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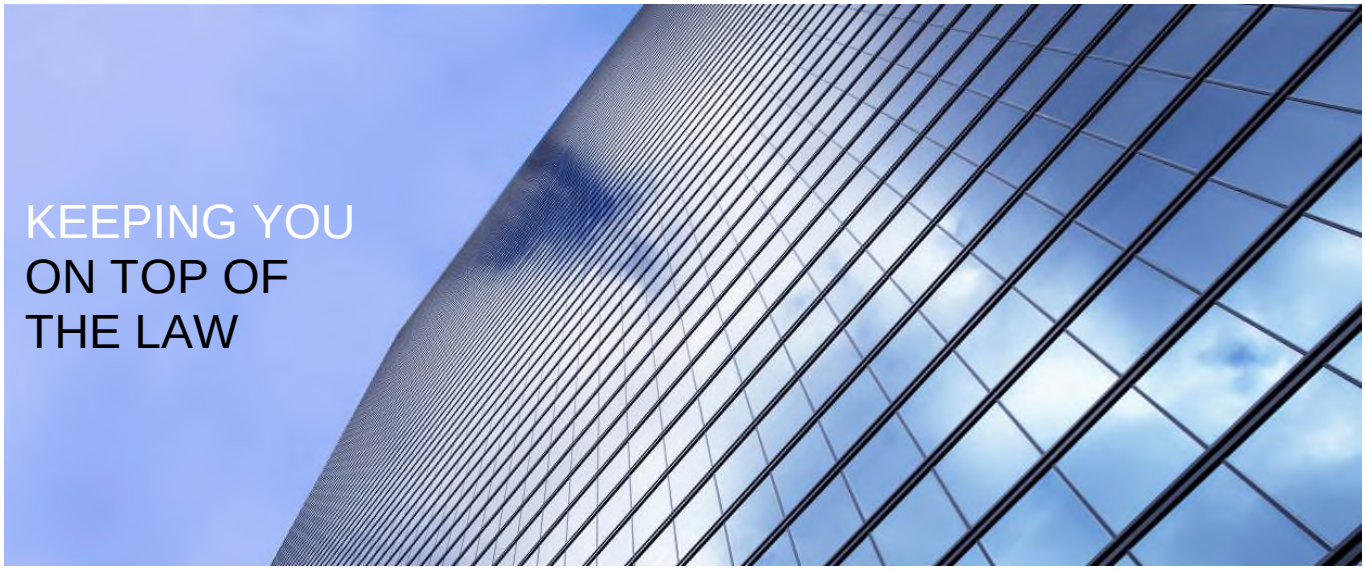

In Brief

Landlords beware: A landlord should not hinder quiet enjoyment of common property, and should be reasonably quick to confirm renewal of tenancy

Extending a landlord's obligation to give quiet enjoyment beyond leased spaces and implying obligations of reasonable expeditious renewal into tenancy agreements

DEALS

WONGPARTNERSHIP ACTS IN…

Manulife Financial Corporation's acquisition of PwC Building

WongPartnership acted in the acquisition by Manulife Financial Corporation from DBS Bank Ltd. of the entire equity stake in DBS China Square Limited which holds the landmark PwC Building located at 8 Cross Street in Singapore's central business district based on an agreed property value of S$747 million. The deal was reported as the first transaction of an entire Singapore office building in 2017, and one of the top two office deals in Singapore for the first quarter of 2017.

Partners from a number of WongPartnership's Practice Groups are involved in the transaction including Tan Teck Howe and Serene Soh from the Corporate Real Estate Practice, Chan Sing Yee and Anna Tan from the Corporate/Mergers & Acquisitions Practice, and Jenny Tsin from the Commercial & Corporate Disputes Practice.

Other recent matters that WongPartnership was involved in were:

DESCRIPTION	TYPE
Acquisition of a 50% interest in an entity (owned by ARA managed funds) which owns Capital Square office tower in Singapore's central business district.	Banking & Finance / Corporate Real Estate / Corporate / M&A
Acquisition by Straits Real Estate Pte. Ltd., the real estate investment arm of The Straits Trading Company Limited, of the entire issued share capital of Singapore-incorporated Nikko AM Japan Property I-I Pte. Ltd. and Nikko AM Japan Property I-II Pte. Ltd., which collectively own Splendid Namba II, a freehold residential property in Japan.	Banking & Finance / Corporate / M&A

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Home | Next Item >

DESCRIPTION	TYPE
Initial public offering of Dasin Retail Trust which raised S$160.1 million in the first pure-play China retail business trust listed in Singapore to be sponsored by a China-based group and the only China retail property trust providing direct exposure to the Pearl River Delta Region, and the grant of a RMB 400.0 million onshore syndicated term loan facility and US$ and S$ denominated offshore syndicated term loan facilities of up to the equivalent of S$430 million in aggregate secured against the initial property portfolio of the business trust to facilitate its initial public offering.	Equity Capital Markets / Banking & Finance
Bain Capital Private Equity's acquisition of Sealed Air Corporation's cleaning and chemicals systems division, Diversey Care, as well as its food hygiene and cleaning business for approximately US$3.2 billion.	Corporate / M&A

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CONTRACT

Court of Appeal says no to punitive damages for breach of contract

Court of Appeal holds that, as a general rule, punitive damages cannot be awarded purely for breach of contract

***PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal* [2017] SGCA 26 (Singapore, Court of Appeal, 11 April 2017)**

In the seminal decision of *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal*, the Court of Appeal held conclusively, for the first time, that, as a general rule, punitive damages cannot be awarded purely for breach of contract absent concurrent liability in tort.

Airtrust (Hong Kong) Ltd ("**Airtrust**") purchased a reel drive unit ("**RDU**") from PH Hydraulics Pte Ltd ("**PH Hydraulics**"), a designer, manufacturer and supplier of machinery for use in the marine and gas industry. Under the sale and purchase agreement ("**SPA**"), PH Hydraulics was to design and supply the RDU. After delivery, the RDU malfunctioned and Airtrust commenced an action against PH Hydraulics for breach of the SPA for not delivering an RDU of merchantable quality and fit for its purpose.

On appeal, the Court of Appeal reversed the High Court's findings of fraud, holding that, because of the serious implications of fraud, cogent evidence is required to establish such an allegation and there is no room for a finding that it *might* have happened. In the present case, the evidence did not justify any findings of fraudulent conduct. The Court of Appeal also declined to award punitive damages, holding that the present case was not a situation which merited an award of punitive damages.

The decision emphasises that "the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance" and that the general aim for damages for breach of contract is to compensate by putting the aggrieved party in the same position as if the contract had been performed and giving effect to the standard set by the contracting parties. This is in contrast to the availability of punitive damages in tort, which are awarded against a wrongdoer as a form of punishment. The Court of Appeal therefore took the view that to apply the concept of punishment to a breach of contract sits very uneasily with the concept of a contract which is a voluntary agreement entered into between willing parties.

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< Previous Item | Home | Next Item >

The Court of Appeal highlighted that there are additional or alternative avenues and bases for the award of damages or remedial options which are or may incidentally be, to some extent, deterrent in function, including an award for account of profits for breach of contract, and/or an award of damages for mental distress. The Court of Appeal also observed that where there is a heightened risk of recurrent reprehensible conduct (*e.g.*, insurance, employment and consumer transactions), such risks would be more appropriately managed by regulation rather than by an award of punitive damages.

WongPartnership acted for the successful appellant, PH Hydraulics & Engineering Pte Ltd.

Our Comments/Analysis

The Court of Appeal's decision closes off the question of whether a court may award punitive damages for breach of contract, a question left open by earlier Singapore cases: the Court will generally decline to do so, unless a truly exceptional circumstance arises.

Although the Court of Appeal observed that "it does not necessarily follow that [punitive] damages will not be awarded … simply because there had not been any fraud" and the Court of Appeal left open the possibility of a truly exceptional case arising which would necessitate a departure from the general rule, these statements have to be tempered against the Court of Appeal's finding that, even if fraud was established and even if such fraud had been planned and deliberate *in this case*, this would not have necessitated a departure from the general rule. This suggests that a high bar has been set for an award of punitive damages for breach of contract. It therefore falls to future cases to determine that upper limit.

The decision introduces clarity to contractual parties undertaking an assessment of potential damages for breach of contract *e.g.*, in considering litigation or settlements, the possibility of punitive damages may not necessarily need to feature in such assessment.

However, the general rule does not mean that contractual parties are free to breach contractual obligations with impunity. Damages for breach of contract will still need to be considered together with the other possible alternative remedies and causes of action available to an aggrieved party.

< Previous Item | Home | Next Item >

BUILDING AND CONSTRUCTION

No contractual entitlement to loss of profits where Public Sector Standard Conditions of Contract for Construction Works contract is terminated for convenience by employer

High Court considers the "termination for convenience" clause under the PSSCOC

***TT International Limited v Ho Lee Construction Private Limited* [2017] SGHC 62 (Singapore, High Court, 29 March 2017)**

In *TT International Limited v Ho Lee Construction Private Limited*, the High Court held that the "termination for convenience" of a building and construction contract entered into on the Public Sector Standard Conditions of Contract for Construction Works 2006 ("**PSSCOC**") does not entitle a contractor to recover for loss of profits on uncompleted work.

TT International Limited had issued a notice of termination under Clause 31.4 of the PSSCOC, terminating the employment of Ho Lee Construction Private Limited as contractor under a contract incorporating the PSSCOC. Clause 31.4 is a "termination for convenience" clause which grants the employer the power to terminate the contract even if the contractor is not in breach or default of the contract. In the event of such termination, Clause 31.4(2) of the PSSCOC obliges the employer to pay certified amounts:

- for all work executed prior to the date of termination; and
- any "*Loss and Expense*" suffered by the contractor in connection with or as a consequence of the termination.

The High Court held that:

- *Clause 31.4(2) of the PSSCOC exhaustively sets out the sums which a contractor is entitled to recover after (proper) termination under Clause 31.4(1) of the PSSCOC*. Clause 31.4(2) imposes a duty on an employer to pay the certified sums to the contractor, which in turn, confers on the contractor a right to receive only the said sums. Further, the employer's mere exercise of its contractual right to terminate the contractor's employment under Clause 31.4(1) does not constitute a breach or repudiation of contract. Upon such termination, a contractor does not, without more, acquire additional remedial rights at common law (*e.g.*, for loss of profits);

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< Previous Item | Home | Next Item >

- *in the event of termination under Clause 31.4(1), the contractor may not directly recover for loss of profits, but may recover a sum in lieu of profits*. Although, Clause 31.4(2) provides for the contractor to recover for "*Loss and Expense* suffered … in connection with or as a consequence of the termination", the phrase, as defined in Clause 1.1(q) of the PSSCOC, does not include loss of profits. Instead, the phrase "Loss and Expense" includes a sum comprising 15% of certain specified costs (*e.g.*, direct relevant costs of labour, plant, materials, or goods actually incurred) *inclusive of and in lieu of any profits*;

- accordingly, on a true interpretation of Clause 31.4(2), *the contractor may not recover for loss of profits for uncompleted work upon termination under Clause 31.4(1)*.

WongPartnership acted for the successful plaintiff, TT International Limited.

Our Comments/Analysis

Open questions

The decision confirms that a "termination for convenience" under the PSSCOC does not entitle a contractor to recover for loss of profits. However, the High Court left open certain questions: whether it is possible to imply a duty of good faith on an employer exercising its right under Clause 31.4, such that an employer may commit a breach of contract in purporting to terminate the contract under Clause 31.4 in some cases and a contractor thereby acquiring a right to recover for loss of profits upon such wrongful termination.

Exercise caution

Employers should therefore continue to maintain some caution in deciding whether or not to exercise its contractual right to "terminate for convenience" and ensure that it complies strictly with the procedure for such exercise under the PSSCOC.

Which form of construction contract to use?

The High Court also remarked that the 1999 FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer: the Construction Contract appears to take the same position in relation to loss of profits upon "termination for convenience" whereas the Singapore Institute of Architects' Articles and Conditions of Building Contract (Lump Sum Contract) (9th Ed, September 2010) and the Real Estate Developers' Association of Singapore Design and Build Conditions of

Contract (3rd Ed, October 2010) provide that the Contractor may recover for "loss of profits (if any) on any uncompleted parts of the Works". Employers may wish to take this difference into consideration in deciding on the form of construction contract they wish to adopt on a project.

CONTRACT

‘General’ indemnity clause – does it cover losses arising from non-payment of principal debt by borrower?

If lenders intend for indemnifiers to be liable for a borrower’s principal debt, then they should say so

***CIFG Special Assets Capital I Ltd v Polimet Pte Ltd and others (Chris Chia Woon Liat and another, third parties)* [2017] SGHC 22 (Singapore, High Court, 8 February 2017)**

In *CIFG Special Assets Capital I Ltd v Polimet Pte Ltd and others (Chris Chia Woon Liat and another, third parties)*, the High Court considered, among others, the scope of an indemnity clause in a series of loans structured as convertible bond subscription agreements (“**CBSAs**”). Pursuant to the CBSAs, CIFG Special Assets Capital 1 Ltd (“**CIFG**”) provided loans to Polimet Pte Ltd (“**Polimet**”) by subscribing for convertible bonds issued by Polimet. The initial shareholders of Polimet (“**Initial Shareholders**”) were party to the CBSAs. Polimet subsequently defaulted and CIFG claimed against the Initial Shareholders, under the following clause (“**Clause 12.1**”), for the sums owing by Polimet:

> 12.1 **General Indemnity.** *The Initial Shareholders and the Issuer* hereby jointly and severally agree and undertake to *fully indemnify and hold the Bondholder* … (the “**Indemnified Parties**”) *harmless from and against any claims, damages, deficiencies, losses, costs, liabilities and expenses* (including legal fees and disbursements on a full indemnity basis) directly or indirectly caused to the Indemnified Parties …. *or for any breach or alleged breach of any term or condition of this Agreement*.
>
> (emphasis added)

WongPartnership acted for the successful defendants. The appeal to the Court of Appeal is currently scheduled for hearing at the end of the year.

High Court

No indemnity for sums owing by Polimet

After considering the text of Clause 12.1 against the full context of the other terms of the CBSAs, the extrinsic evidence of all the parties’ pre-contractual negotiations and the commercial context, the High Court concluded that despite the broad language of Clause 12.1, it did not cover losses arising from Polimet’s default in its payment obligations.

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< Previous Item | Home | Next Item >

Text of the CBSAs

The High Court observed that the omission of any reference in Clause 12.1 to an obligation on the Initial Shareholders to be liable for Polimet's default in its payment obligations was glaring. If Clause 12.1 was intended to cover Polimet's default in payment, then this would have been the most important category of breach falling within the ambit of the clause, both in terms of commercial significance and quantum, and would have been expressly stated. Other clauses in the CBSAs which deal with repayment and default obligations made no reference to the Initial Shareholder's repayment obligations through Clause 12.1.

Relevant context

The High Court also considered the extrinsic evidence of the pre-contractual negotiations and the commercial context of the investment. In particular:

- the term sheets and the revisions made to clearly state that only two of the Initial Shareholders would provide personal guarantees and on their initial shareholding of 50%; and

- the discussions prior to the entry of the first CBSA showed that the Initial Shareholders were concerned about their personal liability and the personal guarantees, and that the parties did not consider Clause 12.1 as altering the commercial bargain with respect to the Initial Shareholders' liability for Polimet's debts.

The High Court found that none of the parties applied their minds to the issue when the CBSAs were executed, but if it was raised then, a reasonable business person would understand that Clause 12.1 was not an indemnity for Polimet's debts.

Our Comments/Analysis

Reconsidering indemnity clauses

The case is a reminder for lenders, bondholders and commercial parties that, indemnity clauses, their drafting, scope and effect and negotiation thereon, need to be considered carefully in every scenario.

< Previous Item | Home | Next Item >

Non-payment expressly

If an indemnity clause is intended to cover all losses arising from non-payment, including a borrower's principal debt, this decision suggests that such losses should be expressly stated. Extra care should also be taken to clearly spell out the scope and obligations of the indemnifier.

Conduct

The case illustrates the importance of pre-contractual negotiations and extrinsic evidence. An indemnified party should always consider drawing express attention to indemnity clauses and its intended scope. Negotiations and agreements reached on the understanding of the terms should be clearly documented.

< Previous Item | Home | Next Item >

LANDLORD AND TENANT

Landlords beware: A landlord should not hinder quiet enjoyment of common property, and should be reasonably quick to confirm renewal of tenancy

Extending a landlord's obligation to give quiet enjoyment beyond leased spaces and implying obligations of reasonable expeditious renewal into tenancy agreements

***iHub Solutions Pte Ltd v Freight Links Express Logisticentre Pte Ltd* [2017] SGHC 06 (Singapore, High Court, 23 January 2017)**

In *iHub Solutions Pte Ltd v Freight Links Express Logisticentre Pte Ltd*, the plaintiff, iHub Solutions Pte Ltd ("**iHub Solutions**"), had entered into a service agreement ("**Agreement**") with the defendant, Freight Links Express Logisticentre Pte Ltd ("**Freight Links**") to use certain spaces belonging to Freight Links and to use certain logistics services performed by Freight Links in the same building but outside the leased spaces.

It was undisputed that under the terms of the Agreement, iHub Solutions had an option to renew the tenancy and Freight Links accepted that there was an implied term for Freight Links to revert reasonably expeditiously to confirm the renewal, unless there was valid reason not to do so.

Issues

iHub Solutions alleged that Freight Links breached implied terms of expeditious renewal and quiet enjoyment by failing to expeditiously confirm the renewal of the tenancy and committing acts of hindrances to iHub Solutions' operations.

High Court's Decision

The High Court held that the question of reasonably expeditious renewal should be considered holistically and not solely in the context of when Freight Links reverted. Taking into account the acts of hindrances mentioned below which were intended to pressurise iHub Solutions to agree to a higher rental rate and Freight Links' delayed responses and actions, the High Court found that there was no genuine attempt by Freight Links to renew the tenancy. As such, Freight Links breached the implied term of reasonable expeditious renewal.

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< Previous Item | Home

The High Court also held that the implied term of quiet enjoyment is not confined to the direct use of the leased spaces and by hindering iHub Solutions' use of common property (including the following acts of hindrances), Freight Links had also breached the implied term of quiet enjoyment:

- restriction of car parking spaces for iHub Solutions;
- cessation of lorry parking for iHub Solutions;
- prevention of charging of electrical equipment at the usual charging point;
- cessation of storage and retrieval services previously provided to iHub Solutions pursuant to the tenancy agreement; and
- Freight Links' requests for iHub Solutions to provide risk assessment forms for the conduct of loading and unloading activities at the common areas, documentation for the parking of a disposal bin, copy of its public liability insurance although there was no need for such documentation.

iHub Solutions also claimed damages for breach of the Agreement under various heads of claims associated with its acquisition of and operations at another property (which it claimed to be alternative premises to the leased spaces) as a result of Freight Links' breaches. The High Court however held that the notion of fairness required iHub Solutions to mitigate its losses by notifying Freight Links of its proposed course of action if Freight Links did not cease the acts of hindrances and confirm the renewal. As iHub Solutions failed to do so, it was not entitled to claim compensation for the costs incurred in the acquisition of premises.

Our Comments/Analysis

Landlords need to be aware that the tenant's right to quiet enjoyment is not limited to the direct use of the leased premises but extend to common spaces outside the leased premises so long as such acts interfere with the tenant's use and enjoyment of the leased premises.

< Previous Item | Home

Whilst an option to renew is a commercially common term, it bears reminding that it obliges a landlord to confirm a renewal once the conditions are met. It will not serve the landlord to hinder or delay such renewal.

The decision also highlights the importance of claimants taking mitigating steps, *e.g.* by notifying the landlord of the same, prior to embarking on a course of action which may involve substantial expense.

< Previous Item | Home

WONG PARTNERSHIP

LAWWATCH

JUNE 2017

ISSUE 2/2017

SOME OF OUR OTHER UPDATES …

DATE	TITLE
5 June 2017	IPMT Client Update – PDPC update on Anonymisation and Healthcare
25 April 2017	Litigation & Dispute Resolutions Highlights 2016
20 April 2017	LegisWatch: Brand New Possibilities – Opening Up Third-Party Funding for International Arbitration in Singapore
20 April 2017	LegisWatch: A new way to carry on another's legacy: the new waiver for the use of legacy health information under the Human Biomedical Research Act

25 YEARS

WONG PARTNERSHIP

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ISSUE 2/2017

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