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

[2022] SGHC(A) 13

Originating Summons No 8 of 2022

Between

Lachman's Emporium Pte Ltd

… *Applicant*

And

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

… *Respondent*

In the matter of 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 — Appeals — Leave — Leave to appeal]

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

[2022] SGHC(A) 13

Appellate Division of the High Court — Originating Summons No 8 of 2022
Woo Bih Li JAD and Chua Lee Ming J
25 February 2022

24 March 2022

Woo Bih Li JAD (delivering the judgment of the court):

Introduction

1 Lachman's Emporium Pte Ltd ("LE") and Kang Tien Kuan ("Kang") entered into a tenancy agreement dated 26 December 2019 ("TA"), with LE as the landlord and Kang as the tenant. LE commenced suit HC/S 474/2021 against Kang, claiming, *inter alia*, unpaid rent for March 2020 and August 2020 to April 2021. LE then applied, by way of HC/SUM 4310/2021 ("SUM 4310"), for summary judgment in respect of this claim. The judge below (the "Judge") dismissed this application, holding that Kang had raised a *bona fide* defence of frustration predicated on COVID-19 measures that took effect since 26 March 2020: see *Lachman's Emporium Pte Ltd v Kang Tien Kuan (trading as Lookers Music Café, a sole proprietorship)* [2022] SGHC 19 ("Judgment") at [5]–[6], [11] and [13]–[14].

2 AD/OS 8/2022 is LE's application for leave to appeal to the Appellate Division ("AD") against the Judge's decision in SUM 4310.

3 A preliminary question arises as to whether the leave application was filed in time. The Judgment was issued on 26 January 2022. The leave application was properly filed on 17 February 2022. Kang takes the view that it was filed out of time. LE takes the view that if it was filed out of time, an extension of time should be granted to it to file the application for reasons which are unnecessary to elaborate on. Suffice it to say that both seem to think that LE has only 7 days after the date of the Judgment to file the leave application pursuant to O 56A r 3(1) of the Rules of Court (2014 Rev Ed) ("ROC"). However, this provision is subject to O 56A r 3(2) which applies to a decision to which s 29B of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) applies. In turn s 29B applies to a decision after any hearing other than a trial of an action. Since the Judgment was issued for an application for summary judgment, it is O 56A r 3(2) which applies.

4 Under O 56A r 3(2) of the ROC, where there is no request for further arguments and no judgment or order relating to the decision is extracted, the time to file the leave application is 7 days after the 15th day after the decision is made. In the present circumstances, the 15th day after 26 January 2022 is 10 February 2022. Thereafter, under the ROC, where the prescribed period to take a step is 7 days or less, then Saturday, Sunday and public holidays are excluded. Thus, the last day for filing the leave application was 21 February 2022. Hence the leave application was filed in time and there is no need to consider any extension of time to do so.

5 LE's claim was for rental arrears of $366,400.00 and interest of $25,281.60 ("the Full Sum"). SUM 4310 was for summary judgment for the

Full Sum and other relief. Kang opposed the application saying that the TA was frustrated because the premises in question were to be used for the purpose of nightlife public entertainment ("the Business"). However, that purpose was frustrated because of the COVID-19 pandemic. Under certain regulations which came into force on 26 March 2020, all public entertainment outlets were prohibited from doing the Business from 27 March 2020. On 26 January 2022, the Judge dismissed SUM 4310 because it was arguable that the TA was frustrated. On 17 February 2022, LE filed its leave application to appeal to the AD.

6 On the substantive merit of the leave application, LE relies only on one ground, *ie*, that the Judge made an error because since the relevant regulations took effect from 26 March 2020, and Kang was required to comply with the measures from 27 March 2020, the Judge should have granted summary judgment for rent and interest for the period from 1 March to 26 March 2020 ("the Period") being $30,730.32 and interest of $3,073.03 ("the Reduced Sum"). Kang argues against this because he says that in fact the frustration occurred from late January 2020, and not just from the date the regulations came into force.

7 It is important to note that LE submits that there is a *prima facie* error in law, which is one of the grounds for which leave to appeal may be granted. In our view, if the Judge made an error, it would have been an error in applying the law to the facts and not an error of law as such. Generally speaking, the former is not a valid ground to seek leave to appeal.

8 In any event, LE had sought summary judgment for the Full Sum. It did not specifically inform the Judge that, as an alternative, it was seeking a summary judgment for the Reduced Sum for the Period. As LE had omitted to

do so, it is not surprising that the Judge did not grant summary judgment for the Reduced Sum. It is true that SUM 4310 was wide enough to include summary judgment for the Reduced Sum but that is not the point. It was incumbent on LE to bring the alternative to the Judge's attention. Having failed to do so, it is not open to LE to allege that the error was that of the Judge. Nevertheless, at trial, LE may pursue the claim for the Reduced Sum, as an alternative.

9 Had LE made it clear that it was seeking a summary judgment for the Reduced Sum, as an alternative, it would then have been open to Kang to stress that the frustration did not take effect only from the effective date of the regulations but earlier and for the Judge to address this issue specifically. As it was, Kang had vacillated as to whether the frustration took effect from 27 March 2020 or late January 2020 and the Judge did not draw a distinction between the two dates.

10 The lack of clarity in Kang's position is evident from the documents he filed in relation to SUM 4310 and Suit 474:

(a) Paragraph 3 of his Defence dated 15 July 2021 referred to frustration due to the COVID-19 pandemic at the end of January 2020.

(b) Unfortunately, Kang's affidavit of 15 October 2021 to oppose SUM 4310 muddied the waters somewhat. Paragraphs 10 to 18 referred to the regulations and paragraph 19 then stated, "[u]nder the circumstances, it was impossible for me to have continued … the Business upon the onset of the above regulatory prohibitions." That suggests he was relying on the regulations as the basis for frustration.

(c) In so far as Kang relied on paragraph 20 of his affidavit to resist the leave application, it stated:

> "Actually, from even before the imposition of the above prohibitions in March 2020, the Covid-19 outbreak had already badly hampered the Business. I recall that the Business had already begun to be badly affected by the outbreak, from as early as about the Chinese New Year on 25 and 26 January 2020."

However, this paragraph does not quite say it was impossible to carry on the Business then. Furthermore, assuming that that was what Kang meant, it seems to us that Kang could not make up his mind when the frustrating event arose. Did it arise from the effective date of the regulations, as suggested by paragraphs 10 to 19, or since the commencement of the pandemic allegedly in late January 2020, as perhaps suggested by paragraph 20?

(d) Furthermore, in Kang's second submissions below dated 17 January 2022, paragraph 4 stated that the operations of the premises for the Business were stopped by the government on 26 March 2020. There is no mention of an earlier date of frustration in that submission which suggests that he was relying on the regulations as the frustrating event.

11 As regards the Judgment, a holistic reading of it indicates that the Judge had identified the COVID-19 regulations as the frustrating event. However, as mentioned above at [9], the Judgment did not distinguish between the onset of the pandemic at the end of January 2020 and the implementation of the COVID-19 regulations on 27 March 2020:

(a) The Judgment at [11] referred to the COVID-19 measures rendering the premises no longer capable for its intended purpose.

(b) However, the first sentence of the Judgment at [13] stated that, "… 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" [emphasis added]. This is a reference not only to the regulations, but to the pandemic itself.
>
> (c) Then the fifth sentence of the Judgment at [13] stated that, "[w]ith the imposition of COVID-19 measures and the closure of night-time entertainment venues, it was obvious that this purpose cannot be achieved."

12 In so far as Kang raises the argument, to resist the leave application, that there is a tenancy deposit which exceeds the Reduced Sum, the deposit was not mentioned in his submissions to oppose SUM 4310. Be that as it may, this may also be because LE had not clarified that it had an alternative claim for summary judgment for the Reduced Sum. While the deposit was mentioned in LE's submission below, this was in the context of his claim for the Full Sum. Even then, LE had alternative positions. First, it argued that it was entitled to forfeit the deposit pursuant to clause 4(a) of the TA. Alternatively, it argued that the deposit was to be utilised for the reinstatement or restoration of the premises under clause 2(u) of the TA, but without elaborating as to what actually was done and how much was attributable to any alleged default of Kang. The question of the deposit and its effect, if any, on the claim for the Full Sum or the Reduced Sum will have to be carefully considered at trial.

13 On another point, the Judgment at [9] referred to the COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) ("the TM Act") which introduced temporary rental reliefs and said that neither party had relied on it. It is unclear if the reason why neither party had relied on the TM Act is that LE had already granted rental relief (under the TM Act) for four months, from April

to July 2020, to Kang as appears from the correspondence exhibited in the affidavit of M J Lalwani of 23 November 2021 filed in support of SUM 4310. Knowing that the Judgment had raised the TM Act, the parties should have clarified in their submissions for the leave application whether the TM Act was still relevant for their dispute. Hopefully, they will do so at some stage.

14 Whether the Frustrated Contracts Act 1959 (2020 Rev Ed), mentioned at [9] of the Judgment, is relevant is another question left unaddressed at present.

15 For these reasons, we dismiss the leave application. LE is to pay Kang costs of the application fixed at $4,000 all in with the usual consequential orders.

Woo Bih Li
Judge of the Appellate Division

Chua Lee Ming
Judge of the High Court

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