**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2018] SGHC 52**

Suit No 470 of 2016

Between

PropertyGuru Pte Ltd

… *Plaintiff*

And

99 Pte Ltd

… *Defendant*

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# JUDGMENT

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[Contract] — [Breach]

[Tort] — [Inducement of breach of contract]

[Copyright] — [Infringement]

[Copyright] — [Groundless threat]

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# PropertyGuru Pte Ltd
# v
# 99 Pte Ltd

**[2018] SGHC 52**

High Court — Suit No 470 of 2016
Hoo Sheau Peng J
20–22, 26–27 September; 27 October; 17 November 2017

9 March 2018 Judgment reserved.

**Hoo Sheau Peng J:**

## Introduction

1 The plaintiff, PropertyGuru Pte Ltd, and the defendant, 99 Pte Ltd, are competitors in the business of providing online property classifieds. They each own and operate a website for this purpose, being www.propertyguru.com.sg ("the PG website") and www.99.co ("the 99 website"). As the defendant accepts,[1] the plaintiff established itself as one of the leading market players after launching its website in 2007. The defendant is the later entrant in the market, having launched its website only in 2015.[2]

2 The suit concerns property listings that were originally found on the PG website but were reproduced on the 99 website. The parties use the term "cross-

[1] Defendant's Closing Submissions at para 3.

[2] Defendant's Closing Submissions at para 5.



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post" to refer to the process of reproducing listings from one portal to another, and in this judgment, I use it in that sense.

3 The plaintiff claims that in developing and marketing a mobile application which allows property agents to cross-post listings from the PG website to the 99 website, and in providing a service by which the defendant undertook to manually cross-post property agents' listings from the PG website to the 99 website, the defendant has (a) breached the terms of a settlement agreement between the parties, (b) induced property agents to breach the terms and conditions for the use of the PG website that they were bound by, thereby committing the tort of inducement of breach of contract, and (c) infringed its copyright. The plaintiff seeks damages and injunctive relief against the defendant.

4 The defendant denies that it is liable to the plaintiff. It counterclaims against the plaintiff for making groundless threats to commence legal proceedings for copyright infringement.

5 The trial was heard over five days in September 2017. The plaintiff called the following witnesses to give evidence at the trial: (a) Mr Jani Antero Rautiainen ("Mr Rautiainen"), its managing director; (b) Mr Koh Yew Hoo ("Mr Koh)", the sole director and shareholder of a company named Media Publishing Group Pte Ltd ("MPG"), of which I will say more in due course; (c) Mr Jason Gregory, a product director of the plaintiff; and (d) Ms Carolynne Tong ("Ms Tong"), a property agent. The defendant called two witnesses: (a) Mr Cheung Yik ("Mr Cheung"), its founder and present chief executive officer, and (b) Mr Phun Yan Yan ("Mr Phun"), its chief operating officer. The trial was bifurcated and dealt only with the question of liability.



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6 Having received the parties' closing submissions on 27 October and reply submissions on 17 November, I reserved judgment. I now deliver my decision.

## Background

### *The parties*

7 The plaintiff was incorporated in October 2006.[3] It launched the PG website sometime in 2007.[4] The PG website allows end users, be they individuals wishing to buy, sell, rent or lease property, or the property agents of these individuals, to list properties or search for property listings. Each listing usually contains information about the property (such as its location, the price at which it is being offered and its size), photographs and a write-up.[5]

8 The defendant was incorporated in Singapore in January 2014.[6] According to Mr Cheung, the defendant wanted to develop a search engine for property listings that would be more "intuitive", and which would make use of algorithms to allow users to find listings more efficiently.[7] To this end, the defendant launched the 99 website in January 2015.[8]

### *The settlement agreement*

9 When the 99 website first started operations, the defendant took rental listings from the PG website and listed them on the 99 website. Mr Cheung

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3 Transcript (20 September 2017) at p 5, lines 4–5.

4 Affidavit of Evidence in Chief ("AEIC") of Jani Antero Rautiainen at para 5.

5 AEIC of Jani Antero Rautiainen at para 6.

6 AEIC of Cheung Yik at para 8.

7 AEIC of Cheung Yik at paras 7 and 9.

8 AEIC of Cheung Yik at para 9.



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candidly admitted this.[9] In technical terms, what the defendant did was to "scrape" listings by means of a software.[10]

10 Not long after the launch of the 99 website, the plaintiff's solicitors contacted the defendant. They conveyed the plaintiff's unhappiness about the defendant's "scraping" of listings from the PG website and asked that the defendant cease doing so.[11] The plaintiff and the defendant then entered into settlement talks which culminated in the signing of a settlement agreement dated 28 September 2015 ("the Settlement Agreement").[12]

11 The Settlement Agreement begins with the following preamble:

> **WHEREAS**
>
> (A) PropertyGuru believes that 99 had accessed and reproduced content ("the **Content**") from the website http://propertyguru.com.sg owned by PropertyGuru (the "**Website**"), and 99 denies the above.
>
> (B) PropertyGuru regards such accessing and reproduction of the Content by 99 as a breach of the Terms of Service and Acceptable Use Policy of the website and/or an infringement of PropertyGuru's copyright in the Content (the "**Dispute**").
>
> (C) The Parties wish to resolve the dispute amicably, without recourse to litigation.

12 This is followed by cl 1, which records that the plaintiff and the defendant agreed "to a full and final settlement" and that the terms of the Settlement Agreement would "immediately be fully and effectively binding on them."

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9 AEIC of Cheung Yik at para 30.

10 Transcript (26 September 2017) at p 17, lines 13–18.

11 AEIC of Cheung Yik at para 31.

12 AEIC of Cheung Yik at para 33.



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13 Then, Clause 2.1 states as follows:

> **2. MANAGEMENT OF RELEVANT INFORMATION AND MATERIALS**
>
> 2.1 Without any admission as to liability, 99 shall undertake to, within 30 days of the date of this agreement, and where applicable:
>
> (a) Not, whether by itself or by its affiliate companies, affiliate websites, administrators, officers, managers, and/or agents, substantially reproduce any of the Content, or any contents found on any website owned by PropertyGuru, without PropertyGuru's consent. To avoid doubt, nothing herein precludes 99 from taking Content pertaining to a user or agent pursuant to the user or agent's request;
>
> (b) Not connect to, for the purposes of posting property listings and/or any other information on, the Website, or any website owned by PropertyGuru, through any of 99's websites, programs, applications, servers, or services or authorise any of its clients, users, affiliate companies, affiliate websites, administrators, officers, managers and/or agents to do the same;
>
> (c) Take reasonable efforts to delete any of the Content from its own website (at 99.co) and to destroy any copies of such Content; and
>
> (d) Take reasonable efforts to delete or destroy any materials prepared based on any of the Content.

Cl 2.2 provides a list of websites for the purpose of interpreting "any Website owned by PropertyGuru", a phrase which is found, for example, in cl 2.1(a). The list includes the PG website.

14 The dispute between the parties did not end with the Settlement Agreement. After the date of the Settlement Agreement, the plaintiff claims that the defendant continued to cross-post listings through a mobile application known as the Xpressor Application ("Xpressor App") and through a service it



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offered known as the Posting Assistant Service ("PA Service").[13] I now turn to explain the nature of the Xpressor App and PA service.

***The Xpressor Platform and the Xpressor App***

15 "Xpressor" is the name of a web-based platform ("the Xpressor Platform") which allows users to post property listings to multiple web portals simultaneously.[14] The Xpressor Platform is owned by MPG, which I referred to at [5]. According to Mr Koh, MPG has operated the Xpressor Platform since 2009 or 2010.[15] At the time of the trial, the Xpressor Platform was still available on the internet.[16]

16 The functions of the Xpressor Platform were explained by Mr Phun, by reference to screenshots of the various pages within the Xpressor Platform. The screenshots show that the Xpressor Platform allows a user to key in information about their property, and then choose onto which portal or portals for online property classifieds they wish to post their listings. The screenshot of the Xpressor Platform's Facebook Page lists eight different portals (including the PG website and the 99 website) as portals onto which users can post their listings.[17] In addition, the user may also select the dates and times at which a listing is to be cross-posted from one portal to another.[18]

17 On 26 March 2015, the defendant and MPG entered into an agreement ("the Xpressor Agreement"),[19] by which MPG would, for a fee, allow the

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13 Plaintiff's Closing Submissions at para 14.

14 AEIC of Koh Yew Hoo at para 4.

15 Transcript (21 September 2017) p 10, lines 15–16.

16 Transcript (21 September 2017) p 10, lines 19–20.

17 Agreed Bundle of Document ("AB") vol 6 at p 1111.

18 AEIC of Phun Yan Yan, PYY-2.



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defendant to provide access to the Xpressor Platform on the 99 website. The purpose of the Xpressor Agreement was to allow users of the 99 website to access the Xpressor Platform from the website. This project was, however, abandoned due to "technical issues".[20]

18 According to Mr Cheung, after the technical issues surfaced, the defendant advised property agents who were using the 99 website to use the Xpressor Platform via the website hosted by MPG.[21] Property agents found this inconvenient, and suggested to Mr Cheung that they would prefer using a mobile application.[22] Furthermore, MPG itself wanted to build a mobile application but did not have sufficient resources to do so. Therefore, Mr Koh asked the defendant to build an application for them. Thereafter, MPG and the defendant collaborated on the development of the Xpressor App.[23]

19 The Xpressor App allows users to cross-post their listings on the PG website to the 99 website. On opening the Xpressor App, users are required to log in to their "Guru Account" (*ie*, their account on the PG website). The Xpressor App then lists all their active listings on the PG website, and the user may choose to cross-post either a selection of those listings or all of them to the 99 website.[24]

20 The Xpressor App was made available for download on the iTunes Apple Store and Google Play Store.[25] There is some dispute over the precise

19 AEIC of Koh Yew Hoo at Tab 1.

20 Transcript (21 September 2017) p 32, lines 23–25; AEIC of Cheung Yik at para 23.

21 AEIC of Cheung Yik at para 23.

22 AEIC of Cheung Yik at paras 23–24.

23 AEIC of Cheung Yik at para 26.

24 AEIC of Phun Yan Yan, PYY-3.

25 Transcript (22 September 2017) at p 74, lines 16–18.



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period when it was available. There is documentary evidence that the Apple Store gave approval for the upload of the Xpressor App on 6 June 2015 and that on 23 January 2016, Apple Store notified Mr Koh (who was registered as the owner of the Xpressor App) that it would be taken down.[26] However, there was no documentary evidence on when the Xpressor App was made available on the Google Play Store. Mr Phun said it was taken down sometime in end January 2016.[27] In any case, both Mr Cheung and Mr Phun testified that, to the best of their knowledge, users who downloaded the Xpressor App before it had been removed from the digital stores could continue to use the Xpressor App.[28]

21 The Xpressor App was taken down from the digital stores at Mr Koh's instructions. Mr Koh gave this instruction because on 8 December 2015, the plaintiff's solicitors had sent a letter to MPG alleging that in making available the Xpressor App which users of the PG website could use to cross-post listings to the 99 website, MPG had induced those users to breach certain terms and conditions of the PG website. These terms and conditions, *inter alia*, prohibit the use of third-party software to crawl or mine information from the PG Website).[29] Thus, Mr Koh asked Mr Cheung to take down the Xpressor App.[30] Thereafter, MPG and the plaintiff signed a confidential settlement agreement dated 6 February 2016. After the settlement agreement, the Xpressor Platform continued to be accessible on the internet.

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26 AEIC of Cheung Yik, CY-4.

27 Transcript (27 September 2017) at p 50, lines 18–20.

28 Transcript (26 September 2017) at p 54, lines 17–20; Transcript (27 September 2017) at p 50, lines 24–29.

29 AEIC of Koh Yew Hoo, Tab 4.

30 AEIC of Koh Yew Hoo, para 20.



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***The PA service***

22 I turn now to the PA Service. Mr Cheung revealed that the defendant started offering the PA Service from August 2016.[31] It was made available for free to premium account holders of the 99 website.[32] Should a property agent choose to use the PA Service, an independent contractor of the defendant would access the agent's listings on the PG website, copy the information in those listings and post them on the 99 website.[33] In other words, the cross-posting is a completely manual process.

***The present proceedings***

23 On 11 May 2016, the plaintiff commenced the present proceedings. The plaintiff's claims against the defendant are founded on three causes of action: (a) breach of contract (specifically, the Settlement Agreement), (b) the tort of inducement of breach of contract by the users of the PG website (with the contract being the Terms of Use and Acceptable Use Policy of the PG website), and (c) copyright infringement.

24 In the Statement of Claim, the plaintiff sets outs details of the defendant's development and marketing of the Xpressor App, and alleges that the Xpressor App has been used by an "unquantifiable number of end users" to cross-post listings.[34] By way of particulars of reproduction by the defendant, the plaintiff provides details of 71 property listings which were said to have been originally posted on the PG website in January 2016 and February 2016, and which were reproduced on the 99 website in the same months. The plaintiff also

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31 Transcript (26 September 2017) at p 59, lines 19–21.

32 Transcript (26 September 2017) at p 59, lines 22–29.

33 Transcript (26 September 2017) at p 62, lines 15–29.

34 Statement of Claim ("SOC") at paras 8--9.



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pleads that photographs for each of these listings were reproduced. Collectively, I will refer to these listings and their accompanying photographs as "the January and February 2016 reproductions".[35]

25 As the defendant rightly stresses, the availability of the PA Service to users of the 99 website and the particulars of copying by way of the PA Service are not found in the plaintiff's pleadings.[36] According to the plaintiff, it was only sometime in April 2017 that it discovered that the defendant was reproducing listings from the PG website pursuant to the PA Service. No step was taken to amend the pleadings. Yet, at the trial, the plaintiff adduced evidence of the copying of one property listing with nine photographs by a property agent, Ms Tong, from the PG website to the 99 website by way of the PA Service ("the PA Service reproduction"). At the appropriate junctures below, I will consider the implications of this failure to plead the matters in relation to the PA Service, as well as other deficiencies in the plaintiff's pleadings. I will now deal with each cause of action in turn, summarising the parties' positions, and giving my decision under each section.

## Breach of Settlement Agreement

### *Overview*

26 The plaintiff pleads that the defendant breached the Settlement Agreement in two ways:[37]

> (a) By substantially reproducing and continuing to substantially reproduce the "Content (as defined in the Settlement Agreement)"

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35 SOC at para 11.

36 Defendant's Closing Submissions at para 88.

37 SOC at paras 16–17.



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sometime "in or around 2015" without the plaintiff's consent or approval. Specifically, the plaintiff relies on the January and February 2016 reproductions; and

(b) By connecting to the PG website through an "unauthorised application", sometime in or around 2015, for the purpose of posting and/or retrieving property listings and/or other information on the PG website. It is clear, when the Statement of Claim is read in its entirety, that "unauthorised application" refers to the Xpressor App.[38]

27 I note that the plaintiff's Statement of Claim reproduces a number of clauses from the Settlement Agreement,[39] including cl 2.1 in its entirety, but does not identify precisely which clause(s) of the Settlement Agreement the defendant was supposed to have breached. In its Amended Reply and Defence to Counterclaim, the plaintiff highlights cll 2.1(a) and (b) as the clauses which the defendant failed to comply with.[40] In its closing submissions, it asserts that the defendant was in breach of cll 2.1(a)–(d).[41]

28 In response, the defendant denies any breaches of the Settlement Agreement, alleging, *inter alia*, that any such acts of reproduction were committed by the property agents, or at the request of the property agents.

29 Ascertaining whether the defendant breached the various clauses requires the court to interpret those clauses. It is not disputed by the parties that the purpose of contractual interpretation is to give effect to the objectively-ascertained expressed intentions of the contracting parties as it emerges from

38 SOC at para 17 read with paras 8–9.

39 SOC at para 15.

40 Amended Reply and Defence to Counterclaim at para 10.

41 Plaintiff's Closing Submissions at paras 18–19.



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the contextual meaning of the relevant contractual language. In line with this, a number of key principles must be borne in mind. First, both the text sought to be interpreted and its context must be considered. Second, it is the objectively-ascertained intentions of the parties, and not their subjective intentions, which are relevant. Third, given that the object of interpretation is the verbal expressions used by the parties, the text of their agreement is of first importance: see the Court of Appeal's decision in *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [30].

30 Although Mr Rautiainen and Mr Cheung were cross-examined as to what they thought the meanings of certain terms in the Settlement Agreement were, I do not think these exchanges are material in interpreting the disputed clauses. As the Court of Appeal recently held in *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd* [2017] SGCA 68 at [65], the parties' subjective understanding of the contract should be treated with caution. Interpretation is after all an exercise in determining the objectively-construed meaning of the contractual terms. Therefore, I place more weight on the plain and ordinary meaning of the contractual language as they would be understood objectively, than on the parties' subjective views of their meaning. The latter appeared to have been advanced with a view to buttressing the respective cases.

31 With that, I turn to analyse cl 2.1(a), cl 2.1(b) and cll 2.1(c)–(d), and consider whether the defendant acted in breach of the stipulated obligations.

***Whether the defendant breached cl 2.1(a)***

32 To recap, cl 2.1(a) says:



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> 2.1 Without any admission as to liability, 99 shall undertake to, within 30 days of the date of this agreement, and where applicable:
>
> (a) *Not*, whether by itself or by its affiliate companies, affiliate websites, administrators, officers, managers, and/or agents, *substantially reproduce any of the Content*, *or any contents found on any website owned by PropertyGuru*, without PropertyGuru's consent. To avoid doubt, *nothing herein precludes 99 from taking Content pertaining to a user or agent pursuant to the user or agent's request*;
>
> [Emphasis added]

33 There are two main parts to this sub-clause. The first contains the obligation on the defendant not to reproduce any of "the *Content*, or any *contents* found on any website owned by [the plaintiff]" without its consent. As will be seen, the distinction between "Content", with a big 'c', and "contents", with a small 'c', is of significance in this case. The second part of the clause contains an exception in that the defendant is allowed to take "Content pertaining to a user or agent" at that user or agent's request.

34 In its closing submissions, the plaintiff argues along the following lines:

(a) The defendant has breached cl 2.1(a) by "substantially reproducing and continuing to substantially reproduce the *Content and/or contents*" [emphasis added] without its consent or approval.[42]

(b) The plaintiff's primary argument is that the defendant has reproduced "the Content". In this regard, the plaintiff submits that "Content" refers to the property listings which had been taken and reproduced prior to the date of the Settlement Agreement – that is, 28 September 2015.[43] As evidence that some of the plaintiff's "Content"

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42 Plaintiff's Closing Submissions at para 18.

43 Plaintiff's Closing Submissions at para 58.



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was reproduced,[44] the plaintiff points to the January and February 2016 reproductions and the PA Service reproduction. On this argument, the plaintiff argues that the exception in cl 2.1(a) does not apply because the "Content" was reproduced at the defendant's request, and not at the property agents' requests.[45]

(c) In the alternative, the plaintiff argues that by the very same listings mentioned in the previous sub-paragraph, the defendant has reproduced "contents" that were found on the PG website after the Settlement Agreement.[46] On this alternative position, the exception is irrelevant because it only applies when there has been a reproduction of "Content".

35 In response, the defendant makes the following arguments:

(a) The obligation under cl 2.1(a) only subsists for 30 days after the Settlement Agreement. The defendant had, within that 30 days, discharged its obligations. The earliest evidence of breach in this case was January 2016.[47]

(b) The word "Content" refers simply to content taken from the PG website. There is no distinction to be drawn, as the plaintiff suggests, between content that was reproduced before the date of the Settlement Agreement, and content that is reproduced after that date.[48]

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44 Plaintiff's Closing Submissions at para 68.

45 Plaintiff's Closing Submissions at para 69.

46 Plaintiff's Closing Submissions at para 70.

47 Defendant's Closing Submissions at para 121(a).

48 Defendant's Closing Submissions at para 107.



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(c) There was no breach of cl 2.1(a) because the listings reproduced in January and February 2016 were cross-posted by the users themselves either through the use of the Xpressor Platform, the Xpressor App or some other means. The broader point the defendant makes is that the Settlement Agreement is not meant to regulate or govern the taking of listings by the property agents themselves. Thus, the defendant is not in breach of the Settlement Agreement if a property agent uses the Xpressor Platform or the Xpressor App to cross-post their listings.[49] In a similar vein, the defendant contends that although it cross-posted Ms Tong's listings by way of its PA Service, this was done at her request.[50]

36 In my view, the defendant breached cl 2.1(a), but only in respect of the PA Service reproduction, and not in respect of the January and February 2016 reproductions. I will make three observations about cl 2.1(a) before explaining why I take this view.

*Meaning of "the Content" in Settlement Agreement*

37 My first observation concerns the dispute over the meaning of "Content". I find that "Content" refers to listings that had already been reproduced by the defendant prior to the date of the Settlement Agreement. In this regard, I agree with the plaintiff's position as set out at [34(b)] above. This is for two reasons. First, the word "Content" is defined in the preamble as referring to content that the defendant "had accessed and reproduced". The use of the past tense is significant as it suggests that the "Content" referred to is what has already been reproduced by the defendant, and not what might be reproduced by the defendant in future. Second, the phrase "Content" is also used

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49 Defendant's Closing Submissions at para 114.

50 Defence at para 28; Defendant's Closing Submissions at para 121(b).



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in cll 2.1(c) and (d). Pursuant to these clauses, the defendant was obliged to delete "any of the Content" from its website and destroy materials prepared based on such "Content". Again, this suggests that "Content" refers to what had already been reproduced before entering into the Settlement Agreement. There is really no reason to impose an obligation on the defendant to delete what it would copy in future given that the whole point of the Settlement Agreement is to prevent it from continuing to copy any listings.

38 However, it should be noted that cl 2.1(a) obliges the defendant not to reproduce "any of the *Content*", as well as "any *contents* found on *any website* owned by [the plaintiff]" [emphasis added]. It is evident that this latter phrase is to prevent the defendant from reproducing any listing found on the PG website, even those which are posted after the date of the Settlement Agreement. I digress to state that it is my view that the January and February 2016 reproductions and the PA Service reproduction are of "*contents*" (and not of "*Content*"). These materials were clearly posted on the PG website after the date of the Settlement Agreement. I will explain this further below at [52] and [61].

*Duration of obligation under cl 2.1 of Settlement Agreement*

39 I will next address the defendant's point about the duration of the obligation of cl 2.1(a). This is an issue which also affects the operation of cl 2.1(b)–(d). The question is what the Settlement Agreement means when it says that the defendant was to execute the obligations under cll 2.1(a)–(d) "within 30 days of the date of this agreement, and where applicable."

40 Consistent with the defendant's position set out earlier, Mr Cheung's understanding was that the obligations under cll 2.1 only had to be complied with "for the period of 30 days …after the agreement".[51] On the other hand, Mr



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Rautiainen's understanding was that this means that the defendant had 30 days to *start* complying with cl 2.1.[52] In other words, the defendant had a grace period of 30 days.

41 In my view, on an objective reading of cl 2.1, both these interpretations do not appear to be correct. One should not assume that the period for compliance is the same in respect of cll 2.1(a), (b), (c) and (d). The addition of "*where applicable*" at the end of the phrase "within 30 days of the date of this agreement, and where applicable" suggests that there are certain sub-clauses under cl 2.1(a) for which there had to be compliance within 30 days, whereas this period might not be applicable to other obligations. In particular, it seems to me that the period would not be applicable to continuing obligations. As to which obligations are continuing obligations and which are not, the answer must be derived by looking at each sub-clause.

42 It is evident to me that cll 2.1(c) and (d), under which the defendant had to delete the Content from the 99 website and destroy copies made of the Content, contain the obligations that had to be executed within the fixed 30-day period. These obligations relate to the Content which led to the Settlement Agreement, and should be completed within the given period. To allow the defendant an indefinite period of time for compliance would make the obligation a hollow one.

43 As for cll 2.1(a) and (b), these appear to me to contain continuing obligations. Broadly speaking, cl 2.1(a) is meant to stop the defendant from reproducing the contents of the PG website. The Settlement Agreement would be of very limited utility if the defendant only had to cease doing so for 30 days.

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51 Transcript (26 September 2017) at p 114, lines 20–30.

52 Transcript (20 September 2017) at p 9, lines 7–8.



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Hence, the obligation within cl 2.1(a) must necessarily be a continuing one. As for cl 2.1(b), likewise, it imposes a negative obligation (an obligation on the defendant *not* to do something that the plaintiff took objection to). It would also make sense for this to be a continuing obligation rather than one that only needed to be complied with for a fixed, and somewhat brief, period of time.

*Conduct meant to be regulated by the Settlement Agreement*

44 My third observation is about the kind of conduct cl 2.1(a) is meant to regulate. I find that cl 2.1(a) is meant to prevent the defendant from taking listings from the PG website and reproducing them on the 99 website. It is not intended to make the defendant liable for all "Content" or "contents" found on the 99 website regardless of who had reproduced them. The following are my two reasons for saying this.

45 The first is the contractual language. Clause 2.1(a) says that the defendant cannot ""whether *by itself* or by *its* affiliate companies, affiliate websites, administrators, officers, managers, and/or agents, substantially reproduce" either the Content or any contents [emphasis added]. The exception to cl 2.1(a) begins with "nothing precludes [the defendant] from taking…". All this plainly means that it is the *defendant*, as someone capable of accessing the PG website just like any other individual or property agent, who is not allowed to substantially reproduce Content or contents. As a corporate entity, the defendant is liable if such reproduction is done by anyone who is under its control, such as its administrator, officer, manager and/or agent.

46 The second reason has to do with the background to the Settlement Agreement. It was the defendant's scraping of listings from the PG website which led to the Settlement Agreement. This is recorded in the preamble where it is stated that what led to the Settlement Agreement was the accessing and



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reproducing of contents "*by [the defendant]*" [emphasis added]. It would be consistent with that background to the Settlement Agreement to read cl 2.1(a) as only restricting the defendant or anyone who is under its control from actively reproducing contents.

47 In this regard, I note that cl 2.1(a) prohibits the defendant from reproducing Content or contents by itself or "by its… *agents*", and that the exception states that "nothing herein precludes 99 from taking Content pertaining to a user or *agent* pursuant to the user or *agent's* request". In my view, the word "agent" is used in two different senses in the same clause. In the former instance, "agent" refers to a person with whom the defendant has the legal relationship of principal and agent, one which is analogous to the relationship it has with an "officer" or "manager". In the latter instance (within the exception), "agent" refers to a "property agent", one who is a "user" of the website just like any other individual who accesses the 99 website to post or view listings.

48 I reject the plaintiff's submission that the property agents should be regarded as the defendant's "agents in law", thus making the defendant liable as principal for their actions.[53] In law, an agent is one who performs an act on behalf of another, being the principal, and whose acts are intended to affect the principal's legal relations with third parties. Like all users of the 99 website, the property agents are the defendant's customers. They are not appointed by the defendant to act on its behalf, much less affect its legal relations with other parties.

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53 Plaintiff's Closing Submissions at para 81.



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*The January and February 2016 reproductions*

49 With that understanding in mind, I turn to the January and February 2016 reproductions, which is meant to evidence breaches of cl 2.1(a) by the defendant. At the outset, I state that I do not find that it is proved that the January and February reproductions were made by the defendant. As such, I find that there is no breach of cl 2.1(a) by the defendant.

50 I should start by giving more details of the January and February 2016 reproductions. These comprised 41 listings in January 2016 and 30 listings in February 2016. For each listing, the plaintiff adduced screenshots of the accompanying photographs, so as to demonstrate that the photographs on the 99 website are reproductions of the photographs on the PG website.

51 Upon reviewing the photographs on the 99 website, *most* of them contain the plaintiff's watermark. Essentially, the Plaintiff's watermark comprises the words "PropertyGuru.com.sg", enclosed within a small grey rectangular box. In fact, it is not in dispute that those watermarked photographs on the 99 website had been reproduced from the PG website. Both Mr Rautiainen[54] and Mr Cheung[55] were asked about a sample of listings from the January and February 2016 reproductions, and agreed with the suggestion that the watermarked photographs had been reproduced from the PG website. As for the remaining photographs which do not contain the plaintiff's watermark, the photographs on the 99 website appear identical to the photographs on the PG website.

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54 Transcript (20 September 2017) at p 60, lines 27–29.

55 Transcript (26 September 2017) at p 39, line 22 to p 41, line 7; p 41, line 13 to p 41, line 6.



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52 At this juncture, I pause to elaborate why I am of the view that the listings in these reproductions form "contents", and not "Content", within the meaning of the Settlement Agreement (see [38] above). As explained by Mr Rautiainen, the watermark found on these photographs was a new version, and was introduced by the plaintiff in or around December 2015 after refinements made to the previous version. After the signing of the Settlement Agreement, the plaintiff continued monitoring the 99 website. Then, it discovered the January and February 2016 reproductions.[56] From the evidence, it seems clear to me that the listings were posted on the PG website after the Settlement Agreement. Contrary to the primary argument by the plaintiff (see [34(b)]), these listings form "contents" within the meaning of the Settlement Agreement.

53 With that said, what is more critical is that it is unclear just *how* the January and February 2016 reproductions came to appear on the 99 website. Prior to 6 February 2016, the Xpressor Platform would not remove the plaintiff's watermark when cross-posting listings. Sometime after 6 February 2016, MPG modified the Xpressor Platform such that when listings were cross-posted from the PG website to the 99 website, the watermark on the photographs would automatically be removed.[57] It is not exactly clear when the modification happened. Mr Koh told the court that he made this modification "as soon as [he knew] this case happened", by which he meant as soon as he knew that "the watermark causes the legal suits".[58] Mr Koh was fairly certain that the change happened after MPG entered into the Settlement Agreement on 6 February 2016.[59] As for the Xpressor App, it is clear from the evidence of Mr Cheung,

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56 AEIC of Jani Antero Rautiainen at para 27 – 28.

57 Transcript (21 September 2017) at p 37, lines 17–27.

58 Transcript (21 September 2017) at p 37, line 28 to p 38, line 2.

59 Transcript (21 September 2017) at p 39, lines 4–6, 19–20.



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that at all material times, the Xpressor App will remove the plaintiff's watermark when cross-posting the photographs.[60]

54 Thus, it might be surmised that of the January and February 2016 reproductions, those listings with photographs with the plaintiff's watermark *could not have been* reproduced by using the Xpressor App. This is because the Xpressor App would have removed the watermark from them. Instead, these *could have been* reproduced using the Xpressor Platform or some other means. I say this because Mr Koh informed the court that besides the Xpressor Platform, there were at least "four or five" other mobile applications with similar cross-posting functionalities available on the market.[61] The possibility that the photographs appeared on the 99 website because of these other applications cannot be ruled out.

55 Turning to the listings with photographs without the watermark, it is still possible that the property agents had used the Xpressor Platform, and not the Xpressor App, to cross-post them. All but one of these listings was posted in February 2016. That coincided with the time when the change was made to the Xpressor Platform to ensure that watermarks would be removed from photographs that were reproduced from the PG website as per Mr Koh's testimony. Quite apart from this, it is possible that the property agents had used other means, including other mobile applications to cross-post listings, and that such mobile applications similarly would remove the watermark, thereby resulting in the reproductions without the watermark on 99 website. I should also add that the evidence was that the Xpressor App was not available for downloading around end January 2016 (see [20]). In this regard, the plaintiff did not adduce any evidence from any of the property agents concerned to

60 Transcript (26 September 2017), p 116, lines 1–4.

61 Transcript (21 September 2017) at p 25, lines 28–30 to p 26, lines 1 – 10.



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explain how the cross-postings from the PG website to the 99 website might have taken place. The plaintiff could have done this.

56 Be that as it may, it is strictly not necessary for the purpose of the plaintiff's claim for breach of cl 2.1(a) to decide definitively how the January and February 2016 reproductions came to appear on the 99 website. Even assuming that all the January and February 2016 reproductions were brought about as a result of the use of the Xpressor App, it does not show, in my judgment, that it was the defendant who reproduced the listings, in the sense I have referred to above, *ie*, that it was the defendant who actively cross-posted the listings.

57 I am not persuaded by the plaintiff's argument that the defendant should be regarded as having "reproduced" the listings because it had developed and marketed the Xpressor App, as well as hosted the Xpressor App on its server.[62] Ultimately, it was the property agents who made the decisions whether or not to cross-post the listings they had on the PG website to the 99 website using the Xpressor App. It was also the property agents who would select which listings to cross-post (see [19] above). These were the acts of the property agents or users, not the acts of the defendant, and thus fell outside the scope of cl 2.1(a).

*The PA Service reproduction*

58 The plaintiff also contends that the defendant breached cl 2.1(a) by way of the PA Service reproduction.[63]

59 Indeed, the evidence shows that nine photographs from one listing from the PG website had been copied to the 99 website, even though the nine

62 Plaintiff's Closing Submissions at para 68.

63 Plaintiff's Supplementary Bundle of Documents, p 10–36.



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photographs had been reproduced with the plaintiff's watermark removed. In her affidavit, Ms Tong deposed that a representative from the defendant had contacted her in September 2016 and asked if she would be interested in using the PA service which was available for free.[64] Ms Tong agreed. On 4 September 2016, via a text message, another representative of the defendant told her that she would be informed when her listings were posted on the 99 website. Thereafter, Ms Tong found that all the listings she had posted on the PG website in September 2016 were also available on the 99 website under her account. She stopped posting listings on the 99 website since they would "automatically" be copied over from her account at the PG website.[65] Ms Tong added that she did not request the defendant to cross-post her listings,[66] and that she did not know who had copied her listings onto the PG website.[67]

60 Based on the evidence, I rule out the possibility that the appearance of Ms Tong's listing with the nine photographs on the 99 website was due to her having cross-posted it, either by herself or using some other application with cross-posting functionalities. Unlike the January and February 2016 reproductions, I am satisfied that the PA Service reproduction was carried out by the defendant pursuant to the PA Service. By doing such an act, the defendant had reproduced "any contents" on its website and thus breached cl 2.1(a).

61 This brings me to the defendant's argument that it can avail itself of the exception to cl 2.1(a) (see [35(c)] above). In my view, it cannot do so. On a plain reading of the exception, it is clear that the exception only allows the defendant to take "Content", being listings uploaded before 28 September 2015,

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64 AEIC of Carolynne Tong at para 8.

65 AEIC of Carolynne Tong at para 13.

66 Transcript (21 September 2017) p 56, lines 3–4.

67 Transcript (21 September 2017) p 58, lines 13–18.



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pursuant to a user or agent's request. The PA Service reproduction was of "contents" and not "Content" because Ms Tong's listing was posted on the PG website after the date of the Settlement Agreement. Therefore, the exception does not apply.

62 I should note that the plaintiff's watermark was removed from the nine photographs on the 99 website, and that the nine photographs also carry an *additional* watermark in the centre of each photograph showing the property agent's name. The additional watermark was added by the defendant. However, in my view, this still means that cl 2.1(a) was breached because the defendant's obligation was not to "substantially reproduce" the contents on the PG website. The reproduction of the photographs, albeit without the plaintiff's watermark and with the defendant's additional watermark, constituted a substantial reproduction of the photographs as they appeared on the PG website.

*The pleading point*

63 As alluded to at [25] above, the plaintiff does not specifically plead the availability of the PA Service and the PA Service reproduction. Further, I also observe that the plaintiff pleads that the defendant has been substantially reproducing and continuing to substantially reproduce "Content" (as defined in the Settlement Agreement)" (see [26] above), and does not specifically plead the reproduction of "contents".

64 It is trite that pleadings play an important part in an action, and that the primary purpose of pleadings is to identify the issues in dispute so as to inform the parties of the case to be met. The heart of a claim of breach of contract is the term alleged to have been breached, and the act in breach of the term. In the Statement of Claim, cl 2.1(a) of the Settlement Agreement is set out in full (which refers both to "Content" and "contents"). As I stated above, the January



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and February 2016 reproductions (particularised in support of the claim) constituted "contents", rather than "Content". As such, I am of the view that the ambit of the plaintiff's pleading covers the reproduction of "contents", as well as "Content" within cl 2.1(a).

65 Next, the *act* in breach of cl 2.1(a) is that of reproduction, and the plaintiff has, in effect, pleaded that defendant *continues* to reproduce materials. In my view, the PA Service reproduction is a further act of reproduction, and falls within the allegation of continuing reproduction by the defendant. Also, it is not strictly necessary to plead that such reproduction was carried out pursuant to the PA Service. The details relating to the PA Service serves to explain why and how the defendant came to reproduce the material, and form evidence of the surrounding circumstances which need not be pleaded.

66 Even if I were to be wrong on the above, I note that a court may depart from the parties' pleadings in limited circumstances: that is, where no prejudice is caused to the other party in the trial or where it would be clearly unjust for the court not to do so (where, for example, both parties have come to court prepared to deal with the unpleaded issue), though such situations are likely to be uncommon (*V Nithia (co-administratix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithnilingam and another* [2015] 5 SLR 1422 at [40]–[41]).

67 In my view, it is not prejudicial to the defendant for the PA Service reproduction to be considered. After all, the defendant takes the position that there should not be any distinction between the "Content" and "contents" (see [35(b)]), and simply frames the issue in dispute as one of whether the defendant is to be liable for the reproduction and continued reproduction of the materials from the PG website. Specifically, the defendant does not dispute the provision



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of the PA Service, or any copying which might have occurred pursuant to the PA Service. It contends that such conduct is permissible because the property agents have requested for such copying (see [35(c)]). Thus, the defendant was well prepared to meet the allegations at the trial, and it would not be unjust to take on board the further act of reproduction by way of the PA Service.

***Whether the defendant breached cl 2.1(b)***

68 Pursuant to cl 2.1(b), the defendant is not allowed to:

> … connect to, for the purposes of posting property listings and/or any other information on, the Website, or any website owned by PropertyGuru, through any of 99's websites, programs, applications, servers, or services or authorise any of its clients, users, affiliate companies, affiliate websites, administrators, officers, managers and/or agents to do the same;

69 The plaintiff submits[68] that the Xpressor App, which was owned, operated and maintained by the defendant, had connected to the PG website "for any other information" in order to cross-post listings. Likewise, the PA service involved the defendant accessing the PG website to cross-post listings. Therefore, cl 2.1(b) was (and continues to be) breached by the defendant.

70 The defendant argues[69] that cl 2.1(b) is meant to prevent the defendant from connecting to the plaintiff's websites to post listings and/or post any other information. The defendant neither connected to the PG website (since it was the end users of the Xpressor App who did so), much less posted any listings or other information on the PG website. Hence, the defendant did not breach cl 2.1(b).

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68 Plaintiff's Closing Submissions at paras 87–88.

69 Defendant's Closing Submissions at paras 122–127.



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71 I agree with the defendant. In my view, the reading put forth by the plaintiff is a strained one. It would not only require separating the verb "posting" from "any other information", but would also involve reading in "copying" or "cross-posting", such that the obligation on the defendant becomes that of not connecting to the PG website for the purposes of either: (1) "posting property listings", and/or (2) "[copying/cross-posting] any other information". I acknowledge that the meaning that the plaintiff attempts to shoehorn into the words of cl 2.1(b) would be consistent with the purpose of the Settlement Agreement which is to prevent the defendant from actively taking listings from the PG website by use of technological means. However, that is not a meaning which can be gleaned from the plain words of the text of cl 2.1(b), and it is the text that must be of first importance.

72 In my view, the meaning of "connect to, for the purposes of posting property listings and/or any other information on, the Website," is that the defendant undertakes "not to connect to *the Website*, for the purposes of posting property listings and/or other information on *the Website*…" Admittedly, the drafting of cl 2.1(b) is somewhat odd, and the clarity could have been improved with the repetition of the words "*the Website*" within the provision (as I have set out). Nonetheless, its meaning is clear enough. There is no evidence that the defendant posted any listings or information on the plaintiff's websites. Therefore, there is no basis for the plaintiff to allege a breach of cl 2.1(b).

***Whether the defendant breached cll 2.1(c) and (d)***

73 I can deal with these alleged breaches summarily. The plaintiff argues that the defendant has breached cll 2.1(c) and (d) because it has not taken steps to prevent copying of property listings via the Xpressor App. Such steps include



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the blocking of the posting to the 99 website via the Xpressor App.[70] The plaintiff's argument fails on a number of fronts.

74 First, the breach of cll 2.1(c) and (d) is not pleaded. Second, Mr Rautiainen conceded at trial that the plaintiff has not adduced any evidence that the defendant breached either clauses 2.1(c) or 2.1(d).[71] Third, and in any event, cll 2.1(c) and (d) oblige the defendant to take action in respect of "Content", being contents uploaded before the date of the Settlement Agreement. However, there is no evidence that the defendant reproduced any such "Content". As I stated earlier, the January and February 2016 reproductions did not constitute Content". Therefore, I find that the defendant did not breach cll 2.1(c) and (d).

75 With that, I now turn to address the plaintiff's cause of action in the tort of inducement of breach of contract.

## Inducement of breach of contract

### *Overview*

76 I start by setting out the relevant background facts. All end users of the PG website must agree to abide by two sets of terms and conditions, being the Terms of Service and the Acceptable Use Policy.[72] From time to time, the plaintiff revises the Terms of Service. The last recorded change to the Terms of Service was in March 2016.[73] To distinguish between the two versions of the Terms of Service, I shall refer to the version that was in existence before that date as the "old Terms of Service" and the version after that as the "new Terms

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70 Plaintiff's Closing Submission at para 72.

71 Transcript (20 September 2017) at p 16, lines 12, 18.

72 SOC at para 4.

73 Transcript (20 September 2017) at p 40, lines 24–26.



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of Service" (where necessary). The Acceptable Use Policy has remained unchanged during the material time.

77 In its Statement of Claim, the plaintiff sets out the following terms of the new Terms of Service:[74]

> **1. ACCEPTABLE OF TERMS**.
>
> 1.1 By using and accessing http://www.propertyguru.com.sg (the "**Website**"), you conclude a legally binding agreement with us, Property Guru Pte Ltd ("we" or "us"), the owner and administrator of the Website.
>
> 1.2 You accept without limitation or qualification the Terms of Service, including the Privacy Policy…
>
> …
>
> **2. USE OF THE WEBSITE**
>
> 2.1 You agree to comply with the Policy of Acceptable Use … in using the Website.
>
> …
>
> **3. PG Material**
>
> 3.1 By using and accessing the Website, you will be exposed to information, data, text, software, photographs, graphics, video, messages or other materials that we and/or other users of the Website upload, post, email, transmit or otherwise make available on the Website ("**PG Material**") whether publicly or privately.
>
> …
>
> 3.3. You understand that PG Material may only be used for your own and non-commercial use, and not for publication, distribution, transmission, retransmission, redistribution, broadcast, reproduction or circulation to someone else in the same company or organisation, and not for posting to other websites or forums, newsgroups, mailing lists, electronic bulletin boards, or Internet Relay Chats operated by other websites.

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74 SOC at para 5.



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> 3.4 You agree not to reproduce, display or otherwise provide access to the Website or PG Material on another website or server.
>
> …
>
> 10. **INTELLETUAL PROPERTY RIGHTS**
>
> 10.1 Upon your upload of any images, photographs, and/or listing descriptions onto the Website (the "**Content**"), you shall give us a worldwide, royalty-free, irrevocable licence to use, store, host, reproduce, modify, adapt, watermark, communicate, publish, publicly perform, publicly display, create derivative works, and distribute the Content. *By uploading the Content, you warrant that you own the copyright of the Content and thus have the requisite rights to licence it to us as stated. We shall have the right to watermark the photographs within the Content and the copyright in the final watermarked photographs shall belong solely to us.* All other names, products and marks mentioned are the intellectual property rights of their respective owners. *No materials provided through the Website, including text, graphic, code, ratings, rankings, databases, aggregated information, PG Material and/or software may be reproduced*, modified, adapted, distributed, published, displayed, uploaded, posted, transmitted or hyperlinked in any manner and in any form *without our express, prior written approval*, and the approval of the respective copyright and trade mark holders. The Website and PG Material are for your personal use only, and you may not engage in dealings with other parties regarding such services and contents. Such dealings include commercial dealings and dealings which will adversely affect the commercial value of the Website and PG Material.
>
> [Emphasis added]

78 The material terms of the Acceptable Use Policy as pleaded in the Statement of Claim[75] are as follows:

> In using the services provided by PropertyGuru Pte Ltd ("**PG**") on http://propertyguru.com.sg/ (the "**Website**"), you agree not to:
>
> …
>
> 2. infringe the copyright, patent, trademark, trade secret or other intellectual property right of any party, including but not limited to PG;

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[75] SOC at para 6.



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> …
>
> 20. alter, remove, cover or otherwise deface any identification, trademark, copyright or other notice from any aspect of the services on the Website;
>
> 21. *use any automation software, hacks, mods or other unauthorised third-party software designed to access, crawl or collect from PG's services*; and
>
> 22. *use any unauthorised third party software that intercepts, "mines" or otherwise collects information from or through PG.*
>
> [Emphasis added]

79 As an aside, I note that there is really only one contract between the plaintiff and the end user, being the Terms of Service. The Acceptable Use Policy does not take the form of a contract. It is a list of acts which the end user undertakes not to do. I would regard the Acceptable Use Policy as having been incorporated by reference into the Terms of Service via cl 2.1. Hence, in the discussion that follows, any reference to a breach of a term of the Acceptable Use Policy should be understood as a reference to a breach of that term as constituting part of the Terms of Service.

80 A person who knowingly procures or induces a third party to break a contract to the damage of the other contracting party without reasonable justification or excuse commits the tort of inducing a breach of contract: see the Court of Appeal's decision in *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [16] and Gary Chan & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 15.005. The question of whether a defendant has committed this tort may be approached by asking if each of the following elements of the tort are present (*M+W Singapore Pte Ltd v Leow Tet Sin and another* [2015] 2 SLR 271 at [88]):



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(a) That the defendant knew of the contract and intended for it to be breached;

(b) That the defendant induced the breach; and

(c) That the contract is breached and damage is suffered.

81 It is necessary to make a few preliminary observations on the nature of the plaintiff's case. The plaintiff's pleaded case is that the defendant induced the end users of the PG website to breach the Terms of Service and Acceptable Use Policy "sometime around September 2015",[76] and that such inducement is evidenced by the defendant's marketing the Xpressor App to end users of the PG website despite being aware that the end users were bound by the terms set out in the Terms of Service and Acceptable Use Policy.[77] The plaintiff also pleads that the defendant launched the Xpressor App "sometime in or about September 2015" and had made it available for download on the internet since or about that time.[78]

82 Thus, in its Statement of Claim, the plaintiff seems to suggest that from the point of launching the Xpressor App, the defendant started to induce breaches of the Terms of Use and Acceptable Use Policy, and this continued for as long as the Xpressor App was available. However, the plaintiff does not plead the particular breaches of contract which the defendant was supposed to have induced. The plaintiff merely alleges that the Xpressor App has been used by an "unquantifiable number" of end users. This appears to be an incomplete pleading because it only identifies the act of inducement, and not the particular

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76 SOC at para 8.

77 SOC at para 8 (h), (i).

78 SOC at paras 8(f) and 8(i).



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breach or breaches of contract by way of the use of the Xpressor App which the defendant had induced.

83 In its closing submissions, as breaches of contract induced, the plaintiff relies first, on the January and February 2016 reproductions *allegedly made using the Xpressor App*, and second, on the PA Service reproduction.[79] I will address these in turn.

***The January and February 2016 reproductions***

84 In my view, the plaintiff's claim as regards the January and February 2016 reproductions fails completely. Assuming for the moment that the property agents had indeed posted the January and February 2016 reproductions on the 99 website using the Xpressor App, they could have been in breach of the Terms of Use and the Acceptable Use Policy. For one, they could have been in breach of cl 10.1 of the Terms of Use, which prohibits users from reproducing materials such as "graphics" (*ie*, the photographs) without the plaintiff's consent (see [77] above). Quite plainly, they would also have been in breach of cll 21 and 22 of the Acceptable Use Policy because the Xpressor App is an "automation software…designed to access…PG's Services" and also an "unauthorised third party software that…collects information …through [the plaintiff]" (see [78] above).

85 The key question, however, is whether it has been shown that the January and February 2016 reproductions were actually made as a result of the property agents' use of the Xpressor App. Without proof of this critical link, there is no point in considering whether, in law, by making available the

[79] Plaintiff's Closing Submissions at para 117.



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Xpressor App to the property agents for their use, the defendant had induced the alleged breaches. Here, the plaintiff's case runs into difficulty.

86 To reiterate, the evidence simply does not show that the January and February 2016 reproductions were made using the Xpressor App. I have discussed this in detail at [53] to [55], and would adopt in entirety what I said above. In the closing submissions, the plaintiff submits that it was for the defendant to explain how the listings and photographs came to be on the 99 website, if not by the use of the Xpressor App. I disagree. It was for the plaintiff to prove its assertion that the property agents used the Xpressor App to reproduce the 71 listings. For instance, it was open to the plaintiff to gather such evidence from the property agents, in the same way that Ms Tong was approached for information about how her listings came to be posted on the 99 website.

87 As it stands, the plaintiff's claim fails for the reason it has not been proven that there is a causal link between the defendant's alleged act of inducement and the alleged breaches. Without proving this, the plaintiff's claim is unsustainable. As such, I shall not go further to consider the other aspects of this claim.

***The PA Service reproduction***

88 I turn then to the use of the PA service and the PA Service reproduction. The fundamental difficulty is that in its Statement of Claim, the plaintiff does not refer to the PA service as a means by which the defendant had induced end users to breach the Terms of Service or Acceptable Use Policy.

89 As I stated above, a court may depart from the parties' pleadings in limited circumstances (see [66]). However, I am not persuaded that this is such



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an instance. The plaintiff pleads in detail that the defendant had induced a breach of contract by means of making available the Xpressor App. However, the plaintiff now wants to take the position that the defendant had also induced Ms Tong to breach her contract with the plaintiff by means of the PA Service. This is a very different *act* of inducement. The plaintiff's attempt to pin liability on the defendant based on the distinct act of inducement strays very far from the case advanced in the pleadings. At no time did the plaintiff seek to amend its Statement of Claim. The plaintiff had time and opportunity to do so. It is bound by its decision not to do so. It would be unfair to the defendant for this distinct act of inducement to be considered, and I decline to do so.

## Infringement of copyright

### *Overview*

90 Turning to the copyright infringement claim, the plaintiff pleads that it owns the photographs bearing the watermark "PropertyGuru.com.sg",[80] and that the defendant has infringed its copyright in certain photographs uploaded on the PG website bearing the watermark.[81] In its Statement of Claim, again, it refers to the January and February 2016 reproductions, in which the plaintiff's watermarked photographs were reproduced.[82]

91 At trial and in closing submissions, the plaintiff pursues a further act of infringement, namely the PA Service reproduction.[83] Like for the claim in breach of contract, I am prepared in principle to consider the PA Service

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80 Statement of Claim at para 10.

81 Statement of Claim at para 11.

82 Statement of Claim at para 11(a).

83 Plaintiff's Closing submissions at para 150. Plaintiff's Supplementary Bundle of Documents at p 10 –37.



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reproduction because it is an additional instance of the act of infringement of copyright pleaded by the plaintiff *ie,* the defendant's reproducing of photographs from the PG website.

92 However, another deficiency in the pleading of the plaintiff's case that emerged at trial is that belatedly, the plaintiff argues that the watermark by itself is a copyrighted work. In its closing submissions,[84] the plaintiff claims that it has pleaded that the defendant infringed its copyright in the watermark.[85] The defendant refers to the paragraph from the Statement of Claim which states that the defendant "had and/or caused to be partially obscured the Watermark when reproducing the aforesaid PG Photographs on the 99 Website".[86] I do not see any suggestion in this pleading that there is any copyright in the watermark. Furthermore, Mr Rautiainen confirmed, when cross-examined, that in this suit, he did not mention in the affidavit any claim to the copyright of the watermark.[87] In my view, the plaintiff's claim of copyright infringement in the watermark is a marked departure from its pleaded case. It would be unfair to the defendant to allow the plaintiff to pursue this course, and the plaintiff should be bound by its pleading. Therefore, I decline to consider this argument.

93 Turning to the legal principles, copyright subsists in artistic works. Under s 7 of the Copyright Act (Cap 163, 2006 Rev Ed), a photograph falls within the definition of an "artistic work". The term "photograph" is further defined in s 7 as follows:

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84 Plaintiff's Closing Submissions at para 152.

85 Plaintiff's Reply Submissions at para 86.

86 SOC at para 11(b).

87 Transcript (20 September 2017) at p 20, lines 17–18.



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> "photograph" means a product of photography or of a process similar to photography, other than an article or thing in which visual images forming part of a cinematograph film have been embodied, and includes a product of xerography, and "photography" shall have a corresponding meaning;

94 The following basic propositions are not in dispute:

(a) The copyright in an artistic work comprises the exclusive right to reproduce it in a material form: s 26(1)(*b*)(i) of the Copyright Act.

(b) The author of an artistic work is entitled to its copyright: s 30(2) of the Copyright Act.

(c) The copyright in an artistic work is infringed by a person who, not being the owner of the copyright or a licensee, does any of the acts comprised in the copyright: s 31 of the Copyright Act. Thus, a reproduction by any person without the consent of the owner would be an infringement of the owner's copyright.

(d) A copyright owner may sue for copyright infringement: s 119(1) of the Copyright Act.

95 The issues I have to decide are whether the plaintiff owns the copyright in the watermarked photographs, and if so, whether the defendant has infringed the copyright.

***Whether the plaintiff owns the copyright in the watermarked photographs***

96 The plaintiff's claim to ownership of the watermarked photographs rests on two grounds: (a) cll 3.1, 3.4 and 10.1 of both the old and new Terms of Service, and (b) the fact that the plaintiff enhances the photographs posted on its website, such as by resizing them, altering the light balance and softening the



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edges of the images, and by adding the watermark.[88] I will refer to these respectively as the "contract argument" and the "originality argument". The plaintiff does not claim copyright over the original photographs uploaded by the end users.[89]

*The originality argument*

97 There is no dispute that the photographs taken by the end users are original and therefore enjoy copyright protection. It may fairly be assumed that, in seeking to make their property marketable for sale or rent, the users would take their photographs carefully, and pay attention to the lighting and angling of their photographs, thus demonstrating a degree of skill and judgment which qualifies the works for copyright protection.

98 The plaintiff is not the author of the original photographs. It has taken those works and altered them such that they became the watermarked photographs. As to when copyright subsists in such works which are derived from other works, I was referred to three cases which are instructive.

99 In *Interlego AG v Tyco Industries Inc* [1989] AC 217 ("*Interlego*"), the Privy Council was asked to determine whether copies of design drawings of toy blocks, which were not visually different from the original drawings, but which had modifications to the written information on them for manufacturing purposes, were original artistic works and therefore copyrightable. Lord Oliver held that copying *per se*, regardless of how much skill and labour was devoted to the process, does not result in an original work (at 705), and added that there must be "an element of material alteration or embellishment which suffices to

88 Plaintiff's Closing Submissions at para 139.

89 Plaintiff's Closing Submissions at para 140; Transcript (20 September 2017) at p 25, lines 13–23.



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make the totality of the work an original work". This was qualified by the view that "even a relatively small alteration or addition quantitatively may, if material, suffice to convert that which is substantially copied from an earlier work into an original work" (at 706). However, the Privy Council held that that it was "not sufficient to confer originality upon them that labour and skill was employed in the process of copying them or in the addition to them of fresh written manufacturing instructions" (at 711). In other words, even with the addition of new technical information, the copied drawings were not original works.

100 In *The Reject Shop Plc v Robert Manners* [1995] FSR 870 ("*Reject Shop*"), the English High Court held that no copyright subsisted in photocopied and enlarged versions of copyrighted drawings. Leggatt LJ held that the photocopying of the drawings "did not result in a depiction substantially different from the drawings themselves". The copying did not involve any "skill and labour as conferred originality of an artistic character" and the process was "wholly mechanical" (at 876).

101 *Virtual Map (Singapore) Pte Ltd v Suncool International Pte Ltd* [2005] 2 SLR(R) 157 ("*Virtual Map*") stands as a contrast to the above two cases. The plaintiff in that case turned raw cartographic data into maps that were fully coloured, readable and interactive. Lai Kew Chai J noted that the contrast between the cartographic vector data and the resulting map was "marked". The plaintiff had added building names, locations, road networks, traffic directions, and full colour (at [12]). Citing *Interlego*, Lai J held that the plaintiff had met the test set out therein, namely that there was in its maps "an addition of some element of material alteration or embellishment which suffices to make the totality of the work an original work" (at [13]).



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102 In summary, the copying, enlargement or resizing of an artistic work, such as a drawing, painting or photograph, does not make the resulting image a copyrighted work. There must be a material alteration or embellishment to the original work to confer originality (and hence copyright protection) on the resulting work. What counts as "material" for this purpose is a question of fact and degree. There was some alteration in *Interlego*, namely the addition of new written information to the drawing, but this was insufficient to confer originality on what was otherwise a visually similar copy of an image. On the other hand, *Virtual Map* provided a clear example of a material alteration. While the alteration in that case was extremely substantial, it does not mean that alterations to an original work must necessarily be to a similar degree before the derivative work becomes original and copyrightable.

103 That brings me to the plaintiff's watermarked photographs. In my judgment, they are not original works which attract copyright protection. Leaving aside the watermark, I would hold, by analogy to the result in *Reject Shop*, that the alterations to the original photographs in the form of resizing, tweaking the light balance and softening the edges did not result in images substantially different from the original photographs. I have compared the original photographs used by Ms Tong in her property listings (these were the only original photographs furnished by the plaintiff) with those that were uploaded onto the listings she posted on the PG website. Apart from the change in size, there is barely any discernible difference between each original photograph and its image. Absent the watermark, one would find it difficult to tell which is the original photograph and which is the modified photograph. I do not mean to say that digital editing of a photograph can never result in an altered image which is an original work in its own right. The technical possibilities for editing an image are now fairly advanced. Conceivably, a photograph might be so substantially altered, in a manner which obviously required much skill and



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labour of an artistic nature as to qualify for copyright protection. On the facts of this particular case, however, the original and watermarked photographs are, if not for the watermark, virtually indistinguishable.

104 The addition of the watermark does not, in my judgment, make the altered image an original work. The watermark "PropertyGuru.com.sg" is in a grey rectangular box which also consists of the property agent's name. This watermark (if one looks at the entire box) merely supplies information to the viewer of the photograph, in the same way as the written information in the design drawings considered in *Interlego* did. It is true that the positioning of the watermark is a matter of judgment, with the plaintiff having considered various possible locations for the watermark[90] before deciding on the present position on the lower right hand side of a photograph, and that the addition of the watermark to the photograph involves some skill and labour. However, it remains the case that the watermark is meant to serve to identify a photograph as one which has been posted on the PG website. The skill and labour is not deployed towards making a difference to the artistic nature of the photograph. Therefore, on the whole, I fail to see how the resulting watermarked image is a materially different image from the original photograph as to render it a copyrightable work in itself.

*The contract argument*

105 The clauses in the Terms of Service relied on by the plaintiff do not add anything to the plaintiff's claim for ownership of copyright of the watermarked photographs.

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90 AB, Vol 1 at pp 119–125.



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106 The plaintiff has relied on cll 3.3, 3.4 and 10.1 of both the old and new Terms of Service. Cll 3.3 and 3.4 of the old and new Terms of Service were identical and imposed on the end user an obligation not to reproduce "PG Material" (which would include the watermarked photographs) on another website. These clauses only regulate the contractual relationship between the plaintiff and the end user and say nothing about whether the plaintiff would own the copyright in the watermarked photographs.

107 Clause 10.1 of the new Terms of Service states that by uploading the photographs, the end users warrant that the end users "own the copyright of the Content and thus have the requisite rights to licence it to [the plaintiff]". It goes on to state that the plaintiff would have the right to watermark the photographs and the copyright in the final watermarked photographs would belong to the plaintiff (see [77]). The plaintiff's assertion in cl 10.1 that the watermarked photographs are copyrighted does not make it so. When challenged, it would be a question to be determined by the court whether copyright subsists in the watermarked photographs. As I have found, there is no copyright subsisting in the watermarked photographs to begin with. Clause 10.1 does nothing to further the plaintiff's claim that it owns copyright in the watermarked photographs.

108 What I said is also true of cl 10.1 of the old Terms of Service. The material part of that clause reads:

> We reserve all intellectual property rights to the Website and PG Material, including international copyright and trade mark rights. All other names, products and marks mentioned are the intellectual property rights of their respective owners. No materials provided through the Website, including text, graphics, code, ratings, rankings, databases, aggregated information, PG Material and/or software may be reproduced, modified, adapted, distributed, published, displayed, uploaded, posted, transmitted or hyperlinked in any form without our express, prior written approval, and the approval of the respective copyright and trade mark holders. …



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Again, this only means that if the watermarked photographs are indeed protected by copyright, any end user who infringes that copyright would be liable to the plaintiff not just for infringement but for breaching cl 10.1. Nonetheless, cl 10.1 has no bearing on whether copyright subsists in the watermarked photographs in the first place.

109 In summary, I do not find that there is copyright in the watermarked photographs. For completeness, I should add that it should be cl 10.1 of the old Terms of Service which would apply to the January and February 2016 reproductions. Strangely, the plaintiff pleaded cl 10.1 of the new Terms of Service as the applicable provision. This is another instance of poor pleading on the part of the plaintiff.

**Groundless threats of infringement proceedings**

110 This leaves me to deal with the defendant's counterclaim against the plaintiff for having made groundless threats of copyright infringement. For this purpose, the defendant relies on s 200 of the Copyright Act.

> **Groundless threats of legal proceedings**
>
> 200.—(1) Where a person, by means of circulars, advertisements or otherwise, threatens a person with an action or proceeding in respect of an infringement of copyright, then, whether the person making the threats is or is not the owner of the copyright or an exclusive licensee, a person aggrieved may bring an action against the first-mentioned person and may —
>
> (a) obtain a declaration to the effect that the threats are unjustifiable;
>
> (b) obtain an injunction against the continuance of the threats; and
>
> (c) recover such damages, if any, as he has sustained,
>
> unless the first-mentioned person satisfies the court that the acts in respect of which the action or proceeding was threatened constituted, or, if done, would constitute, an infringement of copyright.



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111 The legal principles pertaining to s 200 of the Copyright Act are well settled following the Court of Appeal decisions of *Singsung Pte Ltd v LG 26 Electronics Pte Ltd* [2016] 4 SLR 86 ("*Singsung*") and, more recently in *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 ("*GYP*").

112 In general, a provision such as s 200 (there are similar provisions in other intellectual property legislation) represents a balance between protecting copyright on one hand and preventing right-holders from using the threat of legal proceedings directed at their customers or competitors as a bullying tactic to chill their legitimate activities on the other (*Singsung* at [129]). Section 200 "is meant to provide a statutory remedy for aggrieved parties whose business or reputation might be affected by threats emanating from another party without the need to prove the bad faith of the threatening party" (*Singsung* at [133]).

113 Although the reference to groundless threats sent in "circulars, advertisements, or otherwise" seems to suggest communications addressed to a sizeable number of people, the Court of Appeal has accepted that, in principle, the threat of infringement proceedings sent in private letters of demand to a potential defendant may also give rise to relief under s 200. This the Court of Appeal made clear in *Singsung* at [148] (and reaffirmed in *GYP*) when it considered the possibility of granting relief under s 200 based on two letters of demand that the plaintiff there had sent.

114 That said, relief under s 200 is discretionary. It does not follow that the court must grant relief where an allegation of copyright infringement has failed (*Singsung* at [148]). The factors relevant to deciding whether to grant relief under s 200 include whether the action was warranted, whether any conceivable damage flowed from the demand being made, the costs consequences from the failed action, and whether relief is required at all (*GYP* at [101]).



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115 In the present case, the defendant pleads that a letter of demand sent by the plaintiff on 10 March 2016 contained a groundless threat of infringement proceedings.[91] This letter of demand[92] deals not only with the claim for infringement of copyright, but the claims for breach of the Settlement Agreement and inducement of breach of contract as well. The defendant seeks a declaration that the threats contained therein are unjustifiable, an injunction to restrain the plaintiff from continuing to make similar threats and damages.

116 I decline to grant relief under s 200. I am guided mainly by the following considerations. First, I do not think that the plaintiff's threat of commencing legal proceedings was unwarranted. The plaintiff's belief that the defendant's reproduction of the contents (which would include the photographs) on the PG website had infringed its copyright was recorded in the Settlement Agreement. Although there was no admission of liability for any copyright infringement, in the Settlement Agreement, the defendant undertook not to reproduce contents from the PG website in the future. Given that the defendant had done precisely that, there was sufficient basis for the plaintiff to think that it might be justifiable to commence proceedings for copyright infringement.

117 Second, I do not think the defendant suffered any loss as a result of the threat of infringement proceedings over and above that which can be compensated for by a costs order against the plaintiff. The defendant alleges that the threat of the law suit affected its ability to obtain funding and strained its relationships with its investors.[93] However, apart from this assertion, no evidence has been produced to substantiate this claim.

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91 Defence and Counterclaim at para 33.

92 AEIC of Cheung Yik, CY-7.

93 AEIC of Cheung Yik at para 42.



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118 Third, as I have dismissed the plaintiff's claim for copyright infringement, an injunction to prevent the plaintiff from making further threats in future is not necessary. Thus, I dismiss the defendant's counterclaim.

**Conclusion**

119 In conclusion, this is a summary of my decision:

(a) I allow the plaintiff's claim for breach of the Settlement Agreement in part, in that the defendant is liable for the breach of cl 2.1(a) of the Settlement Agreement by substantially reproducing one listing with the nine photographs from the PG website to the 99 website.

As regards the question of the appropriate relief, as prayed for by the plaintiff, I award damages to be assessed.

Although injunctive relief is a prayer sought in relation to the other two causes of action, it is not specifically sought in relation to this cause of action for breach of the Settlement Agreement. Nonetheless, based on all the facts and circumstances, I consider it fit to grant an injunction to restrain the defendant from *continuing* to breach cl 2.1(a) of the Settlement Agreement by means of operating the PA Service. The defendant shall have 30 days from the date of this judgment to bring about a cessation of the PA Service. In my view, this relief may be granted pursuant to the general prayer for any other relief to be granted by the court.

(b) I dismiss the plaintiff's claims against the defendant for inducement of breach of contract and copyright infringement.



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(c) Also, I dismiss the defendant's counterclaim against the plaintiff for groundless threats of legal proceedings of copyright infringement.

120 I will hear parties on costs.

Hoo Sheau Peng
Judge

Sathinathan s/o MR Karuppiah and Shaun Marc Lew (Samuel Seow Law Corporation) for the plaintiff;
Koh Chia Ling and Gerald Tan Han Jie (OC Queen Street LLC) for the defendant.



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