Cupid Jewels Pte Ltd *v* Orchard Central Pte Ltd and another appeal
[2014] SGCA 2

Case Number	: Civil Appeal No 32 of 2013 and Civil Appeal No 33 of 2013
Decision Date	: 13 January 2014
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: David Nayar (David Nayar and Vardan) for the appellant in Civil Appeal No 32 of 2013; Suresh s/o Damodara (Damodara Hazra LLP) for the appellant in Civil Appeal No 33 of 2013; and Philip Jeyaretnam SC, Ling Tien Wah and Tang Jin Sheng (Rodyk & Davidson LLP) for the respondent in Civil Appeal No 32 of 2013 and Civil Appeal No 33 of 2013.
Parties	: Cupid Jewels Pte Ltd — Orchard Central Pte Ltd

CIVIL PROCEDURE – Ex-parte application – duty of disclosure

LANDLORD AND TENANT – Distress for rent

STATUTORY INTERPRETATION – Construction of statute – purposive approach

STATUTORY INTERPRETATION – Definitions

STATUTORY INTERPRETATION – Interpretation Act – extrinsic aids – purposive approach

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2013] 2 SLR 667.]

13 January 2014

V K Rajah JA (delivering the grounds of decision of the court):

Introduction

1 Pursuant to a Writ of Distress, Orchard Central Pte Ltd ("Orchard Central") distrained, amongst other things, the jewellery found on the premises of its tenant, Cupid Jewels Pte Ltd ("Cupid Jewels"). The jewellery distrained had been delivered to Cupid Jewels by Forever Jewels Pte Ltd ("Forever Jewels"). Cupid Jewels and Forever Jewels filed separate applications for the release of the jewellery. Both of their applications were dismissed by a High Court judge ("the Judge") (see *Orchard Central Pte Ltd v Cupid Jewels Pte Ltd (Forever Jewels Pte Ltd, non-party)* [2013] 2 SLR 667 ("the Judgment")). Dissatisfied with the Judge's decision, Cupid Jewels and Forever Jewels filed Civil Appeal No 32 of 2013 ("CA 32") and Civil Appeal No 33 of 2013 ("CA 33") respectively.

2 After considering the parties' submissions, we dismissed both CA 32 and CA 33. We now give the detailed reasons for our decision.

Facts

The parties

3 Cupid Jewels and Forever Jewels are, loosely speaking, "related companies" in the sense that they have the same directors and two common shareholders. Forever Jewels delivers jewellery to Cupid Jewels for the latter to sell. Orchard Central is the landlord of the commercial and retail development known as Orchard Central ("OC").

The background to the dispute

4 On 25 May 2008, Orchard Central and Cupid Jewels entered into an agreement for Cupid Jewels to lease two units in OC ("the Premises") from Orchard Central to carry out retail sales of jewellery ("the Lease Agreement"). [note: 1] Pursuant to cl 1.2 [note: 2] read with Schedule 1 [note: 3] of the Lease Agreement, Cupid Jewels was obliged to pay rent in advance on the first day of each calendar month of the three year term, comprising the higher of: (a) the base rent; or (b) the percentage rent calculated on the basis of Cupid Jewels' gross sales for that month according to a formula set out in Schedule 3 of the same. [note: 4]

5 Possession of the Premises was handed over to Cupid Jewels on 9 June 2009 for renovations and Cupid Jewels commenced business at the Premises in September and December 2009 respectively. From August 2009, Cupid Jewels fell into rental arrears. The outstanding amount increased over the months and amounted to $891,507.99 by August 2010 when Orchard Central filed its application for the Writ of Distress.

6 In May 2010, Cupid Jewels began negotiations for rental review with representatives from Orchard Central and Far East Retail Consultancy Pte Ltd, the company responsible for leasing matters related to OC. On 1 June 2010, Orchard Central sent an email to Cupid Jewels offering varying rental rebates for September to November 2009 and January to May 2010. [note: 5] This was followed up with another email on 2 June 2010 ("the 2 June 2010 Email") listing out the rebates in table form and stating as follows thereafter: [note: 6]

> With this, we enclose herewith a copy of our rebate letter with the respective months for your attention/execution. The original rebate letter will be sent to you shortly. Meanwhile, we would appreciate it if you could make payment for the outstanding rental by **4 June 2010, Friday** … [emphasis in original]

7 The material portions of the formal rebate letter dated 2 June 2010 [note: 7] ("the 2 June 2010 Rebate Letter") that was attached in the 2 June 2010 Email are reproduced below:

> We are pleased to inform you that we will be granting you following rebates on Base Rent for the following months on an ex-gratia basis for your premises.
>
> …
>
> Our offer is made in good faith on our part. We hope that this will help us move forward together to establish a fruitful and mutually beneficial relationship.
>
> An acceptance of this offer would also indicate your unconditional acceptance of the confidentiality and non-disclosure provisions set out in Schedule 1 herein as well as full compliance with the following:
>
> (1) Payment of outstanding for the Premises.

> (2) Acceptance must be accompanied by a cheque for full payment of the sum subject to subsequent clearance.
>
> (3) Rental must be kept current at all times.
>
> (4) Full compliance with the terms and conditions of the Lease Agreement.
>
> We would be grateful if you could kindly confirm your acceptance of the above by signing on the duplicate copy of this letter and return it … no later than 9 June 2010.
>
> …
>
> If for any reason we do not receive the duly signed duplicate copy of this letter by the above stipulated date, the offer shall lapse absolutely without further notice from us. Please note that the Rent Rebate will only take effect on your fulfilment of the conditions precedent stated above.

It was undisputed that Cupid Jewels did not accept the offer made in the 2 June 2010 Rebate Letter. There were subsequent talks between the parties but no agreement was reached.

8 On 14 June 2010, Cupid Jewels sent an email proposing a rental package and requested an extension period for the rebates to cover August 2009 as well. [note: 8] On 17 June 2010, Orchard Central replied rejecting the proposed rental package but stated that it would honour the rebate previously offered if Cupid Jewels could "come up with a plan to settle the arrears up till May10 [*sic*], within a reasonable timeframe". [note: 9] On 25 June 2010, Orchard Central requested for a response from Cupid Jewels "to move forward in this discussion". [note: 10] On the same day, Cupid Jewels replied stating that it would have to revert the next week as its directors were outstation. [note: 11]

9 On 13 July 2010, Cupid Jewels sent an email requesting for the payment of rental arrears to commence in August 2010 in 24 monthly instalments. [note: 12] On 27 July 2010, Orchard Central replied stating as follows ("the 27 July 2010 Email"): [note: 13]

> We have reviewed your request comprehensively and regret that we are unable to agree to your request of payment of your outstanding arrears in 24 months. We have reviewed, and request that all the arrears be paid by 31 December 2010.
>
> We look forward to your installment plans, afterwhich, we can move our discussion forward.

10 On 29 July 2010, Cupid Jewels sent an email acknowledging receipt of the 27 July 2010 Email and notified Orchard Central that it would revert after meeting with its owners who were outstation at that time. [note: 14] From 29 July 2010 to 5 August 2010, the parties continued to correspond in relation to the provision of audited sales reports and sales statements. [note: 15]

The applications filed

11 On 6 August 2010, Orchard Central filed an *ex parte* application in the High Court for a Writ of Distress for the sum of $891,507.99 (being the outstanding rent for the period between August 2009 to August 2010) under s 5 of the Distress Act (Cap 84, 1996 Rev Ed) ("the Act"). [note: 16] This was granted by an Assistant Registrar ("AR"). That same day, pursuant to Writ of Distress No 2 of 2010 [note: 17], the sheriff seized goods found on the Premises comprising 579 pieces of jewellery ("the

Distrained Jewellery”), furniture, displays and office equipment. [note: 18]

12 On 16 August 2010, Cupid Jewels filed an application for the release of the Distrained Jewellery under s 16 of the Act. [note: 19] On 19 August 2010, Forever Jewels filed a separate application for the release of the Distrained Jewellery under s 10 of the Act. [note: 20] These applications were eventually heard together.

The decision below

13 The Judge dismissed Cupid Jewels’ application on the following grounds:

(a) The fact of the negotiations were material and should have been disclosed, but on balance, this omission did not justify setting aside the Writ of Distress (see the Judgment at [20]–[29]).

(b) The conditions under s 5 of the Act were satisfied as:

(i) Cupid Jewels was obliged to pay the full sum of $891,507.99 under the Lease Agreement (see the Judgment at [30]–[36]); and

(ii) The relevant period of rent did not exceed 12 months (see the Judgment at [37]–[39]).

(c) Cupid Jewels failed to prove detriment and reliance and thus could not invoke the doctrine of promissory estoppel (see the Judgment at [40]–[54]).

(d) The Distrained Jewellery did not fall within s 8(*d*) of the Act and were thus not exempt from seizure (see the Judgment at [55]–[74]).

14 The Judge dismissed Forever Jewel’s application as well, for the following reasons:

(a) Forever Jewels failed to prove that Orchard Central had actual knowledge that the Distrained Jewellery belonged to it (see the Judgment at [77]–[79]).

(b) The doctrine of reputed ownership in s 12(*a*) of the Act applied to preclude the release under s 10 of the same (see the Judgment at [80]–[86]).

Issues before this Court

15 The issues before this Court in the present appeals are substantially the same as those before the Judge below, namely:

(a) CA 32:

(i) non-disclosure of material facts before the AR;

(ii) the conditions in s 5(1) of the Act;

(iii) promissory estoppel; and

(iv) exemption from seizure under s 8(*d*) of the Act.

(b) CA 33:

(i) the conditions in s 12(*a*) of the Act; and

(ii) the conditions in s 10(2) of the Act.

Cupid Jewels' appeal in CA 32

16 We turn first to the issues that arose in Cupid Jewels' appeal in CA 32.

Non-disclosure of material facts before the AR

17 The Judge rejected Cupid Jewels' preliminary point that an even higher level of disclosure should apply to *ex parte* applications for a Writ of Distress (see the Judgment at [22]). He held that the general principles governing *ex parte* applications were applicable, and, upon applying these principles, concluded that the negotiations between the parties as to the repayment of rental arrears were material and should have been disclosed before the AR (see the Judgment at [24]–[26]). However, upon balancing Orchard Central's culpability and the gravity of the omission with the potential prejudice that might have been suffered by Cupid Jewels as a result of the omission, the Judge found that it would be entirely disproportionate to set aside the Writ of Distress, and thus exercised his discretion not to do so (see the Judgment at [27]–[29]).

18 Cupid Jewels appealed against the Judge's decision not to set aside the Writ of Distress. It contended, in the main, that a higher level of disclosure ought to apply for Writs of Distress, and that the Judge erred in his analysis of the alleged prejudice that Orchard Central's non-disclosure caused to it.

19 Not only did we reject Cupid Jewels' assertion that a higher level of disclosure ought to apply for Writs of Distress, we were of the view that the doctrine of full and frank disclosure does not apply to *ex parte* applications for Writs of Distress in the manner and extent that it ordinarily does in other *ex parte* applications generally. Pursuant to O 75 r 2(1) of the Rules of Court (Cap 332, R 5, 2006 Rev Ed) ("ROC"), in an *ex parte* application for a Writ of Distress, a landlord is obliged to disclose the following specific information set out in Form 198 of Appendix A to the ROC:

AFFIDAVIT IN SUPPORT OF

APPLICATION FOR DISTRESS

(Title as in action)

> I, of , do make oath (or affirm) and say that I am the landlord (or his attorney or duly authorised agent) and that (the defendant) is justly indebted to in the sum of dollars ($) being arrears of rent of the premises No. Singapore due for months from the day of 20 to the day of 20 at the rate of Dollars ($) a month payable in advance (arrears) on the day of each month (less the sum of Dollars ($) paid to account).
>
> Sworn (or affirmed) as in Form 78.

Beyond this, a landlord is only under a duty to disclose the fact of any *crystallised* dispute between the parties as to whether the right to distress has in fact arisen. In other words, while we hold that there is a duty of disclosure in an *ex parte* application for a Writ of Distress, the scope of this duty in

this particular context is less onerous that the duty of full and frank disclosure in other *ex parte* applications generally.

20 We take this position having regard to the unique nature of Writs of Distress. The remedy of distress has its origins in England as a common law self-help remedy that did not require the leave or authority of the court (see Lye Lin Heng, *Landlord and Tenant* (Butterworths, 1990) at p 190). This remedy of distress was adopted in Singapore but adapted by being placed under the general supervision of the courts via s 5 of the Act and its predecessor provisions. We will now briefly trace the history of s 5 of the Act to better explain this point.

21 The Act has its roots in the Indian Act XXIX of 1866 ("1866 Indian Act"). The Courts Amendment No 2 Ordinance (Ordinance No V of 1874) subsequently conferred jurisdiction to the Summary Side of the Supreme Court at Singapore and Penang, on the abolition of the Courts of Requests at these Settlements. Portions of the 1866 Indian Act were later repealed by the Straits Settlements Distress Bill 1876 ("the 1876 Bill"), which was tabled to adopt the amendments that India made to the 1866 Indian Act via the Indian Act No 1 of 1875, in particular, the placement of the remedy of distress under the supervision of local courts regardless of the amount in issue. The following excerpt from the "Objects and Reasons" commentary of the 1876 Bill is instructive in this regard:

> The existing local law for Distresses for Rent is to be found in the Indian Act XXIX of 1866, an Act passed for the purpose of improving the jurisdiction of the Courts of Requests. By this Act the right of issuing Distress Warrants for arrears of rent not exceeding $50 is confined to the Courts of Requests, and Sections 2 to 8 and Section 29 relate to such Distresses. These Sections, which are taken from the Calcutta Distress Act, VII of 1847, appoint bailiffs and officers, direct how Distress Warrants are to issue, how property is to be seized and sold, and provide for the costs of the distress. Ordinance V of 1874 gave the jurisdiction to the Summary Side of the Supreme Court at Singapore and Penang, on the abolition of the Courts of Requests at those Settlements.
>
> It is proposed now to extend the jurisdiction to arrears of rent beyond $50, and generally to improve and declare the law; which, in many respects is obscure, depending on Acts of Parliament (some of them extending as far back as the reign of Henry III.) which are supposed to be in force, or partly in force, in the Colony.
>
> The Indian Legislature has recently consolidated the law of distress in Act No. 1 of 1875, the provisions of which Act are included in the present Bill.
>
> The English law of distress for rent is very peculiar, inasmuch as it virtually allows the owner of property to be his own Judge and Sheriff in collecting his rents. The Courts have therefore been zealous to exact extreme care and precaution on the part of those employed in levying the distresses, hence the complications in the law. *Where, however, as is intended here, the system is to be changed, and its working is to be placed under the supervision of the Courts, it seems that such strict rules are no longer necessary; consequently the present Bill is drafted so as to remove much of the technical difficulty attending the process of distress as used in England.*
>
> *Placing the execution of Distress Warrants under the sanction of the law, to be executed by Court officers, instead of allowing the parties to act for themselves, is a measure which is in favour of the public;* and there are strong reasons why, not merely Distress Warrants under $50 should be required to be issued by a Court, but that all Distress Warrants should be issued by the Courts, and be served by public officers, under the supervision of the Courts. *It is proposed,*

therefore, to follow the example of the Indian Legislature in Act I of 1875, and to prohibit any Distress, except under warrant issued by the Courts, Sections 1 and 2.

[emphasis added]

22 To that end, cl 8 of the 1876 Bill provided as follows:

> **8.—I**. The Court may thereupon issue a warrant, returnable within six days, to the effect of the form in the Schedule C, addressed to any one of the bailiffs of the Court.
>
> I I . *The Court may*, ***at its discretion*** *, upon examination of the persons applying for such warrant, decline to issue the same*.
>
> III. When no Judge of the Supreme Court, on its Summary Side, is present in Court, or in Chambers, or where the Judge is otherwise engaged, such warrants may be issued by the Registrar of the Supreme Court, and at Malacca by a Deputy Registrar, subject to such Rules and Orders, if any, as may be made under Section 32.
>
> [emphasis added in italics and in bold italics]

23 While the wording of cl 8(II) of the 1876 Bill envisaged an element of discretion as regards the grant of a Warrant of Distress, the following excerpt from the "Objects and Reasons" section of the 1876 Bill suggested that there was in fact not much discretion involved:

> *As the issue of distress warrants is, generally speaking*, ***a matter not involving much judicial discretion*** , and as applications for such warrants are made at all hours, it is proposed, in Clause III of Section 8, to allow the Regitrars [*sic*] to grant such warrants, when a Judge of the Supreme Court is not available. [emphasis added in italics and in bold italics]

24 The 1876 Bill went through some amendments, but none of these were discussed in the Legislative Council meetings. Section 8 of the Distress Ordinance No XIV of 1876 ("the 1876 Ordinance") eventually read as follows:

> **8**.—I. The Court may thereupon issue a warrant, returnable within six days, to the effect of the form in the Schedule C, addressed to any one of the bailiffs of the Court.
>
> I I . *The Court may*, ***at its discretion*** *, upon examination of the persons applying for such warrant, decline to issue the same* ***.***
>
> III. Warrants may be issued by a Judge of the Supreme Court, or by the Registrar or Deputy Registrar, and the Court shall from time to time, by orders to be made under Section 32, make such regulations as may be necessary for the issue of warrants, whether by a Judge or by such Registrar or Deputy Registrar.
>
> …
>
> [emphasis added in italics and in bold italics]

It is evident that cl 8(II) of the 1876 Bill remained unaltered, while cl 8(III) was amended slightly. The element of discretion in cl 8(II) remained.

25 The 1876 Ordinance was subsequently abrogated by Chapter XXXIII of the Civil Procedure Code

1907 (Ordinance XXXI of 1907) ("CPC 1907"). The equivalent provision of s 8 of the 1876 Ordinance was s 724 of the CPC 1907, which was passed by the Legislative Council without any material amendment. Section 724 of the CPC 1907 read as follows:

> **724**. *The Judge may order a writ to be issued*, ***or he may refuse the application*** . If a writ is issued, it shall be returnable within six days, and shall be in the Form in the First Schedule, with such variations as circumstances may require. [emphasis added in italics and in bold italics]

The element of discretion in s 8(II) of the 1876 Ordinance (see [24] above) appeared to have remained via the phrase "or he may refuse the application" in s 724 of the CPC 1907.

26 In 1934, the CPC 1907 was split up into its constituent segments, with the Legislative Council expressing the intention that the new Ordinances very closely follow the existing provisions of the law (see the further discussion in [56]–[70] below). Section 724 of the CPC 1907 eventually became s 5 of the Distress Ordinance (Ordinance No 28 of 1934) ("the 1934 Ordinance"), which reads as follows:

> **5.—(I**) A landlord or his agent duly authorised in writing may apply *ex parte* to a Judge for an order for the issue of a writ, to be called a writ of distress, for the recovery of rent due or payable to the landlord by a tenant of any premises for a period not exceeding twelve completed months of the tenancy immediately preceding the date of the application; ***and the Judge may make such order accordingly*** . [emphasis added in bold italics]

27 Section 5 of the 1934 Ordinance remained materially unchanged through the subsequent Ordinances and Acts. It is *in pari materia* with s 5 of the Act which reads:

> **5**.—(1) A landlord or his agent duly authorised in writing may apply ex parte to a judge or registrar for an order for the issue of a writ, to be called a writ of distress, for the recovery of rent due or payable to the landlord by a tenant of any premises for a period not exceeding 12 completed months of the tenancy immediately preceding the date of the application; ***and the judge or registrar may make such order accordingly*** . [emphasis added in bold italics]

For completeness, we should also mention that s 5 of the Act is, in turn, *in pari materia* with s 5 of the Distress Act (Cap 84, 2013 Rev Ed) that recently came into effect on 30 November 2013.

28 It is evident from the above history of s 5 of the Act that there was a deliberate imposition of a layer of judicial oversight over the remedy of distress, and this element of judicial discretion has persisted through the provisions. As such, the court's role in an application for a Writ of Distress must be more than just purely ministerial in nature. Otherwise, such judicial oversight will be rendered meaningless. That having been said, the role of the court in an application for a Writ of Distress was not intended to be as extensive as that in other *ex parte* applications generally. It will be recalled that the remedy of distress originated as an entirely *self-help* remedy in England *founded upon the landlord's rights of ownership over his land*. It was probably for this reason that the official introduction to the 1876 Bill observed that "the issue of distress warrants is, generally speaking, *a matter not involving much judicial discretion*" [emphasis added] (see [23] above).

29 We therefore think it fit that the landlord's duty to disclose facts beyond those required in Form 198 of Appendix A to the ROC extends *only* to any crystallised dispute between the parties as to whether the landlord's right to distress has in fact arisen. This, in our view, strikes a balance between ensuring adequate protection for tenants on the one hand, while on the other hand ensuring that the costs of such a straightforward application founded upon the landlord's *prima facie* right in land are not unduly increased by the onerous duty of full and frank disclosure necessary in other *ex parte*

applications such as injunctions, arrests and search orders. We should add that a fairly large number of distress applications are made and most of them are routine in nature. An extensive general duty of disclosure does not sit well with the architecture of our distress regime and would unnecessarily add to the complexity and costs of making such applications. In addition, it is always open to the tenant to apply to the court to set aside a Writ of Distress for good reason. The grant of the Writ of Distress upon the landlord's *ex parte* application is not the be all and end all of the matter.

30 Turning now to the facts of the present case, there was in our view no crystallised dispute between the parties as to whether Orchard Central's right to distress had in fact arisen. Cupid Jewels' case was premised upon an alleged promissory estoppel which operated to bar Orchard Central from acting upon the latter's rights. And as we will explain in full later (see [39]–[42] below), there was simply no evidence of a clear and unequivocal representation on the part of Orchard Central that it would not insist on its strict legal position. Put simply, Orchard Central's right to rent due and payable, and its consequent right to distress, were not known by Orchard Central to be disputed when it made its application for distress. That being the case, there was no duty on the part of Orchard Central to give any narrative of the negotiations to the AR. We would therefore respectfully disagree with the Judge that Orchard Central had breached its duty of disclosure. We would, however, affirm the Judge's ultimate decision that the Writ of Distress should not be set aside, albeit for different reasons.

The conditions in s 5(1) of the Act

31 We now turn to Cupid Jewels' contention that s 5 of the Act was not satisfied. The said provision reads as follows:

> **Application for writ of distress**
>
> **5.—(1**) A landlord or his agent duly authorised in writing may apply ex parte to a judge or registrar for an order for the issue of a writ, to be called a writ of distress, for the recovery of ***rent due or payable*** to the landlord by a tenant of any premises for a ***period not exceeding 12 completed months*** of the tenancy immediately preceding the date of the application; and the judge or registrar may make such order accordingly.
>
> [emphasis added in bold italics]

Cupid Jewels argued below and before us that: (a) the rent in issue in the Writ of Distress was not "due or payable"; and (b) the period in question for which rent was claimed exceeded 12 months. In these circumstances, Cupid Jewels argued, the Writ of Distress was invalid and should have been set aside.

32 We rejected these arguments for the same reasons as the Judge. Cupid Jewels' legal obligation to pay the *full* rental without demand under the Lease Agreement had not been extinguished or varied since the offer for the rental rebates had not been accepted. The full sum was due and payable notwithstanding that the amount of percentage rent had not been determined, because the obligation to pay the base rent as the minimum rental sum arose on the first day of each calendar month (with the percentage rent for that month calculated and the relevant adjustments made thereafter). To construe otherwise would render cl 1.2(b) of the Lease Agreement superfluous. We also accepted that the total sum claimed did not exceed 12 months' rent. The discrepancy was satisfactorily explained by Orchard Central on account of its computer-generated Statement of Accounts that could not be manually altered.

33 In the circumstances, we fully affirmed the Judge's finding at [34]–[36] and [38]–[39] of the Judgment that there were no irregularities in the Writ of Distress so as to render it void or invalid. We accordingly also dismissed Cupid Jewels' arguments on this point.

Promissory estoppel

34 We now turn to Cupid Jewels' attempt to invoke the doctrine of promissory estoppel.

35 The Judge below found that this defence was not made out. As a preliminary point, the Judge held that there was no reason why the doctrine of promissory estoppel cannot apply to a statutorily conferred right as long as there was a pre-existing legal relationship between the parties (at [42]–[43] of the Judgment). Overall, however, the Judge found that the doctrine of promissory estoppel was not made out because of his findings on the substantive elements of the doctrine, *viz*, representation, reliance and detriment:

(a) Representation: A sufficiently clear representation that Orchard Central would not insist on its strict legal remedies to recover the full rental arrears *could* be inferred (see the Judgment at [46]).

(b) Detriment: The principles on detriment in the law of proprietary estoppel should not be imported into the law of promissory estoppel as there is no unified legal principle at this stage (see the Judgment at [48]). The cases *Lam Chi Kin David v Deutsche Bank AG* [2010] 2 SLR 896 and *Lam Chi Kin David v Deutsche Bank AG* [2011] 1 SLR 800 did *not* remove the requirement for the inquiry into detriment in the sense of prejudice in some broad form (see the Judgment at [48]–[49]).

(c) Reliance: On the facts, Cupid Jewels failed to prove that it had, in reliance of Orchard Central's representation, suffered detriment in:

(i) the narrow sense by remaining on the Premises, continuing to operate its business and making future plans for the business (see the Judgment at [51]); and

(ii) the broad sense by refraining from making immediate arrangements for full repayment of the rental arrears (see the Judgment at [52]–[53]).

36 We turn first to the preliminary issue of whether the doctrine of promissory estoppel can in principle apply to a statutorily conferred right. In its Respondent's Case, Orchard Central relied on the Privy Council case of *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 933 ("*Kok Hoong*"), cited by Tan Lee Meng J in *Joshua Steven v Joshua Deborah Steven and others* [2004] 4 SLR(R) 403 ("*Joshua Steven*"), for the proposition that the doctrine of promissory estoppel should not apply in the present case in defiance of the Act, particularly since *Supreme Holdings Ltd v Sheriff (Supreme Court of Singapore) and another* [1985–1986] SLR(R) 596 confirmed that the Act conferred a special status upon landlords by providing them with a special remedy.

37 In our view, Orchard Central's reliance on *Kok Hoong* and *Joshua Steven* was misplaced. In *Joshua Steven*, the property concerned was subject to the Residential Property Act (Cap 274, 1985 Rev Ed) ("the RPA") which expressly restricted the rights of foreigners to acquire an interest in the property in issue. It was within this specific context that Tan J held that a party cannot rely on estoppel in defiance of a statute, because as explained by Viscount Radcliffe in *Kok Hoong*, there are (*Joshua Steven* at [15]):

> … rules that preclude a court from allowing an estoppel, if to do so would be to *act in the face of a statute* and to give recognition through the admission of one of the parties to a *state of affairs which the law has positively declared not to subsist*. [emphasis added]

Whether or not an estoppel can be applied depends on whether allowing it would act "in the face of a statute" and to effectively allow "a state of affairs which the law has positively declared not to subsist". The purported estoppel in *Joshua Steven* clearly fell within this scope since the RPA expressly imposed an *express prohibition* against the very thing which the estoppel, if recognised, would result in (*ie*, a foreigner having beneficial interest in property restricted under the RPA).

38 In contrast, in the present case, the Act did not *require* a Writ of Distress to be applied for and executed whenever the conditions of s 5(1) are satisfied. The use of the word "may" in s 5 of the Act which provided that "[a] landlord or his agent duly authorised in writing *may* apply ex parte to a judge or registrar for an order for the issue of a [Writ of Distress]" [emphasis added] indicated that the Act was merely *permissive* and not mandatory. That the Act conferred on landlords a special status by way of the special remedy of distress did not necessarily mean that recognising an estoppel would be in defiance of the Act. There being no legal basis to preclude the application of the doctrine of promissory estoppel in the present case, we accordingly affirmed the Judge's holding on this preliminary point.

39 While we agreed with the Judge that a promissory estoppel could in principle arise to bar a statutorily conferred right, we disagreed with his finding as regards the first element of that doctrine, *viz*, representation. Contrary to what the Judge found, we were of the view that there was in fact *no* clear and unequivocal representation by Orchard Central that it would not enforce its legal rights under the Lease Agreement. While the parties were certainly negotiating over the rental rebates and repayment arrangements, there was nothing in the correspondence between the parties that evinced a representation that was sufficiently of the character necessary to invoke the equitable doctrine of promissory estoppel. On appeal, Cupid Jewels sought to characterise the 27 July 2010 Email as an offer for all arrears to be paid by 31 December 2010, and that this offer was still open at the time of Orchard Central's application for the Writ of Distress. We disagreed with such a characterisation. The 27 July 2010 Email was simply too uncertain to be an offer and was, at best, a mere invitation to treat. Even if this email was an offer (which we did not find), the fact remained that there was no clear and unequivocal representation by Orchard Central *that it would not enforce its legal rights*.

40 In addition, the non-waiver clause in cl 4.4 of the Lease Agreement provided as follows:

> No waiver expressed or implied by the Landlord of any breach of any covenant or obligation of the Tenant shall be construed as a waiver of any other beach of the same or any other covenant or obligation and shall not prejudice in any way the rights and remedies of the Landlord herein contained and any acceptance of Rent or any part thereof or other moneys shall not be deemed to operate as a waiver by the Landlord of any right to proceed against the Tenant in respect of any of its obligations hereunder.

We should clarify that the doctrine of waiver is fundamentally different from that of promissory estoppel (see the observations of Lord Goff of Chieveley in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India ('The Kanchenjunga')* [1990] 1 Lloyd's Rep 391 at 399 which was followed in *Kosmar Villa Holidays Plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147 and *Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd* [2009] EWCA Civ 1108). Nevertheless, a non-waiver clause is a relevant albeit not determinative factor as a matter of evidence in the inquiry as to whether there had been a sufficiently clear and unequivocal promise as to rights being foregone for the purposes of a promissory estoppel (see Sean Wilken QC and Karim

Ghaly, *The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 3rd Ed, 2012) at para 8.15). The crux of the matter is ultimately that of the parties' intentions, objectively construed. We found that the non-waiver clause evinced an agreement that any form of indulgence granted by Orchard Central in respect of any breach of the Lease Agreement by Cupid Jewels would not prejudice Orchard Central's rights to take action against Cupid Jewels. There was no evidence before us that this agreement was intended to be departed from. Even if the non-waiver clause in cl 4.4 of the Lease Agreement did not exist, we would still have found that there was no clear and unequivocal representation by Orchard Central that it would not enforce its legal rights under the Lease Agreement as there was simply no evidence of this.

41 Ultimately, that Cupid Jewels was under a (false) sense of security arising from Orchard Central's initial forbearance and that Cupid Jewels conducted itself according to that self-perceived assurance did not detract from the fact that, as pointed out in [39] above, *no representation giving rise to a promissory estoppel was ever made*. We noted that Cupid Jewels had repeatedly failed to revert on its instalment plan which was the *key* for the parties to move their discussions forward. Then 1 August 2010 came around and Cupid Jewels again failed to keep the rent current as required under the Lease Agreement. This default was the proverbial straw that broke the camel's back causing Orchard Central to lose its patience and to take action to apply for the Writ of Distress to protect its interests. This was done without giving any notice to Cupid Jewels for the obvious and understandable reason that Cupid Jewels would otherwise have been able to remove everything valuable from the Premises, which would have defeated the whole point of the Writ of Distress.

42 To sum up, there was no clear and unequivocal representation by Orchard Central that it would not enforce its legal rights under the Lease Agreement. Since this was one of the three mandatory elements for a promissory estoppel to arise, it was not necessary for us to consider the other elements of detriment and reliance, and we accordingly dismissed Cupid Jewel's case in this regard on this first basis alone.

Exemption from seizure under s 8(d) of the Act

43 We now turn to the issue of whether the Distrained Jewellery was exempted from seizure pursuant to s 8(*d*) of the Act, which provides as follows:

> **Property exempted from seizure**
>
> **8**. Property seizable under a writ of distress shall not include—
>
> …
>
> (*d*) *goods in the possession of the tenant for the purpose of being carried, wrought, worked up, or otherwise dealt with in the course of his ordinary trade or business …*
>
> [emphasis added]

44 To provide the context of our decision on this issue, it would be useful to first set out in chronological order the salient points of the history of s 8(*d*) of the Act.

45 The trade privilege in s 8(*d*) of the Act finds its roots in the common law. The common law trade privilege was laid down in the following terms by Willes CJ in *Nathaniel Simpson v Chiverton Hartopp* (1744) 125 ER 1295 ("*Simpson*") at 1297 as encompassing:

Things delivered to a person exercising a public trade to be carried wrought worked up or managed in the way of his trade or employ.

(a) The common law trade privilege subsequently developed in a piecemeal fashion in the UK to include mercantile factors (see *Gilman v Elton* (1821) 129 ER 1211 ("*Gilman*")) and auctioneers (see *Adams v Grane and Osborne* (1833) 149 ER 447 ("*Adams*")) under the limb of "managed in the way of his trade or employ".

46 As alluded to earlier in [21] above, the local law on distress before 1876 was found in the 1866 Indian Act. In 1876, the law on distress as found in the 1866 Indian Act was subsequently consolidated and amended via the enactment of the 1876 Ordinance. Section 10(II)(*g*) of the 1876 Ordinance was a substantively faithful codification of the common law trade privilege as formulated in *Simpson*. It provided as follows:

10. …

II. The bailiff shall not seize —

…

(*g*) goods delivered to a person exercising a public trade, to be carried, wrought, worked up or managed in the way of his trade or employ.

47 The 1876 Ordinance was subsequently abrogated by Chapter XXXIII CPC 1907. The CPC 1907 re-enacted s 10(II)(*g*) of the 1876 Ordinance in its entirety in s 725(2)(*g*).

48 Then came the enactment of the 1934 Ordinance which enacted (with amendments) the existing provisions on distress in the CPC 1907, together with the inclusion of new statutory provisions drawn from the UK Law of Distress Amendment Act 1908 (c 53) ("the 1908 English Act"). Section 10(II)g of the 1876 Ordinance, which became s 725(2)(g) of the CPC 1907, was now amended to read as follows in s 8(*d*) of the 1934 Ordinance:

8. Property seizable under a writ of distress shall not include—

…

(*d*) goods in the possession of the tenant for the purpose of being carried, wrought, worked up, or otherwise dealt with in the course of his ordinary trade or business …

Section 8(*d*) of the 1934 Ordinance has remained unchanged since and remains in this form in s 8(*d*) of the Act.

49 Having set out the relevant history of s 8(*d*) of the Act, we now turn to set out the Judge's reasoning. The Judge identified the following three possible constructions of the phrase "otherwise dealt with" in s 8(*d*) of the Act (see the Judgment at [64]):

(a) first, this might be synonymous with "manage" under the common law trade privilege ("the 1st Interpretation");

(b) second, this might be a catch-all provision encompassing *any* alternative form of dealing with goods in the ordinary course of the tenant's trade or business ("the 2nd Interpretation"); or

(c) third, this might be read within its immediate context as referring to particular modes of dealing similar to "carried, wrought [or] worked up" ("the 3rd Interpretation").

50 The Judge at [68] of the Judgment rejected the 1st Interpretation on the basis that: (a) the preamble of the 1934 Ordinance states that it was to "*amend* and *re-enact* the law relating to distress for rent" [emphasis in original]; and (b) the language used in the 1934 Ordinance reflected a comprehensive statutory framework that modified an archaic common law self-help remedy, instead of attempting a codification of the nebulous scope of the trade privilege. The Judge also rejected the 2nd Interpretation at [69] of the Judgment because in his view, an expansive reading of the phrase "or otherwise dealt with" would lead to the anomalous result where the tenant's right to seek release of a third party's goods under s 8(*d*) of the Act would be more extensive than that third party's right under s 10, even though both provisions stem from the same fundamental premise that the goods do not belong to the tenant. The Judge accepted the 3rd Interpretation under the *ejusdem generis* canon of construction (see the Judgment at [70]–[71]).

51 The Judge further went on to hold that on the facts of this case, regardless of whether the agreement between Cupid Jewels and Forever Jewels was given the legal shade of a consignment or a sale or return arrangement, the arrangement between them did not plausibly fall within the same genus of activities as "carried, wrought [or] worked up" since no services were provided in relation to the Distrained Jewellery and no work was done on or with them (see the Judgment at [70]–[72]). The Judge added that even if the 1st Interpretation was the correct interpretation of s 8(*d*) of the Act, Cupid Jewels had failed to prove that it was akin to a mercantile factor for the said privilege to apply (see the Judgment at [73]).

52 Cupid Jewels did not appeal against the Judge's interpretation of s 8(*d*) of the Act, but it appealed against the Judge's application of the law to the facts. We agreed with the conclusion reached by the Judge that Cupid Jewels was unable to rely on s 8(*d*) of the Act, but we differed in our reasoning. In particular, we disagreed with the 3rd Interpretation that was adopted by the Judge. We were of the view that the 1st Interpretation should have been adopted instead. We explain our reasoning in more detail below.

53 From the historical background set out in [44]–[48] above, it is evident that the wording of the statutory trade privilege was more than cosmetically amended when s 8(*d*) of 1934 Ordinance was enacted. The old s 10(II)(*g*) of the 1876 Ordinance (which remained the same in s 725(*g*) of the CPC 1907) and s 8(*d*) of the 1934 Ordinance are juxtaposed in the table below for comparison:

Section 10(II)(*g*) of the 1876 Ordinance and s 725(g) of the CPC 1907	**S 8(*d*) of the 1934 Ordinance**
10.—… II. The bailiff shall not seize — … (*g*) goods delivered to a person exercising a public trade, to be carried, wrought, worked up **or managed in the way of his trade or employ** .	Property exempted from seizure **8**. Property seizable under a writ of distress shall not include— … (*d*) goods in the possession of the tenant for the purpose of being carried, wrought, worked up, ***or* otherwise dealt with in the course of his ordinary trade or business …**

54 It is evident that the *three* key differences in the wording of the statutory trade privilege were

as follows:

(a) The requirement that the tenant be "exercising a public trade" had been omitted;

(b) The words "delivered to" have now been replaced with "in the possession of"; and

(c) The words "managed in the way of his trade or employ" have now been replaced with "or otherwise dealt with in the course of his ordinary trade or business".

55 The key question is this – did the above changes reflect an overall substantive amendment that went *beyond* a mere codification of the common law on trade privilege? To answer this, it would be necessary to examine the background to the amendments made via the 1934 Ordinance (we would point out that this background was actually not raised before the Judge or before us).

56 On 19 January 1934, the Distress Bill ("the 1934 Distress Bill") was introduced in the Straits Settlements Government Gazette. Clause 8(*d*) of the 1934 Bill provided as follows:

> **8.** Property seizable under a writ of distress shall not include—
>
> …
>
> (*d*) goods *in the possession of* the tenant for the purpose of being carried, wrought, worked up, ***or otherwise dealt with in the course of his ordinary trade or business*** …
>
> [emphasis added in italics and in bold italics]

At the end of the 1934 Distress Bill, the following was stated:

> **OBJECTS AND REASONS.**
>
> This Bill is one of the series prepared to replace the Civil Procedure Code (Ordinance No. 102) and amends and re-enacts as a separate Ordinance the law relating to Distress for Rent.
>
> *The Clauses of the Bill are based on existing sections of the Civil Procedure Code except Clauses 10, 11, 12, 13 and 14 which are adapted from the law in England.*
>
> [emphasis added]

57 The 1934 Distress Bill was to be passed together with eight other Bills which all used to be part of the consolidated CPC 1907. On 12 February 1934, in begging to move that the first of these nine Bills be read for the first time, the then Attorney-General Mr P A McElwaine KC ("Mr McElwaine KC") explained as follows (see the Supplement to the Straits Settlements Government Gazette No 23 (published on 16 March 1934) at p 11):

> **The Attorney-General**:—Sir, this Bill and the eight which follow it on the Orders of the Day are what I might call a code of Bills which have been prepared by a Committee consisting of two Judges, a former Acting Attorney-General, and two members of the Bar Committee. The idea is to replace the present Courts Ordinance and the Civil Procedure Code by Ordinances which will be compact in themselves. The Courts Ordinance and the Civil Procedure Code at the present time between them deal with a variety of subjects, and it has been thought *more convenient that those Ordinances should be disintegrated into their component parts, and these nine Bills give effect to that policy. There is very little that is new in these Bills. They follow very closely the*

existing provisions of the law. [emphasis added]

58 The 1934 Distress Bill was the fourth in the series of the nine Bills to be read for the first time. When it came to the 1934 Distress Bill, the following was specifically said (see the Supplement to the Straits Settlements Government Gazette No 23 (published on 16 March 1934) at p 11):

> **The Attorney-General**:—Sir, I beg to move the first reading of a Bill entitled the Distress Bill. *This also extracts from the Civil Procedure Code the parts relating to distress, with certain amendments adapted from the Law of Distress Amendment Act, 1908.*
>
> **The Colonial Secretary**:—Sir, I rise to second the motion.
>
> The Bill was read a first time.

59 On 16 April 1934, the 1934 Distress Bill was read for the second time, but cl 8 was not discussed (see the Supplement to the Straits Settlements Government Gazette No 43 (published on 18 May 1934) at p 52).

60 On 28 May 1934, the 1934 Distress Bill was read for the third time, and cl 8 was passed without any discussion and any amendment (see the Supplement to the Straits Settlements Government Gazette No 70 (published on 6 July 1934) at p 77):

> **The Acting Attorney-General**:—Sir, this Bill was left in Committee at the last meeting of Council. I now move that the Council do resolve itself into Committee to consider the remaining clauses of the Bill.
>
> Council in Committee.
>
> *Clauses 3 to 9 are passed without amendment.*
>
> …
>
> **The Acting Attorney-General**:—Sir, I have to report that the Distress Bill has been considered in Committee and passed with amendments.
>
> I move that it be read a third time and passed.
>
> **…**
>
> The motion was agreed to, and the Bill was read a third time and passed.
>
> [emphasis added]

61 The relevant legislative materials pertaining to s 8(*d*) of the 1934 Ordinance clearly indicate that the Legislative Council intended for this provision to be the same as its predecessor. The question that then arises is: why then was there a change in the wording that went beyond the cosmetic? A closer look at the then ongoing development of the common law trade privilege in our view provides the answer to this question. In a nutshell, s 8(*d*) of the 1934 Ordinance was intended to be the same as its predecessor provision in that it was to continue to be a codification of the common law trade privilege. However, what actually happened was that the common law trade privilege had *developed* in the interim period, and thus when s 8(*d*) of the 1934 Ordinance was enacted, the wording was amended to reflect the state of the common law trade privilege *as it then*

stood.

62 We elaborate on this point in the specific context of the three key changes in wording that we identified in [54] above. Turning to the first of the three key changes, namely, the omission of the requirement that the tenant be "exercising a public trade". The following passage from *Woodfall's Law of Landlord and Tenant* (Kim Lewison gen ed) (Sweet & Maxwell, Looseleaf Ed 1994, Release 27) ("*Woodfall*") at para 9.052 illustrates how wide and unprincipled the expansion of the definition of "public trade" became over time through the piecemeal development of the common law:

> **Trade must be public**
>
> In order to attract privilege, the trade carried on must be public. This means that the trade must be one in which the trader invites the public to intrust him with their goods [see *Tapling & Co v Weston* (1883) Cab & El 99]; **or** one carried on generally for the benefit of any persons who choose to avail themselves of it, as opposed to special employment by one or particular individuals [see *Muspratt v Gregory* (1836) 1 M & W 633 *per* Parke B (dissenting)].
>
> Obvious examples of a public trade are a common carrier [see *Gisbourn v Hurst* (1710) 1 Salk 249] or an innkeeper [see *Crosier v Tomkinson* (1759) 2 Ld Ken 439]. **However**, the concept of a public trade also extends to an auctioneer [see *Adams v Grane* (1833) 1 Cr & M 380]; a broker or factor [see *Gilman v Elton* (1821) 3 B & B 75]; a butcher [*see Brown v Shevill* (1834) 2 Ad & El 138]; a clothier [see Read v Burley (1597) Cr Eliz 596]; a commission agent [see *Findon v M'Laren* (1845) 6 QB 891]; a pawnbroker [see *Swire v Leach* (1865) 18 CB (NS) 479]; a wharfinger [see *Thompson v Mashiter* (1823) 1 Bing 283]; a weaver.
>
> The occupation of an artist is not a public trade [*Van Knoop v Moss and Jameson* (1891) 7 TLR 500]. Although a sales agency is capable of being a public trade, it is not a public trade where only two principals are represented [*Tapling & Co v Weston* (1883) Cab & El 99].
>
> [emphasis added in bold]

63 The meaning of "exercising a public trade" expanded so much over time that it eventually became meaningless and otiose as a matter of practice. In addition, the advent of professions in society (such as artists, barristers *etc*) made the continued emphasis on public trade alone unprincipled. After all, the fundamental rationale undergirding the privilege was to exclude from distrainment goods which belonged to third parties and which no one would suppose was the property of the tenant. The omission of the requirement that the tenant be "exercising a public trade" in the 1934 Ordinance therefore did *not* go beyond the common law. It merely codified the common law in its subsisting state in 1934.

64 Next, we turn to the second key amendment where the words "delivered to" were replaced with "in the possession of". This in our view similarly reflected the developments made in the common law which clarified that it was the tenant's possession of the relevant goods and not the location where the goods were delivered to *per se* that was crucial for the privilege to attach. The following passage in *Woodfall* at para 9.053 is instructive:

> **Goods must be in possession of trader**
>
> The goods for which privilege is claimed must be in the possession or custody of the trader. They need not, however, be on the premises from which the trade is carried on, if they have been deposited elsewhere for temporary storage. Thus goods landed at a wharf and consigned to a

> broker as agent of the consignor, and placed by the broker in the wharfinger's warehouse for safe custody pending sale, were not distrainable for the rent of the wharf and warehouse [see *Thompson v Mashiter* (1823) 1 Bing 283]. Similarly, corn sent to a factor for sale, and deposited by him in the warehouse of a granary-keeper, has the same privilege as if it were deposited into the factor's own warehouse [see *Matthias v Mesnard* (1826) 2 C & P 353].

65 We now turn to the substitution of the words "managed in the way of his trade or employ" with "or otherwise dealt with in the course of his ordinary trade or business". This is the amendment in dispute in the present case. We agreed with the Judge that there were only three possible interpretations of the phrase "or otherwise dealt with" (see [49] above). We also agreed with the Judge then the 2nd Interpretation ought to be rejected for its resultant anomalous results (see [50] above). We however disagreed that the 3rd Interpretation should be adopted.

66 Let us compare the 1st and the 3rd Interpretations. Under the 1st Interpretation (which assumes that the phrase is synonymous with "manage" under the common law trade privilege), factors, brokers and commission agents would be afforded the trade privilege under the "managed" limb as confirmed by cases such as *Gilman* and *Adams*. It has also been laid down in the common law that the word "managed" was not limited to "manufactured" (see *Muspratt v Gregory* (1836) 150 ER 588 at 593) and should be "taken in a wide sense to also include, if not to be equivalent to, 'disposed of'" (see *Challoner v Robinson* [1908] 1 Ch 49 at 59). In contrast, under the 3rd Interpretation (which assumes that the limb "or otherwise dealt with" is *limited* to particular modes of dealing with goods *similar* to "carried, wrought [or] worked up"), factors, brokers and commission agents would *not* be afforded the trade privilege because no work or service is usually done on or in relation to goods in the possession of a factor. In addition, the meaning of the phrase "or otherwise dealt with" would be given a *narrow* meaning under the *ejusdem generis* principle of interpretation as it would be restricted to activities similar to "carried, wrought [or] worked up". In short, the privilege under the 3rd Interpretation is significantly *narrower* than that under the 1st Interpretation.

67 Having examined the relevant background materials pertaining to the 1934 Ordinance, it was clear to us that the Legislative Council did *not* intend to narrow the scope of the privilege. It will be recalled that the "Objects and Reasons" commentary of the 1934 Distress Bill (reproduced at [56] above) stated that the Bill was "*based on* existing sections of the [CPC 1907]", *except for* "Clauses 10, 11, 12, 13 and 14 which are *adapted* from the law in England [*ie*, the 1908 English Act]" [emphasis added]. This point was reiterated by Mr McElwaine KC when he explained at the first reading of the 1934 Distress Bill that the said Bill "also *extracts from* the [1907 CPC] the parts relating to distress, with certain *amendments adapted* from the [1908 English Act]" [emphasis added] (see [58] above). It will also be recalled that there were no legislative debates on cl 8(*d*) of the 1934 Distress Bill and it had been passed without any amendment (see [58]–[60] above). To put it simply, the 1934 Ordinance was to effectively consist of: (a) the pre-existing relevant provisions of the CPC 1907; and (b) specific additional provisions from the 1908 English Act. And specifically in relation to the pre-existing relevant provisions of the CPC 1907, Mr McElwaine KC stated that it was thought (see [57] above):

> … more convenient that [the CPC 1907] should be disintegrated into [its] component parts, and these nine Bills give effect to that policy. There is very little that is new in these Bills. They follow very closely the existing provisions of the law.

In other words, the Legislative Council had *expressly* indicated that the portions of the 1934 Distress Bill which were based upon the CPC 1907 (which we would point out *include cl 8(*d*) of the Distress Bill*) were meant to follow very closely the existing predecessor provisions.

68 The fundamental principle of purposive interpretation under s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) and the principle that Parliament would not have removed rights pre-existing in common law if there was no express provision or clearly evinced intention to the effect (see FAR Bennion, *Bennion on Statutory Interpretation* (LexisNexis, 5th Ed, 2008) ("*Bennion*") at p 812 cited with approval in *Goldring Timothy Nicholas and others v Public Prosecutor* [2013] 3 SLR 487 at [51]) must trump the linguistic *ejusdem generis* canon of construction. Unsatisfying and archaic as the common law trade privilege perhaps was, s 8(*d*) of the 1934 Ordinance *was* intended to be a codification of it *in the state it was in at the material time*. The 1934 Ordinance was *not* intended to narrow the scope of the privilege.

69 The Judge, with respect, erred in relying on the preamble to the 1934 Ordinance to reach his conclusion that s 8(*d*) of the same was intended to go beyond the mere codification of the common law. When viewed against the backdrop of the relevant legislative context (see [67] above), the word "amend" in the preamble actually referred to the *new amendments* introduced by way of adoption of specific provisions of the 1908 English Act, and the word "re-enact" referred to the *re-enactment* of the *pre-existing* provisions in the CPC 1907 (which, it bears emphasising, was where s 8(*d*) of the 1934 Distress Bill came from).

70 To sum up, the 1st Interpretation is faithful to the legislative intention behind s 8(*d*) of the 1934 Ordinance (and, by extension, s 8(*d*) of the present Act) and should therefore have been preferred over all the other possible interpretations. The phrase "otherwise dealt with" in s 8(*d*) of the Act should be interpreted in the same way as the word "manage" in the common law formulation of the trade privilege.

71 Having set out our explanation as to why we differed from the Judge's finding on the law, we now turn to the application of the law to the present facts. The feature common to factors, brokers and commission agents who are afforded privilege under the "managed" limb of the common law trade privilege is that of an agency relationship. And as observed in Peter Watts and F M B Reynolds, *Bowstead and Reynolds on Agency* (Thomson Reuters (Legal) Limited, 19th Ed, 2010) at para 1-015, a key aspect of an agency relationship is that of remuneration on a commission basis:

> The fiduciary duties [between an agent and principal] lead to another feature of agency. It is inconsistent with those duties that an agent should act in respect of his relationship with the principal for his own profit (unless he discloses this to the principal and the principal consents). His relationship with his principal is commercially related rather than commercially adverse. Thus *he should be remunerated by commission in respect of the services he has rendered and not take his own undisclosed profit as an independent intermediary*. The commission need not however be related to the value of the transaction: it can be by a mark-up. But *its essence is that it is not an independent profit taken by the agent, but rather a fee paid to him by the principal in return for acting on his behalf.* [emphasis added]

72 In the present case, this key feature was not present in the relationship between Cupid Jewels and Forever Jewels. The facts set out in the parties' Statement of Non Contentious Facts illustrate this point: [note: 21]

> Statement of Non Contentious Facts
>
> 1. The arrangement is for Forever Jewels to deliver jewellery to Cupid Jewels for Cupid Jewells to sell to its customers in retail, and jewellery that cannot be sold will be returned to Forever Jewels. It is open for Forever Jewels to require the return of the jewellery upon demand.

2. Upon delivery of the jewellery from Forever Jewels to Cupid Jewels, Cupid Jewels will reassign the jewellery with Cupid Jewels' own unique bar coding and product identification number.

3. Cupid Jewels can set the price of the jewellery independently at their sole discretion, but will have to account to Forever Jewels for Forever Jewels' cost price.

4. Also upon delivery of the jewellery from Forever Jewels to Cupid Jewels, there is nothing visually on the goods as received and displayed in Cupid Jewels' Premises that would suggest that Forever Jewels had consigned the jewellery to Cupid Jewels.

5. In the event of sale by Cupid Jewels to its customers, Cupid Jewels will pay to Forever Jewels the sum representing the amount charged by Forever Jewels for the goods … and Cupid Jewels is entitled to retain any profits and bear loses [*sic*] if any from the sale.

6. Cupid Jewels will deposit all sale proceeds into its own account.

7. Cupid Jewels issued receipts in its own name to its customers who purchase goods from them.

8. Cupid Jewels insures all the goods in its premises, including the jewellery.

9. Cupid Jewels and Forever Jewels are related parties as described in note 18 of the notes to the financial statements of Cupid Jewels' audited accounts.

73 On the evidence before us, it was obvious that Cupid Jewels was not an agent of Forever Jewels in the true sense of the word. In particular, Cupid Jewels did not sell Forever Jewels' goods upon commission. The financial arrangement between Forever Jewels and Cupid Jewels was such that Cupid Jewels could set the price of the jewellery independently at its sole discretion. It only had to account to Forever Jewels for the cost price. Other than that, Cupid Jewels was entitled to retain any profits and had to bear the losses if any. There was clearly no commission involved.

74 Since Cupid Jewels did not fall within the ambit of the common law privilege, its reliance on s 8(*d*) of the Act failed and we accordingly dismissed its appeal in this regard.

Forever Jewels' appeal in CA 33

75 Having set out our reasons why we dismissed Cupid Jewels' appeal in CA 32, we now turn to set out our reasons why we also dismissed Forever Jewels' appeal in CA 33.

76 Forever Jewels sought to rely on s 12(*a*) read with s 10 of the Act, which provide grounds for a party who is not the tenant to apply for the release of goods distrained. These provisions read as follows:

> **Application by under-tenant, lodger, etc., for discharge, suspension or release**
>
> **10.**—(1) Where any movable property of —
>
> (*a*) any under-tenant;
>
> (*b*) any lodger; or

(c) *any other person whatsoever not being a tenant of the premises or any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof*,

has been seized under a writ of distress issued to recover arrears of rent due to a superior landlord by his immediate tenant, such under-tenant, lodger or other person may apply to a judge to discharge or suspend the writ, or to release a distrained article.

(2) *No order shall be made unless such under-tenant, lodger or other person satisfies the court that the tenant has no right of property or beneficial interest in the furniture, goods or chattels and that such furniture, goods or chattels are the property or in the lawful possession of such under-tenant, lodger or other person*; and also in the case of an under-tenant or a lodger unless such under-tenant or lodger pays to the landlord or into court an amount equal to the arrears of rent in respect of which distress has been levied and also undertakes to pay to the landlord future rent, if any, due from him to the tenant.

…

Exclusion of certain goods

12. Section 10 shall not apply to —

(*a*) goods belonging to the husband or wife of the tenant whose rent is in arrear, or to goods comprised in any bill of sale, hire-purchase agreement, or settlement made by such tenant, *or to goods in the possession, order or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof*; …

[emphasis added]

77 In other words, Forever Jewels' application was dependent on proof that: (a) Cupid Jewels was not the reputed owner of the Distrained Jewellery within the meaning of s 12(*a*) of the Act; and (b) Forever Jewels had beneficial interest in the Distrained Jewellery as required under s 10(2) of the Act. We will address these two issues in turn.

Reputed ownership within the meaning of s 12(a) of the Act

78 The Judge found on the facts that Forever Jewels failed to prove that Orchard Central's representatives had *actual* knowledge that the Distrained Jewellery belonged Forever Jewels (see the Judgment at [78]). The Judge further commented in *obiter* that the doctrine of reputed ownership should not, as a matter of principle, exclude that of actual knowledge (see the Judgment at [79]). The Judge then held that the Distrained Jewellery had been in the possession, order, or disposition of Cupid Jewels under such circumstances that Cupid Jewels had been the reputed owner thereof within the meaning of s 12(*a*) of the Act, and this was so regardless of whether the legal test is that which considers:

(a) the perspective of the reasonable public/customer (as held by this court in *Plaza Singapura (Pte) Ltd v Cosdel (S) Pte Ltd and another* [1990] 2 SLR(R) 22 ("*Cosdel (CA)*") at [23]); or

(b) the perspective of the landlord (as held by the High *Court in Plaza Singapura (Pte) Ltd v Shizuoka Yajimaya (Singapore) Pte Ltd (Cosdel (S) Pte Ltd, claimant)* [1988] 1 SLR(R) 109 at

[20]);

the latter approach being that which the Judge was more inclined to agree with as it was more consistent with the purpose of the doctrine of reputed ownership (see the Judgment at [80]–[86])).

79 We agreed with the Judge's view that the doctrine of reputed ownership should not, as a matter of principle, exclude that of actual knowledge. As the Judge observed at [79] of the Judgment:

> If the landlord is in fact aware that the goods belong to the true owner and not the tenant, the landlord cannot be heard to say that the true owner had "unconscientiously permitted" the goods to be held by the tenant so as to give the landlord a false expectation of the full value of the goods on the premises that were available to be distrained to recover rental arrears.

80 We also agreed with the Judge's finding that Forever Jewels' case on actual knowledge was misconceived. Forever Jewels' representative, Lim Kah Nai, conceded during cross-examination that she had never expressly communicated to Orchard Central that Forever Jewels would be providing jewellery on consignment to Cupid Jewels. The mere awareness that Cupid Jewels would be supported by Forever Jewels in stocks and finance was, as the Judge rightly found at [78] of the Judgment, simply insufficient to found actual knowledge on the part of Orchard Central that the Distrained Jewellery was not owned by Cupid Jewels. We noted that this line of argument was (in our view, correctly) not pursued vigorously by Forever Jewels' counsel at the hearing before us.

81 We now turn to the issue of reputed ownership. As regards the issue of the perspective of the reasonable man test, we agreed with the Judge that it is the *landlord's* perspective that is relevant. After all, the doctrine of reputed ownership in the context of distress is intended to allow a *landlord* to recover the full value of the goods found on the tenant's premises when the true owner of the goods had unconscientiously permitted or consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the tenant must arise (see [79] of the Judgment citing the English bankruptcy case of *Re William Watson & Co* [1904] 2 KB 753 at 757). In the analogous context of bankruptcy proceedings, William Swadling expressed the following view in "Rescission, property and the common law" (2005) 121 LQR 123 at 144:

> The purpose of [the doctrine of reputed ownership] was to prevent the bankrupt obtaining credit on the faith of a fictitious air of prosperity. Thus, in *Joy v Campbell* Lord Redesdale, construing analogous Irish legislation, said that its object was to "prevent deceit by a trader from the visible possession of a property to which he was not entitled." The statute would only authorise the sale and disposition "where the possession, order and disposition, is in a person who is not the owner, to whom they do not properly belong, and who ought not to have them, *but whom the owner permits, unconscientiously as the Act supposes, to have such order and disposition." In that sense, therefore, it penalised the conduct of the true owner for misleading the* ***bankrupt's creditors*** :
>
>> "[The] clause is intended to meet the case of a man obtaining credit from his being seen in the possession of property as his own, and it imposes on the true owner of the property the penalty of losing it if he has allowed such delusive credit to be obtained."
>
> [emphasis in original omitted; emphasis added in italics and in bold italics]

82 That having been said, we were of the view that the distinction in the possible approaches identified above at [78] was a theoretical one without much significance in the practical sphere of

application. For this reason, notwithstanding our views on the appropriate label to be attached to the test, we affirmed the correctness of the decision in *Cosdel (CA)*.

83 In support of its case on reputed ownership, counsel for Forever Jewels relied on the letter from one Ho Nai Chuen, the President of the Singapore Jewellers Association ("SJA") confirming on behalf of the SJA that it was a "common industry practice" for jewellery to be put on consignment by a jewellery manufacturer or wholesaler with a jewellery retailer ("the SJA Letter") [note: 22]. Counsel for Forever Jewels also sought to make two points on the basis of the English Court of Appeal case of *Salford Van Hire (Contracts) Ltd v Bocholt Developments Ltd* [1955] CLC 611 ("*Salford*") to further bolster its case. First, counsel argued that the legal burden was on the *landlord* to establish that the goods in the tenant's possession were in his reputed ownership. Second, the evidence presented in *Salford* was that 8% of vans of the type in question were presently on hire, and the court in *Salford* accepted this as being sufficiently prevalent to find that the landlord failed to establish that the van was in the reputed ownership of the tenant. Counsel for Forever Jewels thus contended that in comparison, the SJA Letter should have been sufficient to establish a prevalent trade custom, and this fixed Orchard Central with constructive knowledge that Cupid Jewels was not the actual owner of the Distrained Jewellery.

84 We disagreed with these arguments. It is important to note that the legal regime in the UK is different from that in Singapore. As alluded to earlier at [20] above, the right to distress in the UK is an ancient remedy that originated as a form of *self-help remedy* that did not require the leave or authority of the court. Subsequently, legislation was enacted to impose some constraints on the landlord's powers of distress, but the right to distress remains rooted in common law. In this regard, the relevant sections of the 1908 English Act are reproduced below:

> **1 Under tenant or lodger, if distress levied, to make declaration that immediate tenant has no property in goods distrained.**
>
> If any superior landlord shall levy, or authorise to be levied, a distress on any furniture, goods, or chattels of—
>
> > …
> >
> > (c) any other person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof,
>
> for arrears of rent due to such superior landlord by his immediate tenant, such under tenant, lodger, or other person aforesaid may serve such superior landlord, or the bailiff or other agent employed by him to levy such distress, with a declaration in writing made by such under tenant, lodger, or other person aforesaid, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such under tenant, lodger, or other person aforesaid, and are not goods or live stock to which this Act is expressed not to apply ; and also, in the case of an under tenant or lodger, setting forth the amount of rent (if any) then due to his immediate landlord, and the times at which future instalments of rent will become due, and the amount thereof, and containing an undertaking to pay to the superior landlord any rent so due or to become due to his immediate landlord, until the arrears of rent in respect of which the distress was levied or authorised to be levied have been paid off, and to such declaration shall be annexed a correct inventory, subscribed by the under tenant, lodger, or other person aforesaid, of the furniture, goods, and

chattels referred to in the declaration …

…

4 Exclusion of certain goods.

<u>This Act</u> shall not apply—

(1) … to goods in the possession, order, or disposition of such tenant by the consent and permission of , the true owner under such circumstances that such tenant is the reputed owner thereof …

[emphasis added in bold and in underline]

85 In contrast, the right to distress in Singapore arises out of *statute*. Section 4 of our Act provides that "[n]o landlord shall distrain for rent except in the manner provided by this Act". We also do not have a provision similar to s 1 of the 1908 English Act in our Act. Furthermore, s 12 of our Act (reproduced in full at [76] above) provides that "*Section 10* shall not apply to … goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof" [emphasis added].

86 Put simply, under the UK regime, the burden is on the party seeking to rely on s 1 of the 1908 English Act to establish that that provision is made out. If successful, this puts the distrained goods out of the reach of the landlord who would otherwise be able to have possession of them under the self-help remedy of distress. The burden is then on the *landlord* to invoke s 4(1) of the 1908 English Act to take the goods out of the ambit of the Act and back into the sphere of the self-help remedy. In this regard, the phrase "This Act shall not apply" in s 4(1) of the 1908 English Act is significant. In contrast, under the Singapore regime, the starting point is that the landlord must first rely on s 5 of the Act to seek the remedy of distress. The burden is then on the non-tenant party seeking the release of the goods to apply to the court under s 10 of the Act to take the distrained goods out of the possession of the landlord. However, s 10 of the Act cannot be invoked if any of the grounds in s 12 is made out. The phrase "Section 10 shall not apply" in s 12 of the Act is significant. The burden is therefore on the party seeking to make an application under s 10 to prove the conditions therein *as well as* those under s 12.

87 For these reasons, we rejected Forever Jewels' submission that Orchard Central bore the burden of proving that the Distrained Jewellery were in Cupid Jewels' reputed ownership. It was Forever Jewels that bore the burden of proving that the Distrained Jewellery was not reputedly owned by Cupid Jewels, and, as we shall now proceed to explain, this burden had not been discharged.

88 As alluded to earlier at [83] above, Forever Jewels also sought to rely on *Salford* in so far as the threshold necessary to establish a trade custom was concerned. We disagreed with such an approach. The findings in *Salford* were industry and fact specific and there was no basis for meaningful comparison with the present case involving the wholly different subject matter of jewellery. The only relevant evidence before us was the SJA Letter adduced by Forever Jewels. Even if we were to disregard Orchard Central's objections as to the reliability and veracity of this letter, we were unable to see how this letter could be sufficient to establish an industry-wide practice that was so prevalent that Orchard Central as the landlord should and would have known about it. The SJA Letter comprised only two short paragraphs, the first of which was as follows: [note: 23]

This is to highlight the fact that jewellery put on consignment by any jewellery

> manufacturer/wholesaler/dealer with jewellery retailer is a common industry practice.

What little weight that could have possibly been placed on this bald assertion (if at all) was sorely diminished by the second paragraph of the SJA Letter, which stated as follows:

> The amount of consigned inventory placed with the jewellery retailer varies across the industry depending very much on the mutual agreement between the jewellery establishment (consignee) and the jeweller supplier (consignor).

Put simply, the evidence was insufficient to establish that a consignment arrangement between jewellers and their suppliers was so prevalent that it would have been immediately apparent to any reasonably informed landlord.

89 Since Forever Jewels failed to prove that the circumstances were not such that Cupid Jewels was the reputed owner thereof within the meaning of s 12(*a*) of the Act, it could not seek to rely on s 10. Accordingly we dismissed Forever Jewels' appeal on this basis.

The conditions in s 10(2) of the Act

90 Given our earlier findings on s 12(*a*) of the Act, it was not necessary for us to consider whether Cupid Jewels had any right of property or beneficial interest in the Distrained Jewellery under s 10(2) of the Act. We would briefly observe that in any event, Forever Jewels failed to prove that it had any right of property in them. On the evidence before us, we were of the view that the relationship between Forever Jewels and Cupid Jewels could not reasonably be said to be a consignor-consignee relationship. On the contrary, it seemed to us that the parties merely had a sale and return arrangement.

91 A similar issue had arisen in *Cosdel (CA)*. This court in *Cosdel (CA)* noted firstly that the respondents in that case were able to produce a bundle of consignment notes, but were of the view that these were actually sales invoices which pointed away from a consignment (at [28]). The court also took into account the fact that unsold articles belonged to and remained at the risk of the respondent, as well as the admission by the provisional liquidator of the tenant that the tenant had no right of property or beneficial interest in the articles (at [29]). The court also weighed the following facts (at [30]):

> (a) the respondents' articles were transacted through the tenant's cashiers who, using a special code assigned for such sale, collected moneys and issued receipts bearing the tenant's name;
>
> (b) the transactions were entered in the books of the tenant and on the 10th day of each month the tenant paid to the respondent the total collections from the sales of the respondent's articles after deducting for the tenant's own account the monthly sum charged to the respondent;
>
> (c) the tenant was required to take out insurance on the articles against fire and theft; and
>
> (d) the year-end physical stock counts would be taken of the respondents' goods and any stock discrepancy in excess of 3% of the record values should be shared equally between the respondent and the tenant.

After weighing all these facts, this court in *Cosdel (CA)* came to the conclusion that the respondents

had not discharged the burden of proving that the tenant had no right of property in the articles at the material time.

92 In comparison, Forever Jewels' case (see the Statement of Non-Contentious Facts set out in [72] above) was even weaker than the respondents' case in *Cosdel (CA)*, whose case was ultimately *dismissed*. Thus, even if we did not dismiss Forever Jewels' appeal on the basis of s 12(*a*) of the Act, we would have dismissed its appeal on the basis of s 10(2) of the Act since Forever Jewels failed to prove that it had any right of property in the Distrained Jewellery.

93 We would further add that there was actually yet *another* ground on which we could have plausibly dismissed Forever Jewels' appeal. This was on the basis of s 10(1)(*c*) of the Act which requires that the applicant (*ie*, the *non-tenant party*) not have any beneficial interest in any *tenancy* of the premises or of any part thereof. We would point out that this ground is different from s 10(2) of the Act which looks at whether the *tenant* has any right of property or beneficial interest in the *goods* in question. Given the reality of the commercial relationship between Cupid Jewels and Forever Jewels, and the fact that both entities were at all times controlled and owned by the same or related parties, Forever Jewels could have difficulty on the established facts in denying any beneficial interest in the tenancy. In short, on the facts, Forever Jewels might not have fallen within the ambit of s 10(1)(*c*). As this point was not argued, we say no more.

Conclusion

94 For the above reasons, we dismissed both CA 32 and CA 33. We awarded Orchard Central the costs of CA 32 and the costs of Cupid Jewels' application below on an indemnity basis as this was provided for in the Lease Agreement. We awarded Orchard Central the costs of CA 33 and the costs of Forever Jewels' application below on the usual standard basis.

[note: 1] Appellant's Core Bundle ("ACB") Vol II in CA 33 at pp 26-54

[note: 2] *Ibid* at p 28

[note: 3] *Ibid* at p 36

[note: 4] *Ibid* at p 43

[note: 5] ACB Vol II in CA 32 at p 68

[note: 6] *Ibid* at p 69

[note: 7] Respondent's Core Bundle ("RCB") Vol II in CA 32 at pp 51-52

[note: 8] ACB Vol II in CA 32 at p 70

[note: 9] *Ibid* at p 71

[note: 10] *Ibid*

[note: 11] *Ibid* at p 72

[note: 12] *Ibid* at p 74

[note: 13] *Ibid* at p 75

[note: 14] *Ibid* at p 76

[note: 15] *Ibid* at pp 77-78

[note: 16] *Ibid* at pp 6-8

[note: 17] *Ibid* at pp 9-10

[note: 18] *Ibid* at pp 11-13

[note: 19] *Ibid* at pp 14-16

[note: 20] *Ibid* at pp 17-22

[note: 21] ACB Vol II in CA 32 at p 81

[note: 22] ACB Vol II in CA 33 at p 142

[note: 23] *Ibid*

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