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THE COMPANIES (AMENDMENT) ACT 2017 AND ITS IMPACT ON LANDLORD'S RIGHTS IN THE EVENT OF TENANT INSOLVENCY

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The Companies (Amendment) Act 2017 introduced new provisions which may prevent landlords from enforcing their rights against a defaulting tenant. For example, landlords may be prevented from exercising their rights of re-entry under a lease if the defaulting tenant goes into judicial management or proposes a scheme of arrangement. These provisions are new and have not yet been commonly utilised by defaulting tenants against their landlords. However, in time to come, defaulting tenants may increasingly utilise these new provisions against their landlords. This article discusses the risks to landlords arising from these new provisions, and proposes contractual and practical ways in which landlords may overcome such difficulties.

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I. New provisions under Companies (Amendment) Act 2017

1 Tenant insolvency is often one of the major risks faced by landlords. The Companies (Amendment) Act 2017 introduced new provisions which potentially increase this risk.

2 Among other things, these new provisions may prevent landlords from enforcing their right of re-entry under a lease or to forfeit a lease to an insolvent defaulting tenant (the "Landlord Moratorium"). The landlord is therefore placed in an awkward position: unable to obtain rent and unable to end the lease without a court application.

3 For example, in the context of judicial management, s 227D(4)(*f*) provides that:[1]

> Effect of judicial management order
>
> Section 227D(4)(*f*)
>
> (*f*) despite sections 18 and 18A of the Conveyancing and Law of Property Act (Cap. 61), no right of re-entry or forfeiture under any lease in respect of any premises occupied by the company may be enforced, except with the consent of the judicial manager, or with the leave of the Court and subject to such terms as the Court imposes.

4 Similar provisions may be found in s 211B(1)(*f*) (application for a discretionary moratorium when a company proposes or intends to propose a scheme of arrangement) and s 211B(8)(*f*) (automatic moratorium when a company makes an application for the above discretionary moratorium).

II. Rationale for landlord moratorium

5 The Landlord Moratorium applies if (a) the defaulting tenant goes into judicial management and (b) proposes (or intends to propose) a scheme of arrangement under s 211B of the Companies Act. The new provisions do *not* apply if the defaulting tenant goes into liquidation. This distinction is likely due to the fact that, unlike liquidation, schemes of arrangement and judicial management are often utilised as "rehabilitation" or restructuring procedures meant to save an

1 The previous iteration of this subsection stated:

> During the period for which a judicial management order is in force —
>
> (a) no resolution shall be passed or order made for the winding up of the company;
>
> (b) no receiver and manager of the kind referred to in section 227B(4) of the company shall be appointed;
>
> (c) no other proceedings and no execution or other legal process shall be commenced or continued and no distress may be levied against the company or its property except with the consent of the judicial manager or with leave of the Court and (where the Court gives leave) subject to such terms as the Court may impose; and
>
> (d) no steps shall be taken to enforce security over the company's property or to repossess any goods under any hire-purchase agreement, chattels leasing agreement or retention of title agreement except with the consent of the judicial manager or with leave of the court and (where the Court gives leave) subject to such terms as the Court may impose.

insolvent company, or at least improve creditors' recoveries. Termination of a lease may sometimes drastically affect a company's chances at rehabilitation or restructuring.

6 An example in Singapore's not-too-distant past may illustrate this point well: the Singapore branch of the major international bookselling brand "Borders" ("Borders Singapore") once operated its flagship outlet at Wheelock Place on Singapore's most popular shopping belt. Based on the court papers filed in the Singapore courts,[2] it appears that in 2011, Borders Singapore entered into financial difficulties and was placed into judicial management, but – before any steps could be taken to obtain potential "white knight" investors – the flagship outlet was repossessed by Borders Singapore's landlord. Without commenting on any other potential causes for the company's insolvency, the landlord's repossession cannot have helped any bid by Borders Singapore to successfully rehabilitate its financial position through judicial management. In fact, Borders Singapore was placed into liquidation shortly thereafter.[3]

III. Legislative history of landlord moratorium

A. UK origins

7 The Landlord Moratorium provisions did not exist in Singapore's Companies Act prior to 2017. The provisions appear to have been adapted from similar Landlord Moratorium provisions in the UK Insolvency Act relating to administration.[4] The UK Insolvency Act itself introduced its Landlord Moratorium provisions only in 2001, after much controversy and conflicting judicial opinion on whether a landlord's re-entry for non-payment of rent or for the breach of other covenants in a lease amounted to "enforcement of security" or "the commencement of a legal process", thereby breaching other moratoriums that applied in UK

2 OS 701/2011/Z.
3 CWU 145/2011/N.
4 Similar to Singapore's judicial management. See, *eg*, the former s 11(3)(ba) of the UK Insolvency Act 1986 (c 45), now found in Schedule B1 to the UK Insolvency Act at para 43(4). A somewhat different legislative framework applies under the US Bankruptcy Code 11 USC (US) §§ 362 and 365.

administration.[5] For example, earlier English authorities noted that the proviso for re-entry on non-payment of rent is regarded in equity as merely a security for the rent. In *Exchange Travel Agency Ltd v Triton Property Trust plc*,[6] Harman J held that the landlord's right of re-entry is an enforcement of security barred by the UK Insolvency Act's moratorium provisions applicable to administration ("The right to re-enter has always been regarded as a security"). Harman J also held that taking possession by peaceably re-entry also fell within the moratorium against commencement of legal process.

8 However, the above (and other reported cases) were eventually departed from in *Re Lomax Leisure Ltd*,[7] where Neuberger J held that the then-moratorium provisions against (a) the enforcement of security and (b) commencement of legal process did not bar a landlord from exercising its right of re-entry into leased premises. It was in this context that legislative amendments were introduced in 2001 to expressly include Landlord Moratorium provisions in the UK Insolvency Act.

B. Report of the Insolvency Law Review Committee, Final Report

9 The Insolvency Law Review Committee was formed on 9 December 2010 by Singapore's Ministry of Law to review the existing bankruptcy and corporate insolvency regimes, and to issue a report making recommendations to consolidate these regimes into a single piece of legislation, while simultaneously updating and enhancing them.[8]

10 In the Report of the Insolvency Law Review Committee, Final Report ("ILRC Report"), published in 2013, the Committee noted that "the protection afforded by the statutory moratorium provided at s 210(10) of the Companies Act is relatively weak compared with the moratoriums found in the liquidation or judicial management regimes", and specifically singled out the lack of any moratorium against "landlords seeking to exercise their right of re-entry to registered

5 *Sealy & Milman: Annotated Guide to the Insolvency Legislation 2015* vol 2 (Sweet & Maxwell, 18th Ed, 2015) at p 78.
6 [1991] BCLC 396.
7 [2000] BCC 352.
8 Report of the Insolvency Law Review Committee, Final Report, 2013 at p 1.

leasehold property".[9] However, the actual recommendations of the ILRC Report did not expressly identify that a Landlord Moratorium should be introduced.

11 Instead, the ILRC Report went on to consider whether to introduce provisions which restrict the enforcement of *ipso facto* clauses (clauses that entitle an innocent contracting party to terminate the agreement and/or exercise certain remedies upon the commencement of judicial management, a scheme of arrangement or other insolvency-related proceeding),[10] and recommended against such provisions being introduced.

12 The enforcement of *ipso facto* clauses and a landlord's right of self-help forfeiture and re-entry are distinct but overlapping. Further, several portions of the ILRC Report's rationale for its recommendation in relation to *ipso facto* clauses may equally apply to the Landlord Moratorium provisions introduced in the Companies (Amendment) Act 2017, in particular the ILRC Report's comment that "[t]he freezing or stay on self-help termination is unquestionably one of the most draconian and controversial of all stays, because of its massive impact on transactions":[11]

> 88. Against the above are the countervailing arguments in favour of giving effect to ipso facto clauses, including the following:
>
> (1) *Without the ability to terminate on insolvency, counterparties already staring at the bleak prospect of writing-off outstanding invoices or loans would be compelled to perform their contractual obligations even where there may be no hope of being paid …*
>
> (2) For smaller suppliers and customers, *the solvent party may itself be threatened by the unpredictability and potentially greater exposure*. This could give rise to the *risk of domino insolvencies …*
>
> (3) Even if the counterparty is precluded from relying on the event of insolvency to terminate the contract, it is *unlikely in most cases that the insolvent company will be able to perform, and so the interference*

9 Report of the Insolvency Law Review Committee, Final Report, 2013 at p 136, para 7.

10 Report of the Insolvency Law Review Committee, Final Report, 2013 at p 117, para 85.

11 Report of the Insolvency Law Review Committee, Final Report, 2013 at p 122, para 89.

with ipso facto clauses in contracts is not justified in the majority of situations.

(4) Despite statutory inroads, English law and, by extension, *Singapore law has always respected party autonomy to choose when to contract with each other, and on what contractual terms*. Among other things:

(a) There is an enormous variety of contracts which may be affected by restrictions on *ipso facto* clauses, each with their own unique balance of risks upon insolvency. *Contracting parties still know best what risks they can and cannot contractually accept, compared to a one-size fits all legislative provision.* It is probably impossible to arrive at a fair balance of risks using such legislation.

(b) *It should be left to the individual creditor to determine, in light of its own and the individual company's circumstances, whether to terminate the contract.* If the creditor is of the view that the company can be turned around, they may not exercise their rights under the ipso facto clause. In this manner, *market forces, and not the legislature or courts or insolvency professionals, determines whether companies should be rescued*, which may lead to a more 'rational' outcome in the economic sense.

…

89. It has been noted that '*[t]he freezing or stay on self-help termination is unquestionably one of the most draconian and controversial of all stays, because of its massive impact on transactions*' … there may be instances where the risk to counterparties in dealing with the insolvent company is unacceptably high.

[emphasis added]

13 Perhaps in recognition of the above, the Ministry of Law's response dated 27 February 2017 to public consultation feedback to the Companies Act amendments stated:[12]

We understand the concern that this provision may be onerous to landlords, who are required to perform their contractual obligations

12 Ministry of Law, *Ministry's response to feedback from public consultation on the draft Companies (Amendment) Bill 2017 to strengthen Singapore as an international centre for debt restructuring (the "Draft Bill")* (27 February 2017) at para 3.1.14.

> *despite the possibility of not receiving payment.* Nonetheless, this concern is ameliorated by the recourse for creditors to apply for leave to enforce their right of re-entry or forfeiture. The Court may then exercise its discretion to grant leave in accordance with established principles, similar to the moratorium in judicial management. [emphasis added]

14 In the light of the above response by the Ministry of Law, this is a good juncture to discuss landlords' options in the event that a Landlord Moratorium is imposed or appears imminent.

IV. Landlord's options in event of landlord moratorium

15 The Landlord Moratorium provisions allow a landlord to forfeit a lease and/or re-enter leased premises with the permission of:

(a) The court.

(b) The scheme company (in a scheme of arrangement) or judicial managers (in judicial management).

16 Landlords can therefore either apply to court for permission to enforce their rights or persuade a company (or its judicial managers) to agree to the termination of the lease.

17 The following sections discuss selected options that landlords may pursue to protect their rights and possibly avoid the prejudice arising under a Landlord Moratorium.

A. Application to court to enforce landlord's rights under new provisions of Companies Act

18 First, landlords may apply to court to lift the Landlord Moratorium.

19 Several English courts have generally accepted that the relevant legal test for lifting the Landlord Moratorium includes the principles set out in *Re Atlantic Computer Systems plc*[13]

13 [1992] Ch 505. See, *eg*, *Sunberry Properties Ltd v Innovate Logistics Ltd* [2009] BCC 164 ("*Sunberry*") at [18]–[22]; *Re SSRL Realisations Ltd (In Administration): Lazari Investments Ltd v Saville* [2015] EWHC 2590 (Ch) at [5]. See also *Metro Nominees (Wandsworth) (No 1) Ltd v Rayment* [2008] BCC 40.

("*Atlantic Computer*"). The well-known *Atlantic Computer* principles also apply to the granting of leave to enforce security if a company were in Singapore judicial management or English administration, and have been approved by the Singapore Court of Appeal[14] in that context.

20 It is understandable that the English courts have applied the same test *vis-à-vis* the enforcement of security and the landlord's exercise of a right of re-entry: both remedies share similarities in that they both block the exercise of proprietary rights. However, like the enforcement of *ipso facto* clauses discussed in the ILRC Report, blocking the landlord's exercise of a right of re-entry carries the *additional* harm of essentially forcing a landlord to continue contracting with an insolvent entity. In the circumstances, and given the aversion to *ipso facto* clauses in the ILRC Report and the Ministry of Law's response to the public consultation feedback discussed in section III above, Singapore may take a different, more landlord-friendly approach when applying the *Atlantic Computer* test to landlords and tenants, as opposed to the enforcement of security.

21 In the light of the *Atlantic Computer* test, landlords may wish to consider "double-barrelling" their application when applying to the court for relief:

(a) First prayer: Apply for leave to re-enter the premises and forfeit the lease, *ie*, to lift the Landlord Moratorium.

(b) Second prayer: Apply alternatively for a condition to be imposed that rental should be paid if leave to re-enter the premises is refused.

22 This is because the scheme company or the company's judicial managers would often resist the "first prayer" above (*ie*, an application for the lifting of the Landlord Moratorium) on the basis that the leased property is essential to the rehabilitation or restructuring of the company in question.

23 If so, it is only fair that the company should then pay for the benefits that it derives under the lease, *ie*, the landlord may succeed on the "second prayer" above. Landlords may of

14 *Hinckley Singapore Trading Pte Ltd v Sogo Department Stores (S) Pte Ltd* [2001] 3 SLR(R) 119.

course consider adding other prayers for relief to ensure that they are not practically prejudiced. For example, if a tenant's security deposit is already in a depleted state, the landlord could request that the court require the tenant to top up the security deposit to the contractually agreed sum as a condition of continuing with the lease.

24 However, applying to court for leave to enforce a landlord's rights may sometimes be chancy and/or expensive. Selected practical alternatives are discussed below.

B. Practical solutions for landlords

25 Second, landlords could terminate a lease and re-enter the leased premises *before* the new Companies Act moratoriums kick in, *ie*, before the judicial management order or before a scheme of arrangement application is filed.

26 A landlord is not normally entitled to forfeit a lease merely because the tenant becomes insolvent; it is therefore important that the lease should contain an express provision which entitles the landlord to elect to do so. Such an express provision has "for a long time been commonly inserted in leases and is a perfectly good proviso".[15]

27 Certain contracts contain automatic termination provisions, *ie*, that a lease terminates immediately upon certain specified events, without the landlord's election, such as upon the insolvency of the tenant (*ie*, the *ipso facto* clauses discussed above). For practical reasons, such automatic termination provisions are not always beneficial to landlords. For example, in certain circumstances, landlords may wish for a lease to continue notwithstanding the insolvency of the tenant, especially if the tenant is likely to continue paying rent, and/or the market for replacement tenants is poor. Nonetheless, at the drafting stage, landlords may sometimes wish to consider whether to include similar provisions for specific tenants that run a higher risk of becoming insolvent.

28 Third, many commercial leases contain "holding-over" provisions which provide for *double rent* if a tenant fails to

15 *Woodfall: Landlord and Tenant* (Lewinson gen ed) (Sweet & Maxwell, 2018) at para 16.184.

hand over a property after the end of a lease. Such holding-over provisions could be amended to provide for double rent after the landlord seeks to terminate a lease after an event of default, and not just after a lease ends.

29 Enforcement of such a right to double rent is arguably not caught by the new Companies Act amendments and may put landlords in a better position to negotiate with the company or its judicial managers relating to termination of the lease, in particular when coupled with the "double-barrelled" application discussed above.[16]

30 Fourth, many master leases contain clauses providing that the tenant agrees in advance to an assignment of subtenancies upon an event of default. This could ensure that all rental income from subtenancies are enjoyed by the landlord, instead of the defaulting master tenant. Enforcement of this right is again arguably not caught by the new Companies Act moratorium against re-entry or forfeiture of a lease.[17]

31 However, such a clause may, depending on how it is drafted, be caught by a separate moratorium against the enforcement of security.[18] In the light of the above, useful drafting points to consider may arguably include (a) drafting the assignment of subtenancies as an outright assignment instead of an assignment by way of security, and (b) providing for power of attorney clauses which authorise the landlord to act as the tenant's lawyer in (among other things) executing the relevant assignment deed or agreement on the tenant's behalf, and doing all acts necessary to make or perfect the assignment.

32 Fifth, it may be possible for landlords to enforce other rights in the lease which do not amount to re-entry or

16 See para 21 above.

17 *Woodfall: Landlord and Tenant* (Lewinson gen ed) (Sweet & Maxwell, 2018) at para 17.088.

18 See, *eg*, *Re Atlantic Computer Systems plc (Nos 1 and 2)* [1990] BCLC 729 at 744e; argument not maintained on appeal in *Re Atlantic Computer Systems plc* [1992] Ch 505 at 533 due to the express language of the clause "the [company] as beneficial owner hereby assigns to [A.I.B.] *by way of security* all the benefit of the terms of each of the subleases and all rentals" [emphasis added].

forfeiture. For example, in *Re SSRL Realisations Ltd*,[19] the tenant had (a) a lease of a restaurant and (b) a licence to use the outside seating area. The tenant went into administration (the UK equivalent of judicial management), and the landlord sought to re-enter the premises. The tenant resisted the re-entry. The landlord terminated the outdoor seating licence, which made the restaurant lease less attractive to the tenant. The court accepted that the landlord was entitled to terminate the separate outdoor seating licence, even though it would have been advantageous to the administration if the landlord had not done so. The termination of this outdoor seating licence was one of several factors that led to the landlord succeeding in its application to court to enforce its right of re-entry.

33 Sixth, if the scheme company or judicial manager insists on remaining on the premises, the landlord may consider asserting that the scheme company or judicial manager has "adopted" the lease, and/or that the rental during the period that the company or judicial manager occupies the premises should be a priority expense payable ahead of the general body of unsecured creditors. Asserting this right may help ensure that the landlord is paid for the use of the property.

34 See for example Lewison LJ's comments in *Jervis v Pillar Denton Ltd*[20] that:

> The true extent of the principle, in my judgment, is *that the office holder must make payments at the rate of the rent for the duration of any period during which he retains possession of the demised property for the benefit of the winding up or administration* (as the case may be). The rent will be treated as accruing from day to day. *Those payments are payable as expenses of the winding up or administration.* The duration of the period is a question of fact and is not determined merely by reference to which rent days occur before, during or after that period. [emphasis added]

35 The above principles may not apply where the administrators (or judicial managers) are not using the premises and are "thinking about what to do".[21] In addition,

19 [2015] EWHC 2590 (Ch).
20 [2015] Ch 87 at [101].
21 *In re ABC Coupler and Engineering Co Ltd (No 3)* [1970] 1 WLR 702.

an application to court may be made under s 227X(*b*) of the Companies Act for the liquidation provisions relating to disclaimer of onerous property to apply in judicial management, in particular s 332(4) which deems a liquidator (or judicial manager) to have adopted a lease if he does not expressly disclaim it within 28 days of a written notice asking him to decide whether to disclaim the lease.

V. Final thoughts

36 Several of the above possible steps must be taken in a timely manner to avoid prejudice. Accordingly, it may be critical for landlords to obtain legal advice early in a default situation.

37 Additionally, landlords should attend creditors' meetings and be especially vigilant regarding the threat of a judicial manager or scheme company selling the business, as opposed to the company. This may leave behind an insolvent shell against which no meaningful enforcement may be carried out of the covenants in the lease.

38 In conclusion, the new Companies Act provisions may cause difficulties for landlords of insolvent tenants.

39 However, good drafting and practical steps may help landlords overcome such difficulties.