Top Ten Entertainment Pte Ltd v Lucky Red Investments Ltd
[2004] SGCA 43

Case Number : CA 137/2003

Decision Date : 15 September 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J; Yong Pung How CJ

Counsel Name(s) : Michael Hwang SC and Ginny Chew (Allen and Gledhill) for appellant; Peter Pang (Peter Pang and Co) for respondent

Parties : Top Ten Entertainment Pte Ltd — Lucky Red Investments Ltd

Evidence – Admissibility of evidence – Hearsay – Whether judge relying on hearsay evidence

Evidence – Documentary evidence – Whether judge gave sufficient weight to contemporaneous documentary evidence

Landlord and Tenant – Rent and service charges – Apportionment – Apportionment of rental for rent of premises and hiring charges – Hiring charges not reflective of value of inventory – Whether hiring charges designed to defraud revenue authority – Whether lease agreements amounting to illegal contracts – Whether tenant entitled to recover hiring charges on basis that it was not in pari delicto with landlord – Whether tenant entitled to recover hiring charges as money paid under mistake of law

15 September 2004

Chao Hick Tin JA (delivering the judgment of the court):

1 The dispute which gave rise to this action concerned a number of tenancy agreements which the appellant, Top Ten Entertainment Pte Ltd (the tenant) and the respondent, Lucky Red Investment Ltd (the landlord) had entered into. The High Court (see [2004] 2 SLR 199) refused the appellant's claim for a refund of certain hiring charges which it had paid to the respondent. On the other hand, the court allowed the respondent's counterclaim against the appellant for certain arrears of rent. Being dissatisfied with both these decisions, the appellant appealed to us. After hearing the parties on 29 July 2004, we dismissed the appeal as regards the hiring charges but allowed the appeal as regards the arrears of rent. The result of this partial success was that the appellant would not be required to pay the respondent the alleged arrears of rent. We now give our reasons.

The facts

2 The respondent, a Hong Kong company, was at all material times the owner of the premises known as #04-35/36 and #05-18A Orchard Towers located at 400 Orchard Road, Singapore 238875 ("the premises"). The appellant, a Singapore company, was the tenant of the premises from December 1984 and was using the premises to operate a discotheque. The man behind the appellant was one Mr Peter Bader ("Bader"), its managing director.

3 From December 1984, the appellant had occupied the premises pursuant to seven tenancy agreements, the particulars of which were as follows:

	Date of Agreement	Rental for premises ($)	Hiring charges ($)	Overall rental ($)	Note

1	1/12/84 –1/12/87	28,000	4,000	32,000	Landlord: Premier Theatre
2	1/12/87 –1/12/90	33,800	4,600	38,400	Landlord: Lucky Red
3	1/12/90 –30/11/93	46,000	9,400	55,400	
4	1/12/93 –30/11/94	58,000	12,000	70,000	
5	1/12/94 –30/11/97	58,000	12,000	70,000	No written lease but agreement to proceed on terms of previous lease.
6	1/12/97 –20/11/00	55,000	15,000	70,000	Lease by way of letter from Lucky Red to Top Ten
7	1/12/00 – 30/11/03	51,000	11,000	62,000	Landlord: Leivest

4 As can be seen from the table above, from the very first tenancy agreement, the rent payable was divided into two components. One component was attributed to be for the rent of the premises and the second for the hiring of furniture and fittings. There was an inventory of furniture and fittings which was set out in a schedule to each tenancy agreement. The inventory included, *inter alia,* an air-conditioning plant, stage and electrical fittings.

5 We should add that when the appellant first became the tenant of the premises, the respondent was not yet the owner thereof. The respondent ceased to be the owner of the premises on 12 March 2002. But nothing in the action, or in the appeal before us, turned on this.

6 By the time the third tenancy agreement was entered into in 1990, many of the items listed in the inventory in the first tenancy agreement had either been discarded or could not be used. Notwithstanding that, the inventory attached to that and subsequent tenancy agreements remained the same and continued to list such items.

7 The issues in this appeal concerned mainly the sixth tenancy agreement covering the period 1 December 1997 to 30 November 2000. The total monthly rent payable was $70,000, with $15,000 being specified as hiring charges.

8 In 1998, this region was embroiled in a financial crisis which adversely affected business generally. Thus, Mr Loi Kai Meng ("Loi"), who effectively owned the respondent company, agreed initially, pursuant to a request by Bader, to reduce the overall rent per month from $70,000 to $65,000 until the end of 1998. However, because of the worsening business environment, Loi wrote on 24 February 1999 to give a further reduction to the appellant. He stated:

> Owing to the economic crisis, we have agreed to accede to your request and reduce the rental temporary [*sic*] to S$58,000 per month from 1st January 1999 to 30th June 1999.

From 1st July 1999, the rental would revert back to the original amount of $70,000 per month as per the Tenancy Agreement dated 1 August 1996.

In this respect, [we] would appreciate [it] if you could let us have the shortfall of $4,000 for January 99's rental to be included in the February 99's rental cheque.

9 It would appear that subsequently, there were conversations between Bader and Loi. According to Bader, Loi agreed to set the overall monthly rent at $56,000 instead of $58,000 and also to apply the reduced rent until the end of the then current term, *ie*, end November 2000. Loi disputed this assertion. He said that while he did later in 1999 orally agree to extend the reduction in rent up to December 1999, he did not agree to apply the reduction up to November 2000.

10 Be that as it may, the appellant continued to pay only the sum of $56,000 for the months from January to June 2000. Moreover, notwithstanding the fact that the appellant was always late in its payment of rent, the respondent never raised with the appellant the fact that the payments made by the appellant for the first months of 2000 were short. On 6 September 2000, even when the respondent wrote expressing its dissatisfaction with the appellant being persistently late in making payment, and at that point the July and August 2000 rent had yet to be paid, the respondent merely warned the appellant of its intention to repossess the premises. No mention was made of any shortfall.

11 On 8 September 2000, the appellant replied to the respondent as follows:

Please note that we have always paid rent on a monthly basis. We have omitted the payment in April and June 1999, this must have been due to an oversight.

I would like to recall our conversation regarding the rental reduction you have allowed us to take place from June 1999 onwards until the expiry of the existing contract.

Since then until the expiry of the present lease agreement, you have allowed us to pay S$56,000 instead of S$70,000 per month.

As for repossession of the premises you seem to forget that we have a Rental Agreement starting the same day the present agreement ends. You did sign the agreement and it has been engrossed with stamp duty paid. [This was a reference to the seventh tenancy agreement which had been executed in August 1998.]

…

Therefore, we will continue to occupy the premises as agreed. And continue to pay the rent.

12 On 19 September 2000 Loi replied to the appellant as follows:

We refer to the rental of the above premises and note the September rental is still outstanding.

We have agreed to rental reduction from $70,000 to $58,000 from January 1999 to June 1999, however to assist you further during the economic crisis, we extended the period of reduction to December 1999. However, we note you have been paying us rental of $56,000/month for period January 1999 to December 1999.

The rental reduction will no longer apply and has to revert back to $70,000/month with effect

from January 2000. However, again, we note you have paid only $56,000/month. In this respect, we need to meet to resolve the issue and review the Tenancy.

Meanwhile, please bear in mind rental for the premises is due and payable by the 8th of each month and appreciate you pay us September 2000 rental of $70,000 promptly.

13 Bader gave a rejoinder on 22 September 2000:

It is with regret and disappointment to note that our relationship is turning sour. What a shame. After more than 15 years since December 1984 as your loyal tenant and friend.

…

You told me more than once that the [r]ental reduction will be in place until the end of this [t]enancy agreement. I am surprised to find that you now all of the sudden change your mind and want the full [r]ental again. This amounts to you reneging on your agreement which is not right.

We shall continue to pay as agreed the amount of $56,000 until the end of November and from then on the [r]ental agreed in the [seventh] Tenancy Agreement.

14 On the respondent's reckoning then, the appellant owed arrears of rent amounting to some $186,000. On 12 September 2001, the respondent's solicitors demanded payment of the same. Part of the outstanding rent was paid. On 12 March 2002, Leivest International Pte Ltd ("Leivest") became the new owner of the premises. Disputes arose between the new owner and the appellant. An action was instituted by Leivest, followed by a counterclaim by the appellant. Leave was then obtained to make the respondent a party to those proceedings. Happily, the disputes between the appellant and Leivest were settled, leaving outstanding two issues which concerned only the appellant and the respondent. First was the appellant's claim for a refund of the hiring charges (subject only to the limitation period) on the ground that the hiring charges were paid pursuant to an illegal transaction. Second was the respondent's claim for the shortfall of the rental paid in respect of the period January to November 2000.

15 As indicated at the outset, the appellant's claim for a refund of the hiring charges was rejected. However, the respondent's claim for the shortfall in rent was allowed by the court below. The appellant thus appealed to us in respect of both these orders which were not in its favour.

Hiring charges

16 The appellant alleged that the apportionment of the overall rent payable under each of the tenancy agreements into two components, the rent for the premises and the hiring charges for furniture and fittings, was designed to distort revenue as it would mean that the respondent would pay less for property tax. The respondent had submitted its return to the revenue authority in the same manner. The appellant emphasised the fact that the amount allocated for hiring charges had no relation at all to the nature, value or quantity of the furniture and fittings provided by the respondent. There was no stock-taking at the time when each new tenancy agreement was entered into. The hiring charges were fixed by the respondent purely as a percentage of the overall rent. This could be seen from the fact that in respect of the first tenancy agreement, the hiring charges were fixed at $4,000 and with every increase in overall rent with each new tenancy agreement, the amount set aside for hiring charges also increased even though no new furniture and fittings had been installed or added. Indeed some items of furniture and fittings had been discarded because of wear and tear. Some items were no longer on the premises and yet they remained in the inventory.

17 Bader claimed that he did not realise the tax implications of separating the overall rent into the two components until October 2001 when the appellant's solicitors advised him of the same. What he was trying to say was that as the matter of apportioning the overall rent into the two portions did not concern him, he did not bother to find out why it was done in this manner.

18 On the other hand, Loi deposed that due to oversight some items which should have been deleted from the inventory had not been removed from it. In any case, the air-conditioning system, among others, was still being used at all relevant times. He agreed that in fixing the figure for hiring charges he did not have regard to the actual worth of the furniture and fittings but only the practice of landlords of adopting a percentage of the overall rent as hiring charges.

19 In any event, the appellant argued that the value of the items of furniture or fittings which were still being used in the premises would have, by the time the fifth tenancy agreement was entered into and applying the normal depreciation formula, been reduced substantially or even to zero. In any case, the hiring charges could not have been more than $4,000, which were the hiring charges under the first tenancy agreement.

20 It was not in dispute that Loi negotiated with Bader only as regards the overall rent figure. Loi never discussed with Bader the apportionment of the overall figure. Quite rightly, as Bader himself said, this aspect did not concern him.

21 The judge below, having noted how the parties entered into the various tenancy agreements and how the overall rent was apportioned, nevertheless felt that whatever were the items which remained on the premises, they would have had some value and the respondent would have been entitled to charge for the same. Perhaps the figure allocated for that was too high. However, the fact of the matter was that all these were declared to the revenue authority which had the clear opportunity to scrutinise each of the tenancy agreements if it had wanted to. In any event, Bader and, in turn, the appellant, were clearly parties to the arrangement.

22 Counsel for the appellant argued that it did not matter whether the revenue authority was, in fact, deceived. The law should not enforce contracts which have as their object, the hoodwinking of public officials. The fact that the respondent had declared the apportionment to the revenue authority did not detract from the illegal intent. In his submission, the crucial question was whether the information contained in each tenancy agreement was basically false to the knowledge of the party who created and tendered it. Once it was shown that the hiring charges could not be justified, the illegal intent to defraud would have been established. The appellant's counsel further contended that, as the appellant was not *in pari delicto* with the respondent, it was entitled to recover. In the alternative, counsel said that the appellant should be able to recover the money paid as money paid under a mistake of law.

23 It was clear to us that in fixing the quantum for the hiring charges, no objective yardstick was used by Loi. He just adopted what he thought was the general practice in the rental property market. None of the approaches discussed in *Chartered Bank v The City Council of Singapore* [1959–1986] SPTC 1 and *Tan Chong Realty (Pte) Ltd v Chief Assessor* [1959–1986] SPTC 338, as being the proper methods to arrive at the annual value of a property, were adopted. But it is important to note that these two cases were concerned with the review of the annual value of property fixed by the Chief Assessor which was being challenged by the property owner. That was not the case here.

24 There was no doubt that the amount set aside in the later tenancy agreements as being hiring charges was excessive. But the parties would also have known that these particulars would have to be submitted to the revenue authority which would make its own independent assessment.

The full rent, together with the apportionments, were submitted by the respondent and the tenancy agreements were also available to the revenue authority for its examination. No attempt was made to hide the amount set aside as hiring charges. The revenue authority knew the amount of the overall sum received by the respondent in respect of the period covered by each tenancy agreement. It was clear to us that the revenue authority was in no way deceived.

25 It was of interest to note that, even though the revenue authority was informed in respect of the period covered by the seventh tenancy agreement that the overall rent per month was $62,000, with $51,000 (annually $612,000) being the rent for the premises and $11,000 being the hiring charges, the revenue authority assessed the annual value of the premises at only $588,000. The reason given by the revenue authority for this downward revision was that it was "in line with the general reassessment of similar properties." This showed that the revenue authority exercised an independent judgment.

26 The appellant relied upon three cases to argue that each of the tenancy agreements had the object of defrauding the revenue authority, *ie*, *Miller v Karlinski* (1945) 62 TLR 85 ("*Miller*"), *Napier v National Business Agency, Ltd* [1951] 2 All ER 264 ("*Napier*") and *Alexander v Rayson* [1936] 1 KB 169 ("*Alexander*"). However, in none of these cases, which we will now examine, was the subject matter or fact situation anywhere close to the present case.

27 *Miller* was a case where the contract of employment provided that the employee was to recover from his employer the tax which the employee would be liable to pay on his salary and this amount was to be treated as travelling expenses. It was clear beyond doubt that the whole scheme was to under-declare the wages of the employee. The Court of Appeal held, reversing the judgment of the County Court, that the entire contract was illegal as it had as its object the defrauding of the revenue authority and thus was contrary to public policy. The entire contract was not severable and the court refused to entertain an action to enforce any of its terms. Unlike the present case, it was clearly the parties' intention in *Miller* to keep the existence of the employment contract from the revenue authority.

28 *Napier* was also concerned with a contract of employment. There, the contract, besides providing a salary of £13 a week also provided for £6 a week for expenses, an amount which was far in excess of what the parties knew would be the employee's actual expenses which could not have exceeded £1 a week. Indeed, except on very exceptional occasions, the employee would not have incurred any expenses. The entire £6 paid was reflected in the accounts as reimbursement of expenses. Clearly the scheme was to enable the employee to pay tax only on £13, instead of £18 or £19. When the employee's employment was summarily terminated, he sued for the wages due in lieu of notice. The English Court of Appeal held that the entire contract was unenforceable as it was contrary to public policy, having as its object the evasion of tax. Again, the critical difference here was that the parties acted on the scheme and never intended to, and never did, let the revenue authority have any insight into the scheme. Of course, if they had informed the revenue authority of the scheme, that would have undermined the whole purpose of the scheme. Thus, the scheme had to be kept secret.

29 In *Alexander,* the defendant agreed to take a flat from the plaintiff at a rent of £1,200 a year, which sum included the provision of certain services by the plaintiff. The defendant was asked to sign two documents. One was for the lease of the flat with certain services at £450 a year and the other for the provision of certain services at £750 a year. Except for the addition of a fridge, the services to be provided under the agreement were the same as those under the lease. When the defendant defaulted, the plaintiff sued under the two documents. The English Court of Appeal held that, although there were two documents, there was in fact only one transaction, the object of

which was to deceive the Westminister City Council into thinking that the rent for the flat was only £450. The parties did not intend to disclose the existence of the agreement to the Council so that the Council would not know about the payment of £750. The court stated (at 177):

> [I]t is obvious that the plaintiff attempted to perpetrate a gross fraud upon the rating authorities and through them upon the Inland Revenue. … [T]he plaintiff in causing the defendant's tenancy to be created and constituted by the unusual method that he adopted intended by means of that device to perpetrate the fraud.

30 It would be seen that the circumstances in all these three cases were quite different from those of the present. Even in *Alexander*, which related to the renting of premises, the critical fact which differentiated the present case from that in *Alexander* was that here, it was always the intention of the parties to disclose the full terms of the tenancy agreement to the revenue authority. Our case here would be nearer to *Alexander* if the tenancy agreement had provided that the rent was $ABC, and there was a further understanding that there would be an under-the-counter payment of $XYZ. Thus, we agreed with the judge below that the three cases were irrelevant and had no application.

31 Accordingly, we held that the successive tenancy agreements were not illegal contracts. This would have sufficed to dispose of the appellant's claim for the refund of the hiring charges.

32 However, even if we were to hold that the arrangement set out in the tenancy agreements were illegal in that its object was to evade tax, we still did not think that the appellant was entitled to a refund of the same. There was no mistake as to the amount which the appellant had agreed to pay for the use of the premises, with whatever furniture and fittings were there. At the time each new tenancy agreement was entered into, the parties negotiated the overall rent that should be paid by the appellant. There was no misunderstanding as to the sum on each occasion. As far as the appellant was concerned, it could not care less how the respondent would apportion the overall sum, if at all. The principle of law is that the court will not assist a party to enforce an illegal contract: *ex turpi causa non oritur actio*. Here, the respondent was not seeking to recover any hiring charges; it was the appellant who, having paid what it had agreed to pay, wanted a refund on a portion of that payment on the pretext that such a payment was contrary to law. If indeed what was done by the respondent constituted an offence, the remedies lay in the hands of the revenue authority.

33 The law draws a distinction between an action brought to enforce an unlawful agreement and one brought to assert a right to property already acquired under such an agreement. In *Taylor v Chester* (1869) LR 4 QB 309, the defendant, who was the keeper of a brothel, had supplied wine and supper to the plaintiff "for the purpose of being consumed there by the plaintiff and divers prostitutes in a debauch there, to incite them to riotous, disorderly, and immoral conduct" (at 312). After the debauch was over, the plaintiff was not willing to pay the full amount at once and instead, left with the defendant half of a £50 note as security. Subsequently, he decided not to pay at all and sought, by an action, to obtain the return of the half bank note. In spite of the illegality of the agreement under which the half bank note had passed, as property thereto had in fact passed to the defendant, the court held that the latter was entitled to keep it.

34 In any event, for the appellant here to recover the hiring charges, it would have to rely on the various tenancy agreements which it said were illegal. In this regard, we would refer to the decision of the House of Lords in *Tinsley v Milligan* [1993] 3 All ER 65 where their lordships, by a majority, held that where property interests were acquired as a result of an illegal transaction, a party to the illegality could recover by virtue of a legal or equitable property interest if, but only if, he could establish his title without relying on his own illegality even if it emerged that the title on which

he relied was acquired in the course of carrying through an illegal transaction. That case related to property. We could see no reason why that ruling could not apply to a case where the "property" was money.

35 A case which involved the payment of money under an illegal contract and in which payment was held to be irrecoverable is *Parkinson v College of Ambulance, Limited and Harrison* [1925] 2 KB 1. There, the secretary of the defendant charity fraudulently represented to the plaintiff that the charity was in a position to divert the fountain of honour in his direction and to procure him at least a knighthood, if he would make an adequate donation. After a certain amount of bargaining, the plaintiff paid £3,000 to the charity and undertook to do more when the knighthood was forthcoming. However, he did not receive any such honour and he sued for the return of the money as money had and received to his use. As the transaction was manifestly illegal to the knowledge of all the parties, Lush J rejected the claim.

36 However, the appellant sought to argue that it was not *in pari delicto*. While Bader did not care how the respondent would apportion the overall rent, he would have known, as the various tenancy agreements (including the inventory) were drafted by the solicitors acting for the appellant, why the overall rent was divided into two portions. Over the years, Bader did not raise any query as to the division of the agreed rental and was quite happy to leave things to Loi even though the furniture and fittings would have, by the mid-1990's, applying the normal rules, depreciated completely. Appreciating that, he nevertheless did not question the respondent why the latter had, in the fourth, fifth and sixth agreements, enhanced the amount set aside for hiring charges. More importantly, there was evidence that he appreciated how the hiring charges were fixed. In a letter written by Bader in June 1992 to his solicitors, he told them that the respondent would decide on the issue of hiring charges and that these charges would increase proportionately with the increase in rent. Therefore, he knew that the amount to be set aside for the hiring charges had nothing to do with the market value of the items in the inventory. He further knew that the items in the inventories of the fourth and later tenancy agreements would not be correct. Thus, we were unable to see how Bader could *bona fide* claim he had no knowledge why the overall rent agreed upon between him and Loi was split up in that manner. He was very much privy to what Loi had planned to do and was *in pari delicto* and should not be allowed to claim it back. There was no allegation of duress or that the respondent stood in a fiduciary position towards the appellant. This would be consistent with what the English Court of Appeal said in *Alexander v Rayson* at 185–186:

> As was said by Parke B in *Scarfe v Morgan* [(1838) 4 M&W 270 at 281; 150 ER 1430 at 1435] … : "if the [illegal] contract is executed, and a property either special or general has passed thereby, the property must remain." The plaintiff on the other hand, could not maintain his action without asserting and relying upon the unlawful agreement. He could not ... recover without showing the true character of the deposit; and that being upon an illegal consideration to which he himself was a party, he was precluded from obtaining "the assistance of the law" to recover it back.

37 For the above reasons, we did not think that the appellant had any legal basis to claim back, even confining the claim to within the limitation period of six years, the sums which were stated in the tenancy agreements to be hiring charges.

Arrears in rent

38 We now turn to the second issue which concerned a question of fact, namely, whether there was an express oral agreement or a tacit understanding between Loi and Bader that the reduction in rent from $70,000 to $56,000 per month, which applied in 1999, was also to apply for the remainder of the term of the sixth tenancy agreement, *ie*, until November 2000.

39 We have in [8] to [11] set out the correspondence between the parties. As far as documentary evidence was concerned, the letter of 19 September 2000 was the first time the respondent alleged in writing that the appellant had been paying rent short of $14,000 per month from January 2000.

40 The basis upon which the trial judge found that there was no agreement to extend the concession to the year 2000 was this (see [1] *supra*, at [46]):

> [I] was satisfied that Loi spoke the truth when he said that he agreed initially to reduce the rent from $70,000 to $56,000 per month for the first six months of 1999 only and later agreed to extend the reduction of rent for another six months. I accepted his evidence that there were oral requests made by his staff to Top Ten to pay up the shortfall in rent in 2000. I also accepted his explanation that there was no written demand made until September 2000 because of the erstwhile good, long-term relationship [the respondent] had with [the appellant].

41 It is trite law that an appellate court should not lightly disturb a finding of fact, particularly where the finding depends on the credibility of witnesses: see *Lo Sook Ling Adela v Au Mei Yin Christina* [2002] 1 SLR 408 at [37] and *Khoo Sit Hoh v Lim Thean Tong* [1912] AC 323 at 325.

42 In coming to his conclusion that there was no agreement to extend the reduced rent to the year 2000, the trial judge relied on the evidence of Loi that his staff made oral requests to the appellant to pay up the shortfall. No staff member was called by the respondent to substantiate this claim of Loi's. Clearly this part of Loi's evidence was hearsay and should not have been relied upon by the judge. Moreover, even Loi's evidence on this was tenuous as could be seen from his answer in cross-examination.

> Q: Then why did you not call him to pay $70,000 after June 1999?
>
> A : *I think* my staff called him. I gave him six months to tide over. The economy can't be bad for two years for Singapore. No reason for me to call him. *I am very sure* my staff must have called his secretary because Bader was not in time [*sic*] a lot of time … We had a tenancy agreement for $70,000 a month. I gave him six months. I don't think I need to write another letter. The 19 September 2000 letter followed the discussion. [emphasis added]

43 From this answer it could be seen that Loi was assuming that some member of his staff called and spoke to Bader or his secretary to chase on the shortfall. Loi was simply guessing that his staff would have done it. He did not even say that his staff told him so.

44 A few other pertinent facts which were not in dispute also deserved attention. When the appellant failed to pay rent in respect of July and August 2000 (which the appellant claimed it overlooked; although the reason was not important), Loi wrote on 6 September 2000, and all that he said was that, as the appellant constantly made payment late and as there was no payment yet in respect of July and August 2000, the respondent intended to repossess the premises upon the expiry of the sixth tenancy agreement on 30 November 2000. The opening words of the letter were most telling:

> I am very disappointed that to date you have not been paying the rental promptly despite our agreeing to rental reduction as a gesture to assist you. You are always two to three months in arrears in rental. To date, July and August rental have not been paid. [emphasis added]

If indeed the appellant had been paying short in respect of January to June 2000, one would have

expected the respondent to have referred to that as well and not just the constant late payments. It was also significant that the complaint was that the appellant did not pay on time "despite our agreeing to rental reduction as a gesture to assist you".

45 Next, in Bader's letter of 22 September 2000, Bader asserted that Loi had told him more than once that the rental reduction would be in place until the end of the sixth tenancy agreement. Loi did not dispute this in his reply. When he was asked in cross-examination why he did not refute this assertion, his answer was a lame one: "That doesn't mean I agreed or disagreed."

46 Thirdly, Bader said in his evidence in court that "between 24 February 1999 letter and 19 September 2000 letter, Loi … never protested at my paying $56,000 a month". This evidence was never challenged by the respondent in cross-examination as was required by the rule in *Browne v Dunn* (1893) 6 R HL 67.

47 Fourthly, in Loi's correspondence in September 2000, the emphasis of Loi was to meet with Bader to discuss matters instead of alleging breach of contract on the part of the appellant. Indeed, the impression that emerged from the exchange between the parties was that the respondent valued the appellant as a tenant. It would be fair to say that in the year 2000, the after effect of the 1997/1998 Asian financial crisis was still being felt.

48 The judge also relied on the long-standing good relationship between Loi and Bader to explain the lack of a written demand for the shortfall in rent until September 2000. Loi said because of that relationship, he was very patient. However, the good relationship and the absence of any written reminder was also consistent, and perhaps more consistent, with the appellant's assertion that there was an agreement or understanding to extend the concession up till November 2000. If there was no such understanding, we would have expected the issue of a gentle reminder just to state that the concession ended in December 1999 and that from January 2000 the rent provided for in the sixth tenancy agreement would reapply, and to request for the payment of the shortfall. Such a reminder need not have been offensive. Notwithstanding the element of friendship, this was no less a business relationship and it defied logic and good sense why such a gentle reminder was not issued if there was no further agreement or tacit understanding between them.

49 In the light of the above, we were clearly of the opinion that the finding of the trial judge that there was no agreement or tacit understanding to extend the reduced rent up to November 2000 was wrong and could not be sustained. First, he relied on inadmissible hearsay evidence. Second, he failed to give sufficient consideration to the contemporaneous documentary evidence. Third, he failed to test Loi's evidence against objective facts and inherent probabilities.

Appeal allowed in part.