

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 3314 OF 1999

BETWEEN

PACIFIC PLACE HOLDINGS LIMITED Plaintiff

AND

SEALAND HOUSING CORPORATION Defendant

Coram: The Hon. Madam Justice Yuen in Chambers

Date of hearing: 29th September 1999

Date of delivery of decision: 29th September 1999

D E C I S I O N

There is before me a Notice of Appeal which states that the
Defendant intends to appeal against:

- (1) the Order of Master Lung made on 16th August
1999 that summary judgment be entered for the
Plaintiff;

- (2) the Order of Master Jones made on 13th September 1999 dismissing the Defendant's application for leave to file a Notice of Appeal against the said decision of Master Lung out of time, and
- (3) The Order of Master Barnes made on 20th September 1999 dismissing the Defendant's application for leave to file a Notice of Appeal against the said decision of Master Lung out of time and requiring the Defendant's solicitors to bear the Plaintiff's costs of the application.

The correct procedure to apply when a litigant wishes to appeal from a Master's decision to a judge out of time has been set out quite clearly in the Supreme Court Practice 1999 Vol. 1 at p.19 against marginal note 3/5/6. It says that the application to extend time should be made to the tribunal having jurisdiction in the matter to which the application relates. An application for extension of time for appealing to a judge in chambers should be made at the same time as the appeal, and the extension asked for in the Notice of Appeal.

That has not been done in the present case. Instead the Defendant has gone before two Masters asking for an extension of time which has not been granted.

However, today I have proceeded with the matter on the basis that instead of the Notice of Appeal which is before me, that was an application for an extension of time for filing a Notice of Appeal from

Master Lung.

Before I deal with the relevant principles it may be helpful briefly to summarize the facts which can be seen from the documents.

The Defendant was a tenant of a unit in a commercial building belonging to the Plaintiff landlord. The term of lease was 3 years from 12th May 1997 expiring on 11th May 2000. There is no dispute on the evidence that the Defendant had failed to pay rent and ancillary charges for the months of December 1998, January 1999 and February 1999.

On 26th February 1999, the writ was issued which stated at paragraph 11 that by reason of the Defendant's said breaches of the Tenancy Agreement as pleaded, "the Defendant's tenancy in respect of the Premises has become liable to be forfeited and is forfeited to the Plaintiff pursuant to Clause 8.01 of the Tenancy Agreement by the issue and service of this Writ".

Clause 8.01 provides among other things

"that if the rent and/or the air-conditioning charges or any other moneys payable hereunder or any part thereof shall be in arrear for (15) fifteen days after the same shall have become payable (whether formally demanded or not) ... it shall be lawful for the Landlord at any time thereafter to re-enter on and upon the Premises or any part thereof in the name of the whole and thereupon this Agreement shall absolutely determine but without prejudice to any right of action by the Landlord in respect of any outstanding breach or non-observance or non-performance by the Tenant of any of the terms of this Agreement."

The Plaintiff has asserted by the affirmation of Theresa Leung Nga Yee, an Assistant Property Manager of the agent of the Plaintiff that on 9th June 1999, the Defendant delivered the keys of the unit to the

agent. Therefore the Plaintiff's case is that it is entitled to mesne profits for the period from 1st March 1999 to 9th June 1999.

It is interesting to note that on 24th June 1999, the Plaintiff's solicitors wrote to the Defendant's solicitors in the following terms which seem to ignore the issue of the writ and the forfeiture altogether. The letter was in the following terms:

"As you are aware, we act for Pacific Place Holdings Limited in connection with a tenancy agreement in respect of the Premises dated 6th June 1997 ("the Tenancy Agreement") under which our client is the landlord and your client, Sealand Housing Corporation, is the tenant. By the Tenancy Agreement, your client agreed to rent the Premises from our client for a fixed term of 3 years commencing on 12th May 1997 and expiring on 11th May 2000 (both days inclusive) and subject to the terms and conditions therein contained.

We are instructed that in wrongful breach of the Tenancy Agreement, your client has been in arrears with the rental and other charges since the month of December 1998.

We are further instructed that on 9th June 1999, your client provided our client's agent, Swire Properties Management Limited, with the key to the Premises. We have advised our client that your client's failure to pay the rental, air-conditioning charges, rates and/or any other outgoings, accompanied by the quitting of the Premises before the expiry of the term of the tenancy, amounted to a repudiatory breach of the Tenancy Agreement. Take notice that our client hereby accepts your client's said repudiation. Accordingly, our client is discharged from further performance of the Tenancy Agreement. However, our client shall take all reasonable steps to re-let the Premises and shall claim against your client for all loss and damage that it may suffer as a result of your client's said repudiation.

It must be clearly understood that all our client's rights against your client for any outstanding breach or non-observance or non-performance of the Tenancy Agreement including (but without limited to) its right to claim payment of the rental and other charges in arrears are hereby expressly reserved."

Shortly thereafter on 28th July 1999, a summons for judgment

under Ord. 14 was issued by the Plaintiff. This letter of 24th June from the Plaintiff's solicitors was referred to in the Defendant's evidence in opposition, but other than that, there was no evidence put forward to dispute the Plaintiff's evidence; in particular, there was no evidence put forward *then* to assert that the Defendant had delivered keys to the Premises to the Plaintiff at any time earlier than 9th June. This was even though that date 9th June had been referred to in the affidavit in support of the application for summary judgment, and in the letter of 24th June.

Master Lung gave summary judgment to the Plaintiff on 16th August 1999 which was a Monday. The rules are clear that the Defendant would have 5 days to appeal; in other words, the time for filing the Notice of Appeal expired on 21st August. No Notice of Appeal was filed; in fact, nothing was done by the Defendant until 10th September when the Defendant's solicitors issued a summons before Master Jones for leave to file the Notice of Appeal out of time, which, as I have said, was refused by Master Jones on the ground that there was no evidence in support. There was then an affidavit filed in support, namely the affidavit of Jonathan Nicholas Green filed on 18th September 1999 which was then placed before Master Barnes for leave to file a Notice of Appeal out of time. That was not granted and the matter has now come before me today.

The Affidavit of Mr. Green states that in effect the Defendant's solicitors had been unable to take instructions from Mr. Barry Hansen, the Defendant's individual director (the other director being a company) who was in London on business from 16th August until he came to Hong Kong on 21st August. He was apparently in Hong Kong from 21st August until 26th August when he went to London and from there to the Turks and Caicos Islands. Apparently from Mr. Green's affidavit it was

not until 9th September that the Defendant's solicitors obtained instructions from Mr. Hansen to proceed with their appeal.

It would seem to me that there is nothing in Mr. Green's affidavit which explains the delay of the Defendant in appealing from Master Lung's decision. It is easy enough to communicate with a person in London, and indeed even in the Turks and Caicos Islands.

I would adopt with respect the relevant principles in the exercise of the Court's discretion to extend time for appealing an order of a Master to a judge in Chambers as set out in Chiu Sin-chung v. Yu Yan-yan, Angela and Another [1993] 1 HKLR 225 at 227. The relevant principles extracted and summarized by Keith, J. (as he then was) are as follows:

“(i) The Rules of Court must, prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a time table for the conduct of litigation”: *Ratnam v. Thamboo Cumarasamy* [1965] 1 WLR 8 at p. 12A-B, applied in *Revici v. Prentice Hall Inc.* [1969] 1 WLR 157 and by the Court of Appeal in Hong Kong in *Re Adhiguna Meranti* [1988] 1 HKLR 410.”

Pausing there, the question before me must be whether there was sufficient material in the affidavit of Mr. Green upon which the Court can exercise its discretion to extend time. I will deal with that later. Coming back to the relevant principles,

“(ii) Accordingly, the pre-requisite of an application to extend time is a clear statement as to the reasons for the time limits not having been observed and for any delay in then applying for an extension.”

Pausing there, the issue must be whether the affidavit of Mr. Green sufficiently and clearly explained the reasons for the delay in not issuing a Notice of Appeal within time. As far as delay in applying for an extension is concerned, I am prepared to accept for present purposes that irrespective of the procedure which was taken by the Defendant's solicitors, that the Defendant in effect applied for an extension albeit before Master Jones on 10th September 1999.

“(iii) Once the time for appealing has elapsed, the respondent who was successful in the Court below is entitled to regard the judgment in his favour as being final. If he is to be deprived of this entitlement, it can only be on the basis of a discretionary balancing exercise; however, blameless may be the delay on the part of the would-be appellant” see *Norwich Building Society v. Steed* [1991] 1 WLR 449, 454.

Applied to the present case, it cannot be said that the would-be appellant in this case was blameless. Indeed, it would appear that the *sole* reason for the delay in the filing of the Notice of Appeal in time was Mr. Hansen's delay in giving instructions to the Defendant's solicitors although I cannot see why it was that it would have taken so much time to consider the simple question of whether to file a Notice of Appeal, a Notice of Appeal which does not even require inclusion of grounds of appeal.

“(iv) The factors which are normally to be taken into account in that balancing exercise are

- (a) the length of the delay;
- (b) the reasons for the delay;
- (c) the chances of the appeal succeeding if an extension of time for appealing is granted, and
- (d) the degree of prejudice to the would-be respondent if the application for extension is granted.” See Steed at p.454h”

Pausing here, the length of the delay here was 20 days.

Although it may be said that 20 days is not a very lengthy period, it is, however, 4 times the period which has been set down by the rules as being the period for appealing a Master's decision to a judge in chambers.

As for the reason for the delay, I have indicated that the difficulty in getting instructions from Mr. Hansen does not appear to be any reason at all for the delay which has been caused. I shall deal with the chances of the appeal subsequently. As for the degree of prejudice to the would-be respondent if the application for an extension is granted, I refer to a subsequent passage in these relevant principles.

I shall then go straight to paragraph 6 (skipping paragraph 5 in Keith J.'s principles).

“(vi) although the existence of prejudice to a would-be respondent is a ground for refusing an extension of time, the absence of prejudice to a would-be respondent is not a ground for extending the time, re: Adhiguna Meranti page 411.”

“(vii) As for the merits, they will play little part in the balancing exercise if the delay is short and is wholly excusable, but where the delay is substantial and is not wholly excusable, much more merit is required to overcome it. Steed at p. 455 distinguishing Palata Investments v. Burt [1985] 1 WLR 942 from Rawasdeh v. Lane Court of Appeal Civil Division Transcript no. 327 of 1988.”

Turning then to the merits of the present appeal, in my view, the merits in this case are nowhere near sufficient to justify the delay in lodging a Notice of Appeal.

The first submission made by Miss Langley was that the Plaintiff could not claim arrears of rent and purport to forfeit the lease at the same time. I am not sure what Miss Langley's authority for this

proposition is. However, it seems quite clear to me from a passage from Hill & Redman Law of Landlord and Tenant at para. 9062 that as with forfeiture by peaceable re-entry, forfeiture by service of proceedings does not affect claims pursuant to the tenancy agreement which had accrued before the forfeiture.

This is supported by the proviso in clause 8.01 of the Tenancy Agreement here, which stated that the agreement shall absolutely determine upon forfeiture, but without prejudice to any right of action by the landlord in respect of any outstanding breach or non-observance or non-performance by the tenant of any of the terms of the Agreement.

The next point taken by Miss Langley was that there was a waiver of any breach on the part of the Defendant because of the claim for rent in arrears. She relied on the case of Segal Securities v. Thoseby 1963 1 QB 887. However, it is clear that in the present case, the rent which was being claimed was rent *in arrears* and therefore there was no question of any waiver of those rent in arrears by virtue of the forfeiture.

Thirdly, in relation to the letter of 24th June 1999 from the Plaintiff's solicitors, although it seems quite remarkable that such a letter should have been written after the issue of the writ and the forfeiture of the lease, the law is quite clear that a forfeiture is irrevocable. Therefore, once the writ has been served on the Defendant, any letter which assumes the continued existence of the lease would be of no effect. The irrevocability of a forfeiture of a lease is set out quite clearly in Hill & Redman at paragraph 8968. The editors say that "the importance of reviewing all the options before choosing to forfeit the lease is illustrated by the case of GS Fashions Ltd v. B&Q plc [1995] 4 All ER 899. In that case, the landlords served proceedings containing a claim for forfeiture,

then appreciated that the tenant would not seek relief, but would be glad to be released from the obligations. It was held that, once forfeiture is effected, the lease is forfeit: simply amending the pleadings to delete the claim could not avoid a bad decision to forfeit instead of suing on the covenants”.

Pausing there, it seems to have been suggested by Miss Langley at an early stage of her submission that in fact the lease had not been forfeited because of this “twilight period” which occurs especially when forfeiture is by way of service of proceedings. However, it is clear to me from paragraphs 9042 to 9046 of Hill & Redman that this twilight period has no effect on the Plaintiff’s claim in the present case. There has been no application for relief from forfeiture and since judgment has been given, the giving of a judgment relates back to the date of service of the writ, so that the tenancy is determined then, but as at the earlier date.

Finally, there is also the point of the delivery of the keys. The second affirmation of Mr. Alexander Kaung the Defendant’s solicitor says at paragraph 6 that “on 24th September 1999 my firm was advised by Mr. Hansen who has been making enquiries from his staff, that the Defendant moved out from the premises to its new office in Pudong, Shanghai on or around 13th February 1999 and that the keys to the premises were soon thereafter returned by courier delivery to the Plaintiff and in any event by the end of February 1999”. Mr. Kaung carries on to say that Mr. Hansen and his staff are presently making efforts to retrieve a copy of the courier shipping bill evidencing the return of the keys to the Plaintiff, and he said that *if* it can be shown that the keys to the premises were delivered by courier and received by the Plaintiff before 26th February 1999, then the entirety of the claim in this action has been unnecessary.

In relation to this issue of the delivery of keys and delivery of vacant possession, I note from Mr. Kaung's affirmation that he has not sought to identify the member of staff who is said to have given the information to Mr. Hansen, nor has he sought to identify why it is that that member of staff would have knowledge of the dates when the keys were delivered. No effort has been made so far to even provide a letter from such member of staff, or to provide any sort of evidence of the use of a courier service for the delivery of the keys.

I have to note that this is the first time that an earlier delivery of keys had been referred to since 24th June 1999, when the letter from the Plaintiff's solicitors referred to 9th June for the delivery of keys, and there was nothing in the Defendant's affidavit in opposition before Master Lung to dispute that date, notwithstanding the reference to that date again in the affirmation of the Deputy Property Manager of the Plaintiff's agent in support of the application for summary judgment. Other than an assertion that Mr. Hansen and his staff are "presently making efforts to retrieve a copy of the courier shipping bill", there is no evidence which proves the delivery of keys to the Plaintiff or to his agent at any time earlier than on 9th June 1999.

Therefore, taking all the above matters into consideration, I find that undertaking the balancing exercise set out in Chiu Sin Chung that no extension of time ought to be given to the Defendant for the filing of a Notice of Appeal from the decision of Master Lung.

Finally, I would simply note that Miss Langley has referred me to the deposit which had been paid by the Defendant to the Plaintiff when the Tenancy Agreement was entered into. It is clear from Clauses 9.01, 9.02 and 9.03 of the Tenancy Agreement that there is no provision

for the forfeiture of the deposit but that the landlord has the right to deduct any charges from the deposit; and subject as aforesaid, the deposit should be refunded to the tenant by the landlord.

It is not disputed by Mr. Reyes that the deposit, or the balance thereof after any such deductions, should be returned to the Defendant. I do not see that it is necessary to set aside any part of the judgment given by Master Lung, given that there is no pleaded set off or counterclaim, and therefore the order I will make is simply that the Defendant's application for an extension of time for the filing of the Notice of Appeal from the order of Master Lung made on 16th August 1999 be dismissed.

The application will be dismissed with costs to the Plaintiff.

(MARIA YUEN)
Judge of the Court of First Instance
High Court

Mr. A. T. Reyes instructed by M/s Johnson Stokes & Masters for the Plaintiff

Ms. Caroline Langley instructed by M/s Richards Butler for the Defendant