CASE UPDATE

Landlord Tenant Dispute: Application of *Contra Proferentum* Rule, Adverse Inference, Right of Peaceful Re-Entry and Right to Appeal to the Court of Appeal for Case Commenced in the District Court

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Introduction

1. In *Prince Restaurant Pte Ltd v Kosma Holdings Pte Ltd* [2017] SGHC 245, the High Court affirmed the District Court's decision in [2017] SGDC 62. The dispute arose from a tenant's claim of alleged breach of a tenancy agreement by its landlord. The landlord counterclaimed for rental arrears, late payment interest, loss of rent and other damages.

2. Despite the tenant's claim well exceeding $250,000.00, parties agreed to have the matter heard in the District Court pursuant to s 23 of the State Courts Act. Dissatisfied with the outcome at first instance, the tenant appealed against the District Court decision to the High Court but the appeal was dismissed. The tenant appealed yet again to the Court of Appeal. However, this appeal was later struck out.

3. This case update will cover the following points:

    (a) The application of the *contra proferentum* rule to construe ambiguity;

    (b) The drawing of an adverse inference pursuant to s 116(g) of the Evidence Act;

    (c) A landlord's right to re-entry and exercising of self-help; and

    (d) The possible lacuna in the legislative framework with respect to the number of tiers of appeal as of right in a civil action.

4. The landlord was successfully represented by Toh Kok Seng and Andrew Tan Jian Ming of Lee & Lee.

Brief Facts and Findings

5. The tenant entered into a three-year lease agreement (the "**Tenancy**") with the landlord and assumed occupation of the premises in June 2014 for the running of a restaurant business. Various documents were executed between the parties including a letter of intent (the "**LOI**"), a tenancy agreement (the "**TA**") and a personal guarantee (the "**Guarantee**") that was executed in the Landlord's favour (collectively the "**Documents**").

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6. On the basis of the tenant failing to pay the monthly rent in full and promptly, the landlord terminated the Tenancy and exercised its right of re-entry per his common law self-help right of forfeiture and cl 6.1 of the TA. However, the tenant sued the landlord for the breach and wrongful termination of the Tenancy. The landlord counterclaimed for rental arrears, late payment interest, loss of rent and other damages.

7. The crux of the dispute was the quantum and due date of the monthly rent payments on a construction of the terms of the Documents. The LOI stated the monthly rent for the first year to be $15,000.00, while the rent for the second and third years would be $16,500.00. On the other hand, the TA was silent on the monthly rent for the first year but stated the rent for the second and third years to be $16,500.00. However, the TA mentioned a prompt rental rebate of $1,500.00 for the first year. The Guarantee stated that the TA was for a monthly rent of $16,500.00 for all three years.

8. At first instance, District Judge Lynette Yap dismissed the tenant's claim and allowed the landlord's counterclaim with damages to be assessed. On an appeal to the High Court by the tenant against the whole of the trial judge's decision, Judicial Commissioner Audrey Lim ("**JC Lim**") affirmed the trial judge's decision and dismissed the appeal with costs. JC Lim held that the documentary evidence supported the trial judge's findings; and even on the tenant's best case (which JC Lim did not agree to), the tenant had underpaid and was late in paying on almost every occasion.

9. The tenant then filed a Notice of Appeal to the Court of Appeal without asking for leave of court. Eventually, this appeal was struck out following an application made by the landlord for further security of costs to be furnished by the tenant.

(a) The *Contra Proferentum* Rule

10. The trial judge held that the monthly rent for the first year ("**Y1 Rate**") was $16,500.00. The tenant submitted that it was instead $15,000.00. The tenant also submitted that there was **ambiguity** in the Documents as to the Y1 Rate and that the trial judge had erred in failing to apply the *contra proferentum* rule to construe this ambiguity against the drafter of the Documents – the landlord. The main body of the TA, which was the formal lease agreement, was silent on the Y1 Rate. As for the rest of the Documents, while the LOI stated that the Y1 Rate was $15,000.00, the Guarantee stated that the TA was for a term of three years "at a monthly rent of $16,500.00".

11. The landlord successfully argued that there was **no ambiguity** – the only consistent reading of Documents as a whole was that the Y1 Rate was $16,500.00 (before prompt rental rebate). Further, even if there was ambiguity, it could be dispelled by taking into account the factual matrix in which the TA was concluded and overall context of the entire agreement. JC Lim also cited the Court of Appeal decision of *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] 2 SLR 1083 where the Court of Appeal held that this rule is to be applied as a last resort if the ambiguity cannot be resolved even after taking the contextual approach to contract interpretation.

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12. Further, JC Lim recognised that the tenant's actions were not consistent with its case. On its case, if paid promptly, the Y1 Rate payable would be $13,500.00 because of the prompt rental rebate of $1,500.00. However, on occasions where the tenant claimed it paid rent promptly, the payments made were not $13,500.00 and the tenant never raised the issue of the prompt rental rebate with the landlord.

(b) Adverse Inference

13. The tenant submitted that the trial judge erred in failing to draw an adverse inference against the landlord pursuant to s 116(g) of the Evidence Act as the landlord had failed to call a key witness, Jesline, who was the landlord's point of contact with the tenant in and around the formation of the Tenancy and who allegedly prepared the TA and LOI.

14. However, JC Lim held that this was not an appropriate case to draw an adverse inference against the landlord. The failure to call a person who may have been able to shed some light on the circumstances of the case as a witness does not necessarily mean that the court will draw an adverse inference. Importantly, the tenant failed to show that Jesline's evidence had potential significance to the entire matter and which could not be resolved by considering the other evidence.

15. Further, the tenant failed to show that the landlord **unjustifiably** failed to contact Jesline. The tenant argued that the landlord did not call Jesline as a witness despite initially listing her as one of its witnesses. The reason given by the landlord was that Jesline was no longer under the landlord's employment and was uncontactable. In the end, JC Lim held that there is no "property in a witness"[1], and the tenant could have made arrangements to subpoena Jesline when it knew the landlord was no longer going to call her. The tenant would have known this by the time AEICs were exchanged.

(c) The Right of Re-Entry

16. JC Lim also affirmed the trial judge's decision that as the tenant had breached the TA by failing to pay rent in full and promptly, the landlord was entitled to terminate the lease and had lawfully done so, and exercised its right of re-entry under cl 6.1 of the TA by turning off the electricity supply to the Premises on 6 April 2015 and physically re-entering the premises on 9 April 2015.

17. As cl 6.1 of the TA reserved the landlord's right to forfeit the lease in the event the rent is unpaid after becoming payable (whether formally demanded or not), s 18(9) of the Conveyancing and Law of Property Act ("**CLPA**") applied in that s 18 of the CLPA did not affect the law relating to re-entry or forfeiture in case of non-payment of rent. A landlord thus has a right to forfeit a lease for non-payment of rent if this is expressly reserved by the TA[2]. Moreover, cl 6.1 of the TA also dispensed with the requirement of a formal demand of

[1] *Prince Restaurant Pte Ltd v Kosma Holdings Pte Ltd* [2017] SGHC 245 ("*Prince*) at [40]

[2] *Prince* at [40], citing *Alwee Alkaff v Syed Jafaralsadeg and others and another action* [1997] 3 SLR(R) 41

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unpaid rent. In any event, JC Lim held that the landlord nevertheless did give the tenant numerous notices demanding payment.

18. Thus, JC Lim held that the landlord was entitled to forfeit the Tenancy by way of physical and peaceable re-entry **without a court order** if the conditions contained in the forfeiture clause in the TA are satisfied and the right has not in the meantime been waived by the landlord[3]. This is per the landlord's common law self-help right of re-entry and cl 6.1 of the TA.

19. Therefore, it can be seen that a landlord in a similar scenario can exercise its common law self-help right of re-entry. However, caution must be exercised while taking such steps. For example, the re-entry should be witnessed by an independent witness, who is willing to testify if need be, to the manner of re-entry and the items found on the premises. This is especially so as it is unlikely the tenant will submit calmly to a landlord's peaceable re-entry. Additionally, reasonable care must be taken. For example, if the landlord was to change the locks of the premises to regain possession[4], it would be prudent for it to ensure that there are no persons on the premises.

20. Another option is through a process of law – via the issuance and service of a Writ of Possession on the tenant, which effects forfeiture by way of a notional physical re-entry[5].

(d) <u>Two Tiers of Appeal As of Right?</u>

i. s 34(2)(a) Supreme Court of Judicature Act ("SCJA") and Parliament's Intention

21. According to s 34(2)(a) SCJA, except with leave, no appeal shall be brought to the Court of Appeal in cases where the amount in dispute, or the value of the subject-matter, at the hearing before the High Court does not exceed $250,000.00.

22. In *Virtual Map (Singapore) Pte ltd v Singapore Land Authority and another application* [2009] 2 SLR(R) 558 ("***Virtual Map***"), the Court of Appeal, having regard to the parliamentary intention behind s 34(2)(a), struck out the Appellant's Notice of Appeal as leave to appeal was not obtained and this leave was necessary, given that the copyright suit was commenced in the District Court and given that the appeal against the District Judge's decision was subsequently heard and dismissed by the Judge in the High Court (at [31]).

23. The Court of Appeal noted that s 34(2)(a) was a process to screen appeals to the Court of Appeal as the legislative intention was to allow only one tier of appeal as of right for civil claims up to a certain amount or value (at [19]), and in *Virtual Map*, the limit was $250,000.00.

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[3] *Prince* at [40] citing *Protax Co-operative Society Ltd v Toh Teng Seng and another* [2001] SGHC 84 ("*Protax*") at [18] and *Kataria v Safeland plc* [1998] 1 EGLR 39 at 41

[4] *NIM Minimart (Suing as a firm) v The Management Corporation Strata Title Plan No. 1079 and others* [2011] SGDC 245 at [95] and [114]

[5] *Protax* at [59]

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24. It is not a coincidence that the monetary threshold of $250,000.00 is pegged to the District Court jurisdictional limit. In fact, the Court of Appeal in *Virtual Map* was following its decision in *Tan Chiang Brother's Marble (S) Pte Ltd v Permasteelisa Pacific Holdings Ltd* [2002] 1 SLR(R) 633; [2002] 2 SLR 225, where it explained that this pegging was for Parliament to give effect to the implicit rule that there should only be one tier of appeal as of right. This ensured that civil actions commencing in the District Court that come on appeal before the High Court would only have one tier of appeal as of right.

ii. In the Present Case

25. Although the amount in dispute exceeded the District Court jurisdictional limit of $250,000.00 (claim was for damages amounting to $698,276.20), the action was commenced in the District Court per a memorandum of agreement signed pursuant to s 23 of the State Courts Act.

26. Having lost in the District Court, the tenant appealed to the High Court without asking for leave.

27. However, upon having its High Court appeal dismissed, the tenant appealed once again to the Court of Appeal without asking for leave and the literal wording of the SCJA suggested that they indeed did not need leave.

28. This appeal to the Court of Appeal would have been the tenant's third bite of the cherry and second tier of appeal as of right, and this appeared to go against the parliamentary intention behind s 34(2)(a) SCJA.

29. In other words, under the current wording of s 34(2)(a), it seems that parties are able to circumvent Parliament's intention of allowing only one tier of appeal as of right if the dispute is for a monetary claim over $250,000.00 and if parties agree to commence the action in the District Court pursuant to s 23 of the State Courts Act. This suggests that there is a possible lacuna in the legislative framework for appeals.

Striking Out of the Appeal to the Court of Appeal

30. The tenant's appeal to the Court of Appeal was fixed for hearing in the week commencing 9 April 2018.

31. On 19 October 2017, the landlord filed an application for further security for costs. At the second hearing of the application, the tenant's counsel requested for more time for the tenant to file and serve a reply affidavit. On 24 November 2017, Chan Seng Onn J made an Unless Order for the tenant to file and serve the reply affidavit within 14 days failing which an order would be made in terms of the landlord's application.

32. The tenant failed to file and serve the reply affidavit and thereafter failed to furnish the further security by the respective deadlines as ordered. On 2 January 2018, the appeal was thus struck out and the hearing before the Court of Appeal vacated.

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