Singapore Management University

Institutional Knowledge at Singapore Management University

Research Collection Yong Pung How School Of Law

Yong Pung How School of Law

6-2016

Agency and partnership law [2015]

Pearlie M. C. KOH
Singapore Management University, pearliekoh@smu.edu.sg

Stephen Noel Henry BULL
Singapore Management University, stephenbull@smu.edu.sg

Follow this and additional works at: https://ink.library.smu.edu.sg/sol_research

Part of the Agency Commons, Asian Studies Commons, and the Business Organizations Law Commons

Citation

KOH, Pearlie M. C. and BULL, Stephen Noel Henry. Agency and partnership law [2015]. (2016). *Singapore Academy of Law Annual Review of Singapore Cases*. 16, 87-99.
Available at: https://ink.library.smu.edu.sg/sol_research/2216

This Journal Article is brought to you for free and open access by the Yong Pung How School of Law at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Research Collection Yong Pung How School Of Law by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email cherylds@smu.edu.sg.

3. AGENCY AND PARTNERSHIP LAW

AGENCY LAW

Pearlie **KOH**
LLB (Hons) (National University of Singapore),
LLM (University of Melbourne);
Advocate and Solicitor (Singapore);
Associate Professor, School of Law, Singapore Management University.

Actual authority

3.1 Actual authority creates a legal relationship between the principal and his agent pursuant to which the agent is empowered to act on the principal's behalf. Such empowerment may be by express words (and hence express authority) or implied from the conduct of the parties and the circumstances of the case (and therefore implied authority): see *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 ("*Hely-Hutchinson*") at 583. Implied authority is, as much as express authority, a species of *actual* authority. Nevertheless, it often coincides with *apparent* authority, which, being merely what appears to others as authority, is in fact no authority at all.

3.2 This coincidence is often illustrated by contrasting the well-known English cases of *Hely-Hutchinson* and *Freeman & Lockyer v Buckhurst Part Properties (Mangal) Ltd* [1964] 2 QB 480 ("*Freeman & Lockyer*"). In *Hely-Hutchinson*, the English Court of Appeal found that the chairman of the defendant company had the implied actual authority to give an indemnity on behalf of the company. This finding was reached on the basis that the board of the defendant company had, by its consent and acquiescence, permitted him to act as the managing director. In contrast, a differently constituted Court of Appeal declined to imply actual authority on broadly similar facts in the earlier decision of *Freeman & Lockyer*, preferring instead to found liability on the basis of *apparent* authority. Diplock LJ stated (*Freeman & Lockyer* at 501):

> I accept that such actual authority could have been conferred by the board without a formal resolution recorded in the minutes … but to confer actual authority would have required not merely the silent acquiescence of the individual members of the board, but *the communication by words or conduct of their respective consents to one another and to* [*the director in question*]. [emphasis added]

3.3 It may well be that it is of little consequence in many cases which particular concept applied. After all, despite the fact that,

© 2016 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

conceptually, implied authority is the very antithesis of apparent authority (see Ian Brown, "Authority and Necessity in the Law of Agency" (1992) 55 MLR 414 at 416), the result of a successful plea of one or the other, is ultimately very much the same. However, there may be cases where a plaintiff's case is better, or perhaps more confidently, advanced on the basis of actual, rather than apparent, authority. In *Hely-Hutchinson*, for example, the fact that the plaintiff was himself a member of the board of the defendant company meant that there were concerns whether the requisite representation and reliance could be established. As counsel for the defendant company had argued (*Hely-Hutchinson* at 574):

> … in order to establish [the director's] ostensible authority [the plaintiff] would in effect have to rely on a representation assumed to have been made by the board of [the defendant company] (of which he himself was a member) to himself …

It is not clear what impact this would have had on an argument premised on apparent authority.

3.4 The High Court decision of *Singapore Salvage Engineers Pte Ltd v North Sea Drilling Singapore Pte Ltd* [2016] SGHC 5 was a case in which both concepts were potentially applicable. The case, however, had proceeded solely on the basis of implied actual authority.

3.5 The plaintiff had provided certain specialist marine services to the defendant which had been procured by one Choo, and for which the defendant had not made payment. The defendant, whose business was to provide support services for operations carried out on an oil rig, did not deny that Choo was employed as its "procurement logistics manager" but asserted that Choo did not have the express authority to transact on the defendant's behalf for values that went beyond $5,000. The plaintiff was claiming for a sum that far exceeded this limit. The question therefore was whether Choo nevertheless had the implied actual authority to contract with the plaintiff on the defendant's behalf.

3.6 The evidence showed that, whilst there might have been an internal protocol requiring Choo to obtain approval prior to exceeding the $5,000 transaction limit, he rarely, if ever, complied with this. There was little oversight or supervision over Choo's activities, and transactions entered into by Choo on the defendant's behalf, whether with the plaintiff or other vendors, were never repudiated, even where these exceeded $5,000. The court found that Choo's superiors must have known about Choo's activities but nevertheless permitted him to proceed. The court noted that, quite unlike other cases involving agents who exceeded their authority for personal gain, Choo had acted entirely honestly and to the best of his ability. In the circumstances, the court held that it was a necessary inference on these facts that the defendant

© 2016 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

had given Choo the actual, albeit implied, authority to transact on its behalf beyond the $5,000 limit.

3.7 It was, however, an undisputed fact that although Choo held the position of "procurement logistics manager", he had scant knowledge or experience to source for suitable vendors in the industry. As the court noted (at [23]), notwithstanding Choo's formal position, "he would have been unable to make any substantive decisions on such matters, and that was presumably the reason for the alleged limitations on his authority". Under such circumstances, it seemed at least arguable that something more than acquiescence would have been required to establish actual authority. The defendant's adoption of the otherwise unauthorised transactions could be analysed as acts of *ratification*, which do not, as a general rule, effect the agency relationship represented by actual authority: see Tan Cheng Han, *The Law of Agency* (Academy Publishing, 2010) at para 06.007. Neither does ratification confer *future* authority: see *Chitty on Contracts* vol 2 (Hugh G Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2015) ("*Chitty on Contracts*") at para 31-027; see also Peter Watts & Francis M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 20th Ed, 2014) ("*Bowstead and Reynolds*") at para 2-048. On the other hand, repeated acts of ratification could amount to a sufficient representation of authority upon which a finding of apparent authority could be premised.

Apparent authority

3.8 Apparent authority arises where a person (referred to here for convenience as the "principal" although he is not technically one), by his words or conduct, leads another (the contractor) to believe that he has authorised a particular person to act as his agent. Where the contractor transacts with the apparent agent on the faith of this belief, the principal may be bound by the acts of his apparent agent as though the latter had indeed been authorised. Returning to the facts of *Singapore Salvage Engineers Pte Ltd v North Sea Drilling Singapore Pte Ltd*, it may be readily appreciated how the conduct of the defendant, in repeatedly affirming the unauthorised acts of Choo, could very well amount to a representation to the plaintiff that Choo possessed the requisite authority to transact for the defendant. The same end result, that the defendant was bound by the transaction, could therefore be arrived at on this very different conceptual basis.

3.9 It bears repeating, however, that apparent authority, quite unlike a situation of actual authority, does not create an agency relationship between the principal and the apparent agent. Instead, the legal relationship is one between the principal and the contractor, and is created by the *principal's* representation to the contractor, manifested in

© 2016 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

the form of words or conduct, which the contractor relied upon to alter his legal position. The doctrine is often said to be a form of estoppel, albeit a "weak" one: see *Chitty on Contracts* at para 31-056. As Diplock LJ stated in *Freeman & Lockyer* (above, para 3.2), "[t]o the relationship so created the agent is a stranger": *Freeman & Lockyer* at 503. It follows therefore that the operative representation must originate from the principal, and any representation by the apparent and unauthorised agent cannot, as a general rule, operate to impose liability on the principal.

3.10 The doctrine of apparent authority was applied in *Viknesh Dairy Farm Pte Ltd v Balakrishnan s/o P S Maniam* [2015] SGHC 27 ("*Viknesh Dairy Farm Pte Ltd*"). The plaintiff company operated a dairy farm on property that was leased from the Singapore Land Authority. It was required to obtain a certificate of statutory completion for certain buildings on the farm in order to renew the lease. To this end, it engaged one *B* to do the necessary paperwork and, for that purpose, granted him access to the farm premises. *B* then entered into agreements with the defendants, purportedly on the plaintiff's behalf, permitting them to dump earth on the farmland for a fee. *B*, who was less than honest, had made representations to the defendants that he was the plaintiff's professional engineer and that earth was needed in order to level the farmland. *B* pocketed the payments made by the defendants who had handed cash cheques to *B* in the belief that the latter was the plaintiff's agent. In the present action, the plaintiff sought a mandatory injunction to compel the defendants to remove earth that they had dumped on the farm.

3.11 The issue before the court was whether the agreements were binding on the plaintiff so that the defendants' earth-dumping acts were legitimate. The answer to this depended on whether *B* was possessed of the requisite authority, actual or apparent. The court found that *B* had only been authorised to assist the plaintiff in obtaining the certificate of statutory completion. He therefore had no actual authority to permit the dumping of earth on the land. The question then was whether *B* had been clothed with the appearance of authority by the plaintiff so that the latter could not then deny *B*'s apparent authority.

3.12 In *Freeman & Lockyer*, Diplock LJ had explained the doctrine of apparent authority as follows (*Freeman & Lockyer* at 503):

> An 'apparent' or 'ostensible' authority … is … created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract.

© 2016 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

3.13 The court in the present case found that *B* had the apparent authority to bind the plaintiff to the earth-dumping agreements on the basis of the following facts:

(a) *B* was authorised to enter the farm premises.

(b) There were visible signs of earth dumping prior to the defendants' earth-dumping operations.

(c) The plaintiff (through its managing director) did not protest despite being aware of the defendants' impugned acts.

The court stated (*Viknesh Dairy Farm Pte Ltd* at [61]):

> Those facts would have led [the defendants] to believe that [B] was indeed the plaintiff's agent for the purpose of obtaining the [certificate of statutory completion]. [*The defendants*] *had taken* [*B's*] *representation that he was a* [*professional engineer*] *as the truth. They were entitled to rely on it*. In fact the circumstances in which the earth dumping was done caused [the defendants] to believe that [B] must be the agent of the plaintiff otherwise the latter would have stopped the earth dumping almost immediately. [emphasis added]

3.14 As already noted, the doctrine of apparent authority is premised upon a representation, not by the agent, but by the principal. The evidence should therefore show that it was the plaintiff, through its managing director, who had led the defendants to believe that *B* was its agent. In this connection, any representation by the purported agent himself cannot suffice. Indeed, the Court of Appeal had, in *Skandinaviska Enskilda Banken AB (Pub), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540 at [38], reiterated the "established principle" that "the law does not recognise the notion of what is commonly termed a 'self-authorising' agent". To the extent that the italicised phrase in the quote above might suggest that the court was prepared to accept *B's representation* as the operative representation with which to impose liability on the plaintiff, this would, with respect, be contrary to received principles.

3.15 The court's conclusion that the plaintiff had clothed *B* with apparent authority on the basis of the facts as stated also seemed overly generous. First, it is difficult to appreciate how the fact that *B* was authorised to *enter the farm premises* amounted to a representation that *B* was *authorised to contract* on the plaintiff's behalf. Secondly, it is not clear how the fact that earth had previously been dumped on the land amounted to a representation to the defendants that *B* was authorised to agree *with the defendants* for the dumping of earth. As pointed out above, it is undoubted that a previous course of dealings can form the premise for a finding of apparent authority. However, in order to amount to an operative representation for this purpose, the past

© 2016 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

dealings must relate to the principal's acceptance or acquiescence of the unauthorised agent's previous dealing with the contractor in question, which, as Lord Keith of Kinkel suggested in *Armagas Ltd v Mundogas SA* [1986] 1 AC 717 at 777, may arise out of the principal honouring transactions arising out of those dealings. Only in such circumstances would the previous course of dealing amount to a representation by the principal as regards the agent's authority. In the present case, the past earth-dumping activities were the result not of *B*'s acts but of the plaintiff's managing director, who would, in all likelihood, have been authorised in any case. The relevance of this fact to the issue at hand is therefore doubtful.

3.16 Thirdly, the court attached much weight to the fact that the plaintiff did not protest about the defendants' activities, despite being well aware of the same. Conceptually, in order for a contractor to have *relied* on any representation of the principal, the representation must have been made *prior* to the act of reliance. The defendants' awareness of the plaintiff's lack of protest arose after they had agreed with *B*, the purported agent. They therefore could not have relied as such on this fact in agreeing with *B*. Nevertheless, there have been cases where, notwithstanding the lack of actual or apparent authority, the principal may still be affected by "true estoppel" (see *Chitty on Contracts* at para 31-057) if he knew that a contractor was labouring under the belief that the impugned transaction fell within the scope of the purported agent's authority but did nothing to disabuse the contractor of his misplaced belief to the contractor's detriment. This involves the application of the principles of general law estoppel and is sometimes referred to as "agency by estoppel" or "estoppel from denying existence of agency relationship": see *Bowstead and Reynolds on Agency* at para 2-099. Establishing an agency in this sense does not depend on showing that the principal had made a representation of the kind necessary for apparent authority to arise. The court in *Viknesh Dairy Farm Pte Ltd*, however, appeared to have proceeded solely on the basis of apparent authority.

Agency by estoppel

3.17 The occasion for considering and applying the concept of agency by estoppel did subsequently arise in *The Bunga Melati 5* [2015] SGHC 190. Referring to *Bowstead and Reynolds* at para 2-099, the High Court there stated at [31]) that an agency by estoppel could arise even in the absence of a representation by the principal:

> [W]here the principal, having notice of [a belief that the agent was authorised] and that this belief might induce others to change their position, did not take (often *after* the operative transaction)

© 2016 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

> reasonable steps to notify those others of the facts. [emphasis in original]

3.18 Thus formulated, the concept is clearly relevant to the factual scenario in *Viknesh Dairy Farm Pte Ltd*. The court in *The Bunga Melati 5*, however, made it clear that any estoppel could only arise if there was an *obligation* to notify the contractor in question. The learned judge observed as follows (*The Bunga Melati 5* at [37]):

> I do not think that in an agency situation a duty to speak can arise in the absence of a pre-existing relationship or dealings between the purported agent and the party claiming under the contract. To impose such a duty would impose onerous obligations on would-be principals who would then bear the responsibility of correcting all misrepresentations made by parties claiming to be their agents despite playing no role in the relevant transactions.

3.19 In *The Bunga Melati 5*, the plaintiff had delivered bunkers (that is, fuel oil) to the defendant's ships for which it had not been paid. The contracts for the purchase and delivery of the bunkers were negotiated through bunker brokers who would connect the buyers with the vendors. However, it was not the defendant who communicated with the brokers *vis-à-vis* the contracts. Instead, it was Market Asia Link Sdn Bhd ("MAL"), a supplier of bunkers, who communicated with the brokers. The question, therefore, was whether MAL, in transacting for the purchase of the bunkers from the plaintiff, had acted as the defendant's agent. The defendant, which was one of the largest shipowners in the world, had a certain *modus operandi* when it came to making purchases of equipment and supplies. Specifically, it could only make purchases from pre-approved, or "registered", vendors, and MAL was a registered vendor of bunkers. The relationship between MAL and the defendant, therefore, was not one of agency but of supplier and buyer.

3.20 The plaintiff had attempted to argue that the defendant had nevertheless granted MAL actual authority to act on the former's behalf on a couple of grounds. First, it was argued that this could be inferred from the evidence, which showed that the defendant tended to treat MAL preferentially over the defendant's other vendors, and also that they shared an exceptionally close relationship that appeared to go beyond purely commercial interests. The court held that whilst this might well be the case, the only inference that could be drawn from the evidence related to a lack of good corporate governance on the defendant's part rather than any intention to confer actual authority on MAL.

3.21 Secondly, it was argued that, as the defendant knew that MAL would have to contract with bunker suppliers in order to fulfil the contracts awarded by the defendant, this meant that the defendant had

© 2016 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

impliedly authorised MAL to acquire the bunkers on its behalf. The court rejected this argument on the ground that (at [79]):

> [I]t would not have been reasonable for [the defendant] and MAL to perceive that MAL had been appointed as [the defendant's] agent on [the] sole basis [that the defendant had awarded the contracts to MAL with the requisite knowledge] – mere acquiescence by a principal to a purported agent's misrepresentation to third parties cannot be tantamount to an agreement to validate further representations by altering the legal position between parties.

3.22 The plaintiff had also attempted to argue that the defendant had clothed MAL with the apparent authority to act on its behalf. Whilst there was evidence that MAL had represented to the plaintiff that it was the defendant's agent, this cannot form the basis for imposing any liability on the defendant as the representation came from the unauthorised agent. Given that the court found no evidence of any representation originating from the defendant, it concluded that there was simply no basis upon which to find any apparent authority.

3.23 What then of the evidence that suggested that the defendant was aware that MAL had been representing itself as the defendant's agent to suppliers generally? The court held (at [104]) that such knowledge could not, in and of itself, give rise to an estoppel as this would mean that there was imposed on the defendant a "general duty to broadcast to the world that [MAL] was not [the defendant's] agent". In order for an estoppel to arise, the defendant must be subject to a duty to speak. Quoting from *Everbright Commercial Enterprises Pte Ltd v AXA Insurance Singapore Pte Ltd* [2000] 2 SLR(R) 287 at [66], the court noted that such a duty would only arise where "silence would create an erroneous impression which leads the prospective representee to alter his position for the worse": *The Bunga Melati 5* at [35]. Specifically, the court considered that whilst the presence of a pre-existing relationship or course of dealings between the parties might conduce towards subjecting the defendant to a duty to speak, this in itself was nevertheless not a sufficient condition.

3.24 On the facts of *The Bunga Melati 5*, the court held that the defendant did not owe the plaintiff any obligation to inform the latter that MAL was not the defendant's agent. The evidence did not disclose any legal or other relationship or even any communications between the plaintiff and defendant upon which such an obligation might be founded. In any event, there was evidence that the plaintiff was itself in possession of information that would have indicated that the buyer was MAL, rather than the defendant. This would have put the plaintiff on inquiry *vis-à-vis* the purported agency relationship between the defendant and MAL.

© 2016 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

3.25 The plaintiff in *Viknesh Dairy Farm Pte Ltd* (above, para 3.10) might, however, have had greater success with the doctrine. The evidence clearly showed that the plaintiff was aware of the earth-dumping activity, which not only involved highly visible heavy machinery and large mounds of earth, but also took place over a period of a few months. As the court had noted, it would have been "reasonable for [the defendants] to believe that [the plaintiff] must have approved of the earth dumping at its Farm or the plaintiff would have stopped the activity if otherwise": *Viknesh Dairy Farm Pte Ltd* at [58]. In such circumstances, it might well be that the plaintiff was (*City Bank of Sydney v McLaughlin* (1909) 9 CLR 615 at 625, cited in *Bowstead and Reynolds* at para 2-103):

> … bound by all rules of honesty not to be quiescent, but actively to dissent, when he knows that others have for his benefit put themselves in the position of disadvantage, from which, if he speaks or acts at once, they can extricate themselves, but from which, after a lapse of time, they can no longer escape.

PARTNERSHIP LAW

Stephen **BULL**
BA, LLB (Hons) (Wellington), LLM (Harvard);
Solicitor (England and Wales), Barrister and Solicitor (New Zealand),
Member of the New York Bar;
Associate Professor (Practice), School of Law,
Singapore Management University.

3.26 One partnership law case of significance was reported in 2015. In it the Court of Appeal considered the nature of the interests held by partners in partnership property consisting of land, and also the limitation period applicable to a claim by a deceased partner's estate for his share of the partnership property.

Relationship of partners between themselves

Admission of new partner

3.27 In *Chiam Heng Hsien v Chiam Heng Chow* [2015] 4 SLR 180 ("*Chiam Heng Hsien*"), the Court of Appeal allowed in part the plaintiff's appeal against the decision of the High Court reported under the same name at [2014] SGHC 119: noted in (2014) 15 SAL Ann Rev 39 at 41–44.

3.28 The case concerned a family dispute over entitlement to share in the sale proceeds of a valuable plot of freehold land formerly occupied

© 2016 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

by the Mitre Hotel near Orchard Road. A one-tenth undivided share in that property had been the main asset of a partnership named Mitre Hotel Proprietors ("MHP") formed in 1951 by five members of the Chiam family, *viz*: Toh Say (holding a 25/88 share), Toh Moo (21/88), Toh Tong (21/88), Toh Kai (19/88) and Toh Lew (2/88). The 10% share was held by Toh Say "in trust for the firm and the partners for the time being thereof". The last of the original partners passed away in 1993 and, following protracted litigation among the next generation of the family, the land was eventually sold in 2010. It fetched some $120m (having originally been purchased in 1948 for $61,000: see *Chiam Heng Luan v Chiam Heng Hsien* [2007] 4 SLR(R) 305 at [7]). The current proceedings were brought to determine who was entitled to share in MHP's $12m portion of the proceeds. The plaintiff (and appellant), the son of Toh Moo, had become a partner in 1974. He sought a declaration that he was solely entitled to the money, asserting that he was the last remaining partner. This was opposed by the defendants (respondents on the appeal) who were the personal representatives of the estates of Toh Say, Toh Tong and Toh Kai (Toh Lew's partnership share had been surrendered by his estate in 1984).

3.29 The High Court concluded that all of the defendants had been admitted to the partnership, in their representative capacities, and so were entitled to share in the sale proceeds. Upon the plaintiff's appeal, the Court of Appeal, in a judgment delivered by Sundaresh Menon CJ, affirmed the High Court's decision regarding the third and fourth defendants (representing Toh Tong's and Toh Kai's estates). However, it reversed the lower court with respect to the first and second defendants (representing Toh Say's estate), holding that they had never been admitted as partners of MHP. It also rejected their alternative claim that they had succeeded to Toh Say's entitlement to the partnership property, holding that the claim was time-barred. As a result, Toh Say's share of MHP was held to have been extinguished.

3.30 The dispute over whether the defendants, *qua* executors, had been admitted to the partnership mainly turned on issues of fact, *viz*, whether the plaintiff had impliedly consented to such admissions by his conduct. The Court of Appeal agreed that admission of an executor in the place of a deceased partner was not automatic by law, nor had any practice of MHP to that effect been established: *Chiam Heng Hsien* at [62]–[66]. The court further upheld the trial judge's findings that the plaintiff's consent to the third and fourth defendants becoming partners had been sufficiently evidenced by his admissions in various sworn affidavits in earlier litigation.

3.31 However, in the case of the first and second defendants, the appellate court disagreed with the trial judge regarding the significance of the business registration records of the Accounting and Corporate

© 2016 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

Regulatory Authority ("ACRA") which showed Toh Say's estate as a partner of MHP. The court held that the plaintiff's failure to seek rectification of ACRA's records could only be held against him if he owed a duty to the first and second defendants to do so. In the circumstances, such a duty was not justified as ACRA had indicated to him that its records were not conclusive as to partnerial status; further, the first and second defendants were well aware of his objections to their claims of partnership: *Chiam Heng Hsien* at [73]. As for the plaintiff's failure to object to the first and second defendants' payment of a share of the property tax on the hotel, the court noted that Toh Say's estate was legally liable to pay the tax as the registered owner of MHP's one-tenth share, and held that the plaintiff's silence was not sufficiently unequivocal to amount to acquiescence: *Chiam Heng Hsien* at [76]–[77]. As a result, it held that Toh Say's executors had not been admitted to MHP in his place following his death.

Partnership property

3.32 In the alternative, the first and second defendants in *Chiam Heng Hsien* had argued that Toh Say (along with the other original partners) had held a beneficial interest in MHP's 10% share in the land, which interest devolved on them as Toh Say's executors upon his death. Although the Court of Appeal upheld a procedural objection to the making of this argument, it had been fully argued and the court gave its substantive reasons for rejecting it. That entailed examining the legal nature of a partner's interest in the partnership property, and also the limitation period applicable to a claim for a share in such property upon the exit of the partner from the firm (by death or otherwise). These questions were related because Toh Say died in 1990 and his partnership share had neither been paid out (as contemplated by the partnership deed) nor, as noted above, been taken over by his estate in the sense of being admitted as a partner. Under s 43 of the Partnership Act (Cap 391, 1994 Rev Ed) a claim for a deceased partner's share in the partnership is stated, subject to contrary agreement, to be a "debt" accruing at the date of death. Accordingly, the six-year limitation period applicable to debts would *prima facie* bar a claim for such share by Toh Say's estate. However, under s 22 of the Limitation Act (Cap 163, 1996 Rev Ed), an "action to recover trust property or the proceeds thereof" is exempt from limitation, thus raising the issue of the extent to which a partner's interest in the firm's property is an interest under a trust.

3.33 As is frequently true in partnership law, the question can be viewed from both external and internal aspects. An asset which constitutes partnership property is held by the legal owner (typically one or more of the partners) on trust for the firm, in the absence of contrary

© 2016 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

agreement. Since a partnership lacks separate legal personality, "firm" here means the partners collectively; they are thus the beneficial owners of the asset as against the outside world. But whether an *individual* partner's interest in that asset is properly described as a beneficial interest or simply as an equitable chose in action has been the subject of a nuanced difference of opinion – some Australian cases have taken the former view. In the present case, the Court of Appeal affirmed that, whatever label is used, partnership property is, as between the partners and unless otherwise agreed, subject to an implied "trust for sale". The effect is that each partner has the right to receive, upon dissolution of the partnership, payment of his share of the firm's surplus assets after the sale thereof and the discharge of its liabilities. Prior to dissolution, therefore, each partner has no claim to a particular asset or even a share in such asset: his claim is simply to his proportionate share of the net proceeds upon eventual sale: *Chiam Heng Hsien* at [112]. One consequence is that where the partnership asset in question is *land* it is treated, as between the partners, as personal property rather than real property. This is known as the equitable doctrine of conversion and is reflected in s 22 of the Partnership Act. The court explained that the reference in the proviso to s 20(1) of that Act to partnership land being held "on trust … for the persons beneficially interested in the land" (on which the first and second defendants had relied) had to be understood in this light: such trust is for the benefit of the partners as a whole and does not give *in-specie* rights in the land to any individual partner. Therefore, absent contrary agreement, such a partner does not have a specific interest in any particular partnership asset which is capable of devolving to his executors. Nor was the express trust on which Toh Say held the legal title for the "firm and the partners for the time being thereof" inconsistent with the normal position described above.

3.34 How the foregoing principles are to be applied in the case of a dissolution caused by the death (or retirement) of a partner depends on a further question: whether the firm's business is to be terminated and wound up (known as a "general" dissolution) or continued by the remaining partners without a full winding-up (a "technical" dissolution). A partner or his personal representatives have a *prima facie* right to have the business wound up upon dissolution (s 39 of the Partnership Act), but this may be expressly or impliedly negated by the partnership agreement: *Chiam Heng Hsien* at [134]. The MHP partnership deed provided that a partner's death "shall not dissolve the partnership as to the other partners", thus indicating that the dissolution upon Toh Say's death was a technical one only: *Chiam Heng Hsien* at [61]. Further, the court interpreted the winding-up clause (cl 21) of the partnership deed as giving his executors the right to have the value of his partnership share ascertained and paid out: *Chiam Heng Hsien* at [148].

© 2016 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

3.35 It may be observed that in some cases this may beg the question as to what valuation principles should apply in such a notional rather than a real winding up, where they are not spelt out in the deed. In fact, in *Chiam Heng Hsien* itself it may respectfully be queried whether cl 21, which in terms contemplated an actual winding up, strictly applied to a technical dissolution. However, the valuation question did not need to be answered in the present case because s 43 of the Partnership Act meant that the executors' claim was deemed to be a debt rather than a claim under a trust. As such, it was subject to the six-year limitation period, which had long expired. (The Court of Appeal went on to opine, *obiter*, that s 43 would apply even in the case of a general dissolution, disagreeing with the view of *Lindley & Banks on Partnership* (Sweet & Maxwell, 19th Ed, 2010) at paras 23-34 and 26-03.) The court further rejected an argument that, exceptionally, time does not begin to run against a deceased partner's estate where the firm's business continues to be carried on after his death and no account has been rendered. Such exception was confined to claims for an account between the ongoing partners: *Chiam Heng Hsien* at [151].

3.36 Finally, the court noted an additional ground for applying the Limitation Act against the first and second defendants. As Toh Say's executors, they had brought proceedings in 1993 against MHP and the plaintiff in the present proceedings, seeking an account of the value of Toh Say's share. An interlocutory order had been made against the plaintiff which he did not comply with: as a result, his defence had been struck out and judgment entered against him in 1996. However, no steps had been taken to enforce that judgment which was subject to a 12-year limitation period. The Court of Appeal, accordingly, held that the executors' original cause of action had merged in the 1996 judgment and was also time barred for that reason. As a result, Toh Say's partnership share had been extinguished and the first and second defendants had no claim to share in the $12m.

© 2016 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.