising from centralization of decision-making.

Requests from constituencies have to be carefully considered because once approval is given, it has to be applied uniformly throughout the country. So we can understand why HDB has to exercise extreme caution. In doing so, they take longer to decide even small municipal matters, and sometimes must say "no" to projects which are worthy but which may set expensive precedent.

There is another problem with centralized decisions. In the long run, it must lead to a dependent mentality among our people. ...

Ideally, people should decide things for themselves. They should make their own decisions. If they make a good decision, they benefit from it. If they make a wrong decision, hopefully they learn from it.

If they run their Town Councils efficiently, their constituencies will be safe, clean and green. If they do not, they only have themselves to blame. We should *let them decide on the types and levels of services* which they want for their constituents or how they want their estates

landscaped.

...

To sum up, Mr Deputy Speaker, Sir, Town Councils will allow Singaporeans to participate actively in the *management of their own affairs*. They decentralize and speed up decision-making. They devolve authority from the HDB to the Member of Parliament and the Town Councillors. They remove uniformity and *introduce individuality into each constituency*. In addition, Town Councils will encourage voters to vote carefully and to examine and to assess their candidates critically. This will provide a ballast to our political system. ...

...

Mr Chew Heng Ching (Kaki Bukit): ...

Finally, Sir, may I know *whether the Government will come to the rescue of the Town Council* in the event that the council runs into debt or is declared insolvent through the incompetence or wrongdoing of its members? Or worse still, its members absconded with the money belonging to the Town Council. ...

...

Mr Lim Boon Heng: ...

Whilst the Town Council is accountable to the residents, is it implicit that ultimately Government will be accountable if a Town Council defaults? This is a question which has been raised by other Members. I think the intention is that if you give the Town Council autonomy, they should bear the responsibility. *But an impression may be created in the minds of people that, finally, if there is mismanagement, it is the Government that would pick up the tabs at the end of it all.* And this impression may be reinforced by the requirement that Town Council accounts are in fact, to be audited by the Auditor-General or his representatives.

...

[emphasis added]

48 AHPETC's central contention, relying principally upon the passages we have set out at [46] above, is that the Parliamentary debates suggest that there was nothing in the way of remedial steps or measures that were available in circumstances where a Town Council fails to comply with its duties under the TCA. Mr Low pointed, by way of contrast, to s 50 of the TCA, as an instance in which the Minister *could* appoint a person to exercise or perform the specified powers, duties and functions of the Town Council; but he noted, this was only available in the exceptional circumstances outlined in that section, and there is no doubt that those circumstances were not met here. Insofar as s 21(2) of the TCA is concerned, he accepted that on its plain words, an application could be made to the court. However, he contended that the MND was not a party that could bring an application for relief under that section. Further, he argued that even if a party could avail itself of that section, there was a severe limitation as to the sort of remedies that the court seised of such an application could order. In fact, according to Mr Low, the *only* thing that such a court could do is to declare that the Town Council should do that which it is allegedly not doing. In this regard, he placed particular emphasis on the fact that there is nothing expressly stated in the TCA that would allow the appointment of independent accountants for instance. Mr Low submitted, based on the extracts from

the Parliamentary debates which we have referred to at [46] above, that the legislative intent was to leave the remedy for any breach in the political sphere and specifically, that the residents would have to wait until an election for them to avail themselves of the only real remedy available to them – namely, to vote out those responsible for lapses in the way the Town Council was run.

49 As against this, the main contention of the MND and the HDB based on the extracts we have cited at [46]–[47] above may be pithily summarised as follows:

(a) The operational latitude granted to Town Councils extends to the way they may run their estates and manage their funds, but it does not detract from Town Council's financial accountability *to the Minister*.

(b) The Parliamentary intent is clear that mismanagement is not to be tolerated, and in particular, there is nothing to suggest any intent to preclude the Government or any other interested party from seeking relief against an errant Town Council for financial mismanagement.

50 In the final analysis, we are unable to agree entirely with either party's submissions on this. In our judgment, it is evident from the debates that the Town Council was seen as a political measure that would deepen the connection between Members of Parliament (especially in their capacity as Town Councillors) and the residents they were elected to serve in their constituency. What was unquestionably clear from the debates was that neither the Town Councils nor the residents could expect that either the Government or the HDB would bail them out with financial assistance of any sort in the event a given Town Council sustained financial or other losses due to mismanagement. To this extent, it was contemplated that the residents would have to bear the consequences, even the adverse ones, of electing, as their representatives in Parliament and as those who would oversee the operations of their Town Council, persons who discharged their duties in such a way that it caused financial and other losses to their Town Council.

51 In our judgment, the broad philosophical thrust of the legislation was to emphasise that Town Councils would enjoy a measure of independence in the manner in which they discharged their duties but on no analysis could it be said that such latitude or independence extended to permitting them to act unlawfully or contrary to the many stipulations imposed by the TCA and the TCFR without any recourse at law. It is one thing to say that the Town Councils would have latitude in developing their plans and operations. It is entirely another thing to say on this basis that there is either no duty to comply with the TCA and the TCFR, or, which in substance comes to the same thing, that there is no remedy to speak of in the event of a breach of such a duty. Section 21(1)(*f*) of the TCA casts upon Town Councils the duty to comply with the provisions of the TCA and the rules made thereunder, and the TCA is replete with provisions that impose obligations of proper governance on the Town Council. Brief reference may be made in this connection to ss 21 and 33–38 of the TCA which set out the obligations of a Town Council to manage its funds as well as the estate under its charge properly. Indeed, taken together with the provisions of the TCFR, it is simply unarguable that there is nothing to constrain the governance of the Town Councils.

52 In our judgment, it is clear from this that such latitude or independence was to be exercised subject to the safeguards that were incorporated in the TCA and the TCFR. But having accorded this degree of independence and latitude on the Town Council, the residents would have to bear the consequences of this. What this means in particular, as we have already noted, is that they would not be entitled to expect the Government to bail them out in the event of mismanagement.

53 Mr Low could not deny the existence of the duty to comply with the various obligations imposed on Town Councils under the TCA and the TCFR. The real nub of his argument then was that even

allowing that this might be so, there is ultimately no legal remedy for a breach of such a duty. Rather, in reliance on the extracts from the Parliamentary debates which he cited, Mr Low contended that the remedy lies in the realm of politics alone. But in our judgment, it is perverse to speak of a legal duty, such as we have noted above, that lacks a legal remedy and invites only a political remedy. To put it another way, there can be no *legal duty* if there is no *legal remedy* for the breach.

54 More importantly, Mr Low's argument places undue emphasis on what was said in the course of the Parliamentary debates without regard to the proper context in which those words were spoken. The most important aspect of this context is that none of what was said in Parliament concerned the central question with which we are confronted, which is the ambit of s 21 of the TCA (see [44] above), and more specifically in this context, who may apply to the court for relief when faced with a breach of the duties laid down in the TCA and the TCFR; and whether the remedies the court may grant in such circumstances are somehow limited. Here, Mr Low's arguments run into considerable difficulty. Not only are the debates silent on this issue, the simple and undeniable fact is that Parliament *did* provide for recourse to be had to the court to enforce the statutory duties of a Town Council through the express provision made in ss 21(2) and (3) of the TCA. It is then a leap of logic to say that there is limited or effectively *no* room for judicial intervention in such circumstances. The fact that the Parliamentary debates do not address the question of what, precisely, the court can do in such a situation, means that in the final analysis the resolution of this issue must rest on the usual interpretative techniques deployed by courts, that is to say, the textual and contextual analysis of the words of the statute.

55 In that light we turn to construe s 21 of the TCA so as to answer the two questions we have identified earlier at [44] above. We take these in turn.

Who can apply?

56 The MND contends that it is entitled to bring an application under s 21(2) of the TCA to enforce the requirement or duty set out in s 21(1)(*f*) of the TCA. On this basis, the MND seeks an order to compel AHPETC to comply with the provisions of the TCA, and in particular, s 35(*c*) of the TCA (set out at [10(a)] above). The MND argues that the requirements in s 35(*c*) of the TCA are imposed on the Town Council for its benefit and therefore that it may rely on s 21(2) of the TCA to obtain the reliefs sought. The Judge did not agree with the MND on this point. In addition, the HDB is now before us contending that it is entitled, in any event, to rely on s 21(2) of the TCA to apply for the reliefs sought because it is specifically named there as a party who may bring a claim. The HDB further submits, in the alternative, that s 35(*c*) of the TCA *and* r 4(2B) of the TCFR (summarised at [10(b)] above) are imposed on the Town Council for its benefit and therefore it may rely on s 21(2) of the TCA to obtain the reliefs sought.

57 In our judgment, s 21(2) of the TCA is a provision that exists for the specific purpose of enabling a certain category of persons to seek relief from the court when a person falling within the said category contends that a requirement or duty imposed on a Town Council has been breached. As to who precisely can invoke the section, we begin with the words of s 21(2) which provides:

> Where *a requirement or duty* is imposed on a Town Council by this section, **the Board or any person for whose benefit, or for the benefit of whose flat that requirement or duty is imposed on the Town Council**, may apply to the High Court for an order compelling the Town Council to carry out *the requirement or perform the duty, as the case may be*. [emphasis added in bold and in italics]

58 The text of the sub-section (in particular the words in italics) shows that, as the first step, the

applicant must identify a *particular* requirement or duty imposed on the Town Council. Moreover, that requirement or duty must be imposed "by this section", which is s 21 of the TCA. The applicant would have to go on to prove that the Town Council has failed to carry out or perform that requirement or duty.

59 We begin with the requirement or duty that we are concerned with and this is prescribed in s 21(1)(*f*) of the TCA. Section 21(1)(*f*) provides as follows:

> A Town Council shall, for the purposes of the residential and commercial property in the housing estates of the Board within the Town comply with the provisions of this Act and the rules made thereunder.

60 In our judgment, this obliges the Town Council to comply with all the provisions of the TCA and the rules made thereunder, and this includes, for present purposes, s 35(*c*) of the TCA and r 4(2B) of the TCFR. Although this point was not challenged by Mr Low, we should nevertheless undertake a brief analysis of s 21(1) to demonstrate that s 21(1)(*f*) is, in fact, quite broad and is not constrained by the other limbs in s 21(1). In our judgment, the language used in s 21(1)(*f*) is wide and unrestricted, and on its terms, it covers all of the provisions in the TCA as well as the rules made thereunder. We can see no reason to reduce the breadth of the provisions by adopting a restrictive interpretation of s 21(1)(*f*). It is not uncommon for provisions of this sort to have a wide scope of application (see [69]–[70] and [72] below), the only difference being that the drafters here have consolidated the Town Council's duties into a single sub-section, namely, s 21(1) of the TCA. Furthermore, the *ejusdem generis* principle of construction, which directs that "wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character" (Oliver Jones, *Bennion on Statutory Interpretation* (Sweet & Maxwell, 6th Ed, 2013) at p 1105), has no application here. For one thing, s 21(1)(*f*) of the TCA is situated in the middle (and not at the end) of the list of requirements and duties in that sub-section. This has been the case for the equivalent of s 21(1)(*f*) of the TCA since the TCA was first enacted in 1988 (see s 21(1) of the Town Councils Act (No 12 of 1988)) and the two subsequent amendments to s 21(1) of the TCA in 1999 and 2005 did not change that (see s 2 of the Town Councils (Amendment) Act 1999 (No 6 of 1999) and s 4 of the Town Councils (Amendment) Act 2005 (No 23 of 2005)). This appears to be a deliberate choice. We observe also that s 21(1)(*f*) of the TCA effectively imports the rest of the provisions in the TCA and the TCFR into the framework set out in s 21 of the TCA. It is not a provision that lends itself to being cut down to fit within a *genus*. To put it another way, it seems to us to be difficult, if not impossible, to find a *genus* which can apply without effectively requiring us to read s 21(1)(*f*) out of existence.

61 We are therefore satisfied that s 21(1)(*f*) was not intended to be read restrictively and that it imports into s 21 the Town Council's duty to comply with all the provisions of the TCA and the rules made thereunder. It must follow that the Town Council is required to act in accordance with, among other provisions, s 35(*c*) of the TCA and r 4(2B) of the TCFR.

62 Section 35(*c*) of the TCA states that a Town Council shall:

> do all things necessary to ensure that all payments out of its moneys are correctly made and properly authorised and that adequate control is maintained over the assets of, or in custody of, the Town Council and over the expenditure incurred by the Town Council.

63 Rule 4(2B) of the TCFR provides that:

> Within one month from the end of each quarter of each financial year, a Town Council shall —

> (*a*) transfer to the bank account of the sinking funds established for the residential and commercial property within the Town, the amount of conservancy and service charges, grants-in-aid and interest that are payble to the sinking funds and that were received by the Town Council; and
>
> (*b*) reflect the outstanding conservancy and service charges and interest that are payable to the sinking funds established for the residential and commercial property within the Town as a debt owing to the sinking fund on the books of accounts.

64 Having identified the requirements and duties in question, we proceed to examine who their beneficiaries are.

65 For this purpose, we turn to the words in s 21(2) which we have marked in bold at [57] above, and which inform us *who* may apply to the court to compel the performance of *that* requirement or duty which has not been carried out or performed by the Town Council. We begin with the HDB's position since it is expressly named in this section. There are two possible interpretations of the sub-section. The first is that the HDB can rely on s 21 of the TCA *without* having to establish specifically that the requirement or duty in question was imposed on the Town Council for *its* benefit or for the benefit of *its* flat(s). On this basis, only persons other than the HDB who are seeking to rely on s 21 of the TCA would have to prove that the requirement or duty in question was imposed on the Town Council for their benefit or for the benefit of their flat. This was the view the Judge took, and it is the primary position advanced by the HDB in this appeal. The second interpretation is that any party, whether the HDB or otherwise, seeking to rely on s 21 of the TCA would have to first establish that the requirement or duty in question was imposed on the Town Council for its benefit or for the benefit of its flat.

66 Of course, it does not follow that just because the HDB was specifically named in s 21(2), it need not demonstrate specifically that it was the intended beneficiary of the requirement or duty in question. Indeed, it might be argued that the legislative drafters specifically named the HDB in s 21(2) so as to make it clear that the HDB would be entitled to rely on s 21 of the TCA just like "any person" but only *if* it was able to show that the requirement or duty in question was imposed for its benefit or for the benefit of its flat. Otherwise, one might argue that the words "any person" should be interpreted narrowly to cover only residents and exclude the HDB altogether.

67 In our judgment, the first of the two interpretations set out at [65] above is to be preferred. To explain this, we need to examine the genesis of provisions that are similar to s 21 of the TCA. The Judge had observed that there are two other statutes in Singapore that contain provisions similar to s 21 of the TCA, namely, s 88(3) of the Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed) and s 38(2) of the HUDC Housing Estate Act (Cap 131, 1985 Rev Ed). The Judge went on to observe however that these provisions were not in themselves instructive as to the proper interpretation of s 21(2) because he considered that each statute must be interpreted in accordance with its own purpose, structure and scheme. But it is also the case that such provisions are not unique to Singapore, and by tracing the evolution of such statutes in other jurisdictions and the language they adopt, rather more might be revealed.

68 Our research takes us back to the 1960s. It was then that Australia first enacted laws governing strata-titled properties (in common parlance, multi-storey buildings). The first such legislation was the Conveyancing (Strata Titles) Act (No 17 of 1961) (NSW) in New South Wales, which was later used as a model for other states in Australia. Other parts of the world, including Singapore (see Land Titles (Strata) Act (Act 41 of 1967)), subsequently followed suit. The scheme of the legislation regulating these developments entailed the creation of a body corporate (commonly

referred to as a management corporation or strata corporation) impressed with various duties and functions, one of which would be to control, manage and administer the common property for the benefit of the residents. It is in such legislation that we first find provisions using language similar to that which we see in s 21 of the TCA.

69 An early example of such a provision can be found in the Strata Titles Act 1967 (No 7551) (Vic) ("the Victorian Strata Titles Act"). Section 33(2) of this statute which was passed in the state of Victoria, reads:

> Any person (including any public or local authority) for whose benefit any requirement or duty is imposed on the body corporate by this Act or the regulations may apply to the Court for any order compelling the body corporate to carry out the requirement or perform the duty as the case may be and on such application the Court may make such order as it thinks proper.

70 Two points are worth noting in connection with this provision in the Victorian Strata Titles Act. The first is that the drafters thought it necessary to specify that "any person" includes "any public or local authority". The second point is that this provision is structured slightly differently from our s 21 of the TCA. This brings us to s 223np(4) of the Real Property Act 1886–1967 (SA) ("the South Australian Real Property Act") which was passed around the same time, and it reads:

> Where a requirement or duty is imposed on a corporation by this Part, any person for whose benefit or for the benefit of whose unit that requirement or duty is imposed on the corporation may apply to the Court for an order compelling the corporation to carry out the requirement or perform the duty, as the case may be, and, on such an application being made, the Court may make such order as it thinks proper.

71 Other jurisdictions have adopted similarly worded provisions in their own statutes (some of which have since been repealed), and it appears that the drafters in those jurisdictions have broadly adopted the wording found in either the Victorian Strata Titles Act (we set out examples of such provisions at [72] below) or that in the South Australian Real Property Act (see, for instance, s 55(2) of the Strata Titles Act 1985 (Act 318) (Malaysia) ("Malaysian Strata Titles Act")). Section 21 of the TCA is worded in similar terms to the provision in the South Australian Real Property Act save that it expressly mentions the HDB and also specifically lists out the various requirements and duties in the section (*ie*, s 21(1) of the TCA) instead of referring to the requirements and duties imposed either by "this Part" or "this Act". The scope of s 21 of the TCA is not narrower even though it refers only to requirements and duties under "this section" (as opposed to "this Part" or "this Act") because, as we have noted, s 21(1)(*f*) requires the Town Council to "comply with the provisions of this Act and the rules made thereunder".

72 A further observation we make is that having reviewed similarly worded provisions in the statutes of various jurisdictions, it appears that *all* of them allow "any person" to apply to the court for relief so long as that person is the intended beneficiary (either personally or by virtue of ownership of the flat, unit, parcel or lot) of the requirement or duty in question. This much is true also of s 21 of the TCA. Some of the provisions in these various statutes go on to *clarify* that "any person" extends to cover local authorities and public bodies. To illustrate this point, we refer to three such provisions (aside from the extract from the Victorian Strata Titles Act that we have reproduced at [69] above). These are:

(a) s 53(1) of the Unit Titles Act 2005 (No 17 of 2005) (Cook Islands):

> *Any person (including any local authority or public body)* for whose benefit any requirement

or duty is imposed on the body corporate by this Act or any regulations made under this Act may apply to the Court for an order compelling the body corporate to carry out the requirement or perform the duty, as the case may be, and on any such application the Court may make such order as it thinks proper. [emphasis added]

(b) s 51(1) of the Unit Titles Act 1972 (No 15 of 1972) (New Zealand):

> *Any person (including any local authority or public body for whose benefit any requirement or duty is imposed on the body corporate by this Act or any regulations made under this Act)* may apply to the Court for an order compelling the body corporate to carry out the requirement or perform the duty, as the case may be, and on any such application the Court may make such order as it thinks proper. [emphasis added]

(c) s 66(1) of the Land Code (Strata) Act (S 29/99, 2000 Rev Ed) (Brunei):

> *Any person including any relevant authority* for whose benefit any requirement or duty is imposed on the strata corporation by this Act or any regulations made under this Act may apply to the Court for an order compelling the strata corporation to carry out the requirement or perform the duty, as the case may be, and on any such application the Court may make such order as it thinks proper. [emphasis added]

73 What is common in each of these four examples, including s 33(2) of the Victorian Strata Titles Act, is that the reference to the local, relevant or public authority or body is *always* as a subset of the primary subject of the provision which is "any person". This reveals a critical and seemingly deliberate point of departure in s 21(2) of the TCA which reverses the sequence and begins with "the Board" (which is defined in s 2(1) of the TCA to mean the HDB) and then adds to that "or any person". This suggests that the HDB was a distinct subject and not a subset of "any person" and this would militate against the suggestion that the HDB also would have to demonstrate a specific interest. Indeed, were that the case, there would have been no real need to name the HDB at all.

74 Furthermore, it seems to us to be sensible that Parliament would have wanted the HDB to have standing to apply for relief without having to specifically prove that the requirement or duty in question that was breached was imposed on the Town Council for its benefit. For one thing, the HDB occupies the *unique* role as the owner of the common property in addition to any other property interests it might have within a given housing estate. In our judgment, specific reference was made to the HDB because it will always have an interest in the common property (which *belongs* to the HDB; see the definition of "common property", read with "residential property", "commercial property" and "housing estate" in s 2 of the TCA; see also *Singapore Parliamentary Debates, Official Report* (28 June 1988) vol 51 at cols 393–395 (Mr Heng Chiang Meng (Jalan Kayu)) and *Singapore Parliamentary Debates, Official Report* (29 June 1988) vol 51 at cols 415–416 (Mr Chiam See Tong)), and by virtue of this, it must have been thought that standing should be conferred on the HDB to bring an application to safeguard this interest aside from any other capacity it might enjoy, in common with other flat owners, by virtue of its ownership of unsold flats. Second, the HDB retains a public function and duty to *ensure* that its housing estates are properly maintained and managed even though the *primary* responsibility for this has been devolved onto the Town Councils by virtue of the enactment of the TCA. One of the HDB's functions and duties is "to manage all lands, houses and buildings or other property vested in or belonging to the [HDB]" (s 13(*b*) of the Housing and Development Act (Cap 129, 2004 Rev Ed)). In keeping with this, the HDB has a residual role when Town Councils are dissolved; thus, while the HDB ceases to be liable for the maintenance and management of common property once a Town Council takes over and for so long as that Town Council is established (s 53(1) of the TCA), it resumes responsibility as the owner of the housing

estates for their maintenance and management upon the dissolution of a Town Council (s 55(2) of the TCA).

75 For these reasons, we are satisfied that the HDB is conferred express standing to bring an application under s 21(2) of the TCA without having to specifically establish that the particular requirement or duty in question exists for its benefit.

76 We turn next to consider the position of the MND, which contends that it is entitled to bring an application under s 21(2) of the TCA because it is a "person for whose benefit" the requirement or duty in question is imposed on the Town Council by s 21(1)(*f*) read with s 35(*c*) of the TCA. In this regard, the MND raises a number of points, namely:

(a) the Minister is "constitutionally charged" with responsibility over Town Councils by virtue of Art 30(1)(*a*) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) read with the Constitution of the Republic of Singapore (Responsibility of the Minister for National Development) Notification 2011 (S 304/2011);

(b) Town Councils are bodies administering public funds and s 35(*c*) of the TCA imposes financial management standards aimed at safeguarding such funds;

(c) the TCA is under the regulatory purview of the MND; and

(d) the MND disburses grants-in-aid to the Town Councils and these make up a substantial portion of a Town Council's funds.

77 To fully appreciate the MND's contention, some background on the role of the Minister in relation to matters concerning the Town Council as envisaged in the TCA would be helpful. Under the TCA, the Minister is empowered to do several things, including:

(a) to make grants-in-aid to Town Councils for the purposes of enabling the Town Councils to carry out their functions (which can be made subject to conditions (s 42 of the TCA));

(b) to make rules on how Town Councils are to manage their finances (s 43 of the TCA); and

(c) to appoint a person to perform the powers, duties and functions of a Town Council in certain limited circumstances (s 50 of the TCA).

78 Further, the Minister is also required under the TCA to receive the audited financial statements, the auditor's reports and the annual reports of the Town Councils and present these to Parliament each year (ss 38(11), (13) and (14) of the TCA). All these go to show that the Minister, supported by the MND, has a role to play with regard to Town Councils under the TCA. And this is perfectly in line with the MND's point that the Minister is "constitutionally charged" with responsibility over Town Councils. The Minister is answerable to Parliament on matters concerning the Town Councils, and to that end, he is expressly empowered by the TCA to do certain things.

79 Furthermore, as the MND rightly pointed out in its argument, s 35(*c*) of the TCA imposes an obligation on Town Councils to ensure that funds held by them, which would consist of both grants-in-aid received from the Minister and conservancy and service charges collected from the residents, are not lost or misused. However, the TCA is conspicuously silent on the power or the role of the Minister (or the MND) with regard to ensuring the Town Councils' compliance with s 35(*c*) of the TCA or indeed any other provisions in the TCA and the TCFR. This stands in contrast to other matters

concerning the Town Councils for which the Minister was expressly empowered to act.

80 The MND's key contention is that it is an intended beneficiary of s 35(*c*) of the TCA that has been imposed on the Town Council because: first, the Minister/MND has regulatory oversight over Town Councils, and second, the Minister disburses public funds to the Town Councils and that considerations of good governance mandate that the Town Councils be answerable to the Minister/MND in relation to their finances. Both grounds are related, but for the sake of clarity we discuss them separately.

81 We reject the MND's first ground because there is a logical gap between, on the one hand, the fact that the Minister has certain powers to regulate the affairs of Town Councils as are *expressly* set out in the TCA, such as in s 42 or s 50 of the TCA, and on the other hand, the proposition that the Minister/MND has regulatory oversight of the Town Councils *in general* and with it, an interest in ensuring compliance with *all* of the obligations imposed by the TCA and the TCFR, including s 35(*c*) of the TCA. We do not agree that the former (*ie*, specific aspects of regulation as provided by the TCA) leads to the latter (*ie*, general regulatory oversight). Not only is there nothing at all in the TCA to that effect, there is evidence to contradict the MND's claim that it has regulatory oversight of the Town Councils. It should be recalled that, at the second reading of the Town Councils Bill, the Minister was asked by the Member for Bo Wen if there would be a supervisory body to monitor the Town Councils and his response was that "[t]hat is not the intention" (see [46] above). Moreover, the fact that the MND is not specifically named in s 21(2) of the TCA, though not determinative in and of itself, does undermine the MND's claim that it is vested with a blanket interest in enforcing the various requirements and duties set out in s 21(1) of the TCA, including s 21(1)(*f*). In the circumstances, we cannot accept the first of the two broad grounds advanced by the MND.

82 As to the second ground, we disagree for two essential reasons. First, it is not disputed that when disbursing the grants-in-aid, it was (and remains) open to the Minister to impose conditions upon which these would be available. This is provided for in s 42 of the TCA and it furnishes ample and indeed, in our judgment, the appropriate means by which to secure the ends of sound governance. To the extent the Minister has any concerns over the application of the grants-in-aid, it is open to him to condition the making of any or further grants-in-aid upon the Town Council agreeing to abide by appropriate safeguards. The MND argues that the Minister's responsibility over the grants-in-aid under s 42 of the TCA must give rise to concomitant rights of supervision over the grants-in-aid and the Town Councils that receive them. However, this argument seems to have missed the fact that the legislative drafters have, by way of express wording in s 42 of the TCA, provided that the Minister can impose conditions on the grants-in-aid and there is no reason for thinking these could not extend to the imposition of reasonable safeguards.

83 Secondly, the grants-in-aid were made in order to enable the Town Council to carry out *its* functions. Indeed, the primary function of the Town Council under s 18(1)(*a*) of the TCA is to control, manage, maintain and improve the common property and to keep it in a state of good and serviceable repair and in clean and proper condition. Those who benefit from the discharge of this function are the residents and flat owners in the area served by the Town Council. If the moneys disbursed by way of the grants-in-aid are not properly applied by the Town Council in the carrying out of its functions, then it is the residents and flat owners who are adversely affected and it is they who would be able to apply under s 21(2) to compel the Town Council to do so. We are therefore satisfied that the MND is not an intended beneficiary of the requirement or duty imposed on the Town Council by s 21(1)(*f*) read with s 35(*c*) of the TCA.

84 In the circumstances, we hold that the HDB (but not the MND) is entitled to bring an application under s 21 of the TCA. We are mindful of the fact that the MND has further grounds,

which are distinct from its reliance on s 21 of the TCA, and on which it contends that it should be entitled to at least some of the reliefs it has sought in these proceedings. These were not pressed with great vigour before us but we have dealt with them towards the end of this judgment at [121]–[129] below. This leads us to the next question: what are the powers of the court when faced with such an application?

What can the court do?

85 The answer to this is circumscribed by the terms of s 21(2) of the TCA which provides that an interested person may apply to the High Court for "an order compelling the Town Council to carry out the requirement or perform the duty", and s 21(3) of the TCA which provides that on such application, the High Court may "make such order as it thinks proper". Relying on the wide terms of s 21(3) of the TCA, Ms Kam submitted that the court has power not only to compel the Town Council to carry out the requirement or perform the duty in question but also to prescribe the manner in which this should be done. She submitted that the court's power is not constrained such that it can only grant a mandatory order, but can do whatever is necessary to remedy the breach of statutory duty, including in the present context, appointing independent accountants to step in and do what is necessary to ensure compliance (see prayer 3 at [17] above).

86 As against this, Mr Low submitted that under s 21 of the TCA, the court only has the power to order AHPETC to abide by the provision or declare that it has not done so. As Mr Low put it, all the court can do is to declare that the Town Council is obliged to carry out the duty or requirement in question and perhaps also that the Town Council is and has been in breach of this requirement or duty.

87 In our judgment, there are difficulties with both sets of contentions. While we accept that s 21(3) is drafted in wide terms, we do not consider that the intention underlying that section was for the court to step into the shoes of the Town Council or to substitute its own decisions for those of the Town Council in question as to how the various requirements and duties are to be carried out. The nature of the orders that were sought by the HDB in effect extended to the court taking steps to see to it that the specified duties were carried out in a particular way by an actor, namely, the independent accountants who, Ms Kam submitted, would be acting on behalf of and be accountable to the court *as its agents* for the conduct of those duties. In our judgment, this reveals the flaw in the argument because it is inconceivable that the court could be put in such a position in a matter that involved an aspect of local government. On the other hand, Mr Low's contention reduced the court to an irrelevant and ultimately toothless observer. As we pointed out to Mr Low, the issue was not one of the Town Council being unaware of its duties so that it needed to be reminded of them by the court. Hence, here again we are driven to construe the provisions of ss 21(2) and (3) to determine just what the court may do in a situation such as this.

88 We begin by observing that s 21 is intended to provide an avenue for interested persons to seek relief when a Town Council fails to perform one or more of its statutory duties. It seems reasonable to approach this on the footing that having provided this avenue, Parliament could not have intended it to lead to a fruitless or pointless end. Indeed, the express terms are an application for an order "*compelling* the Town Council to carry out the requirement or perform the duty" [emphasis added] in response to which the court may make "such order as it thinks proper". That *must* in our judgment encompass an order that has the real object and effect of compelling the Town Council to carry out the requirement or perform the duty that it has hitherto neglected to do.

89 Against the backdrop of those remarks, it may be helpful to examine the court's power to grant a mandatory order. This is because both a mandatory order and an order under s 21 of the TCA serve

the purpose of compelling a body to perform its statutory duty. The cases on mandatory orders granted in the context of judicial review might shed some light on the proper ambit of an order made under s 21 of the TCA. It is however crucial to bear in mind that these are *not* necessarily the same in all respects and should not be unthinkingly treated as such.

90 In relation to mandatory orders, the courts will give specific directions as to how the statutory duty can be performed, so long as they do not impinge on the discretion (if any) conferred on the public body. The case of *R v The Council of the Metropolitan Borough of Poplar (No 1)* [1922] 1 KB 72 provides a helpful illustration of how the court works to strike an appropriate balance in these matters. There, the London County Council and the Managers of the Metropolitan Asylum District issued precepts to the Poplar Borough Council requiring it to pay a certain sum. The Poplar Borough Council was obliged under statutes to pay, but it failed to do so. The Poplar Borough Council did not have the financial means to pay, and it did not wish to levy a rate to meet the precepts as it considered that doing so would impose too great a burden on the poorer segments of its ratepayers. The English Court of Appeal upheld the mandatory order for the Poplar Borough Council to make the payments and "if necessary to make and levy a rate for the purpose of those payments" (at 84). Such an order made it clear that the Poplar Borough Council could not decline to pay what was due on the basis that it did not wish to acquire the requisite funds by levying a higher rate. However, there are limits as to when the courts would give specific directions. For instance, the courts will be reluctant to grant a mandatory order "if the form of the order requires day-to-day supervision" (see David Foulkes, *Administrative Law* (Butterworths, 8th Ed, 1995) at p 395).

91 We turn next to two decisions of the Supreme Court of the Australian Capital Territory involving a provision that is similar to s 21 of the TCA. The provision in question there, namely, s 113 of the Unit Titles Act 1970 (No 31 of 1970) (ACT) ("Unit Titles Act 1970"), reads:

> **113**. (1) Where a corporation fails to carry out a requirement or perform a duty imposed on it by this Act, a proprietor or mortgagee of a unit may apply to the Court for an order requiring the corporation or the committee to carry out the requirement or perform the duty, as the case may be.
>
> (2) On an application made under subsection (1) the Court may, if it is satisfied that the failure has occurred, make such order as it thinks just.

92 In the first case, *Caroline Emily Cole v The Proprietors – Units Plan 109* [1996] ACTSC 60 ("*Caroline*"), the applicant was a proprietor of a unit in Units Plan 109 who sought a number of orders under s 113 of the Unit Titles Act 1970. At the outset, Miles CJ had this to say on the interpretation of s 113 (at [4]):

> Sub-section 113(2) must be read in the light of sub-s.113(1). It is only when the Court is satisfied that the corporation has failed to carry out a requirement or perform a duty imposed on it by the Act that there is any power to make an order at all. There is no room for reading into sub-s.113(2) power to make any order whatsoever. Further, the order must reflect the type of application that a proprietor or mortgagee is entitled to make, that is an application for an order requiring the corporation or the committee to carry out the requirement or to perform the duty. I do not think that the order that the Court is empowered to make on the application may go beyond an order which is properly characterised as an order which requires the corporation or committee to perform the duty. ... s.113 does not enlarge the powers of the Court beyond making orders of the type described in sub-s.113(1) except to the extent that the Court is not confined to granting or refusing the particular order sought by an applicant in an application made under the section.

93 Miles CJ rejected several of the orders sought by the applicant on the basis that they were "outside the scope" of s 113. These included an order for exemplary damages as well as an order that was directed at the managing agent (as opposed to the corporation (made up of all of the proprietors) or the committee of the corporation (made up of the proprietors elected into office to act on behalf of the corporation)). Thereafter, Miles CJ proceeded to examine the specific alleged breaches. He found that there was no failure in relation to most of them. However, there were two which warranted intervention. One of these concerned a poplar tree which was identified to be a "potential problem". The committee was said to have "obtained a quote for the removal of that tree" and it was submitted on behalf of the corporation that there was no failure under s 113 that would warrant a remedial order. Even though Miles CJ acknowledged that there had been "no failure in any pejorative sense" on the part of the committee and the corporation, the fact remained that no positive steps had been taken to have the tree removed. As such, he ordered that the tree be removed within six months.

94 Another aspect of the duties that warranted intervention by the court concerned the acquisition of the letterboxes and intercom equipment without special resolution which was in contravention of s 44(1)(a) of the Unit Titles Act 1970. Miles CJ observed that the other unit holders appeared not to be as concerned as the applicant and considered that they might "well prefer the present arrangements, although not properly authorised". He found that the unit holders should be given an opportunity to require the corporation to restore the property to the position it was in before changes were made, if that was what they wanted. On that basis, he considered that a "convenient, inexpensive and just way of putting this matter to rest" was to have the unit holders vote on it at the next annual general meeting.

95 The second case is *Filaria Pty Ltd v Proprietors Units Plan 932* [2000] ACTSC 69 where Higgins J observed at [73] that an application under s 113 of the Unit Titles Act 1970 would allow the court to set aside a resolution of the corporation which exceeded the powers conferred by the Act and make an order for the committee of the corporation to "re-convene to pass a resolution complying with the Act". While Higgins J did not expressly refer to *Caroline*, it is evident that the decision was consistent with the views of Miles CJ.

96 From these two decisions, a few propositions may be drawn and these, in our judgment, apply also to the ambit of the court's powers under s 21(3) of the TCA:

(a) Section 21(3) does not warrant the conclusion that the court has the power to make any order whatsoever.

(b) The section also does not enlarge the power of the court either to step into the shoes of the Town Council or take it upon itself to attend to the performance of the requirements and duties that have been neglected.

(c) But neither is the court constrained to simply making an order stating that the Town Council must perform the requirement or duty that has not been complied with.

(d) On the contrary, the court can make orders that are effective in compelling the performance of the requirements and duties in question by those on whom these have been imposed.

97 In effect, the court can order the Town Council to take such steps, as it may consider necessary to *effectively* secure compliance with the requirement or duty in question.

98 This makes it necessary for us to focus sharply on what AHPETC is obliged to do and has not done. On the facts before us, there is no real dispute that AHPETC has not fully complied with s 35(*c*) of the TCA and r 4(2B) of the TCFR.

99 Section 35(*c*) of the TCA, which we have set out at [62] above, essentially requires a Town Council to "do all things necessary to ensure" that (a) its payments are correctly made and properly authorised; and (b) adequate control is maintained over its assets and expenditure. AHPETC failed in both respects, and the non-compliances include the following:

(a) First, there were various lapses in internal controls, which exposed AHPETC to the risk of the loss of money or valuables, commitment to expenditure without requisite approval as well as wrong payment for goods and services. To give a few examples: AHPETC did not perform monthly bank reconciliations in the manner prescribed by the TCFR. It did not put in place adequate controls to safeguard cheques and valuable items (for instance, in relation to the arrangements for custody of the key to the padlock, the password to the electronic lock of the strong room and the key to the safe that was placed inside the strong room). It also did not get proper approvals for procurement (for instance, the deputy general manager approved four waivers of quotation and a quotation but there was no documentation to show the delegation of authority which allowed the deputy general manager to do so). It had also delayed settlements of invoices by AHPETC to its vendors resulting in additional interest costs for AHPETC.

(b) Secondly, AHPETC was found to have inadequate oversight of related party transactions with FM Solutions and Integrated Services, a sole proprietorship owned by AHPETC's secretary, and FMSS, whose directors and shareholders were AHPETC's secretary, general manager and deputy general manager. AHPETC did not fully disclose related party transactions in its financial statements and could not produce documentary evidence to show that the Town Councillors had considered the full extent of the related party interests, the conflict of interests involved and the safeguards needed before AHPETC entered into the contracts with FMSS. There were lapses in the procurement of services from FMSS, and the key officers of AHPETC also acted in clear conflict of interests when they approved payment to FMSS (a company in which they were themselves the directors and shareholders).

(c) Thirdly, it does not appear that AHPETC had (or has as yet) seriously considered whether and, if so, what steps need to be taken to recover possible sums due from wrong payments. While AHPETC had appointed Business Assurance LLP as its consultant to advise it on, among other things, how it should address the disclaimers in its financial statements, there is nothing in the proposal from Business Assurance LLP to suggest that its work would extend to inquiring into whether any sums had been wrongly paid and whether action should be taken to recover such sums.

(d) Fourthly, AHPETC did not have a system to monitor the scale of its conservancy and service arrears accurately. As a result, there was no assurance that AHPETC was able to monitor and manage the arrears properly or present an accurate picture of the arrears in its financial statements. It also did not have a proper system to ensure that documents were properly accounted for and safeguarded, and its accounting systems and procedures were inadequate. For instance, it was revealed that AHPETC did not monitor and follow up on amounts due and monies received from external parties, such that its accounts might have overstated receivables by about $1.73m for FY 2012/2013. It also did not trace and remove from its statement of liabilities, the amounts pertaining to works that had been paid or settled as at 31 March 2013, and test checks revealed that liabilities for "accrual without work orders" was overstated by $162,112. As a result of these and other lapses, AHPETC's financial statements for FY 2012/2013 did not

accurately reflect AHPETC's state of affairs and transactions.

100 Further, AHPETC was and continues to be in non-compliance with r 4(2B) of the TCFR. That rule, which we have set out above at [63], requires a Town Council to transfer a portion of the conservancy and service charges, grants-in-aid and any interest received by the Town Council to its sinking fund within one month from the end of each quarter of each financial year. AHPETC was late in making the requisite quarterly sinking fund transfers for the first, second and third quarter of FY 2014/2015. In addition, at the time of the appeal, the sinking fund transfer for the fourth quarter of FY 2014/2015 had not yet been made.

101 Arising from these various instances of non-compliance, the HDB seeks essentially the same orders as the MND (see [17] above) save for prayer 1. If we were to associate the various failures by AHPETC with the orders sought, the HDB's position would be as follows:

(a) for the non-compliance with r 4(2B) of the TCFR (that is, the failure to make timely quarterly sinking fund transfers), the appropriate order should be a declaration that AHPETC has failed to comply with r 4(2B) of the TCFR; and

(b) for the non-compliance with s 35(*c*) of the TCA (namely, the inadequate oversight of related party transactions, the lapses in internal control over its assets and expenditure, and the failure to put in place proper systems and procedures (see [99] above)), the appropriate orders should be (i) a declaration that the HDB has an interest in AHPETC's compliance with s 35(*c*) of the TCA and (ii) an order for the appointment of independent accountants.

102 We will deal with prayer 1 below, given that it requires us to consider the MND's alternative contentions that it has a legal or beneficial interest in the grants-in-aid. For clarity, we should note that here and in the succeeding paragraphs we refer to the prayers in the MND's application, which has been set out at [17] above.

103 Insofar as prayer 2 is concerned, by which the HDB is effectively seeking a declaration that it has an interest in AHPETC's compliance with s 35(*c*) of the TCA, we do not think that there is a need for such a declaration, especially in light of our findings in relation to the HDB's standing under s 21(2) of the TCA and the orders that we will be making in relation to AHPETC's non-compliance with s 35(*c*) of the TCA. We therefore decline to grant the declaration sought in prayer 2.

104 We turn to prayer 2A, in which the HDB seeks a declaration that AHPETC has failed to make *timely* sinking fund transfers (for the first and second quarter of FY 2014/2015) and any sinking fund transfer (for the third and fourth quarter of FY 2014/2015) as required by r 4(2B) of the TCFR. By the time of the appeal, the declaration sought was no longer factually accurate given that AHPETC had made the sinking fund transfer for the third quarter of FY 2014/2015. However, as we have pointed out earlier, there is no dispute that AHPETC has failed to comply with its statutory duty to make the prescribed quarterly transfers to the sinking fund within the specified timeframe. The transfer for the first, second and third quarters of FY 2014/2015 were late, with the transfer for the third quarter being made shortly before the hearing of this appeal. Further, the transfer for the fourth quarter of FY 2014/2015 had not been made yet at the time of the hearing. This was acknowledged by Mr Low. He contended that AHPETC is unable to make the transfer because the Minister has withheld the grants-in-aid.

105 In our judgment, this affords no basis at all for AHPETC to contend that it was not responsible or liable for failing to make the transfer. Mr Low accepted that the Minister is entitled to impose conditions on the grants-in-aid pursuant to s 42 of the TCA. Once such conditions are imposed, it is

then a matter for AHPETC to decide whether it will accept or reject the conditional grants-in-aid. Moreover, if and to the extent it contends that the Minister was not entitled to impose the particular conditions in question, then it could decide to challenge the Minister's exercise of discretion by way of judicial review. No such step has been taken. Further, if AHPETC decided for whatever reason that it would not accept the conditional grants-in-aid, there are other means by which it can fulfil its obligation to make the sinking fund transfers, such as by increasing the conservancy and service charges (s 39 of the TCA) or by liquidating its investments, if any (s 41 of the TCA). What AHPETC cannot do (and what it has hitherto done) is to refuse to comply with its statutory duty. That is simply not an option available to it.

106 In our judgment, the appropriate order to be made in these circumstances would not be a declaration as sought in prayer 2A but an order for AHPETC to make all outstanding sinking fund transfer(s) within a period of three months from the date of this judgment or such other time as we may permit upon application being made to us. Within that time, AHPETC must decide whether to accept the grants-in-aid made by the Minister or to take such other measures as it may determine, such as to raise the conservancy and service charges and/or to liquidate its investments (if any) in order to put itself in a position to make the required transfer(s).

107 Next, we turn to prayer 3, in which an order for the appointment of independent accountants is sought. This requires us to examine AHPETC's non-compliance with s 35(*c*) of the TCA and the appropriate remedy for that. Section 35(*c*) of the TCA has a wide scope and most of the lapses identified in the Auditor-General's Report fall within it. We have elaborated on these lapses at [99] above. The real nub of the HDB's complaint is that the Town Council may have suffered losses by reason of the conflict of interests in which certain officers of the Town Council were in. It is said that there is a lack of transparency as to what, if anything, the Town Council has done to verify the existence of any losses in the past, and to recover these. It is also said, in the circumstances, that an order for the appointment of independent accountants would address this. Ms Kam sought to persuade us that the power to make such an order could be found in our power generally to order the appointment of a receiver and manager of an undertaking.

108 In our judgment, independent accountants, tasked with the role and functions contemplated in prayer 3, cannot fairly be considered to be receivers and managers. The essential characteristic of a receivership is the receiving and holding of the property in question for the purpose of preserving it (see *Kerr and Hunter on Receivers and Administrators* (Sandra Frisby and Malcolm Davis-White eds) (Sweet & Maxwell, 19th Ed, 2009) ("*Kerr and Hunter*") at para 1-6). However, the independent accountants, if appointed, would not be receiving and holding the funds of AHPETC to safeguard it; instead, they are being appointed to co-manage, audit and investigate the financial affairs of the AHPETC. In that sense, the independent accountants cannot be properly described as receivers with limited powers.

109 Moreover, the additional and very real difficulty with the order sought, in our judgment, is that it envisages that we appoint the independent accountants to do that which is required of AHPETC under s 35(*c*) of the TCA (see prayers 3(b) and 3(c)). In that sense, the proposed order would not *compel* AHPETC to comply with s 35(*c*), so much as it would *substitute* AHPETC as the relevant actor by having the independent accountants step in and do what is needed to secure the performance of the relevant duties. We return here to a point we have alluded to already. When we asked Ms Kam what the status of the independent accountants would be, she said they would be *agents* of the court. In our judgment, this highlights the difficulty with this aspect of the relief sought. Under s 21 of the TCA, the court can only make orders compelling the Town Council to perform its statutory duty. It cannot appoint its own agents to perform these powers, duties and functions of the Town Council.

110 This may be contrasted with the position under s 50 of the TCA, which empowers the Minister in certain limited instances to appoint any person to perform such powers, duties and functions of the Town Council and for such period as may be specified in the order or to carry out any duty of the Town Council so as to remove any imminent danger to the health or safety of residents. Similarly, but on a more general level, the strata titles legislation in other jurisdictions, such as s 30 of the Victorian Strata Titles Act and s 51 of the Malaysian Strata Titles Act, provide that a party may apply to the court for the appointment of an administrator who would exercise the powers and be subject to the duties of the management corporation (see Teo Keang Sood, *Strata Titles in Malaysia: Law and Practice* (Butterworths, 1987) at pp 88–89). No such provision exists in the TCA. But what is common in all of these situations is that the statutes specifically provide for alternatives in the event that the person imposed with the statutory or public duty, for some reason, fails or refuses to perform it.

111 While the court may appoint a receiver and manager when it is "just or convenient" to do so (s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA")), we do not think that in the absence of a specific provision, the court can appoint a receiver and manager or other agent to take over the performance of a statutory or public duty that is imposed on a specific person. In this respect, the English case of *Parker v Camden London Borough Council* [1986] 1 Ch 162 is instructive. There, the heating and hot water system in three housing estates broke down. As a result, the tenants were deprived of heating and hot water. The three estates were owned and managed by the local authority, the London Borough of Camden, as provided by statute. In two separate actions, three of the tenants sued the local authority, seeking an order for the local authority to repair the heating system or for the appointment of a receiver and manager under s 37(1) of the Supreme Court Act 1981 (c 54) ("Supreme Court Act 1981") (which is similar to our s 4(10) of the CLA) to restore the heating and hot water services. The judges in both actions refused to order the local authority to restore the heating, but one judge appointed a receiver and manager and authorised him to take steps to repair the heating and hot water system. Both cases were appealed.

112 The appeals went before the Court of Appeal. It was not disputed that the local authority was in breach of its contractual obligations to its tenants (who hold their tenancies on standard terms) and the only question was *how* that right could be enforced. On whether the appointment of a receiver and manager would have been appropriate, Sir John Donaldson MR (as he then was) said in relation to s 37(1) of the Supreme Court Act 1981 that the jurisdiction is "quite general and, in terms, unlimited" but would have to be "exercised judicially and with due regard to authorities which are binding [on the Court of Appeal]". He went on to note that in *Gardner v London Chatham and Dover Railway Co (No 1)* (1867) LR 2 Ch App 201 ("*Gardner*"), Cairns LJ had said at 212 that when Parliament expressly conferred powers and imposed duties and responsibilities of an important kind upon a particular body, it is improper for the court by the appointment of a manager, who would be the agent of the court, to assume those powers and duties. On the facts, Parliament had charged local authorities with the duty of maintaining the housing accommodation under s 111 of the Housing Act 1957 (c 56), and following *Gardner*, Sir John Donaldson MR held that it was wrong to appoint a receiver and manager. On this issue, Browne-Wilkinson and Mustill LJJ (as they then were) both agreed with Sir John Donaldson MR.

113 Before we leave this point, we should also explain why we do not think that *Don King Productions Inc v Warren and others* [2000] BCC 263 ("*Don King*"), which was relied on by Ms Kam, can stand for the proposition that the court has the power to appoint independent accountants in the way that she sought. The plaintiff in that case asked for, among other things, the appointment of a receiver and manager over partnership assets. The defendants argued against it. One of the points raised by the defendants to resist the application was that there was a less intrusive relief available, namely, to have an independent accountant carry out an audit on the affairs of the defendants. It was suggested that the accountant would be appointed by agreement between the parties or, in

default of agreement, by the court.

114 Neuberger J (as he then was) agreed that it would not be right to appoint a receiver and manager. Instead, he preferred the proposal for the *parties* to appoint an independent accountant. He acknowledged that the accountant would not be clothed with the authority of the court which a receiver would have, but it would allow the plaintiff to have the audit and investigation that he sought. In short, it appears that Neuberger J did not think that it was possible for him to appoint independent accountants, who were not receivers, save by way of agreement between the parties.

115 In our judgment, insofar as *Don King* is relied on for the proposition that we can appoint independent accountants to act as *our* agents in the manner envisaged in prayer 3, it simply does not stand for that proposition.

116 In the light of all these considerations, we are not persuaded that an order for the appointment of independent accountants on the terms proposed by the HDB is one that either can or would be appropriate to be made under s 21 of the TCA.

117 But the fact that such independent accountants are not receivers in the classical sense and cannot be appointed as the agents of the court, does not dispose of the issue, if some such step is necessary in order to compel the performance of the requirements and duties of AHPETC. In deciding what the appropriate order should be, we are mindful of two important considerations. The first is that AHPETC, and not some other party, must be the one to perform the statutory duty; the second, on the other hand, is that where it has failed to act, any order we make should be *effective in compelling* AHPETC to comply with s 35(*c*) of the TCA.

118 We also appreciate that the circumstances on the ground might be changing and that AHPETC might already be taking steps to comply with these orders. We note, for instance, that AHPETC had appointed an independent consultant, Business Assurance LLP to address at least some of the weaknesses identified in the Auditor-General's Report. This seems to us to suggest that there is no reason why AHPETC should not or cannot engage external consultants to assist it in fulfilling the statutory duties and responsibilities that are incumbent upon it. At the same time, despite the appointment AHPETC has made, it does not appear that the duties in question have been carried out in full as yet.

119 In these circumstances, we consider that instead of making an order appointing independent accountants (who would be answerable to us as agents of the court) to act in the manner envisaged in prayer 3, the various interests at play would be adequately secured by an order requiring AHPETC to make the necessary appointment itself. In effect, this would bring us broadly within the ambit of the approach that was taken by Neuberger J in *Don King* save that because in this situation we are able to make such order as would appropriately *compel* AHPETC to do what it must, we, unlike Neuberger J, are not dependent on its consent. Hence, we order as follows:

(a) AHPETC must take steps to comply with s 35(*c*) of the TCA;

(b) To this end, AHPETC shall:

(i) appoint accountant(s) to

(A) assist in identifying the outstanding non-compliances with s 35(*c*) of the TCA and

(B) advise on the steps that must be taken to remedy those outstanding non-compliances;

(ii) require the accountant(s) to produce monthly progress reports until the accountant(s) is or are reasonably satisfied that AHPETC is fully compliant with s 35(*c*) of the TCA;

(iii) ensure that the monthly progress reports, which are to be submitted to the HDB, which in turn may make these publicly available on the first day of every month (starting on 1 January 2016), provide sufficient details of

(A) the outstanding non-compliances with s 35(*c*) of the TCA, and

(B) the steps that AHPETC is taking to remedy those outstanding non-compliances.

(c) Without prejudice to the generality of (b) above, the terms of reference of the accountant(s) who is/are appointed should extend to establishing whether any past payments made by AHPETC were improper and ought therefore to be recovered.

(d) To ensure transparency and efficacy in the execution of these duties, the identity and, if necessary, the terms of reference of the accountant(s) to be so appointed shall be subject to the consent of the HDB, which consent shall not be unreasonably withheld and in respect of which there shall be liberty to apply.

120 As for the orders sought in relation to the grants-in-aid yet to be disbursed (that is, prayer 3(a) and the first part of prayer 3(b)), we consider these unnecessary and inappropriate. It is a matter for the Minister to specify the conditions on which he will make the grants-in-aid and for AHPETC to decide if it will accept the grants-in-aid. We therefore decline to make any order in respect of this part of prayer 3.

Is the MND entitled to rely on one of its alternative legal bases to found its claim to relief?

121 We have found that the MND is not entitled to rely on s 21 of the TCA, and it remains for us to consider the MND's alternative contention that it has a *concurrent* (a) statutory interest pursuant to the TCA, (b) legal interest pursuant to a contractual mandate, and/or (c) beneficial interest under a *Quistclose* trust over the grants-in-aid which would entitle it to the reliefs sought. We will first address with points (b) and (c) which are premised upon private law concepts.

122 In the proceedings below, the Judge agreed with the MND that the TCA does not preclude the application of common law rights and remedies, relying on the case of *Goldring Timothy Nicholas and others v Public Prosecutor* [2013] 3 SLR 487 ("*Goldring*"). In our judgment, *Goldring* does not support the MND's contention. In that case, V K Rajah JA (as he then was) found that the Criminal Procedure Code 2010 (No 15 of 2010), which included a criminal disclosure framework, did not exclude the common law right of access to documents. This is because Rajah JA acknowledged that, as a matter of statutory interpretation, it is presumed that Parliament would not have removed rights pre-existing in common law if there is no provision or clearly evinced intention to that effect. We do not see how this proposition, even if it were accepted as correct, would apply here.

123 *Goldring* deals with a situation where there was a pre-existing common law right of access to documents and a new statutory framework governing disclosure in criminal cases was overlaid upon it. Importantly, both were meant to apply to the same relationship between the prosecution and the

accused. That is not the case here. The entire relationship between the MND and AHPETC arises out of the TCA, and can only be analysed by reference to the TCA. There may be recourse available to the MND as provided in the statute, such as pursuant to s 50 of the TCA. The MND may also be able to apply for judicial review, subject to the usual legal prerequisites that apply in the context of such applications. But we do not think that it can fundamentally alter the very basis of the relationship from one founded in and regulated by statute to one in trust, agency or any other private law concept. It is not appropriate, on the facts of the present case, to add such private law overlays to the statutory relationship between the Minister and the Town Councils. Indeed, there is nothing at all in the TCA to suggest otherwise. This also forecloses the MND's alternative contention based on a legal interest pursuant to a contractual mandate and a beneficial interest under a *Quistclose* trust.

124 Our view is reinforced by the decision of the Federal Court of Australia in *Re Patricia Isobel Gold (A Bankrupt)* [1996] FCA 1274. There, the applicant sought to annul a sequestration order made against her for failing to pay the levies under the Unit Titles Act 1970. One of her arguments was that she should not have been placed under any liability to pay the levies. She argued that the body corporate had breached the "essential terms and conditions" of the Unit Titles Act 1970 which thereby relieved her of the obligation to pay the levies. Finn J rejected the argument. He said that even if there was a breach of the "essential terms and conditions" of the Act, the remedy lay in s 113 of the Act and not in refusing to pay levies (at [25]). This is because "[a] statute is not so contract-like that its obligations can be discharged for breach" (at [25]). Since the relationship between the applicant and the body corporate was one that arose out of and was governed by statute, their mutual rights and obligations could not be determined based on private law concepts.

125 The importance of recognising the distinction between public law and private law was also emphasised by the House of Lords in *Swain and another v The Law Society* [1983] 1 AC 598, where the Law Society, acting on behalf of all solicitors required to be insured, took out insurance to provide indemnity against loss arising from claims made against solicitors in respect of liability for professional negligence. The plaintiffs, who were solicitors, argued that the Law Society was accountable for the share of the commission it secured from the brokers. The argument turned on whether the Law Society was a trustee for the solicitors in respect of their share of the commission. The House of Lords said it was not, holding that the Law Society was performing a public duty in exercising the power conferred on it by the statute, for which there was no remedy in breach of trust or equitable account, and on that basis, the Law Society was not liable.

126 Lord Diplock emphasised the importance of bearing in mind that the Law Society has both private and public capacities. When the Law Society is acting in its private capacity, it is subject to private law alone. But when the Law Society is acting in its public capacity, the principal purpose of which is to protect the public, it is governed by public law. This fundamental distinction, according to Lord Brightman, had important consequences because (at 618):

> ... the nature of a public duty and the remedies of those who seek to challenge the manner in which it is performed differ markedly from the nature of a private duty and the remedies of those who say that the private duty has been breached. If a public duty is breached, there is the remedy of judicial review. There is no remedy in breach of trust or equitable account. The latter remedies are available, and available only, when a private trust has been created ... The duty imposed on the possessor of a statutory power for public purposes is not accurately described as fiduciary because there is no beneficiary in the equitable sense.

127 Lord Diplock agreed with the reasoning of Lord Brightman, but added the pertinent observation on the "initial error" of failing to distinguish between public law and private law (at 609):

> ... I will limit my own comments to what I regard as the initial error, resulting from the way in which the cases of both parties had been presented in the courts below and uncorrected until the hearing in this House, of *failing to distinguish between public law and private law* and because of that failure seeking to discover the legal relationships between the Society, the insurers, the brokers and the individual premium-paying solicitors *by applying to these relationships concepts of private law alone*. [emphasis added]

128 The same error, with respect, was made by the MND in its submissions here and below. The MND may well be correct in its contention that the grants-in-aid were advanced for the purposes of the TCA. But any remedy for any failure to apply any such money in accordance with the TCA must rest in the TCA as a matter of public law and be based upon it.

129 We should finally touch on the MND's argument that it has a statutory interest in enforcing the Town Council's obligation to use its funds in accordance with the TCA and the TCFR because the MND "administers the TCA and regulates [Town Councils]" as well as disburses the grants-in-aid which form a substantial part of a Town Council's funds. Unlike the other two arguments which are based on private law concepts, this argument is based on a "statutory interest" in the grants-in-aid. As we understand it, the MND is simply saying that it should be entitled to compel AHPETC to comply with the law (in particular, the TCA and the TCFR). But this brings it squarely within s 21 of the TCA, which we have already dealt with. Accordingly, this argument must fail as well.

130 For these reasons, we see no basis for prayer 1, that is, a declaration that the Government through the MND has a legal or equitable interest in the grants-in-aid disbursed or to be disbursed to the MND. In essence we hold that the MND has no legal or equitable interest in the grants-in-aid that it has paid over unconditionally.

Conclusion

131 For these reasons, we allow the appeal in part, and order as follows:

(a) AHPETC shall make all outstanding sinking fund transfer(s) within a period of three months from the date of this order or such other time as the Court of Appeal may permit upon application being made to it. Within that time, AHPETC must decide whether to accept the grants-in-aid made by the Minister or to take such other measures as it may determine, such as to raise the conservancy and service charges and/or to liquidate its investments (if any) in order to put itself in a position to make the required transfer(s).

(b) AHPETC must take steps to comply with s 35(*c*) of the TCA;

(c) To this end, AHPETC shall:

(i) appoint accountant(s) to

(A) assist in identifying the outstanding non-compliances with s 35(*c*) of the TCA and

(B) advise on the steps that must be taken to remedy those outstanding non-compliances;

(ii) require the accountant(s) to produce monthly progress reports until the accountant(s) is or are reasonably satisfied that AHPETC is fully compliant with s 35(*c*) of

the TCA;

(iii) ensure that the monthly progress reports, which are to be submitted to the HDB, which in turn may make these publicly available on the first day of every month (starting on 1 January 2016), provide sufficient details of

(A) the outstanding non-compliances with s 35(*c*) of the TCA, and

(B) the steps that AHPETC is taking to remedy those outstanding non-compliances.

(d) Without prejudice to the generality of (c) above, the terms of reference of the accountant(s) who is/are appointed should extend to establishing whether any past payments made by AHPETC were improper and ought therefore to be recovered.

(e) To ensure transparency and efficacy in the execution of these duties, the identity and, if necessary, the terms of reference of the accountant(s) to be so appointed shall be subject to the consent of the HDB, which consent shall not be unreasonably withheld and in respect of which there shall be liberty to apply.

132 We will hear parties on the issue of costs.

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