

# Court of Appeal upholds Takashimaya's win in rent calculation dispute with Ngee Ann Development

**Court of Appeal exercised discretion to intervene in advance of valuation and held that the renewal rent would be determined on the basis of the existing configuration**

In *Ngee Ann Development Pte Ltd v Takashimaya Singapore Ltd* [2017] SGCA 42, the Court of Appeal dismissed Ngee Ann Development Pte Ltd (“**Ngee Ann Development**”)’s appeal on the rent payable by its anchor tenant, Takashimaya Singapore Ltd (“**Takashimaya**”). The dispute centred on the construction of a rent review clause in the lease (“**Lease**”) with Takashimaya and the configuration of the leased premises (“**Premises**”) to be applied by the valuers in determining the “prevailing market rental value” for the Premises, in accordance with the provisions in the Lease. The parties disagreed on whether the lease intended for the rent valuation to be based on:

- the existing configuration; or
- a hypothetical configuration yielding the “highest and best use” of the Premises.

Two key issues arose in the appeal:

- the scope of judicial intervention in advance of an expert determination (e.g., a valuation); and
- the approach to contractual interpretation.

In the present case, the court found that the scope of the expert’s jurisdiction was clearly a matter within the purview of the court, and it was appropriate, in the circumstances of the case, for the Court to intervene in advance of the valuers’ determination of the “prevailing market rental value” of the Premises. The Court of Appeal then construed the rent review clause and found that, taking into account the provisions of the Lease and context of the parties’ agreement, it was the parties’ intention for the prevailing market rental value to be determined based on the existing configuration of the Premises.

## Our Comments

The decision is a reminder of the risks of legal challenges to expert determination clauses and curial intervention in such determination. Expert determination clauses are common and can encompass a wide range of issues from rent reviews to valuations of shares. Parties should exercise care in drafting an expert determination clause, with particular attention given to the expert’s decision-making authority and jurisdiction, and the principles upon which the expert will render his determination. Any uncertainty or ambiguity in drafting could lead to challenges and parties should be mindful of the situations in which the court may exercise its discretion to intervene.

This decision also reinforces the contextual approach to the interpretation of written agreements. The court will pay close attention to both the text and context of the written agreement in interpreting the written agreement and ascertaining the parties’ intentions with the written agreement. The court will, in this regard, consider all relevant matters to the context, including the parties’ commercial roles and relationship, and the parties’ conduct.

**WongPartnership acted for the successful party, Takashimaya Singapore Ltd, at the trial and at the appeal.**

This Update takes a look at the Court of Appeal's decision.

## The Court's role in contractually-agreed expert determination which has yet to be rendered

### *Scope of expert's jurisdiction is a matter for the court*

The scope of the expert's decision-making authority and jurisdiction (which may include the principles on which the expert is to render a determination) are matters within the purview of the court.

### *Advance intervention: Dispute must not be hypothetical and intervention must be fair and just*

The court may intervene ahead of the expert's determination, where the court is satisfied that intervention at an early juncture is fair and just in all the circumstances, and considering whether such intervention would prevent unnecessary wastage of costs and time.

In this case, the court considered that early intervention was appropriate as it was clear, on the facts, that the parties' dispute regarding the configuration to be applied for the valuation had already crystallised, and had culminated in a decision to set aside the first valuation that had been carried out and to obtain a fresh set of valuation reports. The valuers would not be able to properly proceed with the fresh valuation, without a resolution of the parties' dispute over the configuration to be applied.

### *Open questions*

Notably, the Court of Appeal left open issues which were not before the court:

- whether the court, rather than the expert, has authority to reach final and binding decisions on *any and all issues of law*; and
- whether it is open to parties to agree that questions of construction and of law be decided by an expert, without the possibility of curial correction.

## Contractual interpretation of "prevailing market rental value"

In finding that the parties had agreed to apply the existing configuration for the purposes of valuation, the Court of Appeal emphasised that contractual interpretation is contract-specific and fact-specific. The Court of Appeal highlighted the atypical nature, context and terms of the Lease and the parties' relationship and conduct; these features meant that applying a hypothetical configuration yielding the "highest and best use" of the Premises was inconsistent with the parties' expectations and commercial sense.

### *Text of the agreement*

Although the text of the Lease and the letter from the parties jointly appointing the valuers did not unequivocally prescribe a configuration to be used for the valuation, the Lease revealed the parties' intended commercial relationship and contractual expectations:

- Takashimaya had a wide discretion to use, manage, shape and sublease the Premises as it saw fit, and was not required to apply any particular configuration;
- the parties envisaged a lengthy commercial relationship of approximately 80 years which included extensions at Takashimaya's sole discretion; and

- the Lease conferred Takashimaya privileges, atypical of a usual tenant, that went beyond the Premises, including a “first option to lease” additional areas beyond the Premises and pre-emption rights over the Premises.

*Context of the agreement: Nature of the parties’ intended relationship*

From an examination of the context of the Lease:

- the parties’ intended relationship went beyond a contractual or landlord-tenant relationship:
  - it was a long-term joint enterprise where Takashimaya’s parent company also invested in Ngee Ann Development;
  - the parties intended that Takashimaya operate a large department store on the Premises as anchor tenant;
  - the parties intended that the department store would be as large as Takashimaya considered appropriate, and would enhance the image and prestige of Ngee Ann City and the rental value of other parts of Ngee Ann City;
- requiring Takashimaya to pay rent at the highest possible rate would effectively erode Takashimaya’s freedom to configure the Premises; and
- there was no agreement or obligation that Takashimaya should configure or use the Premises or that the valuation be conducted, to maximise rental yield of the Premises for Ngee Ann Development’s benefit.

*Context of the agreement: Conduct in relation to previous rent reviews*

The Court of Appeal also considered prior rent reviews in 2003 and 2008 where the parties disagreed on the renewal rent. The valuer who had conducted those prior rent reviews gave evidence that he understood the parties to have agreed on a valuation based on the existing configuration. The Court found that Ngee Ann Development knew of the same but did not query or object.

These particular features supported the ultimate finding that the parties had agreed for Takashimaya to have wide discretion over the configuration of the Premises and for the existing configuration to be applied for the purposes of valuation.

For completeness, the Court of Appeal also dismissed the following arguments made by Ngee Ann Development in support of their case:

- The argument that the valuer could unilaterally decide the configuration made little sense as the different configurations would yield very different valuations and correspondingly, tremendous uncertainty over a period of 80 years, which would be inconsistent with expectations at the time of contracting.
- The Court of Appeal also warned against transposing an interpretation from one case to another, where the context (e.g., commercial aims and corporate relationship) is different. Ngee Ann Development’s argument that the term “prevailing market rental value” had been “judicially settled” in an Australian case could not be simply transposed into the present situation without considering the particular facts and context at hand.

If you would like information on this or any other area of law, you may wish to contact the partner at WongPartnership that you normally deal with or any of the following partners:



**Alvin YEO, Senior Counsel**

Chairman & Senior Partner

DID: +65 6416 8101

Email: [alvin.yeo](mailto:alvin.yeo@wongpartnership.com)

[@wongpartnership.com](mailto:alvin.yeo@wongpartnership.com)

Click [here](#) to view Alvin's CV.



**LIM Wei Lee**

Partner

Banking & Financial

Disputes Practice

DID: +65 6416 6871

Email: [weilee.lim](mailto:weilee.lim@wongpartnership.com)

[@wongpartnership.com](mailto:weilee.lim@wongpartnership.com)

Click [here](#) to view Wei Lee's CV.

# WPG MEMBERS AND OFFICES

- [contactus@wongpartnership.com](mailto:contactus@wongpartnership.com)

## SINGAPORE

-  
WongPartnership LLP  
12 Marina Boulevard Level 28  
Marina Bay Financial Centre Tower 3  
Singapore 018982  
t +65 6416 8000  
f +65 6532 5711/5722

## CHINA

-  
WongPartnership LLP  
Beijing Representative Office  
Unit 3111 China World Office 2  
1 Jianguomenwai Avenue, Chaoyang District  
Beijing 100004, PRC  
t +86 10 6505 6900  
f +86 10 6505 2562  
-  
WongPartnership LLP  
Shanghai Representative Office  
Unit 1015 Corporate Avenue 1  
222 Hubin Road  
Shanghai 200021, PRC  
t +86 21 6340 3131  
f +86 21 6340 3315

## MYANMAR

-  
WongPartnership Myanmar Ltd.  
Junction City Tower, #09-03  
Bogyoke Aung San Road  
Pabedan Township, Yangon  
Myanmar  
t +95 1 925 3737  
f +95 1 925 3742

## INDONESIA

-  
Makes & Partners Law Firm  
Menara Batavia, 7th Floor  
Jl. KH. Mas Mansyur Kav. 126  
Jakarta 10220, Indonesia  
t +62 21 574 7181  
f +62 21 574 7180  
w [makeslaw.com](http://makeslaw.com)

## MALAYSIA

-  
Foong & Partners  
Advocates & Solicitors  
13-1, Menara 1MK, Kompleks 1 Mont' Kiara  
No 1 Jalan Kiara, Mont' Kiara  
50480 Kuala Lumpur, Malaysia  
t +60 3 6419 0822  
f +60 3 6419 0823  
w [foongpartners.com](http://foongpartners.com)

## MIDDLE EAST

-  
Al Aidarous International Legal Practice  
Abdullah Al Mulla Building, Mezzanine Suite 02  
39 Hameem Street (side street of Al Murroor Street)  
Al Nahyan Camp Area  
P.O. Box No. 71284  
Abu Dhabi, UAE  
t +971 2 6439 222  
f +971 2 6349 229  
w [aidarous.com](http://aidarous.com)  
-  
Al Aidarous International Legal Practice  
Zalfa Building, Suite 101 - 102  
Sh. Rashid Road  
Garhoud  
P.O. Box No. 33299  
Dubai, UAE  
t +971 4 2828 000  
f +971 4 2828 011

## PHILIPPINES

-  
ZGLaw  
27/F 88 Corporate Center  
141 Sedeño Street, Salcedo Village  
Makati City 1227, Philippines  
t +63 2 889 6060  
f +63 2 889 6066  
w [zglaw.com/~zglaw](http://zglaw.com/~zglaw)

[wongpartnership.com](http://wongpartnership.com)