IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 19

Suit No 474 of 2021
(Summons No 4310 of 2021)

Between

Lachman's Emporium Pte Ltd

… *Plaintiff*

And

Kang Tien Kuan
(trading as Lookers Music Café, a sole proprietorship)

… *Defendant*

JUDGMENT

[Civil Procedure] — [Summary judgment]
[Contract] — [Discharge] — [Frustration]
[Contract] — [Frustration] — [Leases]

Lachman's Emporium Pte Ltd
v
Kang Tien Kuan
(trading as Lookers Music Café, a sole proprietorship)

[2022] SGHC 19

General Division of the High Court — Suit No 474 of 2021 (Summons No 4310 of 2021)
Choo Han Teck J
16 November 2021, 17 January 2022

26 January 2022 Judgment reserved.

Choo Han Teck J:

1 This case is about the effects of COVID-19 measures on small businesses, and the doctrine of frustration in the time of COVID-19. The plaintiff is the landlord of 510 Geylang Road, #01-01, Singapore 389466 ("the Premises"). The defendant used to operate a night-time entertainment business, before the COVID-19 measures were implemented. In a tenancy agreement dated 26 December 2019, the plaintiff agreed to lease the Premises to the defendant for a fixed-term period of two years, from 1 January 2020 to 31 December 2021 ("the Tenancy Agreement"). The plaintiff claims that the defendant has failed and refused to pay rent for March 2020, and August 2020 to April 2021, amounting to $366,400, and also claims for the interest of $25,281.60 for non-payment of the rent.

2 The Tenancy Agreement was terminated in April 2021, before the intended end date in December 2021. The plaintiff claims that they have sought to mitigate their losses after the defendant's repudiation, by applying for the change of use of the Premises to Urban Development Authority ("URA"), so that the Premises can be used for restaurant, or bar and bistro, where it was previously a music lounge. On 10 May 2021, the URA accorded the plaintiff temporary permission for the change of use of the Premises subject to —

(a) the plaintiff reapplying with a business concept and floor plan that is accommodated with the new use; and

(b) upon the plaintiff informing URA of any mitigating measures of disamenities to surrounding residents.

URA stated in the letter that once the restaurant is approved, it would supersede the last approved karaoke lounge. However, the Premises remain vacant to date.

3 Further, on 7 August 2020, the plaintiff received the Notice of Cash Grant and Rental Waiver from the Inland Revenue Authority of Singapore ("IRAS"). It is declared that four months' of the tenants' rent must be waived in accordance with the COVID-19 (Temporary Measures) Act 2020.

4 In the present suit, the plaintiff applied, by way of Summons No 4310 of 2021, for summary judgment under O 14 of the Rules of Court (2014 Rev Ed) against the defendant, on the basis that there is a *prima facie* case of breach of contract by the defendant, and that the defendant has no defence.

5 The defendant claims that it has a strong and viable defence under the doctrine of frustration, by reason of the COVID-19 outbreak. The tenancy agreement required the defendant to use the Premises as a "pub/bar/cabaret/

night club/discotheque/karaoke lounge" only. This was clearly stated in Clause 2(x) of the Tenancy Agreement which is reproduced below:

> (x) To use the demised premises as **pub/bar/cabaret/night club/discotheque/karaoke lounge only** and such use to be in accordance with any of the laws, orders, rules, regulations, requirements, by laws and notices for the time being in force in the Republic of Singapore or as permitted only by the competent authorities.
>
> [emphasis in bold in original]

6 The defendant claims that since 26 March 2020, the COVID-19 measures led to a closure of bars, cinemas and entertainments. Accordingly, it was impossible for the defendant to have continued with the use of the Premises for the intended purpose under the regulations. The defendant submits that the four-month rental rebate is not adequate, and does not bar the defendant from relying on the defence of frustration.

7 To obtain a judgment without trial, the plaintiff must show that he has a *prima facie* case for summary judgment. If he fails to do that, his application ought to be dismissed with the usual adverse costs consequence: see O 14 r 3(1) and r 7 of the Rules of Court. If the plaintiff does cross that threshold, the burden is shifted to the defendant as *per* O 14 r 3 to raise "an issue or question in dispute which ought to be tried". Hence, the question before me is not whether the defence is made out, but rather, whether the defendant has succeeded in raising a triable issue. The defendant must raise a reasonable probability of a real or bona fide defence in relation to the issues in dispute: *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR(R) 32.

8 The doctrine of frustration discharges parties from their contract by operation of law when, without the default of either party, a supervening event that occurred after the formation of the contract rendered a contractual

obligation radically or fundamentally different from what had been agreed to in the contract (*Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] 3 SLR 857). The supervening event must have significantly changed the nature of the outstanding contractual rights from what the parties could reasonably have contemplated at the time of its execution, that it would be unjust to hold them to the strict contractual obligations. However, as this is an exceptional doctrine, mere hardship or mere increase in cost to perform the contract will not result in a frustrating event.

9 Neither party has relied upon the COVID-19 (Temporary Measures) Act 2020 which introduced temporary rental reliefs. Nor have they referred me to the Frustrated Contracts Act 1959 (2020 Rev Ed) which sets out the effects of contracts discharged by frustration. Further, neither is relying on a force majeure clause in the contract. But I note that the force majeure clause in the contract applies where the Premises are destroyed or damaged:

> (c) In case the demised premises or any part thereof shall at any time during the term hereby created destroyed or damaged by fire, lighting, riot, tempest, flood, civil commotion, act of God, explosion and which foregoing and any other cause(s) not caused by the negligence or default of the Tenant so as to be unfit for occupation and/or use then in every such case the rent hereby reserved or a just and fair proportion thereof according to the nature and extent of the damage sustained shall be suspended and cease to be payable in respect of any period while the demise premises shall continue to be unfit for occupation and/or use by reason of such destruction of damage.

10 This is not the case here as the Premises were fit for rental. As for the applicability of the doctrine of frustration, this is not a case of supervening impossibility. The primary obligation, which is for the plaintiff to lease the Premises and for the defendant to rent the Premises, is not rendered impossible by virtue of the COVID-19 measures. The plaintiff could continue to lease, and

the defendant could continue to rent. The issue of supervening impossibility for the doctrine of frustration to operate therefore does not arise.

11 However, a contract may also be frustrated when the effect of a supervening event thwarts the commonly held purposes by the parties when they entered into the contract. In the present case, the COVID-19 measures rendered the Premises no longer capable for its intended purpose, *ie*, as a music lounge, contrary to what the Tenancy Agreement has provided for at Clause 2(x), and contrary to the permitted usage of the Premises by URA. There is a triable issue as to whether using the Premises as a music lounge is a commonly held purpose shared by both parties. If so, the contractual obligations might have been rendered radically or fundamentally different from what was agreed upon in the contract, and that performance of the contract is futile in light of the supervening event.

12 All contract students will recall the case of *Krell v Henry* [1903] 2 KB 740. There, the parties entered a contract for the plaintiff to let a room to the defendant for the purpose of viewing a procession. The plaintiff Krell posted a notice that the windows to view the coronation procession of King Edward VII were available; the defendant Henry, having had sight of the notice and having been told that there was a good view of the procession from the flat's windows, proceeded to take the flat for two days. The King died before the procession and after the contract was signed. The question then was whether the contract to let the premises for the purpose of viewing the coronation was frustration. Vaughan Williams LJ held that the contract had been discharged by frustration. It could not have been reasonably contemplated by the parties that the coronation would not be held, and it is the shared purpose of both the hirer and the lessor for the premises to be used for the purpose of viewing the procession.

13 In the present case, although the primary obligation to lease has not been rendered impossible by COVID-19 nor the COVID-19 measures, there is a *bona fide* defence of the frustration of the shared purpose of using the Premises for a music lounge. On the face of the Tenancy Agreement, it may be said that there was a shared purpose of using the Premises to run a music lounge (see Clause 2(x)). At the time of the contract, parties may not have contemplated that the Premises might be prevented by a tiny coronavirus from being used as a music lounge. The fact that the plaintiff had to write in to the URA subsequently in April 2021 to ask for a temporary permission to use the Premises as a restaurant reinforces my view that the plaintiff had similarly intended the Premises to be used as a music lounge. With the imposition of COVID-19 measures and the closure of night-time entertainment venues, it was obvious that this purpose cannot be achieved. It may, however, transpire at trial that this purpose was not shared – or it might not; but for the purpose of this summary judgment application, I find that the defendant has raised a *bona fide* defence.

14 Thus, the plaintiff's application for a summary judgment is dismissed. Costs to be in the cause.

- Sgd -
Choo Han Teck
Judge of the High Court

Roy Paul Mukkam and Ng Yuan Sheng (DL Law Corporation) for the plaintiff;
Lim Tean (Carson Law Chambers) for the defendant.