Orchard Central Pte Ltd *v* Cupid Jewels Pte Ltd (Forever Jewels Pte Ltd, non-party) [2013] SGHC 46

Case Number	: Originating Summons No 813 of 2010
Decision Date	: 22 February 2013
Tribunal/Court	: High Court
Coram	: Lee Seiu Kin J
Counsel Name(s)	: Ling Tien Wah and Ho Chun Yoong Charles (Rodyk & Davidson LLP) for the plaintiff; David Nayar (David Nayar and Vardan) for the defendant; Suresh Damodara (Damodara Hazra LLP) for the non-party.
Parties	: Orchard Central Pte Ltd — Cupid Jewels Pte Ltd (Forever Jewels Pte Ltd, non-party)

Landlord and Tenant – Distress for Rent

22 February 2013 Judgment reserved.

Lee Seiu Kin J :

1 These proceedings concern two related applications for the release of goods seized by a landlord of commercial premises under a writ of distress issued on 6 August 2010. The first application was brought by the tenant, and the second application was brought by a third party claiming to have beneficial ownership over the seized goods.

Background

Parties to the dispute

2 The plaintiff, Orchard Central Pte Ltd ("Orchard Central"), is the landlord of a commercial and retail development located at 123 Orchard Road known as Orchard Central ("OC").

3 The defendant, Cupid Jewels Pte Ltd ("Cupid Jewels"), leased two units in OC, #01-D1 and #02-07 (hereafter the "Premises"), from Orchard Central for the purpose of carrying out the retail sales of jewellery.

4 The non-party, Forever Jewels Pte Ltd ("Forever Jewels"), is described as the "sister company" of Cupid Jewels. [note: 1] Cupid Jewels and Forever Jewels share the same directors and two common shareholders.

The negotiations over the Lease Agreement

5 Sometime in October 2007, Marjory Lim Bee Teen ("Lim Bee Teen") – the managing director of Forever Jewels – and Rosalind Lim Kah Nai ("Lim Kah Nai") – executive director of Cupid Jewels – commenced negotiations with representatives from Far East Retail Consultancy Pte Ltd ("Far East"), the company responsible for the conduct of leasing matters relating to OC.

6 On 25 May 2008, a lease agreement was entered into for the Premises for a period of three years ("the Lease Agreement"). Pursuant to cl 1.2 and Schedule 1 to the Lease Agreement, the rent

payable was either a base rent of a fixed sum per month or a percentage rent of 5% of the monthly gross sales turnover, whichever was higher.

7 In March 2009, before Cupid Jewels took possession of the Premises, Lim Kah Nai wrote to Far East seeking a review of rental rates as "the current market situation [was] working against all of [them]" and because "the tenant mix and occupancy [had] yet to reach the projected figures that were presented to [Cupid Jewels]". [note: 2] Far East agreed to offer a rental assistance of $13,294 to be distributed between June and October 2009.

8 Possession of the Premises was handed over to Cupid Jewels on 9 June 2009 for renovations, and Cupid Jewels commenced business at OC in two phases; the unit located on Level 2 opened in September 2009 and the unit located on Level 1 opened in December 2009. [note: 3]

The negotiations over the payment of rental arrears

9 Sometime in May 2010, the director of retail operations of Cupid Jewels, Louis Chua How Meng ("Louis Chua"), began negotiations with representatives from Far East and Orchard Central for a rental review. On 1 June 2010, Jaylyn Ong, the general manager of Orchard Central, offered a rental rebate ranging from 40% to 60% of the base rent for the months of September 2009 to November 2009 and January 2010 to May 2010. [note: 4] A formal rebate letter was forwarded to Louis Chua on 2 June 2010 with the following conditions [note: 5]:

> Our offer is made in good faith on our part. We hope that this will help us to move forward together to establish a fruitful and mutually beneficial relationship.
>
> An acceptance of this offer would also indicate your unconditional acceptance of the confidentiality and non-disclosure provisions set out in Schedule 1 herein as well as full compliance with the following:
>
> (1) *Payment of outstanding [sic] for the Premises*.
>
> (2) *Acceptance must be accompanied by a cheque for full payment of the sum* subject to subsequent clearance.
>
> (3) Rental must be kept current at all times.
>
> (4) Full compliance with the terms and conditions of the Lease Agreement.
>
> *We would be grateful if you could kindly confirm your acceptance of the above by signing on the duplicate copy of this letter and return it ... no later than 9 June 2010*.
>
> ...
>
> *If for any reason we do not receive the duly signed duplicate copy of this letter by the above stipulated date, the offer shall lapse absolutely without further notice from us.* Please note that the Rent Rebate will only take effect on your fulfilment of the conditions precedent stated above.
>
> [emphasis added]

10 Cupid Jewels did not sign the rebate letter or confirm acceptance of the offer. Louis Chua gave evidence during cross-examination that, after the offer lapsed on 4 June 2010, there was a

subsequent meeting with representatives from Far East and Orchard Central, including Jaylyn Ong and Chan Iz-lynn, who was taking over the matter from Jaylyn Ong. The parties discussed the possibility of reviewing the rent, but there is no evidence that any agreement was reached. [note: 6]

11 Louis Chua responded via email on 14 June 2010, proposing a rental package with a base rent of $15,000 plus a graduated percentage rent of the sales turnover. Louis Chua also requested Far East to consider extending the proposal retrospectively from August 2009. [note: 7] Chan Iz-lynn replied on 17 June 2010. She rejected Louis Chua's proposal for a new retrospective rental package, but stated that Orchard Central would "honour our rebate committed as shown in the list, provided that [Cupid Jewels] come [sic] with a plan to settle the arrears up till May10 [sic], *within a reasonable timeframe*" [emphasis added]. [note: 8]

12 The next email correspondence on rental from Louis Chua was not until 13 July 2010, in which he requested for payment of rental arrears to commence in August 2010, in 24 monthly instalments. [note: 9] On 27 July 2010, Chan Iz-lynn replied with the following message [note: 10]:

> ... We have reviewed your request comprehensively and regret that we are unable to agree to your request of payment of your outstanding arrears in 24 months. We have reviewed, and request that all the arrears be paid by 31 Dec 2010.
>
> We look forward to your instalment plans, afterwhich [sic], we can move our discussion forward.

Louis Chua sent an email acknowledging receipt on 29 July 2010, and notified Chan Iz-lynn that the owners of Cupid Jewels were presently "outstation" and that he would "revert on plans after meeting with the owners". [note: 11] From 29 July 2010 to 5 August 2010, Louis Chua continued to correspond with other representatives of Far East on the provision of audited sales reports and sales statements. [note: 12]

Procedural history

13 On 6 August 2010, Orchard Central filed an *ex parte* application for a writ of distress for the sum of $891,507.99 being the amount due in respect of outstanding rent for the period from August 2009 to August 2010. Writ of Distress No 2 of 2010 (the "Writ of Distress") was granted by the Assistant Registrar (the "AR"), and the sheriff seized all the goods found on the Premises on the same day pursuant to the writ of distress. The seized goods included 576 items of jewellery (the "distrained jewellery"), furniture, displays and office equipment.

14 On 16 August 2010, Cupid Jewels filed Summons No 3835 of 2010 ("Cupid Jewels' Application") for the release of all the distrained jewellery pursuant to s 16 of the Distress Act (Cap 84, 1996 Rev Ed). A separate application Summons No 3916 of 2010 was filed by Forever Jewels ("Forever Jewels' Application") on 19 August 2010 for the distrained jewellery to be released to the custody of Forever Jewels pursuant to s 10 of the Distress Act.

15 Both applications came before me for hearing on 7 September 2010. I dismissed Cupid Jewels' Application and granted leave for the parties to cross-examine the deponents of the affidavits filed in this matter.

16 Cupid Jewels appealed against my dismissal of its application. The Court of Appeal restored Cupid Jewels' Application to be heard together with Forever Jewels' Application: see *Cupid Jewels Pte Ltd v Orchard Central Pte Ltd* [2011] 3 SLR 492 ("*Cupid Jewels (CA)*").

The applications for release of the distrained jewellery

17 Cupid Jewels' Application was premised on the following grounds:

(a) Orchard Central had failed to make full and frank disclosure to the AR when making the *ex parte* application for the Writ of Distress.

(b) The application for the Writ of Distress did not satisfy the procedural requirements under s 5 of the Distress Act.

(c) Orchard Central was estopped from enforcing its strict legal rights to take out the Writ of Distress as it had made a representation to Cupid Jewels that a rental rebate would be granted and that the latter would have until 31 December 2010 to pay the rental arrears in instalments.

(d) Cupid Jewels was entitled to the release of the distrained jewellery under s 16 of the Distress Act as the goods were exempt from seizure under s 8(d) of the same act.

18 Forever Jewels argued that the distrained jewellery should be released to it under s 10 of the Distress Act as it was at all times the beneficial owner of the distrained jewellery and Orchard Central had actual knowledge of this fact.

Cupid Jewels' Application

19 I preface my discussion of Cupid Jewels' Application by noting that a number of arguments were raised in submissions by Forever Jewels. Orchard Central took the position that Forever Jewels had no *locus standi* to raise any issues that relate solely to the grounds of Cupid Jewels' Application. However, as Cupid Jewels indicated its adoption of Forever Jewels' submissions without reservation, I will, for completeness, consider these supplementary arguments where relevant.

Issue I: Was there material-nondisclosure?

20 Cupid Jewels argued that Orchard Central had failed to make full and frank disclosure to the AR while taking out the application for the Writ of Distress. In particular, Orchard Central had allegedly failed to inform the AR of the ongoing negotiations between the parties for the payment of the rental arrears only by 31 December 2010 or the pending offer for a rental rebate conditional upon the proposal of an acceptable instalment plan for repayment by Cupid Jewels. Cupid Jewels further submitted that the court should adopt an even stricter view than that generally taken in relation to *ex parte* applications, as the execution by seizure and sale pursuant to a writ of distress proceeds without the landlord having to prove his claim.

21 In response, Orchard Central submitted that it had never informed Cupid Jewels that payment was only required by 31 December 2010; the email correspondence was only for the purpose of inviting Cupid Jewels to forward its instalment plans for Orchard Central to consider whether it would reinstate the offer made on 2 June 2010 to provide rental assistance, which had lapsed as of 6 August 2010. There was nothing material to disclose beyond informing the court that Cupid Jewels was aware of the arrears and that the arrears were for the 12-month period as prescribed by s 5 of Distress Act.

22 As a writ of distress is taken out *ex parte* and the writ is issued at the court's discretion under s 5 of the Distress Act, it is clear that parties are obliged to make full and frank disclosure to assist

the court in reaching a balanced determination after being apprised of all the relevant facts. I agree with Cupid Jewels that a writ of distress is a "draconian" remedy that could potentially cause serious and irreparable damage; there is therefore a duty on the landlord to give full and frank disclosure, although I would hesitate to agree with Cupid Jewels that a different level of disclosure should apply to writs of distress in particular. I will hence proceed on the basis of the general principles articulated by the courts in relation to all *ex parte* applications.

23 The classic articulation of this general principle is Warrington LJ's *dicta* in *The King v The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington; Ex parte Princess Edmond de Polignac* [1917] 1 KB 486 at 509:

> ... It is perfectly well settled that a person who makes an ex parte application to the Court – that is to say, in the absence of the person who will be affected by that which the Court is asked to do – is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it. …

24 The modern principles governing full and fair disclosure in the context of a Mareva injunction were summarised by Chan Seng Onn J in *Bahtera Offshore (M) Sdn Bhd v Sim Kok Beng and another* [2009] 4 SLR(R) 365 ("*Bahtera*"):

> (a) The plaintiff in an *ex parte* application is under a duty to make full and fair disclosure of all material facts in his possession, even if they are prejudicial to his claim. This includes defences that are likely to be advanced by the other party (at [20] of *Bahtera*).
>
> (b) Material facts include both legal and factual matters, and include facts that the plaintiff has knowledge of and facts which he ought to have known or could have discovered had he made proper inquiries (at [22] of *Bahtera*). The test of materiality is whether it is a fact that the court should take into account in making its decision, and this depends on the facts and circumstances of each case and the relief sought (at [23] of *Bahtera*).
>
> (c) The court will not necessarily discharge an application granted *ex parte* if it is subsequently found that the plaintiff has not made full and frank disclosure. The court retains a discretion and whether it exercises its discretion will depend on factors such as the relief sought, the seriousness of the non-disclosure, the importance of the undisclosed facts and the merits of the plaintiff's case and whether the material non-disclosure was an inadvertent oversight or whether it was deliberate and intended to mislead the court (at [25]-[27] of *Bahtera*).

25 In Orchard Central's supporting affidavit, filed by one Sim Chee Wah, for the Writ of Distress, it was averred that the basis of Cupid Jewels' obligation to pay rental was the Lease Agreement and the statement of accounts showing the sum of rental arrears as of 3 August 2010 (the "Statement of Accounts"). The notes of evidence indicated that counsel for Orchard Central had also informed the AR that Cupid Jewels was aware of the rental arrears:

> Ct: They are aware of the arrears?
>
> [Counsel for Orchard Central]: Monthly statements were sent. [note: 13]

It was not disputed that Orchard Central had not disclosed that there had been prior negotiations

between Louis Chua and Chan Iz-Lynn for the repayment of rental arrears.

26 In my view, the negotiations for a rental rebate and payment of the arrears in instalments was a material fact that a court would have taken into account in deciding whether the Writ of Distress should be issued, even if this fact would not, in the end, have determined the matter against the applicant. The AR would reasonably have factored this into his consideration of whether the rental arrears were in fact "due or payable", even if he eventually takes the view that the strict legal obligation to make payments for rent had nevertheless arisen under the Lease Agreement. This was a plausible defence that could have been advanced by Cupid Jewels, and was therefore relevant to the court in its assessment of whether the conditions under s 5 of the Distress Act had been satisfied. I am therefore unable to agree with Orchard Central that the only material facts that had to be disclosed were that Cupid Jewels was aware of the rental arrears and that the arrears claimed for were within the 12-month period prescribed by the Distress Act. Although it was not disputed that Cupid Jewels was aware of its *liability* to pay the rental arrears, the AR may have wished to seek further clarification on whether the negotiations between the parties were conducted on the basis that Cupid Jewels was nevertheless aware of its *present obligation* to pay the arrears before exercising his discretion to issue the writ.

27 However, I do not think that Orchard Central's failure to disclose the background negotiations would necessarily justify a setting aside of the Writ of Distress on that ground alone. As the Court of Appeal observed in *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 at [84]:

> ... while material non-disclosure is a legitimate ground for setting aside a warrant of arrest, the courts always retain an overriding discretion whether or not to do so ... The courts will often *apply the principle of proportionality in assessing the sin of omission against the impact of such default.* This invariably requires a measured assessment of the material facts as well as the circumstances in which the application has been made. [emphasis added]

I acknowledge that it may not have been plainly obvious to Orchard Central that its statutory right to take out a writ of distress may have been affected by negotiations over payment of the rental arrears. The relevance of the negotiations was not initially evident to Cupid Jewels itself; these facts were not put before me during the initial hearing of its application and only subsequently came to light when Cupid Jewels filed an affidavit raising fresh evidence of the negotiations before the Court of Appeal. The borderline between what was a material and non-material fact in the circumstances may have been an uncertain one to Orchard Central. I have some sympathy for Orchard Central's submission that it had genuinely held the view (correctly or otherwise) that the subsequent negotiations after the formal offer for rental rebates had lapsed on 4 June 2010 were only commenced on a without prejudice basis and that no unconditional agreement had been reached. While the omission was material, it does not appear to me to be an overwhelming or blatant one.

28 I also do not find that the omission was deliberate or cynical or that Orchard Central had intentionally distorted the facts by informing the AR that Cupid Jewels was aware of the arrears as monthly statements had been sent to Cupid Jewels. Although counsel for Forever Jewels disputed whether invoices or statements had been sent to the correct address, Cupid Jewels did not, at any point, claim that they had not been aware of the arrears or that the total sum of the arrears had not been communicated to them or brought to their attention. In the absence of any affirmative evidence that Orchard Central had in fact not sent monthly statements, there is nothing to indicate that Orchard Central had sought to mislead the AR.

29 Balancing Orchard Central's culpability and the gravity of the omission with the potential prejudice that may have been suffered by Cupid Jewels as a result of the omission, it would be

entirely disproportionate to set aside the Writ of Distress at this stage and order the release of the distrained jewellery. Orchard Central would now not be able to exercise any of its alternative remedies as a landlord, apart from a contractual action under the Lease Agreement, and I do not think that the injustice suffered by Cupid Jewels – who has not denied at all times that it was legally liable to pay the rental arrears under the Lease Agreement – from the execution of the Writ of Distress was so grave that the Writ of Distress should be set aside. The injustice purportedly suffered by Cupid Jewels, *viz*, eviction from the Premises and termination of their business, stemmed from Orchard Central's right of re-entry as a landlord under the Lease Agreement, not the execution of the Writ of Distress.

Issue II: Were the statutory conditions under s 5 of the Distress Act satisfied?

Rents "due and payable"

30 Section 4 of the Distress Act states that "no landlord shall distrain for rent except in the manner provided by this Act", and s 5(1) sets out the conditions for an application for a writ of distress:

> **5**—(1) A landlord or his agent duly authorised in writing may apply ex parte to a judge or registrar for an order for the issue of a writ, to be called a writ of distress, for the recovery of rent *due or payable* to the landlord by a tenant of any premises *for a period not exceeding 12 completed months of the tenancy immediately preceding the date of the application*; and the judge or registrar may make such order accordingly.
>
> [emphasis added]

31 Cupid Jewels argued that rental arrears in the sum of $891,507.99 were not "due or payable" at the time the application for the Writ of Distress was made, and the Writ of Distress was accordingly flawed and had to be discharged. The only relevant "arrears" were for the sum of $363,657.91, *ie*, the total sum after the rental rebate, and no "cause of action" existed at the material time as there was an offer pending acceptance. Forever Jewels submitted that the obligation to pay rental was never triggered as the percentage rent under the Lease Agreement had not been calculated and Cupid Jewels had not been given notice thereof. Based on a *contra proferentum* construction of cl 1.2 of the Lease Agreement, it must have been the intention of the parties that the amount of percentage rent would be determined before Cupid Jewels was obliged to pay rental for that month.

32 The words "due or payable" should be given a plain linguistic construction to refer to a legal obligation to pay for rental under a tenancy agreement. This is a question to be resolved in accordance with the Lease Agreement governing the landlord-tenant relationship and the surrounding facts

33 Clause 1.2 of the Lease Agreement provided as follows:

> **1.2 Rent**
>
> (a) The rent payable ("Rent") by the Tenant during the Term shall comprise the aggregate of:
>
> (i) the base rent ("Base Rent"); or
>
> (ii) the percentage rent ("Percentage Rent"), whichever is higher, in accordance to the provisions of Schedule 3; and

(iii) the service charge ("Service Charge").

calculated at the rates as stated in Schedule 1 ...

(b) *The Tenant shall pay the Rent monthly in advance without any deductions and without demand on the first day of each calendar month of the Term*. Where the Term does not commence on the first day of a calendar month, the Rent and any other charges payable under this Agreement shall be pro-rated accordingly. The Landlord's statement in writing as to the pro-rated payments due from the Tenant shall be binding and conclusive on the Tenant.

[emphasis added]

Clause 1.2 defines the scope of Cupid Jewels' obligation to make payments for rent, and the simple question before this court is whether the obligation to pay, in relation to the period for which the Writ of Distress was issued, had arisen.

34 Based on the above construction of the phrase "due and payable", I am unable to accede to Cupid Jewels' contention that the rents "due or payable" as of 6 August 2010 were at most for the rebated rental arrears of $363,657.91. The strict legal obligation to pay advance rental as specified in cl 1.2 of the Lease Agreement took effect on the first day of each calendar month without the issuance of a formal demand or notice, and Louis Chua conceded that the parties had at no time reached a different *agreement* on the time or quantum of payment. [note: 14] Until the purported offer for a rental rebate had been accepted by Cupid Jewels and the condition precedents for the offer satisfied, the accrued legal obligation to pay the full sum under the Lease Agreement had yet to be extinguished or varied.

35 Forever Jewels' convoluted construction of cl 1.2 also defies commercial sense. The obligation to pay rental arises in advance on the first day of each calendar month, and is calculated on the basis of either a fixed base rent or a percentage rent of 5% of the gross sales for that month, whichever is the higher. It is, in my view, far more logical and sensible to construe the clause as imposing an obligation to pay the base rent – as the minimum rental sum – on the first day of each calendar month in advance, with the percentage rent for that month calculated after the completion of that month and the relevant adjustments made thereafter. In short, the obligation to pay the base rent is triggered at the beginning of each month, and is not dependent on the determination of the percentage rent, which is only in issue if subsequent upward adjustments to the total rent payable have to be made. On Forever Jewels' interpretation of the overall effect of cl 1.2, cl 1.2(b) would be incapable of performance as the percentage rent cannot possibly be determined at the beginning of the month; this runs contrary to the established canon of contractual interpretation that a court should hesitate to interpret a provision in a manner that would render any other provision superfluous. I also note that Cupid Jewels itself had at no point denied that the base rent was due and payable.

36 It is thus clear to me that the sums indicated in the Statement of Accounts reflected the base rent for the relevant period and were "due and payable" at the time the application was made.

Period for which the Writ of Distress was issued

37 Forever Jewels also submitted that Orchard Central had claimed for a period exceeding 12 completed months of the tenancy immediately preceding the date of the application, and that the Writ of Distress should accordingly be discharged for failure to comply with the conditions in s 5(1) of the Distress Act. On the face of the Statement of Accounts, the relevant invoice period that Orchard Central was claiming for was from 8 August 2009 to 31 August 2010, a period of almost 13 months.

38 I accept the explanation given by Goh Boon Peng, an assistant director of Far East who was responsible for overseeing the commercial operations of OC, that the actual sum of rental arrears claimed for under the Writ of Distress was for less than 12 months although the period reflected on the face of the computer generated Statement of Accounts was for a period of 13 months as the invoice description could not be manually altered. Although the Statement of Accounts did not clearly enumerate the precise rental arrears due for each calendar month or how rental adjustments were made, the full sum claimed under the Writ of Distress was S$891,507.99, which was clearly less than the full sum of rental payments that were due under the Lease Agreement for the relevant period of 12 months based on the available evidence.

39 I therefore do not consider that there was any substantive irregularity in the Writ of Distress that would render the Writ of Distress void or invalid.

Issue III: Are the requirements of promissory estoppel satisfied such that Orchard Central was estopped from enforcing its strict legal rights under the Lease Agreement to take out a writ of distress?

40 Cupid Jewels submitted that Orchard Central was estopped from filing the application for the Writ of Distress as Orchard Central had made a promise that it would not enforce its legal rights to demand full payment of the arrears at least until 31 December 2010.

41 Orchard Central denied that a promissory estoppel had arisen. It claimed that it had carried on the negotiations with Cupid Jewels on a without prejudice basis and had made no representations or promises to the effect that it would not be enforcing its legal rights against Cupid Jewels to recover the rental arrears. Orchard Central further argued that Cupid Jewels had not adduced any evidence to show how it had acted to its detriment in reliance on Orchard Central's conduct; Cupid Jewels had merely done what it was at all times already contractually obliged to do under the Lease Agreement.

Application of the doctrine of promissory estoppel to a statutorily conferred right to apply for a writ of distress

42 A preliminary issue that arises is whether a promissory estoppel may arise to preclude the exercise of a *statutorily conferred* right, *viz*, the right to apply for a writ of distress once the conditions under s 5 of the Distress Act have been satisfied.

43 While the doctrine historically developed within the confines of a contractual relationship, I do not see any reason in principle why a promissory estoppel cannot arise to invalidate a writ of distress issued pursuant to a statutorily prescribed procedure. The statutory right to apply for a writ of distress is premised on a contractual right to payment of rent under a pre-existing landlord-tenant relationship; the principle underlying a promissory estoppel – the suspension or abeyance of the enforcement of a strict legal right – would apply equally to a situation where the landlord's right to apply for a remedy conferred under statute cannot be exercised because the landlord has been estopped from asserting that the condition precedents to exercising such a right have been satisfied. The traditional limits of the promissory estoppel doctrine only demand that there be a pre-existing legal relationship between the parties: see Spencer Bower, *The Law Relating to Estoppel by Representation* (Piers Feltham et al eds) (LexisNexis UK, 4th Ed, 2004) at para XIV.2.23.

Elements of promissory estoppel

44 The traditional elements of promissory estoppel are well-established, *viz*, representation, reliance and detriment (see *The Law of Contract in Singapore* (Andrew Phang Boon Leong *gen ed*)

(Academy Publishing, 2012) at paras 04.073-04.085), but the precise ambits of each element are ambiguous. There is a further overarching requirement that it must have been *inequitable* in the all circumstances for the promisor to resile on his promise.

45 First, the representation or promise must have been clear and unequivocal. This is a question of fact in each case, but the general principle is that the promise gives rise to an *objective* understanding that *certain* strict legal rights of the promisor *will not be enforced*, at least for a period. It has been held that negotiations on a substituted manner of performance of a contractual obligation will not give rise to a promissory estoppel in relation to the contractually mandated time of performance in the absence of an understanding that there would be an extension of time (see the Court of Appeal decision of *Energy Shipping Co Ltd v UDL Shipping (Singapore) Pte Ltd* [1995] 2 SLR(R) 609), and neither will "mere acts of indulgence" (*per* Viscount Simonds in *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 WLR 761 at 764) suffice.

46 Having considered the chain of correspondence between the representatives of Orchard Central and Cupid Jewels, I accept that a sufficiently clear representation could be inferred that Orchard Central would not, at least before negotiations on the payment of arrears had broken off, insist on asserting its strict legal remedies to recover the full sum of rental arrears, including its right to apply for a writ of distress. While Louis Chua admitted that he did not accept the original offer of 2 June 2010, it would appear that the offer was subsequently revived by the email from Chan Iz-lynn dated 17 June 2010; until 27 July 2010, Orchard Central continued to take the ostensible position that negotiations for an appropriate payment scheme were still pending. Orchard Central did not call Chan Iz-lynn as a witness, and its only witness, Goh Boon Peng, was not personally involved in any verbal discussions that the representatives of the parties may have had. The email correspondence is therefore the only record or summary of the overall negotiations, and in my view, they must evince an objective representation by Orchard Central that it would not exercise any of its legal remedies to demand immediate payment of the arrears while negotiations on an appropriate instalment payment plan were still pending. The negotiations would otherwise be rendered meaningless. There can be no other meaning of the sentence "We look forward to your installment plans, afterwhich, we can *move our discussion forward*" [emphasis added] in the email sent by Chan Iz-lynn on 27 July 2010. I also do not consider that Orchard Central was granting a without prejudice indulgence or concession to Cupid Jewels not to demand immediate payment of the rental arrears. Orchard Central was not merely refraining from insisting on strict compliance on the date of payment of rent, but was also offering a substantial rebate of the rental arrears if Cupid Jewels was able to offer a satisfactory installment plan. The negotiations were plainly intended to affect the legal positions of the parties.

47 I now turn to consider the more controversial elements of "detrimental reliance". Cupid Jewels submitted that it had suffered detriment in reliance on the representation by Orchard Central. Counsel for Forever Jewels relied on the cases of *Lim Chin San Contractors Pte Ltd v Shiok Kim Seng (trading as IKO Precision Toolings)* [2011] 1 SLR 433 ("*Lim Chin San*") and *Lam Chi Kin David v Deutsche Bank AG* [2011] 1 SLR 800 ("*Lam Chi Kin (CA)*") in support of the proposition that the element of detriment was no longer determinative in the finding of an estoppel. The key question was instead whether it was unconscionable or inequitable for the promisor to resile from his promise or representation. Orchard Central argued that Cupid Jewels had not adduced any evidence to show how it had acted to its detriment in reliance on Orchard Central's representation; Cupid Jewels was not, in any event, in a position to make any payment for the arrears at the material time and it was not inequitable or unconscionable for Orchard Central to apply for the Writ of Distress in the circumstances.

48 I first note that *Lim Chin San* was concerned with the law of *proprietary* and not promissory estoppel; there is, at the present stage of the development of the law, no unified legal principle of "estoppel", and I do not think that principles from separate and distinct areas of the law should be

elided. In *Lam Chi Kin David v Deutsche Bank AG* [2010] 2 SLR 896 ("*Lam Chi Kin (HC)*"), Steven Chong JC observed that there was a divergence of judicial opinion on whether detriment was a necessary element of promissory estoppel and stated at [55]-[57]:

> 55 The principal reason for the divergence of judicial and academic opinion about the requirement to establish a detriment is because the term "detriment" has not been used consistently: see Bower at p 481. It has been used to describe:
>
> (a) Expenditure of money and time
>
> In *Yokogawa Engineering Asia Pte Ltd v Transtel Engineering Pte Ltd* [2009] 2 SLR(R) 532, the court held that the plaintiff was estopped from relying on the correct version of the arbitration clause because the defendant had commenced arbitration proceedings under the ICC Rules and had paid the sum of US$30,000 to the ICC based on an outdated version of the general conditions which was provided by the plaintiff. The court found that the payment of the US$30,000 constituted "detriment". Similarly in *Hartley v Hymans* [1920] 3 KB 475, the buyer was found to be estopped from exercising his right to terminate because by his conduct he had led the seller to believe that the contract was still valid (even though the delay would have justified termination) and the seller had incurred expenditure in preparation for future deliveries.
>
> (b) Incurring a liability
>
> In *Fenner v Blake* [1900] 1 QB 426, the tenant represented to the landlord that he wanted to vacate the premises midway during the tenancy. Relying on the representation, the landlord sold the premises to a third party. The tenant subsequently refused to vacate the premises and claimed there was no consideration for his promise to quit the premises. The court had no hesitation in finding that the tenant was estopped from resiling from his promise to vacate the premises because the landlord had incurred a liability in relying on the tenant's promise by entering into the sale and purchase agreement for the premises. In so doing, the landlord had rendered himself liable to an action at the suit of the purchaser if he was unable to provide vacant possession.
>
> (c) Change of position
>
> The *locus classicus* of this species of detriment is none other than *Thomas Hughes v The Directors of the Metropolitan Railway Company* (1877) 2 App Cas 439 ("*Hughes*"). In that case, the owner of the freehold gave six months notice to the lessee to repair the premises. The lessee, however, made an offer to purchase the owner's leasehold interest. Unfortunately, the negotiations which went on for some time did not result in the sale whereupon the owner gave the lessee notice of ejectment for failing to complete the repairs on time. The court found that the owner was estopped from enforcing its strict legal rights because the lessee had changed his position by relying on the owner's implied promise that he would not be required to repair the premises while the negotiations were underway.
>
> (d) Deprivation of benefit
>
> This has already been covered in *W J Alan* in ... In *W J Alan*, the buyers through the sellers' conduct was led to believe that payment could be made in sterling shilling. The court found that the sellers had irrevocably waived the right to receive payment in Kenyan currency. If the sellers were permitted to withdraw from the promise, the buyers would be deprived of

the benefit to pay in sterling shilling which by that time had devalued against Kenya shilling.

5 6 **Expenditure of money/time and incurring a liability have often been described as "detriment" in the narrow sense because in both these situations, the promisee *had already* suffered the "detriment" in reliance on the promise. However as for change of position and deprivation of benefit, the promisee *would only* suffer the "detriment" if the promisor is permitted to resile from his promise. This is commonly described as "detriment" in the broader sense.**

57 In my view, it will not be helpful to attach labels to properly characterise "detriment". **The overarching principle in each of these categories is that the doctrine has consistently been held to apply in circumstances when it was inequitable either in the narrow or broader sense of "detriment" for the promisor to resile from his promise and to enforce his strict legal rights.** ...

[emphasis in original in italics; emphasis added in bold]

The general principle that emerges from *Lam Chi Kin (HC)* therefore appears to be that while a promisee must have relied on the promise or representation, the semantic characterisation of the *nature* of the reliance as "detrimental" may simply be a description of a situation where the promisee had acted in reliance on the promise in such a way so as to render it inequitable to allow the promisor to act inconsistently with the promise (see *Chitty on Contracts* vol 1 general principles (Thomson Reuters (Legal) Limited, 30th Ed, 2008) at para 3–135).

49 Chong JC's finding that there was no promissory estoppel on the facts was overturned by the Court of Appeal in *Lam Chi Kin (CA)*, but the Court of Appeal did not disagree with the legal principles set out by Chong JC. Nevertheless, I do not think that it is clear or even implicit from either *Lam Chi Kin (HC)* or *Lam Chi Kin (CA)* that the inquiry into "detriment" in the sense of prejudice in some broad form is *generally* no longer a formal legal pre-condition to a finding of a promissory estoppel; significantly, both Chong JC and the Court of Appeal considered on the facts whether any "detriment" had been suffered in reliance on the promise: see *Lam Chi Kin (HC)* at [63]–[69] and *Lam Chi Kin (CA)* at [38] (*cf Lam Chi Kin (CA)* at [40], which accepted, *obiter*, that there may be an *exception* to the rule that detriment is required if the promisor has obtained an advantage by the reliance of the promisee on the representation). I will thus proceed on the basis that both the broad and narrow characterisations of "detriment" are proxies for assessing whether the promisee was made worse off, rendering it inequitable for the promisor to now resile from the promise, rather than focusing solely on "inequity" or "unconscionability", which is premised on a much higher level of abstraction.

50 Cupid Jewels argued that it had relied to its detriment on Orchard Central's promise and assurances:

(a) by remaining on the Premises, continuing to operate its business and making future plans for the business; and

(b) by refraining from making immediate arrangements for full repayment of the rental arrears while Orchard Central took the time to consider a proposal for payments of the rental arrears by instalments.

51 The detriment allegedly suffered in category (a) could be classified as detriment in the narrow sense if Cupid Jewels was able to prove on the evidence that it had incurred further expenditure on the understanding that it could continue its business on the Premises and would – with the extended

period for payment promised by Orchard Central – be able to pay the rent at a later date. I find that Cupid Jewels has not discharged the burden of demonstrating this. The only evidence directly adduced on this point were cursory comments made by Louis Chua during re-examination that Cupid Jewels had taken the position that it could continue its day-to-day business while negotiations were ongoing:

> A When this email was sent to us by Iz-Lynn of the 27th of July---erm, I---I---I go back a bit first before I tell you our position. We know that we have to pay the rent. That is something we need to do, all right, and we asked them for 24-month instalment plan, which after they said that they have reviewed it comprehensively and regret that they:
>
> [Reads] "...are unable to agree to your request of payment of your outstanding arrears in 24 months".
>
> I take it that they don't agree to 24 months, but however, they said they have reviewed and request that all arrears be paid by 31st December. Which means to me, or a person reading this email would have thought, I have the 5 month to pay. So that, in my mind, will be business as usual, I continue with my business, er, I also continue to talk to promotional companies to do, er, promotion within the atrium of, er, er, Orchard Central, all right?
>
> ...
>
> ... So our position was, business as usual, let's come back with the, er, 5-month plan and present it to, er, Orchard Central and see how we go from there, basically to---to be---to---to solidify the case that we---we can't be spending more than $1 million on renovation and then stop business after 1 year. This is illogical. [note: 15]

There were also only vague assertions of proposed marketing plans and discussions with third parties for various promotional events in the email correspondence between Louis Chua and Chan Iz-lynn. [note: 16] While I accept that Cupid Jewels had continued to pursue its usual business activities and had intentions to carry out rebranding and promotional activities to increase its sales turnover, there was no documentary evidence to show actual expenditure of money or effort or any additional liabilities incurred by entering into contracts for advertising or sponsorship in *reliance* on Orchard Central's representation that Cupid Jewels would be allowed to defer payment of the rental arrears. The causal link was assumed rather than proven.

52 I now consider whether Cupid Jewels' assertion of the "detriment" suffered in category (b) would fall within the broad definition, *ie*, a change in position that represents a "detriment which would result from the denial of the correctness of the assumption upon which the person has relied" (*per* Mason CJ in *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 415). It may be argued that the alleged "detriment" suffered by Cupid Jewels bears some similarity to the *locus classicus* of the promissory estoppel doctrine, *Hughes*, considered in the passage in *Lam Chi Kin (HC)* cited above at [48]. The principle in *Hughes* has been described in Sean Wilken QC and Karim Ghaly, *The Law of Waiver, Variation and Estoppel* (Oxford University Press, 3rd Ed, 2012) at para 8.47:

> ... Whilst the promise was adhered to the tenant did indeed enjoy a benefit, namely not having to perform the repairs. It was not at this point, however, that detriment was assessed. *The relevant point at which to analyse the position of the promisee is only after the promise has been withdrawn. Thus the tenant in Hughes would have suffered detriment, had the landlord been permitted to withdraw his implied undertaking with impunity: the tenant would have been liable for breach of covenant and open to proceedings to forfeit the lease.* [emphasis added]

53 In my view, the definition of "detriment" in *Hughes* is not satisfied on the present facts. It may have been sufficient if Cupid Jewels had failed to safeguard its legal position to its disadvantage, *eg*, by refraining from making efforts to procure an immediate source of finance to repay the rental arrears in full or by rearranging its general day-to-day budget to take into account the fact that it had been granted an extended period to make payments. While I express no concluded view on this point, those could have constituted examples of change of position in the broad sense of "detriment" that the court may have considered inequitable to ignore, as Cupid Jewels would have been vulnerable to proceedings for distress (as has happened) if Orchard Central were to issue a writ of distress without giving due notice that the rents were immediately due and payable. However, Cupid Jewels has not adduced any objective evidence of any such failure to take measure to secure its legal position apart from mere generalities and *ex post facto* assumptions of its passive conduct. I am not in a position to make any inferences or speculate on how Cupid Jewels had purportedly acted in "detrimental" reliance on the representation made by Orchard Central.

54 I am thus unable to accede to Cupid Jewels' contention that it had suffered "detriment" – in either the narrow or broad sense – such that it was inequitable for Orchard Central to resile from its promise that it would not invoke any of its strict legal remedies to recover the rental arrears while negotiations were pending. Cupid Jewels' defence that Orchard Central was estopped from taking out an application for the Writ of Distress is unsustainable.

Issue IV: Was the distrained jewellery exempt from seizure under s 8(d) of the Distress Act?

55 Section 8 of the Distress Act states as follows:

> **8**. Property seizable under a writ of distress shall not include —
>
> (*a*) things in actual use in the hands of a person at the time of the seizure;
>
> (*b*) tools and implements not in use where there is other movable property in or upon the house or premises sufficient to cover such amount and costs;
>
> (*c*) the tenant's necessary wearing apparel and necessary bedding for himself and his family;
>
> (*d*) *goods in the possession of the tenant for the purpose of being carried, wrought, worked up, or otherwise dealt with in the course of his ordinary trade or business;*
>
> (*e*) goods belonging to guests at an inn; and
>
> (*f*) goods in the custody of the law.
>
> [emphasis added]

56 Cupid Jewels argued that the distrained jewellery fell within the scope of s 8(d) of the Distress Act as the jewellery was on consignment from Forever Jewels and Cupid Jewels was acting as the modern day equivalent of a mercantile factor. Cupid Jewels submitted that on the authority of *Nathaniel Simpson v Chiverton Hartopp* (1744) 125 E.R. 1295 ("*Simpson*") and *Gilman v Elton* (1821) 129 E.R. 1211 ("*Gilman*"), goods held by Cupid Jewels as a factor for the purpose of sale, including the distrained jewellery, were exempt from seizure under the common law trade privilege as codified by s 8(d). Orchard Central appeared to assume in its submissions that s 8(d) would be interpreted in

consonance with the common law trade privilege, and that a factor would accordingly appear to fall within the scope of the exception in s 8(d). Instead, Orchard Central's key areas of dispute were factual, *ie*, whether Cupid Jewels had proven that it was acting as a factor and whether the common law requirement that the tenant was exercising a "public trade" was satisfied.

The common law trade privilege

57 Cupid Jewels did not claim that the distrained jewellery were goods in its possession for the purpose of being "carried, wrought, worked up". The key question before me is whether the final limb "otherwise dealt with" covers goods possessed by a tenant on consignment for the purpose of sale.

58 In *Cupid Jewels (CA)*, the Court of Appeal made the following observation on the genesis of s 8 of the Distress Act at [10]:

> **Section 8 is largely unchanged from its original incarnation as s 10(IIg) of Ordinance XIV of 1876. It generally mirrors privileges at common law under which certain goods were exempt from distress.** For example, s 8(*a*) reflects *Bisset v Caldwell* (1791) Peake 50; s 8(*b*) reflects *Nargett v Nias* (1859) 1 El & El 439; **s 8(d) reflects Nathaniel Simpson v Chiverton Hartopp (1744) Willes 512**; and s 8(*f*) reflects *William Eaton v Robert Southby* (1738) Willes 131. **Therefore, s 16, read together with s 8, substantially represents a codification of the tenant's standing and substantive remedies at common law.** [emphasis in original in italics; emphasis added in bold]

The Court of Appeal added at [16]:

> ... Section 8(*d*) covers most of the ground of trade privilege at common law. The general principle appears to be that if goods are sent to a place to remain there, they are distrainable; but if sent for a particular object and the goods remaining at the place is necessary for the completion of that object, they are not: *Woodfall's Law of Landlord and Tenant* (Kim Lewison gen ed) (Sweet & Maxwell, Looseleaf Ed, 1994, Release 27) at paragraph 9.051. Trade privilege has been held to cover goods sent to an auctioneer for sale and goods sent to a commission agent for sale: *Adams v Grane and Osborne* (1833) 1 Cr & M 380 and *Findon v M'Laren* (1845) 6 QB 891 respectively. ...

59 Under the common law, a landlord was entitled to seize all goods found on the tenant's premises without regard to the actual ownership of the goods, but this general rule was engrafted with a number of exceptions. In *Simpson*, Willes CJ laid down the common law trade privilege exception in the following terms at 1297:

> Things delivered to a person exercising a public trade to be carried wrought worked up or managed in the way of his trade or employ.

Gilman extended the application of the trade privilege to goods held by a factor. The plaintiff was a manufacturer who had sent his goods for sale upon commission to the tenant, a factor and broker. The landlord distrained the goods for the arrears of rent due from the tenant, and the plaintiff sued for the recovery of the goods. Dallas CJ held (at 1213 of *Gilman*) that the purpose of the privilege exempting certain goods from distress was for the benefit of trade, and that the court was bound to consider the rule of public convenience as applicable to trade and commerce. It would be detrimental to the public and inconsistent with decided cases if the court were to hold that goods in the custody of a factor were liable to seizure. In *Adams v Grane and Osborne* (1833) 149 E.R. 447 ("*Adams*"), Lord Lyndhurst C B, reasoning by analogy with *Gilman*, concluded that goods in the possession of an

auctioneer fell within the trade privilege, holding (at 449 of *Adams*) that "there [was] no distinction turning on the particular mode of sale". Bayley B also observed at 450:

> … *The privilege has from time to time been extended according to new modes of dealing established between parties; and one of the modern modes is the case of a factor*: and I should observe what is noticed by Mr. Justice Blackstone in his Commentaries, that there is no hardship in the privilege which is allowed to exist in these cases, because *the privilege generally arises to goods which no one could suppose to be the property of the individual from whom the rent was due.* [emphasis added]

The definition of the last limb, *ie*, managed, was articulated by Alderson B in *Muspratt v Gregory* (1836) 150 E.R. 588 at 593:

> I n *Simpson v. Hartopp*, the word "managed" appears to be used as synonymous with "manufactured." *But that is too limited a sense of the expression: for the Courts have held that goods sent to a factor by a merchant are privileged from distress under this head.* I think therefore, that it extends both to the working up of goods from their unwrought state into a new form, as a manufacturer; and also to the dealing with the goods as articles of trade, in their original or their wrought state as articles of commerce, as a factor. [emphasis added]

The (comparatively) modern scope of the trade privilege in relation to goods "managed" by the tenant was also considered in *Challoner v Robinson* [1908] 1 Ch 49 ("*Challoner*"), where Lord Cozens-Hardy M.R. held at 59:

> ... [A]ccording to a long course of decisions the word "managed" must be taken in a wide sense so as to include, if not to be equivalent to, "disposed of." Goods sent to a factor or to an auctioneer are thus held protected. ...

60 With the scope of the common law trade privilege in mind, I now turn to consider the legislative history and construction of s 8(d) of the Distress Act.

The origins and construction of s 8(d)

61 As explained by Judith Prakash J in *Ginsin Holdings Pte Ltd v Tan Mui Khoon (trading as Chan Eng Soon Service) and another* [1996] 3 SLR(R) 500 ("*Ginsin Holdings*") at [8], the Distress Act was based initially on provisions existing in India, the Indian Act XXXIX of 1866 which was made applicable in the Straits Settlements by Ordinance V of 1874. The law of distress was consolidated by the Indian legislature in Act No 1 of 1875 and extended to the Straits Settlements by Ordinance XIV of 1876 (the "1876 Distress Ordinance"). Section 10(IIg) of the 1876 Distress Ordinance provided:

> **10**.—II. The bailiff shall not seize —
>
> ...
>
> (*g*) goods delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ

This was a faithful codification of Willes CJ's formulation of the common law trade privilege in *Simpson*.

62 The Distress Ordinance was abrogated by Chapter XXXIII of the Civil Procedure Code 1907 (Ordinance XXXI of 1907) ("Civil Procedure Code 1907"), which re-enacted s 10(IIg) of the 1876

Distress Ordinance: see [12] of *Ginsin Holdings* and s 725(2)(g) of the Civil Procedure Code 1907. Distress Ordinance (Ordinance No 28 of 1934) (the "1934 Distress Ordinance") subsequently enacted (with amendments) the existing provisions on the issuance of a writ of distress in the Civil Procedure Code 1907, together with the inclusion of new statutory provisions drawn from the English Law of Distress Amendment Act 1908 (c. 53) ("the 1908 Act"): see *Proceedings of the Legislative Council of the Straits Settlements for the Year 1934 (12 February 1934)* at p B11.

63 In particular, ss 10 and 12 of the 1934 Distress Ordinance substantively incorporated ss 1 and 4 of the 1908 Act respectively. The corresponding provision to s 725(2)(g) of the Civil Procedure Code 1907 was s 8(d) of the 1934 Distress Ordinance, which omitted the requirement that the tenant be "exercising a public trade" and replaced the words "delivered to" with "in the possession of" and "managed" with "otherwise dealt with". There is no indication in the legislative debates on why these amendments were made. The present s 8(d) of the Distress Act is an exact replication of s 8(d) of the 1934 Distress Ordinance.

64 There are three possible constructions of the phrase "otherwise dealt with". First, the phrase "otherwise dealt with" may be read as synonymous with the meaning of "manage" under the common law formulation of the trade privilege. This would support an interpretation of s 8(d) that mirrors the scope of the common law trade privilege as it stood in 1934, if the enactment of s 8(d) was not intended to change the law as codified by s 10(IIg) of the 1876 Distress Ordinance. Second, the word "otherwise" could be read with its common dictionary meaning and the phrase "otherwise dealt with" would thus be a catch-all provision encompassing any alternative form of dealing with goods in the ordinary course of the tenant's trade or business; the preceding three modes of dealing with the goods would merely be illustrative and not limiting. This interpretation would suggest that the change in language used by the Legislative Council in 1934 was intended to clarify and expand the scope of the trade privilege as interpreted by the courts to take into account new mercantile developments, and to abrogate any common law technicalities that may have encrusted the word "manage". Third, "otherwise dealt with" may be read within its immediate context as referring to particular modes of dealing with the property that are of a similar nature to "carried, wrought [or] worked up". This is a narrow interpretation that encompasses only limited forms of activities. It may have been the legislative intention that s 8(d) was to be thereon interpreted in a very constrained fashion, particularly when this change in statutory language is viewed against the backdrop of the attenuated importance of the trade privilege by 1934.

65 In my view, while s 8 relates to the grounds under which a tenant may apply for the released goods and s 10 relates to a third party's separate and distinct grounds of relief, s 8 cannot be interpreted in isolation from the overall statutory structure of the Distress Act in order to determine the object underlying s 8(d). Sections 8(d) is concerned with the scope of the common law exemption for goods belonging to a third party but found on the tenant's premises, while s 10 is a statutorily created right of a third party to bring an application for the release of goods that belong beneficially to the third party and not the tenant. I observe that a broad survey of the cases cited above indicates that claims involving the common law trade privilege were inevitably brought by the third party for the release of his goods, not the tenant *(cf Cupid Jewels (CA)* at [10], where the Court of Appeal observed that s 8 codified the *tenant's* substantive remedies under common law). There therefore appears to be some degree of overlap between the two provisions in terms of the intended purpose of protecting certain goods of a third party from seizure. With all due respect, while I agree with the observations of the Court of Appeal in *Cupid Jewels (CA)* that s 8 and s 10 are distinct substantive grounds of relief (at [15]-[16] of *Cupid Jewels (CA)*), I do not think that such a clear demarcation can be drawn in terms of the basic principle that underlies both s 8(d) and s 10. It is true that the tenant's remedy derived from the common law and the landlord's remedy was a creature of statute. However, the 1908 Act was enacted in England and Wales precisely to deal with the

unsatisfactory state of the common law trade privilege in relation to the goods of third parties following *Challoner*, which was regarded as an unsatisfactory decision that did not provide sufficient protection for the rights of third parties: see *The Parliamentary Debates (Hansard) – House of Lords* (14 July 1908) vol 192 at cols 571 to 575. The impetus behind the 1908 Act was to qualify, if not to supersede, the common law trade privilege.

66 The choice between an interpretation referable to the common law antedating the enactment of Distress Act or a textual interpretation is in effect an issue of the extent to which the common law trade privilege, developed out of expediency and to some extent in a fairly unprincipled way (see the observations of Lord Herschell L.C. in *Clarke v The Millwall Dock Company* (1886) L.R. 17 Q.B.D 494 at 499, commenting that it was "very difficult to find any sound principle upon which to explain the law of distress and to support the various decisions"), should colour the interpretation of s 8(d) when read in the overall context of a comprehensive statutory scheme that contains a separate provision that was enacted to deal with the inadequacies of the common law.

67 In *The Governor and Company of the Bank of England v Vagliano Brothers* [1891] AC 107, Lord Herschell stated the following rule of interpretation for codifying statutes at 144–145:

> … I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.
>
> If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. …

This passage was cited with approval by the majority of the Court of Appeal in *Ng Boo Tan v Collector of Land Revenue* [2002] 2 SLR(R) 633 at [55].

68 There is no reported English authority that has come to my attention on the application of the common law trade privilege after the passing of the 1908 Act, and it appears to me that the trade privilege has evidently lost most of its former 18th and 19th century importance. The preamble of the 1934 Ordinance states that it is "an ordinance to *amend* and *re-enact* the law relating to distress for rent" [emphasis added]; even if s 8(d) was, in its original incarnation in the 1876 Distress Ordinance, intended to be a codification of the common law, I consider that the language used in 1934 changed to reflect a comprehensive statutory framework that modified an archaic common law self-help remedy, instead of attempting a codification of the nebulous scope of the trade privilege that developed in a piecemeal fashion for "public convenience". I therefore do not think that reference to the common law trade privilege should be the starting point in interpreting the language of s 8(d) of the Distress Act. It would do little for the coherence of the law on distress to read s 8(d) as though it was an exact importation of the common law trade privilege, and engraft upon it all the attendant peculiarities.

69 I now turn to examine the meaning of the words of s 8(d). The effect of adopting the second expansive interpretation of the phrase "or otherwise dealt with" would appear to be that goods left in the tenant's possession and dealt with in any manner for a broad and vaguely intended object in the tenant's course of business would be *per se* exempt from distress under s 8(d). On the other hand, the third party may not be able to satisfy the requirements under s 10 if the goods were held by the tenant in the course of his business with the consent of the third party such that the tenant

appeared to be the reputed owner thereof: see s 10(1) read with s 12(a) of the Distress Act. This would lead to a rather anomalous result that the tenant's right to seek the release of the third party's goods under s 8(d) would be more extensive than the third party's personal right under s 10 in certain situations, even though both grounds of release stem from the same fundamental premise that the goods *do not* belong to the tenant and should not be appropriated towards the payment of the tenant's debts. The purpose of section 8 is to create *exceptions* from seizure that have a very defined and circumscribed scope, and in my view, a broad interpretation of s 8(d) would not be logically consistent or one that would advance the general object of s 8.

70 I consider that the third interpretation is therefore preferable, as it reads the words "for the purpose of being carried, wrought, worked up, or otherwise dealt with in the course of his ordinary trade or business" as a whole and within the overall context of the Distress Act. The phrase "otherwise dealt with" should be construed as subject to the preceding words "carried, wrought, worked up" under the *ejusdem generis* canon of construction. In *Bennion on Statutory Interpretation: A Code* (LexisNexis, 5th Ed, 2008) ("*Bennion*") at p 1231, the *ejusdem generis* principle is described in the following terms:

> The Latin words *ejusdem generis* (of the same kind or nature), have been attached to a principle of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character. The principle may apply whatever the form of the association, but the most usual form is a list or string of genus-describing terms followed by wider residuary or sweeping-up words.
>
> ...
>
> The *ejusdem generis* principle arises from the linguistic implication by which words having literally a wide meaning (when taken in isolation) are treated as reduced in scope by the verbal context. It may be regarded as an instance of ellipsis, or reliance on implication. The principle is presumed to apply unless there is some contrary indication.

71 Each of the preceding words involves some form of alteration or modification to the goods ("wrought" or "worked up") or an activity with the object of effecting some intermediate process leading up to the final intended use ("carried"). The genus of the type of activity encompassed by the phrase "otherwise dealt with" should therefore be confined to *services* provided by the tenant in the course of his ordinary business by *acting on* goods entrusted to him.

72 The above interpretation of s 8(d) does not seek to define the class of goods exhaustively, but I consider that s 8(d) would clearly apply to situations where, for example, the landlord seizes watches found at a watch repairer's shop, goods loaded on a truck found at the premises of a freight company or articles of clothing sent to a drycleaner. Whether the agreement between Cupid Jewels and Forever Jewels is given the legal shade of a consignment (akin to the agency relationship a mercantile factor enters into) or a sale or return arrangement, looking at the nature of activity involved, I do not think that the sale of goods by Cupid Jewels on behalf of Forever Jewels plausibly falls within the same genus of activities even if Cupid Jewels purports to be in the trade or business of "retailing". No services in the course of Cupid Jewels' business were actually provided *in relation to* the jewellery and no work was done on or with the jewellery. Cupid Jewels was merely displaying the jewellery for sale at the Premises through a particular form of arrangement entered into with Forever Jewels.

73 For completeness, I would add that even if I were to construe s 8(d) in accordance with the scope of the common law privilege and accept Cupid Jewel's contention that it had been holding the

distrained jewellery on consignment for sale, there is a leap in reasoning as to why Cupid Jewels would therefore have been akin to a "mercantile factor" such that the trade privilege would apply. Cupid Jewels is not in the trade or business of a factor or broker selling goods upon commission (as was the case in *Gilman*); it would merely be retailing jewellery through a particular mode, *ie*, consignment, and I do not think that the rationale of the common law trade privilege of "public convenience" for trade and commerce applies so obviously by analogy to the present fact situation.

74 I find that the distrained jewellery was not in Cupid Jewels' possession "for the purpose of being ... otherwise dealt with in the course of [its] ordinary trade or business" within the meaning of s 8(d), and therefore hold that the distrained jewellery was not exempt from seizure.

Forever Jewels' Application

Issue V: Was Forever Jewels entitled to the release of the distrained jewellery under s 10 of the Distress Act?

75 Section 10 of the Distress Act states as follows:

> **10**—(1) Where any movable property of —
>
> (*a*) any under-tenant;
>
> (*b*) any lodger; or
>
> (c) any other person whatsoever not being a tenant of the premises or any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof,
>
> has been seized under a writ of distress issued to recover arrears of rent due to a superior landlord by his immediate tenant, such under-tenant, lodger or other person may apply to a judge to discharge or suspend the writ, or to release a distrained article.
>
> (2) *No order shall be made unless such under-tenant, lodger or other person satisfies the court that the tenant has no right of property or beneficial interest in the furniture, goods or chattels and that such furniture, goods or chattels are the property or in the lawful possession of such under-tenant, lodger or other person*; and also in the case of an under-tenant or a lodger unless such under-tenant or lodger pays to the landlord or into court an amount equal to the arrears of rent in respect of which distress has been levied and also undertakes to pay to the landlord future rent, if any, due from him to the tenant.
>
> ...
>
> [emphasis added]

Section 10 does not apply to certain categories of distrained goods under s 12. Section 12(a) provides:

> **12**. Section 10 shall not apply to —
>
> (*a*) goods belonging to the husband or wife of the tenant whose rent is in arrear, or to goods comprised in any bill of sale, hire-purchase agreement, or settlement made by such tenant, *or to goods in the possession, order or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed*

owner thereof; …

[emphasis added]

76 Forever Jewels' application for the release of the distrained jewellery is therefore dependent on proof that Cupid Jewels had no beneficial interest in the jewellery and that the jewellery was not in the possession of Cupid Jewels "under such circumstances that [Cupid Jewels was] the reputed owner thereof".

Actual knowledge of ownership and reputed ownership

77 Forever Jewels argued that Orchard Central was at all material times aware that the distrained jewellery belonged to Forever Jewels and the doctrine of reputed ownership in s 12(a) therefore did not apply to preclude the release of the distrained jewellery under s 10.

78 Having heard the witnesses on this issue, I do not think that Forever Jewels has discharged the burden of showing that Orchard Central's representatives had *actual* knowledge that the distrained jewellery belonged to Forever Jewels and not Cupid Jewels. This is distinct from the issue of *constructive* knowledge, which the doctrine of reputed ownership is more properly concerned with. During cross-examination, Lim Kah Nai conceded, after some equivocation, that she had never expressly communicated to Orchard Central that Forever Jewels would be providing jewellery on consignment to Cupid Jewels. [note: 17] Louis Chua also confirmed that Cupid Jewels had never informed Orchard Central that the distrained jewellery was held on consignment. [note: 18] I do not think that mere awareness that Cupid Jewels would be supported by its sister company Forever Jewels in "stocks and finance" [note: 19] would have given rise to an inevitable inference on Orchard Central's part that the jewellery displayed at the Premises must have been consigned to Cupid Jewels for sale and were owned by Forever Jewels.

79 Following from my finding above, it is not necessary for me to express a concluded opinion on the interaction between actual knowledge of ownership and the doctrine of reputed ownership under s 12(a) of the Distress Act, although I would observe that the doctrine of reputed ownership operates so as to fix the landlord with constructive knowledge of non-ownership of the goods. Section 10 engrafted a broad statutory exception on the common law principle that all goods found on demised premises could be distrained irrespective of ownership; this general exception for third-party goods was then subject to a specific exception in s 12(a) under the doctrine of reputed ownership. The principle underlying this doctrine, albeit in the different context of bankruptcy, was expressed in the following terms by Vaughan Williams LJ in *Re William Watson & Co* [1904] 2 KB 753 at 757:

> ... *the true owner must have unconscientiously permitted the goods to remain in the order or disposition of the bankrupt*, ... This does not mean, as we understand it, that he must have intended that false credit should be obtained by the bankrupt's apparent possession of the goods, but it does at least mean that the true owner of the goods must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe, not might or might not) arise... [emphasis added]

By analogy, the *landlord's* right to distrain third party goods found on the demised premises should apply only if the true owner of the goods has allowed the goods to remain in the possession of the tenant in circumstances that give rise to an inference, *vis-a-vis* the landlord, that the goods belong to the tenant. If the landlord is in fact aware that the goods belong to the true owner and not the

tenant, the landlord cannot be heard to say that the true owner had "unconscientiously permitted" the goods to be held by the tenant so as to give the landlord a false expectation of the full value of the goods on the premises that were available to be distrained to recover rental arrears. The doctrine of reputed ownership should not, as a matter of principle, exclude actual knowledge of ownership. The landlord who has actual special knowledge that would not have been apparent to a reasonable landlord should not be entitled to rely on the doctrine of reputed ownership.

Reputed ownership

80 Orchard Central argued that Forever Jewels could not rely on s 10(1) of the Distress Act to obtain the release of the distrained jewellery as the jewellery had been in the possession, order or disposition of Cupid Jewels under such circumstances that Cupid Jewels had been the reputed owner of the jewellery within the meaning of s 12(a) of the Distress Act.

81 The test for reputed ownership was set out by the Court of Appeal in *Plaza Singapura (Pte) Ltd v Cosdel (S) Pte Ltd and another* [1990] 2 SLR(R) 22 ("*Cosdel*") at [23] as:

> ... whether in all the circumstances, a reasonable man would necessarily infer that the tenant was the owner of the articles in question, and that this inference is one which must in the circumstances arise. …

The Court of Appeal applied the reasonable man test from the perspective of the "public" or "customers visiting the demised premises" (at [23]–[26] of *Cosdel*). This differs from the decision of Lai Kew Chai J at first instance – which was overturned by the Court of Appeal – in *Plaza Singapura (Pte) Ltd v Shizuoka Yajimaya (Singapore) Pte Ltd (Cosdel (S) Pte Ltd, claimants)* [1988] 1 SLR(R) 109, where Lai J considered (at [20]) that "no *landlord* can be heard to say that they had let their premises in the knowledge or expectation that they could levy distress on the goods of these consignors" [emphasis added]. I have my reservations on whether the approach of the Court of Appeal is consistent with the purpose of the doctrine of reputed ownership (discussed above at [79]), but do not consider that the choice between either approach would be determinative on the present facts.

82 It was a non-contentious fact that Forever Jewels would deliver jewellery to Cupid Jewels for retail sales, and Cupid Jewels would then reassign the jewellery with Cupid Jewels' own unique bar coding and product identification number. The parties also agreed that there was no overt visual indication or marker on the jewellery displayed in the Premises that would suggest that the jewellery had been consigned to Cupid Jewels by Forever Jewels. Further, Cupid Jewels would issue receipts in its own name to customers who purchased jewellery from them. There was nothing to indicate that Cupid Jewels was only acting as an authorised agent for a third party in selling the jewellery and that the jewellery therefore did not belong to Cupid Jewels. There was ostensibly only a single business carried on at the Premises under the name of "Cupid Jewels". I consider that in all the circumstances, the necessary inference that must have arisen to a reasonable customer was that Cupid Jewels was the owner of the jewellery displayed in the Premises and sold solely by them. Similarly, in the light of my factual finding above that Orchard Central was not apprised of any consignment arrangement by Cupid Jewels during the course of negotiations for the Lease Agreement, I do not think that the position would have been any different to a reasonable landlord who had leased out his premises for retail operations.

83 Forever Jewels further submitted that the practice of consignment of jewellery was customary in the jewellery retail trade, and adduced in evidence a letter from one Ho Nai Chuen, the President of the Singapore Jewellers Association ("SJA"), confirming on behalf of the SJA that it was a "common

industry practice" for jewellery to be put on consignment by a jewellery manufacturer or wholesaler with a jewellery retailer. [note: 20] The veracity of the contents of the letter was not directly challenged in cross-examination, but Orchard Central argued in submissions that there was no credible evidence to show that it was usual and customary in the jewellery retail trade to have goods on consignment and that the letter was vague and drafted by Cupid Jewels' representative.

84 Forever Jewels did not make submissions on reputed ownership as its argument on this point was presumably that an inference of actual knowledge that the jewellery had been consigned to Cupid Jewels by Forever Jewels could be drawn as the practice of consignment was widespread in the jewellery retailing trade. I nevertheless consider that the evidence adduced is more apposite to address the issue of whether the purported trade custom would support a finding of reputed ownership.

85 As Forever Jewels sought to rely on an alleged commercial custom or usage in the jewellery retail trade, the burden was on Forever Jewels to prove this with "certainty and precision": see [12] of *Cosdel*. Quite apart from the issue of the reliability and veracity of the letter, I do not think that Forever Jewels has satisfied this threshold simply by adducing a single letter framed in very general language. The letter included the following qualifier:

> The amount of consigned inventory placed with the jewellery retailer varies across the industry depending very much on the mutual agreement between the jewellery establishment (consignee) and the jewellery supplier (consignor). [note: 21]

This appears to indicate that there is no fixed industry wide custom or practice that can be identified with specificity or that such trade practices are so extensive that they would have been immediately apparent to any reasonably informed landlord in the circumstances. I therefore consider that the evidence given by Ho Nai Chuen is of limited assistance to Forever Jewels.

86 For the foregoing reasons, I hold that s 10 of the Distress Act does not apply to Forever Jewels on the basis that the distrained jewellery was "in the possession, order or disposition of [Cupid Jewels] by the consent and permission of [Forever Jewels] under such circumstances that [Cupid Jewels was] the reputed owner thereof" within the meaning of s 12(a).

Conclusion

87 As I have found that the Writ of Distress was not irregularly issued and that Cupid Jewels and Forever Jewels have not satisfied the requirements of s 8(d) and s 10 of the Distress Act respectively, I dismiss both Cupid Jewels' Application and Forever Jewels' Application. I will hear counsel on costs.

88 I conclude with the postscript that I do not think that my findings on Forever Jewels' Application resulted in any substantive injustice on the facts. Notwithstanding the fundamental principle of separate legal personality, Cupid Jewels and Forever Jewels were at all times controlled and owned by the same or related parties. Forever Jewels is not an innocent or unwary third party which found itself in the unfortunate position of having left its goods in the possession of an impecunious tenant with an overzealous landlord.

[note: 1] fifth affidavit of Lim Kah Nai dated 3 May 2011 at para 4, defendant's bundle of affidavits ("DA") p 263

[note: 2] fifth affidavit of Lim Kah Nai dated 3 May 2011 at LKN-8, DA p 418

[note: 3] fifth affidavit of Lim Kah Nai dated 3 May 2011 at [28]

[note: 4] defendant's bundle of documents ("DBD") p 195

[note: 5] DBD p 196

[note: 6] notes of evidence ("NE"), cross-examination of Louis Chua, day 1 pp 21-22

[note: 7] DBD p 202

[note: 8] DBD p 205

[note: 9] DBD p 208

[note: 10] DBD p 212

[note: 11] DBD p 214

[note: 12] DBD p 215

[note: 13] defendant's bundle of pleadings p 1

[note: 14] NE, cross-examination of Louis Chua, day 1 p 25 line 32, p 26 lines 1-3

[note: 15] NE, re-examination of Louis Chua, day 1 p 58, lines 13-32; day 1 p 59, lines 1-10

[note: 16] DBD p 208

[note: 17] NE, cross-examination of Lim Kah Nai, day 1 p 76 at lines 22-30, p 77 at lines 30-31

[note: 18] second affidavit of Louis Chua dated 3 September 2010 at para 5b

[note: 19] fifth affidavit of Lim Kah Nai dated 3 May 2011 at para 20

[note: 20] affidavit of Ho Nai Chuen dated 6 March 2012, HNC-1, 4NA at Tab D

[note: 21] affidavit of Ho Nai Chuen dated 6 March 2012, HNC-1

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