Prince Restaurant Pte Ltd
v
Kosma Holdings Pte Ltd

[2017] SGHC 245

High Court — District Court Appeal 4 of 2017
Audrey Lim JC
27 June; 11, 28 July 2017

Contract — Breach

4 October 2017

Audrey Lim JC:

Introduction

1 District Court Appeal 4 of 2017 is against the district judge's ("the trial judge") decision dismissing the appellant's claim for breaches and wrongful termination of a tenancy agreement while allowing the respondent's counterclaim for breaches of the same agreement. After hearing the parties and considering their respective cases and submissions, I affirmed the trial judge's decision and dismissed the appeal with costs. The appellant has appealed against my decision, and I therefore set out the full grounds for my decision.

Background

2 The respondent is the owner of premises situated at Peninsula Plaza ("the Premises"). The appellant was interested in running a business at the Premises and approached the respondent. Around 20 June 2014, one of the appellant's directors, Jimina Jacee ("Jimina") signed a Letter of Intent ("LOI") to rent the Premises from the respondent for three years.[1] The LOI stated that "[u]pon the [appellant's] acceptance of [the respondent's] offer, the [appellant] will be required to enter into a formal Lease Agreement with the [respondent]".[2] The LOI was apparently the product of negotiations around 20 June 2014 between the respondent's operations manager at the material time, Jesline Ong ("Jesline"), and Jimina and Ashokan Vinod ("Vinod") who represented the appellant. It was disputed as to whether the respondent's business development manager, Lim Tjie Minn ("Tjie Minn") was also present on this occasion.[3] Apparently with approval from one of the respondent's directors, Ang Chwee Lian ("Ang"), Jesline countersigned on the LOI on the respondent's behalf. The respondent claimed that the LOI was dated 25 June 2014 on Jimina and Vinod's insistence.[4] The keys to the Premises were handed to the appellant on 20 June 2014.

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1 Record of Appeal ("ROA") Vol 1, p 68: Notes of Evidence ("NE") for 17 October 2016, p 38.

2 ROA Vol 2, pp 495-496.

3 ROA Vol 2A pp 834–836; Jimina's Affidavit of Evidence-in-Chief ("AEIC"), paras 5–6.

4 Lim Tjie Min's AEIC, paras 4–10; ROA Vol 2A, pp 966–968.

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3 Around 23 June 2014, Jimina signed only the first page of the tenancy agreement ("the TA") on behalf of the appellant when the copies of the TA were handed over by Jesline.[5] Again, it was disputed that Tjie Minn was present.[6] Tjie Minn claimed that the reason Jimina signed only the first page of the TA was because she claimed that she wanted to go over its contents first, and apparently she retained the remainder of that copy of the TA.[7] Subsequently, on 14 July 2014, the appellant's directors, Jimina and Bhamah Ramdas ("Bhamah"), signed one copy of the TA and initialled on every page.[8] On the same day, for reasons which will be explained below, Bhamah signed another copy of the TA on the appellant's behalf. The appellant alleged that the copies of the TA differed; the first copy signed on 14 July 2014 contained five schedules, while the second copy of the same date contained three schedules.[9] On the same day, Jimina and Bhamah also executed a personal guarantee ("the Guarantee") in the respondent's favour.

4 As the appellant allegedly failed to pay the monthly rent in full and/or promptly throughout most of the tenancy, the respondent terminated the tenancy and exercised its right of re-entry by turning off the electricity supply to the Premises on 6 April 2015 and then physically re-entering the Premises on 9 April 2015.

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5 Ang Chwee Lian's AEIC, para 19.

6 Appellant's Case, para 59.

7 Lim Tjie Min's AEIC, paras 11–12.

8 Bhamah's AEIC, para 10; ROA Vol 2, pp 504–526 and 530–551.

9 Appellant's Case, para 16.

Proceedings below

5 The appellant commenced an action against the respondent for breaches of the TA by cutting off electricity supply to the Premises at peak periods and wrongful termination of the TA without notice. The respondent denied that there was any breach or wrongful termination of the TA, arguing that it was entitled to terminate the TA as the appellant had failed to pay the rent in full and/or on time. The respondent asserted that the tenancy was to commence on 3 July 2014, with a monthly rent of $17,655 (inclusive of GST) in the first year, payable in advance for July 2014, and on the first day of each month for the subsequent months. The respondent's case was that there would be a rental rebate of $1,500 per month applicable in the first year, if the appellant paid rent promptly. In its Defence and Counterclaim, the respondent pleaded that the following amounts were made by the appellant on the following dates, and so there was a shortfall in payment (reproduced from [17] of the GD):

	Date of payment	**Amount paid**
1.	21 July 2014	$16,050
2.	18 August 2014	$16,050
3.	20 September 2014 2 October 2014	$10,050 $6,050
4.	7 November 2014 12 November 2014	$11,000 $5,050
5.	28 November 2014	$16,050
6.	1 January 2015 6 January 2015	$3,000 $13,050

7.	13 February 2015	$12,000
8.	2 March 2015	$12,000
9	3 March 2015	$12,000
	Total amount paid	$132,300 (Note: this should be $132,350 instead)

6 The respondent therefore counterclaimed for damages arising from the appellant's failure to pay the rent in full as well as interest arising from the appellant's late payment of the monthly rent. The appellant's response was that it was not late with payment of the monthly rent nor did the payments fall short of the rent sum. Further, the appellant claimed that the tenancy was to commence on 14 July 2014, with a monthly rent of $16,050 (inclusive of GST) in the first year, because there was a rent-free period from 20 June 2014 to 13 July 2014. Rent was payable only from 14 July 2014 and on the 14th day of each subsequent month. The respondent's position regarding the purported rent-free period was that the appellant was given vacant possession of the premises on 20 June 2014 rent-free until the commencement of the TA on 3 July 2014.

7 The action below was bifurcated and the trial focused only on the issue of liability. At the beginning of the trial, the parties agreed that the issues were as follows:

(a) what was the quantum of the monthly rent payable, on a construction of the terms of the LOI, the TA and the Guarantee;

(b) when were the monthly rent and service charge payable, on a construction of the terms of the LOI, the TA and the Guarantee;

(c) whether the appellant or the respondent was in breach of the TA; and

(d) whether the respondent had lawfully terminated the lease.

8 The trial judge noted (at [29] of the GD) that the appellant spent some time cross-examining the witnesses regarding the validity of the TA, raised the possibility that there were three versions of the TA, and appeared to be trying to show that none of the TAs were valid and that the TAs were materially different. The trial judge did not accept the appellant's argument in this regard, and noted that the versions of the TA were identical, and in particular the versions on 14 July 2014 had the signatures of the appellant's representatives so it was not open for the appellant to argue that it was not bound by the TA (at [30] of the GD). The trial judge found in favour of the respondent on all the issues and dismissed the appellant's claim while allowing the respondent's counterclaim with damages to be assessed.

Issues on appeal

9 The appellant appealed against the entire decision of the trial judge. The issues raised by the appellant before me were the same issues dealt with by the trial judge. Further, the appellant argued that the trial judge had erred in:[10]

(a) failing to call Jesline as a witness, as she had prepared and signed the LOI on the respondent's behalf;

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[10] Appellant's Case, pp 7–8.

(b) failing to apply the *contra proferentum* rule against the respondent since it was ambiguous as to what was the rent payable for the first year of the tenancy; and

(c) arriving at the conclusion that all the three TAs (one TA dated 23 June 2014 and two TAs dated 14 July 2014 with different schedules attached) adduced by the respondent were the same.

My decision

Multiple copies of the TA

10 I will first address the point regarding the multiple copies of the TA. It was not disputed that there was a TA dated 23 June 2014 (signed only on the first page) and two signed copies of the TA dated 14 July 2014 with identical substance and wording. It was also not disputed that the signatures were genuine in all three copies. The difference was the number of schedules and the signatures that were included in the two versions of the TA that were signed on 14 July 2014.[11] The appellant's counsel, Mr Retnam, pointed out that one copy of the TA dated 14 July 2014, sent by the respondent's previous solicitors to the appellant on 23 April 2015,[12] exhibited five schedules (Schedules 1 to 5), while the other copy of the TA dated 14 July 2014 included only three schedules (*ie*, Schedules 1, 3 and 5).[13]

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11 NE for 11 July 2017.

12 Jimin's AEIC, para 11; ROA Vol 2, pp 502–525.

13 Jimina's AEIC, para 13 and exhibit JJ-6; NE for 11 July 2017.

11 In my view, this was not a real issue in the case. In the parts of the TAs of 14 July 2017 which were material to the case, *ie*, the first page of the TA and Schedule 1 appended thereto, the TAs were identical in wording and both were signed by the appellant and respondent's representatives. The first page of the TA was identical across all three versions of the TA. Counsels for both parties also agreed before me that the substance and wording of all the TAs were the same.[14] In effect, these concessions put paid to the appellant's argument that the trial judge had somehow erred in her conclusion regarding the copies of the TA. Mr Retnam also accepted that where the two TAs of 14 July 2014 were exhibited with schedules, someone from the appellant had signed on each and every page including on the schedules. Therefore, it seemed to me that the discussion on multiple TAs was really much ado about nothing. In any event, I noted that Lim Sian Leong ("Lim"), a director of the respondent, explained that the two TAs of 14 July 2014 were signed because Vinod's signature as witness in the first copy covered the portion where Lim was meant to sign as the respondent's representative, and so Lim asked Tjie Minn and Jesline to obtain another copy of the TA signed by the appellant. The second copy of the TA was signed by Bhamah, instead of by both Bhamah and Jimina for the first copy. Lim was firm in his testimony that the TA of 14 July 2014 that was exhibited with three schedules was because of printing errors made by his solicitors who prepared the documents, and Lim's claim in this regard was not challenged.[15] Therefore I failed to see how the trial judge erred in substance in finding that the three copies were the same. In the rest of this GD, I will refer to the TA dated 14 July 2014 with five schedules.

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14 NE for 11 July 2017; NE for 18 October 2016, p 75.

15 Lim Sian Leong's AEIC, paras 4–7; NE for 15 December 2016, pp 7–11.

Commencement of the tenancy agreement

12 I agreed with the trial judge that the TA commenced on 3 July 2014. The documentary evidence clearly supported the trial judge's conclusion. The LOI, stated that the "Commencement of Lease" was 3 July 2014. Clause 1 of the TA did not state the date of commencement of the tenancy, but stated that this was to be found in Part B of Schedule 1 of the TA, which in turn stated that "the [t]erm of [the] lease is three (3) years commencing from 3rd July 2014". This point was repeated at Part E of the same schedule, which stated that the period of rental rebate was from 3 July 2014 to 2 July 2015. As noted earlier, there was no dispute as to the validity of the signatures on the TA and its schedules. The Guarantee, signed by Jimina and Bhamah, also stated that the tenancy commenced on 3 July 2014.[16]

13 Jimina asserted in her affidavit of evidence-in-chief ("AEIC") that, when Jesline brought the second copy of the TA of 14 July 2014 to the appellant, the commencement date of the TA "[had been] changed from 3 July 2014 to 14 July 2014"[17]. However, given my findings in the preceding section that the multiple copies of the TA were identical in substance and wording, her assertion in this regard was contradicted by the documentary evidence. In cross-examination, Jimina claimed that Jesline had informed her that the tenancy would commence on 14 July 2014.[18] This was not stated in Jimina's AEIC, even though she referred to the terms of the LOI, which stated that the commencement date of the tenancy was 3 July 2014. I also noted that when the

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16 ROA Vol 4C, p 2293.

17 Jimina's AEIC, para 11.

18 NE for 17 October 2016, p 64–65.

respondent's counsel, Mr Toh, put to Bhamah that the documents showed that the tenancy was to commence on 3 July 2014, Bhamah did not categorically refute this or state that the parties had agreed to commence the tenancy on 14 July 2014. Instead, Bhamah merely responded that "what I'm thinking is, what [the respondent] should have done is … [the appellant] definitely wanted [the respondent] to shift [the date of commencement] to 14th [of July] or whatever".[19] There was no indication that this purported intention on the appellant's part was ever conveyed to the respondent.

14 Although Jimina and Bhamah's testimonies on the issue of the date of commencement of the tenancy was not dealt with by the trial judge, I was of the view that her decision was nevertheless correct. There was no evidence that the agreement between the parties was for commencement of the tenancy to be 14 July 2014, or of any agreement to vary the commencement date of the tenancy (stated as 3 July 2014 in all the documents) to 14 July 2014. Jimina admitted that she did not read the TA (either the one in exhibit JJ-4 or JJ-6 of her AEIC). Even if that were so, this did not affect what was stated in the TA. The appellant was not disputing the validity of the TA and had also relied on it to support its case. In addition, although the two copies of the TA were dated 14 July 2014 and undisputedly signed on that date,[20] this did not mean that the tenancy could not have commenced on an earlier date. The date of signing of the TA did not have to coincide with the date of commencement of the TA.

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19 NE for 18 October 2016, p 59.

20 Jimina's AEIC, para 11; Bhamah's AEIC, para 10; Lim Sian Leong's AEIC, paras 4–5; Respondent's Case, para 6.

Whether there was a rent-free period as the appellant claimed

15 The appellant claimed that the parties had agreed to a rent-free period of 15 days, and because the appellant began renovations of the Premises on 1 July 2014 and commenced business on 14 July 2014, no rent was payable from 1 to 14 July 2014. The respondent denied any such agreement, but averred that the appellant was given vacant possession of the premises on 20 June 2014, rent-free, until the commencement of the TA on 3 July 2014.

16 I agreed with the trial judge's finding (at [16] of the GD) that there was no suggestion in the TA that there would be a rent-free renovation period up till 14 July 2014. The only basis for the appellant's claim appeared to be the sentence in the LOI which stated "Renovation Period: 15 days or start of operations, whichever earlier". However, nowhere in the LOI was it stated that there was to be a *rent-free period*, and all three of the key documents (*ie*, the LOI, TA and Guarantee) stated that the tenancy was to commence on 3 July 2014. Quite simply, the appellant's claim in this regard was only a bare assertion. Furthermore, if the parties had really agreed to a rent-free period up to 14 July 2014, it was surprising that such an agreement had not been recorded in the TA, since the rent-free period would have reduced a substantial part of the rental payable for July 2014. Hence, I was satisfied that the trial judge had not erred in this regard.

Whether rent was payable in advance

17 The appellant maintained its position that the rent was payable only from 14 July 2014, and was thereafter due on the 14th of successive months. I agreed with the trial judge (at [16] of the GD) that the rent for each successive month from August 2014 would have been payable on the first day of that month. There

was nothing contradicting the documentary evidence as such. Clause 1 of the TA provided that the first of the rental payments was to be paid "on or before signing of this agreement and the subsequent payments shall be made on the 1st of every succeeding calendar month payable in advance (whether formally demanded or not)". As the trial judge found, the LOI also expressly provided for "rental in advance". Hence, even if the tenancy was only to commence on 14 July 2014 (a claim which I had earlier rejected), the rent for the months from August 2014 had to be paid on the first day of those months, pursuant to the TA. There was also nothing to suggest that the parties had agreed to vary the date of payment under clause 1 of the TA. Indeed, Bhamah agreed in cross-examination that the "normal common practice" was to pay rent in advance.[21]

Monthly rent payable

18 The appellant submitted that the trial judge had erred in finding that the monthly rent for the first year of the tenancy was $16,500 (or $17,655 inclusive of GST) instead of $15,000 (or $16,050 inclusive of GST). The appellant argued that the trial judge erred in not applying the *contra proferentum* rule to construe the ambiguity in the TA against the respondent, since the respondent prepared the LOI, the TA and the Guarantee. The respondent's case was that the monthly rent was $16,500 (or $17,655 inclusive of GST), save that there was a rebate of $1,500 per month if rent was paid promptly. The respondent argued that it was important to have regard to the factual matrix in which the TA was concluded. It also argued that the LOI was prepared by the appellant instead.[22]

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21 NE for 18 October 2016, pp 58–59.

22 Respondent's Case, para 40; Lim Tjie Minn's AEIC, para 5.

19 In my view, the *contra proferentum* rule was not necessary in this case. The Court of Appeal in *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] 2 SLR 1083 ("*Hewlett-Packard*") at [51] stated that in order for the *contra proferentum* rule to apply, "it is a necessary condition that there be an ambiguity in the contract which cannot be resolved (and *not merely* that it is *difficult* to resolve) by interpreting the term in the context of the overall contract". In gist, *contra proferentum* is applied as a last resort. In *Hewlett-Packard*, the Court of Appeal (at [52]) cautioned against applying the rule too readily especially in the light of the contextual approach to contractual interpretation adopted by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") as "the first task is always to construe the document based on the well-established principles of contractual interpretation, including looking at the surrounding context as well as at the purpose of the agreement".

20 In endorsing the contextual approach to contractual interpretation as the prevailing one, the Court in *Zurich Insurance* also held (at [132]) that extrinsic evidence was admissible to aid in the interpretation of written words under proviso (*f*) of s 94 of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act"), as long as extrinsic evidence is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context. The extrinsic evidence must also go towards proof of what the parties, from an objective view point, ultimately agreed on.

21 In my view, based on the findings made by the trial judge and the evidence of the parties, any ambiguity in the TA was dispelled when I considered the overall context of the entire agreement. It was not disputed that the monthly rent for the second and third years of the tenancy was $16,500 (or

$17,655 inclusive of GST). The trial judge based her decision on the documentary evidence, namely the LOI, the TA and the Guarantee. Although the trial judge did not appear to deal with the parties' testimonies in the GD, I saw no reason to disturb her finding that the monthly rent payable for the first year was $16,500 (or $17,655 inclusive of GST) when considered against the entirety of the evidence.

22 The LOI expressly stated that the rent for the first year was $15,000 (excluding GST), while the rent for the second and third years would be $16,500 (excluding GST). The LOI had to be read together with the TA and the Guarantee. The LOI expressly stated that the appellant had to enter into a formal lease agreement with the respondent on the appellant's acceptance of the offer in the LOI. In other words, the LOI did not represent the final version of the parties' agreement. The formal lease agreement was the TA, the main body of which was silent on the rent payable for the first year of the tenancy. Part C of Schedule 1 stated:

> The Rent shall be Singapore Dollars FIFTEEN THOUSAND AND NINETY-SEVEN AND THIRTY-THREE CENTS ($15,097.33) for the period of two (2) years from 3rd July 2015 to 2nd July 2017.
>
> The Service Charge shall be Singapore Dollars ONE THOUSAND FOUR HUNDRED AND TWO AND SIXTY-SEVEN CENTS ($1,402.67) per month.

23 Part E of Schedule 1 of the TA stated "[t]here [would] be a prompt rental payment rebate of [$1,500] [o]nly per month for the period of one (1) year from 3rd July 2014 to 2nd July 2015", and "[n]o rebate shall be given if payment of rental is late".[23] The trial judge found that the rental rebate, when applied to

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[23] ROA Vol 2, p 521.

the monthly rent of $16,500 (including service charge but excluding GST payable), would result in the first year's monthly rent of $15,000 (excluding GST payable) and would be consistent with the intention of the parties as described in the LOI. I did not find her inference to be wrong in this regard.

24 Jimina's explanation was that she had negotiated with Jesline for a lower rent in the first year, which was why the rent was $15,000 (excluding GST).[24] If the appellant's position in this regard were true, it was difficult to understand why the respondent would have given the appellant a lower monthly rental rate (of $15,000) in the first year, and also give a rental rebate of $1,500 if the appellant paid rent promptly. This potentially amounted to a total reduction of $3,000 per month for the first year. Hence if the appellant had paid rent promptly, it would effectively only have had to pay $13,500 per month (excluding GST), which did not appear to have been the parties' intention at any point in time. Crucially, the appellant's actions were not consistent with its case in this regard. If it were the case that the payable sum per month was $15,000 (excluding GST) and the appellant had (as it claimed) paid rent promptly, then it was strange that it made the payments it did to the respondent but never raised the issue of the rental rebate with the respondent.

25 Moreover, the Guarantee dated 14 July 2014, signed by Jimina and Bhamah to guarantee the appellant's monthly payment of rent, clearly stated that the TA was for a term of three years "at a monthly rent of $16,500". The sum of $16,500 was not stated to be inclusive of GST. The Guarantee embodied the personality liability of the appellant's directors for the terms under the TA,

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[24] Jimina's AEIC, para 5.

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and was more consistent with the respondent's case. Jimina and Bhamah claimed that they did not read through the Guarantee and were not given a copy of it after it was signed.[25] Besides being a rather unconvincing claim, this did not affect the validity of what they signed, because it was not a claim that they did not know what they were signing. Even if I believed them, this would not have changed the legal effect of what was stated in the Guarantee. Jimina and Bhamah have also not claimed that some form of coercion or fraud occurred in the process of signing the Guarantee. Hence, I accepted that since the Guarantee was executed contemporaneously with the TA, this showed that the parties intended the monthly rent to be $16,500 (excluding GST payable), and that any concession given by the respondent in the first year's rent was in the form of a rebate upon prompt payment (as explained by Ang).[26]

26 I considered the appellant's claim that when the respondent's employee, Ang Poey Chin ("Poey Chin"), came to collect the monthly rent, he did not allege on the respondent's behalf that the appellant was under-paying rent or that rent was not paid on time.[27] In my view, this point was neither here nor there, as Poey Chin was merely tasked to collect the rent. In fact, the invoices sent by the respondent to the appellant as early as 3 July 2014 and thereafter at the beginning of each month consistently reflected the total monthly rent payable as $17,655[28]. The statements of accounts also showed the cumulative amounts owed by the appellant, which consisted of the shortfall in payments of

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25 NE for 17 October 2016, p 50; NE for 18 October 2016, p 50.

26 Ang Chwee Lian's AEIC, para 12.

27 Appellant's Case, para 68; Appellant's Skeletal Submission, para 21.

28 ROA Vol 2A, pp 930–941.

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rent. The appellant did not dispute the amounts mentioned in the invoices in any form of written communication.

27 Jimina acknowledged in her AEIC[29] that the respondent sent a statement of account on 3 August 2014 to the appellant, which stated that the rent payable was $17,655. Jimina claimed that she then called and informed the respondent that the rent payable was only $16,050 but the respondent apparently insisted that the appellant had to pay $17,655 first and "then discuss the matter later". The appellant continued to pay only $16,050.[30] I noted that Ang denied that the respondent ever received such a call or gave such a response.[31]. In cross-examination, however, Jimina contradicted her AEIC. She claimed that she had never seen the invoices until she came to court, and that the first time she realised that the respondent was charging monthly rent of $17,655 was after a letter dated 16 October 2014.[32]

28 Likewise, Bhamah stated in her AEIC that the respondent started "sending letters asking for rental arrears" despite the appellant paying $16,050 in full.[33] Bhamah claimed that she called Jesline and told her that the agreed rental was $16,050; however, I note that Bhamah did not state what Jesline's response to this claim was.[34] Bhamah further stated in her AEIC that the appellant received a letter dated 16 October 2014 from the respondent stating

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29 Jimina's AEIC, paras 22–25.

30 Jimina's AEIC, para 24

31 Ang Chwee Lian's AEIC, para 35.

32 NE for 17 October 2016, p 25–30.

33 Bhamah's AEIC, para 13.

34 Bhamah's AEIC, para 14.

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that they would be deducting $2,400 from the appellant's security deposit. However, in cross-examination, she contradicted her AEIC by claiming that she had never received letters from the respondent with regard to rental arrears prior to the letter of 16 October 2014. She also claimed that she rang someone at the respondent up and the person replied that there must have been a mistake.[35]

29 Although the parties' testimonies were not discussed in the trial judge's GD, in my view, it was more likely than not that the respondent, through Jimina and Bhamah, knew of the various invoices issued by the respondent (stating the rent payable as $17,655), but chose to ignore them. This knowledge was clearly alluded to in Jimina's and Bhamah's AEICs. If Jimina had called the respondent to dispute the actual rental amount, and the respondent nevertheless continued to send monthly invoices for rent at $17,655 and even legal demands for rental arrears, it was improbable that the appellant would not write to the respondent to register its protest or to dispute the rental arrears. The respondent's representative(s) whom the appellant purportedly called were also not identified. I found that the respondent's conduct, on the other hand, by sending the monthly invoices (which were not disputed), supported the trial judge's inference that the monthly rent was actually $17,655.

30 In the round, I found that any ambiguity was dispelled once I had regard to the context of the entire agreement between the parties. Hence I found that the rent payable was $16,500 (or $17,655 inclusive of GST) per month for the first year, just like the second and third years, except that there would be a monthly rental rebate of $1,500 for prompt payment.

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35 NE for 18 October 2016, p 62.

Total amount of rent payable

31 The undisputed payments for rent made by the appellant is set out above at [5] ("the Table"). The total amount of rent that was payable was disputed, as a result of the dispute over the amount of rent payable per month, and the number of months for which rent was payable. Having dealt with the former, I turn to the latter. The appellant took the position that only eight months of rent were payable and it had overpaid[36].

32 Mathematically, the appellant's position did not add up. Even accepting its case (which I did not) that the first payment was for the month starting on 14 July 2014 and that every other payment was due on the 14th day of each month, the appellant should have paid nine months of rent, the first payment being on 14 July 2014 (for 14 July to 13 August 2014) and last payment being on 14 March 2015 (for 14 March to 13 April 2015). Jimina conceded in cross-examination that this was so.[37] Indeed, before me, Mr Retnam appeared unsure, first stating that the appellant had paid eight months of rent, then stating that it should be nine months. Hence, even if I were to accept the appellant's case, it should have paid nine months of rent at $16,050 per month, or a total of $144,450. This flatly contradicted Jimina's AEIC that the appellant, by paying a total of $132,350 from 14 July 2014 to 31 March 2015, had overpaid.[38] The appellant's assertion that it had overpaid was plainly wrong, and in fact, it would have underpaid even on its own case.

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36 NE for 17 October 2014, p 75–81.

37 NE for 17 October 2014, p 82–83.

38 Jimina's AEIC, para 27.

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33 I considered the argument relating to an additional cheque dated 14 March 2015 for $12,000 which the appellant had issued.[39] Mr Retnam argued that the appellant had issued this cheque in addition to the others in the Table, and asserted that the appellant had paid a total of $144,350 and not $132,350. Even taking the appellant's case at its highest, this additional cheque did not help its case. As Mr Retnam conceded at the hearing before me, on his case, this was still $100 short of the total rent payable of $144,450 for the nine months.

34 The trial judge stated (at [32] of the GD) that she was unable to draw any conclusions on whether this additional payment of $12,000 was made by the appellant because it had not been mentioned in its pleadings or its witnesses' AEICs. I saw no reason to disturb her reasoning and finding in this regard. The appellant did not deal with this $12,000 cheque in its pleadings, despite the respondent having set out, in its Defence and Counterclaim, a table of all the payments that it had received (and which did not include this $12,000 cheque). The issue of this additional cheque was first raised by appellant's counsel in his *re-examination* of Jimina.[40] This was also plainly contrary to Jimina's assertion in her AEIC that the appellant had paid $132,350 in total from 14 July 2014 to 31 March 2015.[41]

35 In the round, I agreed with the trial judge's finding that the appellant paid $132,350 in total, as set out in the Table. If so, there would have been an underpayment of rent, even going by the appellant's own case (which I did not accept) that rent was payable from 14 July 2014 and payable on the 14th of every

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39 ROA Vol 4, p 1333.

40 NE for 18 October 2016, p 16.

41 Jimina's AEIC, para 27.

month. As I accepted that the trial judge was correct in that the actual monthly rent payable was $17,655, and the commencement of the tenancy was on 3 July 2014 with rent payable on the first day of each subsequent month, the appellant was clearly in arrears of payment. In fact, the appellant ought to have paid 10 months of rent, with the last payment being due on 1 April 2015.

36 The appellant appeared to argue that there was an oral agreement to reduce the rent to $12,000 per month from February 2015 onwards because it was going to renovate the premises and business would have to stop during the renovation period.[42] I rejected this allegation. First, this oral agreement was never pleaded, not even in the appellant's Reply and Defence and Counterclaim after the respondent had set out the monthly arrears of rent in its Defence and Counterclaim. This was despite the appellant mentioning the renovations in its pleadings. Second, the first time the alleged oral agreement was mentioned was in the appellant's former solicitor's letter to the respondent's former solicitors on 27 April 2015,[43] after the respondent had terminated the tenancy. Third, the appellant's witnesses had never raised the alleged oral agreement in their AEICs, but instead maintained throughout that the monthly rent payable was $16,050 (including GST). Fourth, Jimina conceded in cross-examination that after the appellant spoke to the respondent about reducing the rent, the respondent's representative (Jesline) did not revert on this and hence Jimina assumed that the respondent did not agree to this.[44] Finally, I also noted that the

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42 Appellant's Case, para 69.

43 ROA Vol 4A, p 1752.

44 NE for 17 October 2016, p 87.

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Appellant's Case rather contradictorily stated that there was no such agreement.[45]

Whether there was late payment of rent

37 As stated earlier, the undisputed payments for rent by the appellant is set out in the Table at [5]. Mr Retnam confirmed before me that the appellant had prepared a schedule,[46] which was identical to the Table. Mr Retnam, however, stated before me that based on the appellant's schedule, the payments were to start from 14 July 2014. In my view, even going by the appellant's own case and schedule, that rent was payable only from 14 July 2014 and on the 14th day of every month, it was clearly late in paying rent almost every month. The trial judge made the same observation (at [19] of the GD).

38 Given my agreement with the trial judge's finding that rent was supposed to be paid on the first day of every month (with the exception of July 2014), and the monthly rent was $17,655, the appellant was clearly late in its payment of rent and in arrears. As I noted above at [35], the appellant should have paid 10 months of rent. It was clear from the Table that the appellant had not made any payment for April 2015, which was due on 1 April 2015. Therefore, even based on the month of April 2015 alone, the appellant was in breach of the TA.

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45 Appellant's Case, para 70.

46 NE for 27 June 2017; ROA Vol 4A, p 1559.

Whether the respondent lawfully terminated the TA

39 I agreed with the trial judge that since the appellant had not paid rent in full and on time, the respondent 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. The respondent had given various notices and made numerous demands in writing to the appellant, the last being on 7 April 2015[47]. Specifically, the letter of 7 April 2015 had stated that as a consequence of the appellant's failure to pay rent in full or promptly, it had breached the TA and the respondent had exercised its right in turning off the electricity on 6 April 2015. The letter further stated that if the arrears were not settled promptly, the respondent would exercise its rights under the TA to re-enter and re-possess the premises without further notice, which it did on 9 April 2015.

40 As cl 6.1 of the TA reserved the right to forfeit the lease, s 18(9) of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) ("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 lessor thus has a right to forfeit a lease for non-payment of rent if this is expressly reserved by the lease (*Alwee Alkaff v Syed Jafaralsadeg and others and another action* [1997] 3 SLR(R) 419). The forfeiture can be done by way of physical and peaceable re-entry without a court order if the conditions contained in the forfeiture clause in the lease are satisfied and the right has not in the meantime been waived by the lessor (*Protax Co-operative Society Ltd v Toh Teng Seng and another* [2001] SGHC 84 at [18] and *Kataria v Safeland plc* [1998] 1 EGLR 39 at 41). In this case, cl 6.1 dispensed with the requirement of a formal demand of unpaid rent

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[47] ROA Vol 4A, p 1557.

and did not expressly state any period of time which had to elapse before the right of re-entry could be exercised. Despite cl 6.1, the respondent nevertheless gave the appellant numerous notices, the last being on 7 April 2015. Therefore, the respondent's actions in terminating the lease were lawful.

41 I also agreed with the trial judge that there had been no waiver by the respondent of the appellant's breach, and the trial judge's reasoning in this regard could not be faulted (see [31] of the GD). I add also, that even if the respondent, by agreeing to the appellant's renovations and accepting the lower rent for that period, could be said to have waived its right to terminate the tenancy (which I rejected), there was no evidence that the waiver would apply to prospective or further breaches by the appellant after the renovations were completed. According to Jimina, the renovations were completed by the end of March 2015.[48] If so, from April 2015 onwards, the appellant would have remained obligated to continue paying rent and to make such payment on the first day of the month. This the appellant clearly did not do.

Cutting off power supply to the Premises

42 The appellant also claimed that the respondent had cut off the electricity supply to the Premises at peak periods and had breached cl 5.2 of the TA to grant peaceable enjoyment of the Premises without interruption. I agreed with the trial judge that the appellant had not provided any evidence or details of these alleged instances. Bhamah and Rajesh, the appellant's directors, admitted in cross-examination that they had no proof and were merely speculating that

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[48] Jimina's AEIC, para 29.

(*cont'd on next page*)

the respondent had cut off the supply of electricity.[49] I saw no reason to disagree with the trial judge's finding. The appellant had failed, on balance, to prove its assertion on this matter.

Miscellaneous issue

43 The appellant submitted that an adverse inference should be drawn against the respondent pursuant to s 116(*g*) of the Evidence Act as it had failed to call, among others, Jesline, the main person who had liaised with the appellant regarding the terms of the tenancy and also allegedly prepared the TAs and LOI. As noted in Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) at para 12.068, while a person may have been able to shed some light on the circumstances of the case, the failure to call him as a witness does not necessarily mean that the court will draw an adverse inference; the evidence that the person would give ought to have potential significance before the court determines that an adverse inference should be drawn against the party who *unjustifiably* failed to call him (emphasis added).

44 In my view, this was not an appropriate case to draw an adverse inference against the respondent. Lim, the respondent's director, testified that Jesline had left the respondent's employment and that the respondent could not contact her.[50] The appellant could not show that the respondent "unjustifiably" failed to contact Jesline. In any event, the appellant would have known, by the time the parties' AEICs were exchanged, that the respondent would not be

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49 NE for 18 October 2016, pp 72, 114, 115.

50 NE for 15 December 2016, pp 18, 22 and 25.

calling Jesline and the appellant could have made arrangements to call her if it thought necessary. There is no property in a witness.

45 More importantly, the appellant did not show that Jesline's evidence had potential significance to the entire matter and which could not be resolved by considering the other evidence (see [21] to [29] above). I considered that her evidence could shed some light on the negotiations leading up to the signing of the LOI and the multiple TAs. However, the effect of the LOI alone was limited because it was expressly stated to be subject to a formal lease agreement. As for the circumstances of the signing of the TAs, it became evident at the hearing before me that it was inconsequential as to why there were three copies of the TA signed on two different dates; the parties did not dispute that the material contents were the same. Since I found that it was not appropriate to draw an adverse inference against the respondent for failing to call Jesline as a witness, I also failed to see how adverse inferences should be drawn for the respondent's failure to call Geraldine, Chua Peng Hong and Pei Wen, mentioned in the Appellant's Case,[51] as their evidence would have been of limited significance.

Conclusion

46 For the above reasons, I dismissed the appeal with costs to the respondent fixed at $12,000 (inclusive of disbursements).

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[51] Appellant's Case, para 54.

Audrey Lim
Judicial Commissioner

Singa Retnam (I R B Law LLP) and Gopalakrishnan Dinagaran (Prestige Legal LLP) for the appellant;
Toh Kok Seng and Ho Jiaxin (M/s Lee & Lee) for the respondent.
