RBC Properties Pte Ltd *v* Defu Furniture Pte Ltd
[2014] SGCA 62

Case Number	: Civil Appeal No 19 of 2014
Decision Date	: 17 December 2014
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Steven Chong J
Counsel Name(s)	: Goh Yihan (instructed) and Nicholas Narayanan (Nicholas & Tan Partnership LLP) for the appellant; Kirindeep Singh, June Hong and Edwin Chua (Rodyk & Davidson LLP) for the respondent.
Parties	: RBC Properties Pte Ltd — Defu Furniture Pte Ltd

Contract – Misrepresentation – Misrepresentation Act

Contract – Misrepresentation – Rescission

Contract – Breach – Repudiatory Breach

17 December 2014 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 In deciding any given case, it is axiomatic that the court concerned must apply the law to the relevant facts. Whilst the law to be applied is objective and universal, the facts that the law is applied to are varied and specific. Unsurprisingly, therefore, the decision or result of a case is heavily dependent (in the final analysis) on the specific facts concerned.

2 That this is so is demonstrated in no uncertain terms by the main issue that has to be decided in this appeal, which concerns the respondent lessee's (Defu Furniture Pte Ltd, hereinafter known as "the Respondent") claim to rescind a lease entered into with the appellant lessor (RBC Properties Pte Ltd, hereinafter known as "the Appellant") on the grounds of misrepresentation. The lease was in respect of the first storey of an industrial building ("the Premises") and its sole permitted use under the lease was as a furniture showroom. The misrepresentation complained of was the Appellant's assurance that all necessary approvals had been obtained for the Premises to be used as a furniture showroom, which, it is argued, was never the case because the Singapore Land Authority ("the SLA"), acting on behalf of the State, had not in fact given its approval for the premises to be so used. Such a misrepresentation would, of itself, entitle the Respondent to rescind the lease. However, the Respondent claims that it is further entitled, under s 2(1) of the Misrepresentation Act (Cap 390, 1994 Rev Ed) ("the Misrepresentation Act", the provision is hereinafter simply referred to as "s 2(1)"), to damages for losses suffered, because the Appellant did not have (within the meaning of s 2(1)) any reasonable ground to believe that all necessary approvals for the use of the premises as a furniture showroom had been obtained, and was therefore liable *as if* the misrepresentation had been made fraudulently.

3 In the court below, the High Court Judge ("the Judge") held that the Appellant did in fact make a misrepresentation to the Respondent in the terms complained of, and (more importantly) that such

a misrepresentation fell within the ambit of s 2(1) as the Appellant did not have any reasonable ground to believe that the facts it had represented to the Respondent were true (see *Defu Furniture Pte Ltd v RBC Properties Pte Ltd* [2014] SGHC 1 ("the Judgment")). The Appellant has appealed, *inter alia*, against this particular finding.

4 On the correct and holistic appreciation of all the facts that are before us, we do not entertain any serious doubt whatsoever that the Appellant did make a misrepresentation to the Respondent, who relied on that misrepresentation in entering into the lease and thereby suffered loss. Accordingly, we are of the view that the Respondent is entitled to rescind the lease, which is an equitable remedy that generally applies to all forms of misrepresentation, whether the claim is mounted under the Misrepresentation Act or at common law. The crux of the appeal before us (which formed the main thrust of the Appellant's case) is the closely related (and indeed, crucial) issue: can the Appellant avail itself of the statutory defence in s 2(1), *viz*, that it had reasonable ground to believe, and did believe up to the time the lease was entered into, that the facts it had represented were true? If so, the misrepresentation would be wholly innocent as the presumption in s 2(1) would be defeated, and whilst the Respondent would still be entitled to the rescission of the lease and an indemnity for obligations it had taken on under the lease, it would not, under that self-same provision, be entitled to damages as if the misrepresentation had been made fraudulently. As we shall see, the determination of this particular issue is clearly fact-centric and therefore requires a nuanced and contextual consideration of all the relevant facts.

5 Whilst this issue constitutes the crux of the present appeal, it is by no means the only issue before us. Indeed, it is important at this juncture to note that there is another – and no less important – issue which was also raised in the court below, *viz*, whether or not the Appellant was (in the *alternative*) liable to the Respondent for *breach of contract*. The Judge declined to render a decision on this particular issue in light of his decision in favour of the Respondent with regard to s 2(1) (see also below at [43] and [133]), and the primary focus of the parties' submissions to this court was (not surprisingly) therefore also on s 2(1). However, as we were of the view that this was also an important issue, we invited counsel for the parties to elaborate upon it further during oral submissions before this court – not least because if this court is of the view that the Appellant is not liable under s 2(1), that would not be the end of the matter inasmuch as it could still be potentially liable for breach of contract.

6 Nevertheless, given the focus by the parties on s 2(1), we will deal with their (rather comprehensive) arguments in this particular regard first before proceeding to consider the issue relating to breach of contract. Before we turn to a discussion of these various issues, it might be apposite first to set out briefly both the factual background as well as the decision of the trial court.

Background facts

7 The Appellant is the sub-lessee of a five-storey industrial building located at 11, Bedok North Avenue 4, known as the Richland Business Centre ("the Property"). The Property was originally developed in 2006 by a company known as RLG Development Pte Ltd ("RLG"), a sister company to the Appellant. Pursuant to a building agreement dated 16 August 2006 ("the Building Agreement"), RLG leased the plot of land at Bedok North Avenue 4 under a 30-year lease from the President of the Republic of Singapore (in effect, the State). RLG undertook to develop the land in accordance with the relevant conditions of tender and, in particular, to develop it in accordance with its zoning status.

8 At that time, the relevant zoning provisions were those expressed in the Urban Redevelopment Authority's ("the URA") Master Plan Written Statement 2003 ("the Master Plan 2003"). Under the Master Plan 2003, that plot of land was zoned for Business 2 use ("B2 use"), which meant that it

could only be used for clean industry, light industry, general industry, warehouse, public utilities and telecommunication uses and other public installations. The Master Plan 2003 also permitted "ancillary uses", but restricted such uses to "40% of the total floor area", and further stipulated that "the types of B2 and ancillary uses that may be allowed are subject to the evaluation of the competent authority and other relevant authorities".

9 It is not disputed that from the very beginning of the development process, RLG's intention was to utilise the Premises as a showroom. It drafted plans to this effect and on 5 October 2006, obtained provisional permission from the URA for its development plans ("the Provisional Permission"). This was followed, on 24 April 2007, by written planning permission from the URA to erect a "5 storey single-user light industrial development comprising showroom at 1st storey and warehouse from 2nd to 4th storey and ancillary office at 5th storey" ("the Written Permission"). It is not disputed that the Written Permission amounted to the URA's approval for the Premises to be used as an ancillary showroom. The URA's prevailing guidelines also stipulated a minimum size for the showroom and that the showroom was not be used for retail sales such as cash and carry transactions, but only for the display of items (such as furniture) which could then be ordered and delivered separately. On this basis, RLG began construction of the Property, which was completed in 2008.

10 Following the completion of the Property, RLG entered into a lease numbered 26784 with the President of Singapore as lessor on 22 August 2008 ("the State Lease"). The essential terms were that, in consideration for the sum of $5.118 million paid by way of premium, the State leased to RLG the plot of land at Bedok North Avenue 4, with all buildings erected thereon for 30 years from 16 August 2006. Clause 1(i) of the State Lease provides that RLG was to develop the land at its cost and expense:

> … in accordance with the Building Agreement dated the 16th day of August 2006 made between the Lessor and the Lessee and also in accordance with the plans approved or to be approved by the Competent Authority under the Planning Act (Cap 232) and all relevant Competent Authorities.

It is not disputed that the "Competent Authority" under the Planning Act (Cap 232, 1998 Rev Ed) ("the Planning Act") referenced in this clause was the URA.

11 In so far as restrictions on use are concerned, the relevant clause is clause 2 of the State Lease which reads as follows:

> 2. And it is hereby agreed between the Lessor and the Lessee as follows: -
>
> (i) The said development on the said land –
>
> (a) may be for any use or uses that may be permitted by the Competent Authority under the Planning Act (Cap. 232) for a 'Business 2' zoning in accordance with the Master Plan Written Statement;
>
> (b) shall have a total gross plot ratio not exceeding 2.0 ("maximum GPR") but not less than 1.6.
>
> (ii) The provisions of sub-clause (i) shall apply unless a variation or change thereof is approved in writing by the Lessor, which approval may be given subject to such terms and conditions as the Lessor may impose and provided that if such variation or change will in the opinion of the Lessor result in an enhancement of the value of the said land the Lessee shall pay the Lessor

within such time as may be specified by way of differential premium such amount as the Lessor may determine as the amount representing the enhanced value of the said land.

(iii) For the purpose of sub-clause (ii) of this Clause, the enhanced value of the said land shall be determined by the Lessor with reference to the date of the grant of Provisional Permission by the Competent Authority under the Planning Act (Cap. 232) for the variation or change to sub-clause (i) that requires the Lessor's approval.

(iv) No work or development in respect of any variation or change to the provisions of sub-clause (i) that requires the Lessor's approval may be effected, implemented or carried out unless the prior approval in writing of the Lessor in respect thereof is obtained and all the terms and conditions subject to which such prior approval is given are complied with any amount of differential premium payable under this Clause is paid to the Lessor.

12 On 24 April 2008, RLG granted the Appellant a lease of the Property for a term of 10 years and 4 months ("the Head Lease"). The Head Lease subjected the Appellant to the obligations of RLG under the Building Agreement and the State Lease. The Appellant also had to ensure that any sub-tenants complied with all the terms of those agreements. Under clause D7.1 of the Head Lease, the permitted uses of the Property were restricted as follows:

Permitted Use

D7.1 Unless prior approval of the relevant competent authorities have been obtained, the Tenant shall at all times use the [Premises[strictly and only as in compliance with the [State Lease] and with the use or uses permitted by the planning authority for a 'Business 2' zoning in accordance with the [Master Plan 2003] which shall include but not limited to warehouse and workshop for containers, vehicles and machinery repair and refurbishment only subject to the Tenant obtaining all necessary approvals and licenses (if any) from the relevant authorities at the Tenant's own cost and absolute responsibility…

13 On 16 September 2008, RLG assigned its interest in the Property to a company known as AMB Changi South DC1 Pte Ltd ("AMB"). AMB therefore stepped into RLG's shoes as the lessee under the State Lease, and as the lessor under the Head Lease. AMB was subsequently re-named Prologis Changi South 1 Pte Ltd ("Prologis").

14 In 2010 the Appellant decided to rent out the Premises as a showroom, as was originally envisaged in the plans. A potential lessee who was interested in leasing the Premises for use as a furniture and furnishings showroom was found. Accordingly, Mr Siebren Kamphorst ("Mr Kamphorst"), a commercial executive working for the Appellant, wrote to the URA on 8 April 2010 to ask if the Premises were approved for use as a showroom. The Judge found, and the Respondent does not dispute, that the URA replied in the affirmative. Pursuant to the Head Lease, the Appellant also wrote to AMB to seek its permission to sub-lease the Premises for use as a showroom. AMB responded that it had no objections in principle for the Premises to be leased for such use, provided that any approvals required from the authorities were obtained. In the event, the proposed lease fell through and the Premises were again advertised for lease in late 2010.

15 In early 2011, the Respondent, which was also a furniture seller, approached the Appellant with a view to leasing the Premises for use as a furniture showroom. The Respondent's owners, Mr Lim Thiam Soon ("Mr Lim Sr") and Mr Allen Lim ("Mr Lim Jr") (collectively, "the Lims"), viewed the premises in January of that year, accompanied by Mr Kamphorst. The Lims claimed that Mr Kamphorst was asked whether there were restrictions on the use of Premises as a showroom and that he confirmed

that whilst no retail sales could take place, all necessary approvals had been obtained for the use of the Premises as an ancillary showroom. The Lims also alleged that Mr Kamphorst had pointed to the floor-to-ceiling glass panels around the Premises as evidence that they had been installed for showroom purposes.

16 The Lims made a second visit to the Premises in early February 2011. Again they asked whether it could be used as a showroom and received Mr Kamphorst's assurance that it could be so used as long as no retail sales were carried out, in accordance with the URA guidelines on ancillary uses of B2 zoned industrial land. He then gave the Lims a copy of the URA's Written Permission and also pointed to the schematic plan of the Premises which specified its showroom use.

17 We pause at this juncture to note, parenthetically, that the Appellant's case on appeal is that at this point all that Mr Kamphorst said was that he was not sure if there were any other government or regulatory approvals required for the Respondent to use the premises as a furniture showroom. The Respondent's case is that the Lims were specifically told that the URA had given its approval and that no other approval was necessary.

18 On 16 February 2011, the Respondent signed and returned a letter of ("the Letter of Offer"), by which it offered to lease the Premises. The permitted use was expressed under clause 1.3 of the Letter of Offer as "Ancillary Showroom for furniture and furniture accessories (Subject to URA and NEA and any other relevant authorities' approval)". The handover date was 1 April 2011 and the lease was for 60 months from 1 June 2011, at a monthly rental of $1.75 per square foot ("psf") for 39,500 square feet of floor area.

19 The Appellant accepted the Letter of Offer on 18 February 2011 and accordingly, the parties entered into a lease agreement dated 11 March 2011 ("the Lease"). Clause 3.14.2 of the Lease set out the permitted use of the Premises:

> 3.14.2 Not to use or permit the use of the [Premises] or any part thereof:-
>
> (a) otherwise than for the purpose(s) and in accordance with the provisions of **Schedule 4**;
>
> (b) for any purpose otherwise than in accordance with the permitted use approved by the relevant government authorities; and
>
> (c) for the purpose(s) specified in **Schedule 4**, until and unless all necessary approvals, consents, licences and permits shall have been obtained by the Tenant from the relevant government authorities and such approvals, consents, licences and permits remain valid and subsisting.
>
> [emphasis in bold in original]

20 Schedule 4 reads as follows:

> The [Premises] shall not be used for any purpose other than as a Showroom for furniture and furniture accessories under the trade name of Defu Furniture Pte Ltd only or such name as may be approved by the Landlord and in accordance with the guidelines of all other relevant authorities.

21 The Lease also contained an indemnity clause which reads as follows:

3.19 The Tenant shall occupy, use and keep the [Premises] at the risk of the Tenant and shall indemnify and hold harmless the Landlord from and against all actions, claims, demands, losses, costs and expenses for which the Landlord shall or may suffer or become liable for in connection with:

…

(c) any breach or non-compliance with any provision of this Lease by the Tenant

22 The Respondent was given a two-month rent-free period in April and May 2011 for the purpose of fitting out the Premises. Accordingly, the Respondent took possession of the Premises on 1 April 2011 and commenced fitting it out.

23 The first sign of trouble emerged three weeks later. On 21 April 2011, the SLA wrote to AMB in relation to a proposed racking system to be installed on the 2nd floor of the building by another of the Appellant's tenants, DHL Supply Chain Singapore Pte Ltd ("DHL"). The URA had granted written planning permission for the racking system on 30 March 2011, which permission had come to the notice of the SLA. The SLA took the view that under clause 2(i) of the State Lease, the racking system would create additional industrial gross floor area of 765.31 square metres, an addition which was inconsistent with the pre-existing approved use of the building under the terms of the State Lease. Accordingly the SLA said it was entitled under clause 2(ii) of the State Lease to charge a differential premium for that enhanced value.

24 The racking system was completely unrelated to the Respondent's proposed use of the ground floor as a furniture showroom. However, it appears from the letter of 21 April 2011 that the SLA further took the view that the Written Permission obtained by RLG on 24 April 2007 – almost four years previously – for the Premises to be used as a showroom (see above at [9]) *also* constituted a change in use within the meaning of clauses 2(i) and (ii) of the State Lease, for which the SLA's approval and the attendant payment of a differential premium for the enhancement in land value were required. The reason advanced by the SLA at paragraph 4 of its letter of 21 April 2011 was that this involved "change of use of 3,436.6 sqm of GFA from industrial use (Group D) to *commercial showroom* use (Group A)" [emphasis added]. The enhancement in value – for both DHL's racking system and the "change of use" as a showroom – was accordingly priced at S$2,820,935, or S$2,964,894.53 including fees and GST, which had to be paid in return for the SLA lifting the restrictions on use under the State Lease.

25 AMB received the letter on 26 April 2011 but neither the Appellant nor the Respondent was notified immediately; fitting out work continued apace. It was not until 27 May 2011 that Mr Kamphorst of the Appellant was informed. It appears that the SLA's use of the words "commercial showroom" confused AMB, because after it received the letter AMB contacted SLA and formed the view that the differential premium would only need to be paid if the Premises were used as a "commercial showroom" (as stated in the SLA's letter), but not if the Premises were used as an "ancillary showroom". In other words AMB *misunderstood* the SLA's position to mean that whilst approval had been obtained for use as an "*ancillary* showroom", the SLA's objection was that the Premises had *not* been approved for use as a "*commercial* showroom". AMB asked Mr Kamphorst to clarify the distinction with the URA, which he did in the following terms on 27 May 2011:

> I wanted to get additional confirmation from URA, that our incoming Tenant, a furniture company, is permitted to use our level 1 Ancillary Showroom at 11 Bedok North Avenue 4 as a furniture showroom. I want to be very clear that we are not applying for a Commercial Showroom (no retail sales) and we haven't started operations yet. Our tenants may also consider using part of the

showroom as a warehouse to store their displayed items.

There seems to be some confusion as to whether our incoming tenant are permitted to do so and in accordance with the approved use.

26 The URA's response was that the premises were approved for use as a "showroom for display of furniture to prospective customers" and there was no change of use so long as the premises were used as an ancillary showroom with no retail element. It is apparent that at this point, Mr Kamphorst was still under the misapprehension that it was the URA's planning approval that was at issue, instead of the SLA's approval as lessor under clause 2(ii) of the State Lease. The requirement for the latter's approval was never in his mind.

27 On 27 May 2011, Mr Kamphorst also informed Mr Lim Jr of the Respondent of the SLA's letter. Their correspondence indicates that both continued to hold the (mistaken) belief that the hold-up was an issue of compliance with the URA's planning regulations. In the event, the Respondent did not halt its fitting out works until 6 June 2011.

28 On 21 June 2011, the SLA wrote again to AMB to particularise the premium it was charging for the racking system alone instead of adding the premiums for the two "improvements" (the racking system and the "change of use" as a showroom) together. The SLA's letter clarified that the previous letter of offer of 21 April 2011 had included a differential premium:

> … payable for 3,436.6 sqm of GFA for ancillary showroom use (Charged at Group A commercial rates). Please note that upon accepting this offer dated **21 June 2011** there is still an outstanding differential premium sum of $2,852,171.10 (excluding stamp duties) owed to the State" [emphasis in original].

29 On 5 July 2011, the SLA sent a further letter to M/s Lee & Lee, the solicitors acting for AMB (which by now had changed its name to Prologis). This was the first time that the SLA explained in some detail why it thought it was entitled to charge a differential premium for the change of use as a showroom, and the fourth and fifth paragraphs of the aforementioned letter therefore merit quotation in full:

> 4. In this regard, "Business 2" zoning under URA's Master Plan Written Statement referred to in Clause 2(i) of the [State Lease] refers to uses such as clean industry, light industry, general industry, warehouse, public utilities and telecommunication uses and other public installations. These uses are classified in Group D under the URA Development Charges Table of Rates. The ancillary showroom is not a use under Business 2 zoning. It is classified under commercial GFA (See attached URA's circular) and falls under Group A in URA's Development Charges Table of Rates. As showroom is in a higher use group, there is an enhancement in land value for which [a differential premium] of $2,852,171.10 (inclusive of GST and processing fees but excluding stamp duties) is determined to be payable under Clauses 2(ii) and (iii) of the [State Lease].
>
> 5. Please note that until such time that the differential premiums are paid, your clients are in breach of the covenants in the [State Lease]. As such, the clarification sought in paragraph 7 of your said letter is premature.
>
> [emphasis in original]

30 Despite the SLA's clarification, Prologis and the Appellant continued to labour under a misapprehension with regard to the SLA's position. As the URA had granted approval for the use of

the Premises as a showroom back in 2007 and that letter had been copied to the Commissioner of Lands and the SLA, Prologis and the Appellant were of the view (as a natural conclusion in those circumstances) that any objection as to the change of use ought to have been raised then.

31 The matter was only finally clarified when the SLA wrote to Prologis on 26 July 2011 and again in 22 August 2011. The SLA explained that the use of the Premises as a showroom was *not* a use falling under B2 zoning as stated in clause 2(i) of the State Lease. It was, instead, a variation in use requiring *both* the URA's *and* the SLA's approval. RLG had obtained only the URA's permission in 2007, as was required under the Planning Act. However, the SLA's separate approval was required pursuant to clause 2 of the State Lease as it stood in the position of the lessor under the State Lease. This separate approval, which had never been obtained, was contingent on a differential premium being paid if, in the SLA's opinion, there was an enhancement in the value of the land. Thus, as the SLA put it in its letter of 22 August 2011, a differential premium "will be charged if the Lessee/Assignee has used the Property in such a way that results in an enhancement of land value … the grant of URA's approval *coupled with the actual use of the 1st storey as a showroom* will attract payment of differential premium" [emphasis added].

32 We pause in our recital of the factual background to note that, even assuming that the SLA's interpretation of the various provisions was correct, the SLA's letters did not explain why the SLA had not imposed a differential premium *at the time the State Lease was executed in 2008*, since that had been entered into *after* URA had issued both the Provisional Permission and the Written Permission approving the Premises for use as a showroom, or even at any point in time since. The words "change in use" imply that a *subsequent* change had been made, when in fact the Property had been planned all along to have a showroom as its first storey. The SLA never explained why it had not simply charged a higher premium at the very beginning of the process, when the State Lease was being negotiated. The only relevant evidence is paragraph 5 of the letter of 26 July 2011, which stated as follows:

> From our dealings with other assignees of a State Lease, before any variation or change is carried out after obtaining approval from URA, as a matter of prudence, their professional consultants would check with SLA whether there is any differential premium payable under the Head Lease. *This was not done in your case.* …

For completeness, we note that there was no evidence before us as to whether or not this was done by the professional consultants and there is no basis for us to reach a conclusion either way.

33 After this letter of 26 July 2011, the tenor of the communications changed. Whether or not Prologis had understood and accepted the SLA's position in relation to the State Lease as correct, it was no longer engaged in clarifying or disputing that point with the SLA. Instead, the focus shifted – first, to attempt to persuade the SLA to reduce the amount of differential premium payable; and, second, to get the Appellant either to pay that premium itself or to pass that cost to the Respondent. The Appellant refused. It wanted Prologis to pay the premium instead and to indemnify it against any claim by the Respondent.

34 In September 2011, Prologis and the SLA succeeded in negotiating a reduction in the differential premium from $2,852,171.10 to $1,358,000 (excluding GST, stamp duty and processing fees payable). The basis of the reduction was that the change in use would be authorised only over the term of the Lease entered into between the Appellant and the Respondent. However, Prologis refused to pay the reduced premium and the Appellant remained adamant that it would not do so either. Finally on 21 September 2011, the Appellant suggested a compromise – Prologis would foot the upfront cost of paying the differential premium, which would be amortised over the term of the Lease. That monthly

sum, which worked out to $22,633, would be passed on to the Appellant under the terms of the Head Lease, and through the Appellant to the Respondent under the Lease. This worked out to an extra 57 cents psf per month over and above the existing rent of $1.75 psf per month.

35 The Respondent refused to pay this extra sum. It commenced the present proceedings on 14 October 2011, announced its intention to rescind the Lease and proceeded to reinstate the Premises. The reinstatement works concluded in December 2011 but the keys were not accepted by the Appellant until 12 March 2012.

The parties' pleaded cases

36 The Respondent's primary case in the court below was in misrepresentation. It claimed that the Appellant had represented to it that it could use the premises as a showroom without any further approval, and that this representation was made on four occasions – during each of the two occasions that the Lims viewed the premises; when the Letter of Offer was signed; and when the Lease was signed. The Respondent's case was that this representation was demonstrably false because the SLA's further approval for the change in use was in fact required; and further that the representation was negligently made because the SLA's right to charge a differential premium was founded on a clause in the State Lease that the Appellant could and ought to have checked. Had the Appellant done so, it would have been alive to the possibility of a differential premium being charged; and it would not have represented to the Respondent that no further approvals for the Premises to be used as a showroom were needed. As the Respondent had relied on this misrepresentation in entering into the Lease, it was therefore entitled to rescind the Lease; and further, because the Appellant had no reasonable ground to believe in the truth of the representation (from the time it made the representation up to the time the Lease was entered into), the Respondent was also entitled to claim damages under s 2(1) for the losses suffered. It therefore sought the following relief:

(a) A declaration that it had validly rescinded the Lease;

(b) A consequent refund of certain payments made to the Appellant being:

(i) Security deposit of $345,625;

(ii) Pre-paid rent of $73,963.75; and

(iii) Double payment of rent of $69,125;

(c) Damages for misrepresentation in the following sums:

(i) Stamp duty of $13,272;

(ii) Cost of fitting out works of $888,685.90;

(iii) Utilities charges for April and May 2011 of $2,70.51;

(iv) Interest on a loan taken for the fitting out works of $78,216.88; and

(v) Reinstatement costs of $85,056

37 The Respondent mounted the following claims in the alternative. The first was for equitable relief for rescission of the Lease for innocent misrepresentation and for an indemnity for all losses suffered. The second was for the Appellant's alleged repudiatory breach of the Lease by failing to

respond to the Respondent's requests to continue the fitting out after it was interrupted by the SLA's intervention. The third was in unjust enrichment on the basis of a total failure of consideration. The fourth was that the Lease was voidable for mistake in equity under the principle laid down in the English Court of Appeal decision of *Solle v Butcher* [1950] 1 KB 671.

38 The Appellant's defence at first instance was twofold. First, it denied that it had made the representation on which the Respondent relied and maintained that the Letter of Offer and the Lease placed the burden of seeking all necessary approvals required for using the Premises as a showroom on the Respondent. The Appellant averred that, in any event, the Respondent could not reasonably have relied on the representation. Second, and in the alternative, the Appellant submitted that even if there was a misrepresentation, it had been made innocently; and, in any case, clause 6.9 of the Lease ("Clause 6.9") was effective in excluding liability for any misrepresentation.

39 The Appellant also mounted a counterclaim for breach of contract resulting from the Respondent's alleged repudiation of the Lease.

The decision of the court below

40 The Judge found that the Appellant had indeed made the misrepresentation to the Respondent that had induced the latter to enter into the Lease. This was for the following three reasons:

(a) The Appellant in fact represented that only the URA's approval was needed for use of the Premises as a showroom because that was Mr Kamphorst's actual belief in the relevant period *before* the Lease was entered into; it was not until 27 May 2011 that he was notified of the SLA's letter of 21 April 2011.

(b) The Appellant completely failed to understand the distinction between the URA's approval in the form of written planning permission for the use of the Premises as a showroom on the one hand and the SLA's *separate and independent* approval for such use on the other, and that this misunderstanding persisted even after 27 May 2011.

(c) Finally, the Appellant's conduct upon realising the true state of events was exactly as might be expected had it made the misrepresentation claimed by the Respondent – it repeatedly sought an indemnity from first AMB and later Prologis for any liability owed to the Respondent.

41 The Judge also rejected the Appellant's reliance on clauses 1.3 and 6.3 of the Letter of Offer as placing on the Respondent the burden of obtaining all the necessary approvals, for four main reasons:

(a) The SLA did not come within the language of clause 1.3, which contemplated approvals from "relevant authorities". In this case, the SLA, although a government authority, was acting in its capacity as the representative of the lessor (the State) and its right to withhold approval was founded in contract, *viz*, clauses 2(i) and (ii) of the State Lease, and not on any regulatory powers.

(b) Clause 6.3 was an "unhappily worded" clause, whose meaning was not apparent on its face. But, in any event, any reliance on this clause was misplaced because it referred to clause 1.3.

(c) The SLA's approval was never in the minds of the parties at the time they entered into the Lease and it therefore followed that it could not, as a matter of construction, be covered by the terms of thereof.

(d) The Appellant and, in particular, Mr Kamphorst did not behave as if the burden was on the Respondent to secure any approvals – it was the Appellant which was at all material times in contact with Prologis, the URA and the SLA.

42 The Judge further held that the Appellant did not discharge its burden under s 2(1) to prove that it had "reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true". This was because the Appellant possessed copies of the Head Lease and the State Lease and had to be aware of their terms, *ie*, that it was obliged under the Head Lease to comply with and to ensure that its sub-tenants complied with, all terms and conditions of the State Lease. The Judge relied on the English Court of Appeal decision of *Howard Marine and Dredging Co Ltd v A Ogden & Sons (Excavation) Ltd* [1978] 1 QB 574 ("*Howard Marine*") for the proposition that the Appellant could not have had reasonable ground to believe that the representations it made were true, where it had special knowledge from reliable documents in its possession that would have demonstrated that the representations were false. Had the Appellant checked clauses 2(i) and (ii) of the State Lease, it would have become aware of the SLA's right to charge a differential premium. The Judge found that even though the Written Permission had been granted in 2007, *before* the State Lease was entered into in 2008, this was immaterial as the State Lease incorporated the Building Agreement that had been entered into *in 2006* (and thus predated the Written Permission). The use of the land under the State Lease was therefore limited to primary industrial uses under B2 zoning as stipulated in the Building Agreement and did not include ancillary use of the Premises as a showroom. The Judge also observed that the Appellant had the benefit of legal advice in interpreting the State Lease.

43 The Judge found that the Appellant had not excluded liability for misrepresentation under Clause 6.9. Accordingly, he held that the Respondent was entitled to damages under s 2(1) as well as rescission of the Lease. The refunds and damages claimed for were all allowed, save that the Judge reserved the particulars of the Respondent's claim for fitting out works and reinstatement cost for further hearing, and rejected the Respondent's claim for interest paid on the loan it took for the fitting out works as being too remote to be recovered.

44 As the case had been determined on the foregoing bases, the Judge made no finding on the Respondent's alternative claims in restitution and breach of contract and also dismissed the Appellant's counterclaim.

The parties' cases on appeal

The Appellant's case

45 The Appellant's case before us proceeds on three fronts.

46 First, it maintains that it had never made the representation complained of. The Appellant argues that the indicia relied on by the Judge (described above at [40]) were equally consistent with the Appellant's alternative version of the representation made ("the Alternative Representation") (see also above at [17]), *ie*, that Mr Kamphorst had only said he was "not sure if there were any other government and/or regulatory approvals needed". Therefore, the Respondent had failed to discharge its burden of showing that there was a misrepresentation.

47 The Appellant's fall-back position is that, even if there was an operative misrepresentation, it was made innocently such that it should not be liable for damages under s 2(1). The Appellant argues that it had reasonable grounds to believe, and did believe up to the time the Lease was entered into, that the facts represented were true. The Appellant accepts that it has the burden of showing this

but avers that it has discharged this burden because:

(a) The effect of the Lease, the Head Lease and the State Lease is that the URA was the first port of call for matters pertaining to planning permission.

(b) The URA's planning permission affected the SLA's contractual right to approve any change of use, and the URA's Provisional Permission of 5 October 2006, and its subsequent Written Permission of 24 April 2007, *did not state that there was any change of use*, nor did the SLA (which was copied in that document) object or raise any issue at that time, or at any time until April 2011. It took AMB (later Prologis) and the Appellant more than two months, even with the aid of legal advice, to understand and accept the SLA's position on the matter. It follows that the Appellant had reasonable grounds to believe that the SLA's right to impose a differential premium had not arisen at all.

(c) Ultimately, the Appellant only needs to demonstrate that its representation of the approval status of the Premises were reasonable, not that it was correct.

(d) Finally, the cost of the fitting out works, which formed the bulk of the Respondent's *monetary* claims below (see above at [36(c)(ii)]), could not be claimed by way of an indemnity for rescission because the fitting out works were not obligations under the Lease.

48 The third plank of the Appellant's case is that it was absolved of liability due to the exclusion clause contained in the Lease, *viz*, Clause 6.9. The Appellant argues that Clause 6.9 had to be read in its context to mean that the parties agreed to treat all representations as denuded of any force whatsoever, whether for a claim for a breach of warranty or in misrepresentation. It was also argued that the aforesaid clause was reasonable under the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed).

The Respondent's case

49 The Respondent argues that all three grounds of appeal are without merit. First, it submits that the Appellant's claim that Mr Kamphorst had made the Alternative Representation was wholly speculative as it was not corroborated by any documentary or other witness evidence.

50 Second, the Respondent submits that the Appellant did not have reasonable grounds for believing in the truth of its misrepresentation. The Respondent says the Appellant cannot now claim that it was unaware of SLA's right to impose a differential premium for a change in use, for the simple reason that the Appellant never demonstrated that it had ever considered the terms of the State Lease at all. Whether or not the SLA was correct in the assertion of its contractual rights under clause 2(ii) of the State Lease, the undisputed fact was that the Appellant had never bothered to make any inquiries of the SLA, or even to read, let alone examine, the terms of the State Lease, even though that document was in its possession (which meant that it had all the knowledge required to assess whether and what further approvals were required). The Respondent contends that the Appellant's failure to make those necessary enquiries means that it must be taken to have failed to discharge its burden under s 2(1).

51 Thirdly, the Respondent states that, broadly for the same reasons advanced by the Judge, the Appellant cannot rely on Clause 6.9 to exclude any liability for misrepresentation.

Issues before the court

52 Three issues arise for our decision. The first is whether there was any misrepresentation made by the Appellant to the Respondent. The next is the consequent issue of whether, if there was in fact such a misrepresentation, the Appellant was liable under s 2(1), or whether there was no liability inasmuch as the Appellant had reasonable ground to believe and did believe up to the time the contract was made that the representation was true. The third issue is whether the Appellant may rely on Clause 6.9 to exclude any liability for misrepresentation.

53 There are also two further miscellaneous issues that were canvassed in argument before us. The first miscellaneous issue is this: Assuming that the misrepresentation was wholly innocent and did not fall within the ambit of s 2(1), would the Appellant nevertheless be entitled to what it might have recovered under s 2(1) by way of an indemnity? The second miscellaneous issue is whether this appeal might have been resolved on the basis of the finding of a breach of contract instead.

Whether there was a misrepresentation

54 As we have alluded to briefly (see above at [4]), we do not think that there is any serious doubt that the Appellant, through its agent, Mr Kamphorst, did misrepresent to the Respondent that all necessary approvals for the Premises to be used as a showroom had been obtained. In the hearing before us, Assoc Prof Goh Yihan ("Prof Goh"), instructed as counsel for the Appellant, did not (correctly, in our view) seriously contend that the misrepresentation had not been made, and was content to stand on his written submissions on this point. This was that the Appellant's Alternative Representation, *ie*, that Mr Kamphorst had only stated that he was "not sure if there were any other government and/or regulatory approvals needed", was equally consistent with the facts as found by the Judge. We now amplify our reason for arriving at this conclusion.

55 In our view, as a matter of commercial reality, the Respondent would hardly have gone ahead with the Lease had Mr Kamphorst caveated the representation in the way the Appellant now claims he did by means of the Alternative Representation. Put simply, the Appellant had advertised the Premises as being suitable for use as a showroom and had sought lessees willing to pay an enhanced rent on that basis. The Respondent had, in consequence, registered its interest in the Premises *solely* on the basis that they could be used as a showroom. Indeed, Schedule 4 of the Lease states that the Premises "shall not be used for any purpose other than as a Showroom for furniture and furniture accessories under the trade name of [the Respondent]". In this context, it is *wholly improbable* that the Respondent would have accepted the terms of the Lease if it had been told that there was any doubt over whether the necessary approvals other than that of URA were needed, which is the main import of the Alternative Representation. Whether the representation was express and in words, or implied through conduct, we are satisfied that the Appellant had represented to the Respondent that all necessary approvals had been obtained for the use of the Premises as a showroom, and that this was a *mis*representation because it is not disputed nor is it in doubt that the representation is demonstrably false.

Whether the misrepresentation fell within the ambit of s 2(1)

56 There is no dispute that, assuming there was in fact a misrepresentation made, the Respondent had relied on said misrepresentation in entering into the Lease and thereby suffered loss. Thus our finding above, without more, entitles the Respondent to *rescind* the Lease, together with a consequential entitlement to an indemnity from the Appellant for all sums it was obliged to pay over under the Lease. However, s 2(1) affords a further possible remedy for victims of misrepresentation (such as the Respondent) and reads as follows:

> Where a person has entered into a contract after a misrepresentation has been made to him by

another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, *unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true*. [emphasis added]

57 Thus, this subsection further entitles any victim of a misrepresentation to *damages* as he would have been so entitled "had the misrepresentation been made fraudulently". To avoid liability under s 2(1), the representor must be able to show that "he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true". For convenience, we will term this "the test of reasonable belief".

The test of reasonable belief

The historical background to s 2(1)

58 We begin our analysis of the test of reasonable belief with the observation that s 2(1) of the Misrepresentation Act is, for all intents and purposes, the equivalent of s 2(1) of the English Misrepresentation Act 1967 (c 7) (UK) ("the UK Misrepresentation Act"). Section 2(1) of the UK Misrepresentation Act was enacted in order to give effect to the recommendations in the UK Law Reform Committee, *Tenth Report on Innocent Misrepresentation* (Cmnd 1782, 1962) ("the 1962 Report"), paragraphs 17 and 18 of which read as follows:

17 … On the other hand, we think that where one of the parties was at fault in making the representation, the other ought to be entitled to damages as of right. We also think that the onus should be on the representor to satisfy the court that he was not at fault. He will normally be in a better position to know the true facts than the other party. For instance a vendor should know the likely defects in the articles he sells from his specialised knowledge of the trade. If he was truly innocent of any desire to mislead, he will suffer little hardship by being put to the proof of his innocence but, if he cannot establish this, the loss should fall on him rather than on the other party …

18 There is a precedent for legislation on these lines in section 43 of the Companies Act, 1948. That section makes those responsible for the issue of a prospectus inviting persons to subscribe for shares or debentures in a company liable for any untrue statement in the prospectus unless they can show that they had reasonable ground to believe, and did up to the time of the allotment believe, that the statement was true. We think a similar rule should apply where any contract has been induced by a representation which is untrue. We accordingly recommend that any person who has, either by himself or his agent, induced another to enter into a contract with him by an untrue representation made for the purpose of inducing the contract should be liable in damages for any loss suffered in consequence of the representation. But the defendant should not be liable if he proves that up to the time the contract was made he (or his agent, if the representation was made by him) believed the representation to be true and had reasonable grounds for his belief.

59 The stated inspiration for the test of reasonable belief is therefore s 43 of the Companies Act 1948 (c 38) (UK), specifically, s 43(3)(*c*) thereof, which reads as follows:

A person who, apart from this subsection would under subsection (1) of this section be liable, by reason of his having given a consent required of him by section forty of this Act, as a person who has authorised the issue of a prospectus in respect of an untrue statement purporting to be

made by him as an expert shall not be so liable if he proves—

…

(*c*) that he was competent to make the statement and that he had reasonable ground to believe and did up to the time of the allotment of the shares or debentures, as the case may be, believe that the statement was true.

60 The sub-section quoted in the preceding paragraph was, in turn, drawn from s 3(1)(*a*) of the Directors Liability Act 1890 (c 64) (UK) ("the Directors Liability Act 1890") (see also John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (Sweet & Maxwell, 3rd ed, 2012) ("*Cartwright*") at para 07-16). The section reads as follows:

3. *Liability for statements in prospectus.*—(1.) Where after the passing of this Act a prospectus or notice invites persons to subscribe for shares in or debentures or debenture stock of a Company, every person who is a director of the Company at the time of the issue of the prospectus or notice, and every person who having authorised such naming of him is named in the prospectus or notice as a director of the Company or as having agreed to become a director of the Company either immediately or after an interval of time, and every promoter of the Company, and every person who has authorised the issue of the prospectus or notice, shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture stock on the faith of such prospectus or notice for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved—

(*a*.) With respect to every such untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares, debentures, or debenture stock, as the case may be, believe, that the statement was true…

61 Interestingly, s 3 of the Directors Liability Act 1890 was intended to *reverse*, in the particular situation to which that section applies, the decision in the House of Lords decision in *Derry v Peek* (1889) 14 App Cas 337 ("*Derry*"). *Derry* is, of course, the leading decision on the tort of *fraudulent misrepresentation* or *deceit* in the Commonwealth, and in which Lord Herschell famously observed (at 374) as follows:

… I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (*1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false*. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. *To prevent* a false statement being fraudulent, there must, I think, always be *an honest belief in its truth*. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made. [emphasis added]

62 As this court observed in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 ("*Wee Chiaw Sek Anna*"), fraud or

deceit is separate and distinct from negligence or carelessness. In particular, it was observed as follows (at [34]–[35]):

> 34 However, the concept of *recklessness* must *not* be equated with negligence or carelessness. As Bowen LJ aptly observed in the English Court of Appeal decision of *Angus v Clifford* [1891] 2 Ch 449 ("*Angus*") (at 471):
>
> > It seems to me that a second cause from which a fallacious view arises is from the use of the word "recklessness". ... Not caring ... did not mean not taking care, it meant *indifference to the truth, the moral obliquity which consists in a wilful disregard of the importance of truth*, and unless you keep it clear that that is the true meaning of the term, you are constantly in danger of confusing the evidence from which the inference of dishonesty in the mind may be drawn – evidence which consists in a great many cases of gross want of caution – with the inference of fraud, or of dishonesty itself, which has to be drawn after you have weighed all the evidence. [emphasis added]
>
> 35 This approach has been adopted locally in the Singapore High Court decision of *Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co* [2007] 1 SLR(R) 196 ("*Raiffeisen Zentralbank*"), where the learned judge opined (at [40] and [43]) as follows:
>
> > 40 ***Dishonesty is the touchstone*** *which distinguishes fraudulent misrepresentation from other forms of misrepresentation. This turns on the intention and belief of the representor*. A party complaining of having been misled by a representation to his injury has no remedy in damages under the general law unless the representation was not only false, but fraudulent. See Spencer Bower, Turner & Handley, *Actionable Misrepresentation* (Butterworths, 4th Ed, 2000) ("Spencer Bower") at para 98.
> >
> > …
> >
> > 43 Thus, ***negligence, however gross, is not fraud*** .
> >
> > [emphasis added in italics and bold italics]

63 The distinction referred to in the preceding paragraph is an important one. In particular, s 3 of the Directors Liability Act 1890 was clearly referring to conduct *other than fraud or deceit*. As already noted, the touchstone for establishing fraud or deceit is that of *dishonesty*. The provision just mentioned was clearly intended to *exclude* the necessity for establishing this particular element. It is also important to note that, unlike fraud or deceit, the burden of proof in s 3 of the Directors Liability Act 1890 was placed on *the representor* to establish that he had reasonable ground for his belief. All this is made *even clearer* in s 2(1) of the Misrepresentation Act itself. In particular, the words "that person shall be so liable *notwithstanding* that the misrepresentation was *not* made fraudulently" [emphasis added] in the provision itself are of crucial importance. Put simply, there is *no* need for *proof* of *dishonesty* in order for a claim under s 2(1) to succeed. The burden of proof is also clearly on the representor to prove "that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true".

64 In order to understand the somewhat awkward phraseology of s 2(1) itself, the historical backdrop against which that provision was enacted ought to be borne in mind. Section 2(1) was intended to provide a legal avenue for the recovery of damages at common law *where none had existed before apart from a claim for fraudulent misrepresentation or deceit*. Put another way, under the common law, absent a claim for fraudulent misrepresentation or deceit, *no damages were*

recoverable for all other types of misrepresentation (at best, only an *indemnity* might be obtained). To be sure, the equitable remedy of *rescission* was and is *always available for all types of misrepresentation*, subject to the operation of any applicable bars to rescission (see generally Pearlie Koh, "Misrepresentation and Non-disclosure" in ch 11 of *The Law of Contract in Singapore* (Academy Publishing, 2012) at paras 11.133–11.156; the chapter is hereinafter referenced as "*Koh*" and the book as "*The Law of Contract in Singapore*"). However, it bears reiterating that the common law remedy of *damages* was *not always available*, save in the situation where there was fraud or deceit.

65 In this regard, it is of the first importance to note that the tort of *negligent* misrepresentation (which was first established in the landmark House of Lords decision of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 ("*Hedley Byrne*")) had *yet to be established at the time the Law Reform Committee issued its report* in 1962 (*Hedley Byrne* was decided in 1963). Whilst it is true that the decision in *Hedley Byrne* had been handed down by the House of Lords by the time the Misrepresentation Act was enacted in 1967, it is likely that the tort of negligent misrepresentation was still in an *embryonic* stage, thus prompting the promulgation of the Misrepresentation Act and, in particular, s 2(1) thereof. Be that as it may, it is clear, in our view, that a claim brought under s 2(1) is (consistent with the analysis in the preceding paragraph) and, indeed, must have been, *ex hypothesi*, a *different legal creature* from an action in *fraud or deceit*.

66 What, then, is its true nature? Section 2(1) of the Misrepresentation Act is, in the first place, undoubtedly *statutory* in nature. It now *co-exists* with the tort of negligent misrepresentation at common law as first established in *Hedley Byrne* and was clearly enacted to perform the *same function* – to furnish a remedy in *damages* where none had hitherto (apart from fraud or deceit) existed. However, it is also *simultaneously different from* the tort of negligent misrepresentation at common law. The burden of proof under the common law, in respect of a claim based on the tort of negligent misrepresentation, is on the plaintiff/representee. However, under s 2(1), as already noted above at [63], *the burden is on the defendant/representor to prove* "that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true". In this regard, the following perceptive observations by Prof Cartwright may be usefully noted (see *Cartwright* at para 6-64):

> … Broadly, the remedy under section 2(1) of the Misrepresentation Act 1967 is more restricted in its application, since it is only available to one contracting party against the other contracting party, whereas the tort of negligence applies to all cases where a claimant can establish a duty of care, including actions between contracting parties. *But in those case where section 2(1) applies it is more attractive for the claimant since the elements of his claim are easier to establish than the elements of the tort of negligence; the burden of proving (in substance) absence of negligence lies on the defendant (rather than, as in the tort of negligence, the burden of proving breach of duty lying on the claimant)*; and in certain circumstances the remedy of damages under the section might be more extensive than the remedy in negligence. It is therefore clear that, where the claimant has a cause of action under section 2(1), it is unlikely to be of any benefit to him to pursue any action he may have in the tort of negligence. But the tort will be used where the Act is not available; in particular, where the claimant and the defendant are not parties to a contract. [emphasis added]

67 As already noted above at [64], the equitable remedy of rescission is always available for every type of misrepresentation (subject to any applicable bars to rescission). Section 2(2) of the Misrepresentation Act now furnishes the representee with the *additional option of claiming damages in lieu of rescission*. Whether or not this particular provision applies *notwithstanding the fact that one or more of the bars to rescission operates* raises rather thorny legal issues (see generally *Koh* at paras 11.240–11.242) which (fortunately) do *not* have to be resolved in this judgment as only s 2(1)

is in issue. Let us turn now to elaborate on the test of reasonable belief.

The test proper

An objective standard to aid in ascertaining subjective belief

68 As previously noted, the representor (here, the Appellant) would be liable to pay damages under s 2(1) "unless he proves that he had ***reasonable ground*** *to believe* and did believe up to the time the contract was made *that the facts represented were true*" [emphasis added in italics and bold italics]. This element of *reasonableness* constitutes the *objective element* in the application of s 2(1) to the given facts of the case concerned. It is not only consistent with the general approach towards legal analysis in the law of contract (as to which see generally *The Law of Contract in Singapore* at paras 03.006–03.020); it is also consistent with the tort of negligence (which utilises the *objective standard* of reasonableness as well (see, for example, *per* Lord Atkin in the seminal House of Lords decision of *Donoghue v Stevenson* [1932] AC 562 at 580)).

69 The court must ascertain his *subjective* state of mind based on an *objective* standard – hence, the test of reasonable belief that is an integral part of s 2(1). Such an approach is wholly understandable, as it would otherwise be all too easy for a defendant representor to merely assert that he had truly believed in what he had represented, *notwithstanding the fact that he had no reasonable ground to believe that what he had represented to the plaintiff representee was true*. But, this is not to state that the representor's *subjective* state of mind is immaterial; the fundamental point is that the objective standard is *not intended to be a substitute* for the representor's subjective belief. Far from it. If on the *objective* assessment of the evidence placed before the court, it is found that the representor did *not* subjectively believe that what he had represented to the representee was true, then the court *must* hold that he (the representor) has *not* discharged his burden so as to escape liability under s 2(1). Put simply, this assessment of the representor's alleged belief in the truth of his representation is *always* an *objective* assessment of whether, in the context of the particular facts placed before the court, the representor did *in fact* subjectively hold that belief. It would otherwise be invidious to expect the court to accept the representor's claims as to his *subjective* state of mind at face value.

70 Once, on the particular facts of the case objectively assessed, the representor is found *subjectively* to believe that the representation made was true, the analysis proceeds to the *objective* assessment of whether the representor *had reasonable grounds for that belief*. The court would have to assess the reasonableness of the representor's alleged belief in the context of both the representation(s) made as well as all the circumstances of the case, and what is reasonable will inevitably be, in the nature of things, a *fact-centric exercise*. We think it pertinent to emphasise though that, in the nature of things, no hard and fast line can be drawn and, in certain situations, both the subjective and objective elements may apply in an *interactive* fashion. In this regard, we preface our analysis with the observation that *the fact that the representor is to some degree at fault in making the representation* lies at the heart of s 2(1) and is the *sole* justification for imposing on him the burden of damages *as if* he was fraudulent. It follows that it would only be fair to fault the representor, if, *assessed in the context of the circumstances present and acting on his mind*, it was *not* objectively reasonable for him to make the representation that he did. In effect, the liability for damages flows from the fact that the representor's subjectively held belief has fallen short of what, *in those circumstances*, would have been objectively reasonable for him to believe. Removing this subjective element from the test of reasonableness would transform the test of reasonable belief from an assessment of the representor's *culpability*, which, we have said, is a necessary assessment for the finding of liability, into a *post-hoc rationalisation* of the representation. We think that this *cannot* be correct as a matter of principle. As Prof Cartwright aptly observes (see *Cartwright* at para 7-25):

> **"Reasonable ground to believe".** The defendant must show that "he had reasonable ground to believe" that the statement was true. It is not entirely clear whether this is wholly objective, or has a subjective element. ***But the latter appears to be the more natural reading, since the issue is not the broad one of whether a reasonable person could have believed the statement to be true, but whether the particular defendant had reasonable grounds for his belief*** *:* he must prove that "*he had* reasonable ground" to believe it. On this basis, the question is whether a reasonable person could have deduced the truth of the statement from the information available to the defendant. The particular circumstances of the defendant will therefore be relevant. However, it is clear that the courts regard this as an onerous burden for the defendant to discharge. [header in original in bold, emphasis in original in italics, emphasis added in bold italics]

71 We should add that, even though the test is an *objective* assessment of the reasonableness of the representor's *subjectively* held grounds for his belief, we do not think the representor is entitled (for instance) to claim innocence where he was, *in effect*, wilfully blind to *obvious* sources of information that would, if they had been referenced, have brought him to a realisation of the true position. It is clear that the inquiry is a broad and fact-centric one that delves into *all the circumstances present and available to the representor*, although it is *not* a detailed and forensic examination of particular propositions of beliefs. We think that this conclusion follows inexorably from the rationale that we have said lies at the heart of an action for damages under s 2(1).

72 Indeed, the courts have also, in our view, always taken the position that the *only* grounds the court may assess in relation to the reasonableness of a belief in defending a claim under s 2(1) are those grounds *that were present to the representor's mind*, even if (initially at least) the authorities had not always articulated this fully. For example, in the English Court of Appeal decision of *Broome v Speak* [1903] 1 Ch 586, one of the questions was whether the defendant directors of a company were liable for damages under s 3(1) of the Directors Liability Act 1890 for failing to make mention in a prospectus of two material contracts entered into by the company. Buckley J found that, as a matter of fact, the statements in the prospectus were thereby made untrue, and, turning to the test of reasonable belief, observed as follows (at 603):

> Then had the directors reason to believe, and did they believe, that those statements were true? Now as regards Mr Shepheard, I do not for a moment impute as against him that he was stating anything which was untrue in the sense that he believed that it was untrue. I acquit him altogether of any fraudulent intent or improper action in the matter, but in point of fact he had no reason to believe that the cancellation contract had been put an end to, because it had not. *I do not suppose he ever addressed his mind to the point. That is the real answer to it. The contract existed, and he did not think or inquire, I suppose, at all as to whether that was a thing which was in existence or not*. … [emphasis added]

73 This reasoning was endorsed by the House of Lords on further appeal. In *Shepheard and another v Broome* [1904] AC 342 ("*Shepheard*"), Lord Lindley put the matter thus (at 347):

> The prospectus unfortunately stated a fact which was not true, namely, that the only contracts to which the bank was a party were the two which were mentioned in it. This untrue statement brings the case clearly and unmistakably within s. 3, sub-s. 1, of the Directors Liability Act, 1890. It is contended for the appellant that he is not liable under this Act because he had reasonable ground to believe, and did believe, that the statement in the prospectus was true. *But he knew of the documents, and he knew they were not disclosed; he thought they were not such as required disclosure. This is a question of law, and I agree with Buckley J. and the Court of Appeal that a mistake of this kind does not furnish a defence to an action founded on the statute in*

question. … [emphasis added]

74 To both the English Court of Appeal and the House of Lords, therefore, the *subjective* state of mind of the defendant *was instrumental* in the *objective* assessment of reasonableness, and thereupon in the finding of liability.

75 Turning to a more recent decision, in *Howard Marine*, the issue there was whether the plaintiff, a barge owner, had reasonable grounds for his belief that the capacity of certain barges hired by the defendant was 1,600 tonnes. The true figure was 1,055 tonnes and the discrepancy was because the plaintiff's employee had relied on a mistaken entry in Lloyd's Register when the correct figure was stated in documents from the barges' manufacturer. The English Court of Appeal embarked on the exercise of determining the *actual* state of mind of the plaintiff's employee. Bridge and Shaw LJJ ruled that the plaintiff had no reasonable ground for preferring one reliable source of information, which was Lloyd's Register, over another, the documents from the manufacturer. Lord Denning MR dissented on this point. The learned Master of the Rolls accepted that the plaintiff's employee *had* seen the figure in Lloyd's Register and *had also seen* the documents from the manufacturer, but that the latter figures "did not register"; he observed thus (at 593):

> … All that was in his mind was the 1,800 tonnes in Lloyd's Register which was regarded in shipping circles as the Bible. That afforded reasonable ground for him to believe that the barges could each carry 1,600 tonnes pay load: and that is what [the plaintiff's employee] believed.

76 It is apparent that the dissent by Lord Denning was based, in effect, on a difference with regard to the proper inferences to be drawn from the evidence. Bridge LJ disagreed with Lord Denning (at 597) that the correct figures had not registered in the employee's mind, *noting that the employee had given evidence that he had in fact seen the correct capacity figures in the documents*, but instead had preferred the figure in Lloyd's Register for two reasons: the documents referred to freshwater capacity and not seawater, and that he was concerned only with cubic capacity. Bridge LJ found that neither reason was objectively reasonable (at 598), first, because the issue of cubic capacity was quite irrelevant, and, second, because there was a minimal difference between freshwater and seawater capacity. Shaw LJ concurred in this particular assessment of the evidence.

77 Hence, the exercise of determining whether a person had reasonable grounds to believe in the truth of a representation that was false, is an *objective enquiry* undertaken with regard to *all* the considerations that were *subjectively present* in the mind of that person. Where there were conflicting sources of information to which the representor had recourse, the touchstone is whether he possessed objectively reasonable reasons to prefer one source over another. We think this is the correct statement of the law and, in so far as this is the holding in *Howard Marine*, we approve it. We also note that the difference in views based on the evidence illustrates a point that we have already emphasised (see above at [5]) – that the application of the test of reasonable belief under s 2(1) is a very *fact-centric* exercise.

78 At this juncture, we should also note a related point with regard to *the timeframe* to which the test of reasonable belief applies – and to which our attention now briefly turns.

The relevant timeframe

79 Section 2(1) of the Misrepresentation Act is clear: the representor (in this case, the Appellant) must not only prove that "he had reasonable ground to believe" that the facts he represented to the representor (here, the Respondent) "were true" – he must *also prove* that he "did believe *up to the time the contract was made*" [emphasis added] that the facts so represented "were true". The

timeframe laid down by s 2(1) is both logical as well as commonsensical as this must surely be what one would consider to be *the operative period* of the misrepresentation(s). Put simply, this operative period commences from the time the misrepresentation concerned is made and ceases when the contract is entered into after or as a result of the misrepresentation. It should also be noted that the *objective* assessment of whether the representor had reasonable ground to believe in the truth of the representation is a *continuing assessment that is applied throughout this period*. Thus, for instance, if the representor *originally had reasonable grounds* to believe in the truth of the representation made, but due to a change in circumstances those grounds were no longer objectively reasonable *by the time the contract was made*, then the representor would *not* have passed the test of reasonable belief. This is clear not only on a plain reading of s 2(1) but also constitutes a logical as well as commonsensical application of the letter and spirit of the provision itself.

What kind of damages are recoverable under s 2(1)?

80 In order to complete our analysis on the test of reasonable belief, we pause to say a few words on the *nature* of the damages recoverable in a claim under s 2(1). This is an area of law of considerable controversy, which is not, as we shall see, engaged precisely on the specific facts of the present appeal; however we think it appropriate to discuss the point briefly in view of the Judge's observations on this issue at [146]–[151] of the Judgment.

81 In essence, the controversy may be stated as follows: Assuming that the measure of damages to be awarded under s 2(1) is the *tortious* (and not the contractual) measure, ought the actual measure of damages to be awarded be that awarded for *fraud or deceit or* for *negligence*? There is in fact a difference between each measure of damages. To elaborate briefly, the measure of damages awarded for the tort of *fraudulent misrepresentation or deceit* includes *all* loss that flowed directly from the entry into the contract in question, regardless of whether or not such loss was foreseeable; the damages awarded would include *all* consequential loss as well (see, in particular, the House of Lords decision of *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 ("*Smith New Court*"), the principles of which were endorsed by this court in *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909 ("*Wishing Star*")). On the other hand, the measure of damages awarded for the tort of *negligent misrepresentation* would only include loss that was *reasonably foreseeable* (see, for example, *Wishing Star* at [23]).

82 The rationale for the more generous measure of damages under *fraudulent misrepresentation* was in fact helpfully elucidated by Lord Steyn in *Smith New Court* in the following terms (at 279): "[f]irst it serves a deterrent purpose in discouraging fraud"; and "[s]econdly, as between the fraudster and the innocent party, moral considerations militate in favour of requiring the fraudster to bear the risk of misfortunes directly caused by his fraud". In so far as the last-mentioned point is concerned, Lord Steyn proceeded to observe thus (at 280):

> … I make no apology for referring to moral considerations. The law and morality are inextricably interwoven. To a large extent the law is simply formulated and declared morality. And, as *Oliver Wendell Holmes, The Common Law* … observed, the very notion of deceit with its overtones of wickedness is drawn from the moral world.

83 Returning to the measure of damages to be awarded under s 2(1), we observe that the English Court of Appeal, in *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297 ("*Royscot Trust*"), held (disagreeing with the then prevalent academic opinion on this particular issue) that the measure of damages to be awarded under s 2(1) ought to be that measure which would have been awarded for *fraudulent misrepresentation or deceit*. In arriving at this view, the court relied primarily on the language of s 2(1) itself. However, the difficulty with such an analysis is that s 2(1) (as we have

already seen) does *not* concern a situation that pertains to *actual fraud* as such, but one that, on the contrary, falls *short* of it (see Richard Hooley, "Damages and the Misrepresentation Act 1967" (1991) 107 LQR 547 ("*Hooley*")). Indeed, if Lord Steyn's observations in *Smith New Court* (quoted in the preceding paragraph) are accepted, it is, with respect, difficult to see that the moral turpitude entailed under s 2(1) would be on the same level as that entailed in a situation of fraudulent misrepresentation or deceit. Indeed, although the language of s 2(1) refers to "fraud", the *context* in which the word "fraud" is used is, in our view, of the first importance. In particular, the references to "fraud" were (as we have seen above at [63]) in fact intended to signal the fact that s 2(1) offered a *statutory* remedy for damages which was hitherto available only in the context of the (more serious) situation of fraudulent misrepresentation or deceit. Looked at in this light, s 2(1) *extended* the remedy of damages to situations that *fell short* of *fraudulent misrepresentation or deceit*, and this is underscored by the phrases "*had* the misrepresentation *been made fraudulently*" and (perhaps more importantly) "*notwithstanding* that the misrepresentation was *not* made *fraudulently*" in s 2(1) [emphasis added]. Indeed, as Prof Cartwright correctly observes, "s.2(1) does not refer to "negligence" *but that is, in substance, what it covers*" (see *Cartwright* at para 6-64, note 386 [emphasis added]). Put simply, it is the *statutory analogue* of the *common law* action for *negligent* misrepresentation (the latter of which was, as we have seen (see above at [65]), first established in *Hedley Byrne*).

84 If the above analysis is correct, then it ought to follow that the measure of damages awardable under s 2(1) ought, instead, *to be that awarded under the common law action for negligent misrepresentation*. The decision in *Royscot Trust* ought not to be followed. That having been said, we note that, in the Singapore High Court decision of *Ng Buay Hock and another v Tan Keng Huat and another* [1997] 1 SLR(R) 507, *Royscot Trust* was cited with apparent approval, with the court referring (at [31]) to that case as reflecting what the "prevailing opinion" appeared to be. The Judge (at [150] of the Judgment) also expressed his agreement with *Royscot Trust*. There is nevertheless a strong case, in our view, for reconsidering *Royscot Trust*. Indeed, Lord Steyn himself noted in *Smith New Court* (at 1075), that *Royscot Trust* has been subject to "trenchant academic criticism" (citing *Hooley*; see also generally Ian Brown & Adrian Chandler, "Deceit, Damages and the Misrepresentation Act 1967, s. 2(1)" [1992] LMCLQ 40; *Chitty on Contracts* (Sweet & Maxwell, 31st ed, 2012) at para 6-075; as well as Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 13th ed, 2011) ("*Treitel*") at para 9-066). Although both Lord Steyn and Lord Browne-Wilkinson expressed no conclusive view on *Royscot Trust* in *Smith New Court*, the tenor of their judgments (particularly that of Lord Steyn) suggests that the days of *Royscot Trust* might be numbered. Indeed, as we have already noted, there is no reason in both logic and principle why a plaintiff should be as well-placed as he would have been had the misrepresentation concerned taken place in a situation of *actual* fraud or deceit since, *ex hypothesi*, the situation is in fact *not* one that pertains to actual fraud or deceit but on the contrary one that *falls short* of it. Further, and consistent with Lord Steyn's observations in *Smith New Court*, it is extremely difficult to see how the moral turpitude entailed under s 2(1) would on the same level as that entailed in a situation of fraudulent misrepresentation or deceit.

85 However, as this particular issue was not argued before this court, we will express a conclusive view only when it is next directly in issue before us. In any event, as already noted and shall be elaborated upon below, the result in the present case does not turn on which view is adopted with regard to the proper measure of damages to be awarded under s 2(1). This would be an appropriate juncture to turn to the application of s 2(1) (in particular, the test of reasonable belief) to the facts of the present appeal.

Applying the test of reasonable belief

86 Returning to the facts of the present case, we are of the view that it is clear on the objective

evidence that the Appellant did honestly believe in the truth of the representation it had made to the Respondent. We are satisfied for the reasons given by the Judge that the Appellant, in the shape of its representative Mr Kamphorst, did in fact believe at all the relevant times that *only URA's approval was necessary* for the Respondent to use the Premises as a showroom and that therefore *no other approval was required* (see the Judgment at [96]–[97] and [120]). However, the key question in the context of the present appeal is whether or not, *in the circumstances*, it was *reasonable* for the Appellant to hold that belief.

87 The Appellant's main contention, which was advanced with considerable force (and commendable clarity) by Prof Goh in the oral hearing before us, is that the Judge was wrong to find that the Appellant had no reasonable grounds to believe that the representation was true. In other words, that the Appellant had failed the test of reasonable belief. The Judge's reasoning bears quoting in full (at [121] and [124]–[125] of the Judgment):

> 121 The question that remains under s 2(1) of the Act, therefore, is whether [the Appellant] discharged its burden of proving that it had reasonable grounds to believe that its representation was true at the material time. I find that [the Appellant] did not. [The Appellant] had in its control and possession the Head Lease and the State Lease. Although [the Appellant] was never of course a party to the State Lease, [the Appellant] had an obligation under the Head Lease to be familiar with the terms and conditions of the State Lease. Further, cl D18 of the Head Lease… obliged [the Appellant] to "comply with and cause its sub-tenants… to observe and comply… with all terms and conditions of" the State Lease. This obligation meant that [the Appellant], when sub-letting the Premises, had a legal duty under the Head Lease to check the terms and conditions of the State Lease. [The Appellant] owed this obligation, of course, not to [the Respondent] but to Prologis as the counterparty to the Head Lease. But the existence and purpose of this obligation is nevertheless a factor to be weighed in determining the reasonableness or otherwise of the grounds which [the Appellant] had for making the representation to [the Respondent] that it did. The purpose of this obligation is to ensure that [the Appellant] does not put Prologis in breach of the terms of the State Lease by the terms of any sub-lease which it extends to a third party. This is exactly what happened in this case: [the Appellant] leased the Premises to the plaintiff for use as a showroom, putting Prologis in breach of its obligations to SLA under the State Lease and thereby putting itself in breach of its obligations to Prologis under the Head Lease. Mr Kamphorst admitted that he had read the Head Lease and would have been alerted to the existence of crucial information which may be contained in the State Lease. I add for good measure that [the Appellant] was not a complete stranger to the State Lease: it was [the Appellant's] sister company RLG which originally entered into it with the State.
>
> …
>
> 124 Had [the Appellant] checked the State Lease, it would have become aware of cl 2(ii) and 2(iii) of the State Lease, which allowed the lessor to determine the enhanced value of the land with reference to the URA's permission to designate the Premises as an ancillary showroom and to reflect that enhanced value in the form of a differential premium. Even though the permission had been granted before the date of the State Lease, the State Lease incorporated the Building Agreement which pre-dated the permission. The use of the land under the State Lease was thus limited to the primary industrial use permitted in land zoned B2 in the Master Plan. That use did not include the use of the Premises as a showroom.
>
> 125 [The Appellant] was not suffering from any handicap in interpreting the State Lease. It was legally advised at the time and could easily have shown its lawyers the State Lease and

sought legal advice on the obligations it had under the State Lease and Head Lease. This would have been sufficient to dispel any ambiguity about what cl 2 of the State Lease meant and whether granting the Sub-Lease would put [the Appellant] in breach of its obligations to Prologis.

88 The Judge's reasoning may be summarised as follows:

(a) The Appellant had in its possession the Head Lease and the State Lease.

(b) The Appellant had an obligation not to put its own landlord (AMB and later Prologis) in breach of the State Lease.

(c) *Had it checked the State Lease*, the Appellant would have become aware of clauses 2(ii) and 2(iii) thereof which granted the SLA the right to charge a differential premium in circumstances that, in the end, eventuated.

(d) The Appellant was legally advised and could have sought a legal opinion on the relevant terms in the State Lease.

89 Prof Goh attacked the reasoning of the Judge in the following manner. The Appellant's belief in the truth of the representation was reasonable because *even if* it had examined the relevant contractual documents, it would have reasonably come to the view that the SLA did not have any right to charge a differential premium. It could therefore not be faulted for its ignorance of the SLA's right to do so. The Appellant relies, in particular, on clause 3.3 of the Building Agreement, and clauses 1(i) and 2(i)(a) of the State Lease, which, it says, have the cumulative effect that URA was always the first port of call in relation to planning permission. For convenience, clauses 2(i) and (ii) of the State Lease are reproduced as follows:

2. And it is hereby agreed between the Lessor and the Lessee as follows: -

(i) The said development on the said land –

(a) may be for any use or uses that may be permitted by the Competent Authority under the Planning Act (Cap. 232) for a 'Business 2' zoning in accordance with the Master Plan Written Statement;

(b) shall have a total gross plot ratio not exceeding 2.0 ("maximum GPR") but not less than 1.6.

(ii) The provisions of sub-clause (i) shall apply unless a variation or change thereof is approved in writing by the Lessor, which approval may be given subject to such terms and conditions as the Lessor may impose and provided that if such variation or change will in the opinion of the Lessor result in an enhancement of the value of the said land the Lessee shall pay the Lessor within such time as may be specified by way of differential premium such amount as the Lessor may determine as the amount representing the enhanced value of the said land.

90 The Appellant's case is that it is apparent from these clauses that SLA's right to charge a differential premium was premised on there being a change in use of the property in question, which in turn was premised on the URA's approval of such change in use. This two-step framework means that if and when the URA comes to the view that some use for which planning permission was obtained is outside the presently approved use, it will *state explicitly* that there is a variation or change of use, triggering the SLA's right to examine that change and to charge a differential premium if that change

results in an enhancement in the value of the land. The example raised was DHL's request for a racking system to be installed on the second floor of the Property. This increased the gross floor area of the Property beyond that approved under clause 2(i) of the State Lease; planning permission was granted by the URA and it was *explicitly stated* in the grant of planning permission that "[t]he applicant is to pay differential premium to the Commissioner of Lands, Singapore Land Authority".

91 In contrast, the Written Permission, by which the URA marked its approval of the development plans for the Property, *including* the planned use of the Premises as a showroom, *did not state explicitly* that the SLA was entitled to charge a differential premium. The Written Permission was copied to "COL, SLA", that is, the Commissioner of Lands of the SLA. Furthermore, between April 2007 (when the Written Permission was issued) and April 2011 (when the SLA first raised the issue of the premium), the SLA was conspicuously silent on the issue as to whether a differential premium was payable. That silence fortified the Appellant's belief that *only* the URA's permission was required for the use of the Premises as a showroom, and that permission having undoubtedly been obtained, *no further approvals were required*.

92 Prof Goh conceded that, on hindsight, it might have been prudent or even wise for the Appellant to have checked directly with the SLA on whether a differential premium was payable *before* embarking on the process of finding a lessee for the Premises. However, he argued, the key issue was whether the grounds were *reasonable* in *the circumstances*, and in the circumstances, *viz*, the SLA's deafening silence on the matter, plus Mr Kamphorst's own inquiries with the URA, it was reasonable to believe that the SLA's approval was not an issue at all. This view, he argued, was buttressed by the fact that, *even with the benefit of legal advice*, it took AMB and later Prologis *over two months of communications with the SLA* in order to clarify the position (see above at [23]–[31]). It would thus *not* have been reasonable to expect the Appellant to come to the SLA's view of the matter, in particular because, with respect to issues arising under the State Lease including the issue as to the differential premium, the SLA was willing to communicate *only with AMB and Prologis* who were the lessees under the State Lease, and not with the Appellant, who was only the sub-lessee and therefore not privy to the State Lease.

93 We admit to having some sympathy for the Appellant's case. We agree that, even if the State Lease had been reviewed by competent legal counsel, it is likely that they would have found it difficult to accept that the SLA's approval was even an issue. We are much struck by the written communications between the solicitors for AMB and Prologis on the one hand, and the SLA on the other, in which it was clear that the former had *completely failed* to understand the source of the SLA's objection to the Lease, whilst the latter *had repeatedly failed to communicate its position with any clarity*. We point to two specific instances.

94 First, the SLA wrote, on 5 July 2011 to the solicitors and, amongst other things, enclosed a circular produced by the URA which had been sent to professional institutes in 2003 ("the 2003 Circular"). The 2003 Circular announced the relaxation of guidelines for industrial developments, in particular, the permitting of independent operators for showrooms within all developments, and not just developments fronting major roads. In particular, the 2003 Circular said that:

> … The owner or operator of the existing approved ancillary showrooms can submit a development application for conversion to showroom for our consideration if they satisfy the revised guidelines for showrooms. *Differential premium or development charge will be levied, if any*. Existing approved ancillary showrooms that cannot comply with the guidelines for display area can continue to remain until redevelopment.
>
> …

… If you or your members have any queries concerning this circular, please do not hesitate to call our DCD Customer Service Hotline at Tel: 6223 4811 or email us at ***URA_CSO@ura.gov.sg*** …

[emphasis added in italics and bold italics]

We found it particularly striking that the extracted passages above give the impression that *the URA* (and *not* any other agency, *and certainly not the SLA*, which was not mentioned by name anywhere in the 2003 Circular) was primarily responsible for approving changes in use and levying differential charges and premiums if any. The *reasonable* inference (at least in so far as this particular circular was concerned) is that, where approvals for showroom use were concerned, there was *no necessity* to have *any contact* with *the SLA* at all.

95 The second instance occurred on 5 August 2011, when the solicitors wrote to the SLA seeking further clarifications on three points, as follows:

(a) Whether it was the actual use as a showroom together with the grant of the URA's approval for the such use that attracted a differential premium;

(b) Whether the SLA's approval had to be sought and differential premium paid, after planning permission was obtained and the premises were actually used as planned; and

(c) Whether there would be no breach of the State Lease if the premises were left vacant or used in accordance with B2 zoning, provided that the URA's approval for this "reversion" in use was obtained.

It is clear that these questions completely missed the point, which was that it was not the actual or planned use of the Premises as a showroom in 2011 under the Lease that had triggered the requirement to seek the SLA's approval, but the *original change of use in 2007 approved by the URA.*

96 In this regard, Prof Goh also brought our attention to another circular dated 1 July 2013 jointly sent to professional institutes by the URA *and* the SLA ("the 2013 Circular"), setting out a change in procedure for development proposals that could result in a differential premium being paid. The old procedure, applicable to the period with which we are concerned, was that the SLA would assess whether a differential premium was payable *only after final written permission was granted by the URA*. The change effected by the 2013 Circular was that the landowner would now be obliged to make this application to the SLA *once provisional planning permission was granted.* Proof of payment of any differential premium charged would then have to be provided to the URA *before* final written planning permission would be granted. If this procedure had been in place in the present case, it is clear to us that this litigation might not have occurred. The 2013 Circular is, of course, *legally irrelevant* to our determination of the present appeal, as it was circulated only *after* the present suit was filed in 2011. However, it highlights the lack of clarity in the contractual documents, which, in our view, *contributed materially* to the issues faced by the parties. On perusing all the relevant clauses, and reading them in the context of all the relevant documents, including the Building Agreement, the Master Plan 2003, and the 2003 Circular (but *not* the 2013 Circular), we are unsure whether it would have been *reasonably apparent* that the SLA's approval was required in the circumstances. At this juncture, however, we should say that *neither* party disputed the correctness of the SLA's entitlement to charge a differential premium. We would therefore *not* express any definite (and unnecessary) conclusion on the matter.

97 Whilst, as we have said, we can sympathise with the position the Appellant was faced with, the real question before us is whether the Appellant had reasonable grounds to believe in the truth of the

representation, *assessed in the context of the circumstances that were subjectively present to its mind at the material time*. In our view, the chief obstacle facing the Appellant's case is that *the Appellant had failed entirely to review the State Lease at all*. Therefore, to a very considerable extent, Prof Goh's submissions *did not reflect* the *actual and subjective state of mind of the Appellant during the relevant time*. As Mr Kirindeep Singh ("Mr Singh"), counsel for the Respondent, noted, the Appellant's submissions on a reasonable interpretation of the State Lease (see above at [89]–[92]), came as a surprise to him because those arguments had not been raised before the Judge below, for the simple reason that it is not disputed that the Appellant (or its agents) never read the State Lease at all. The Judge found (at [97] of the Judgment) as a fact that:

> … neither party contemplated when they executed the Letter of Offer and the [Lease] that either party would need to obtain approval from anyone other than the URA for [the Appellant] to lease the Premises to [the Respondent] as a showroom…

98 Further, at [120] of the Judgment, the Judge accepted that:

> … [the Appellant] did believe up to the time it executed the Letter of Offer and [Head Lease] that the Premises had been approved by the URA for use as a showroom and needed no further approvals for such use. At the time [the Appellant] made these representations, it did not appreciate that the State Lease required SLA's approval in addition to the URA's approval. Mr Kamphorst testified – and I believed him – that he was "led to believe" that no further approvals would need to be obtained in order for the Premises to be used as a showroom.

99 In other words, the clauses in the State Lease and their effect were, subjectively, *absent* from the minds of both parties and particularly the Appellant's at all the relevant times. The Appellant does not contest this finding on appeal (and we can see no rational basis on which it might do so). Thus, Prof Goh's arguments miss the crucial point which constituted the crux of the Judge's decision in the court below: *Was the Appellant's belief in the truth of the representation it had made to the Respondent reasonable in light of the fact that it had not checked the State Lease?*

100 We can appreciate why this was a point that weighed so heavily with the Judge below. Checking the State Lease or inquiring with the SLA would appear to be obvious and simple ways in which the Appellant might have been apprised of the possibility of SLA asserting its right to charge a differential premium. The Appellant is clearly not a total novice without any business experience or acumen, but nevertheless it did neither of these things. In coming to our decision, we admit this was the issue that most troubled us. However, as we have emphasised in the introduction to this judgment (see above at [1]), *the decision in each case must be entirely dependent on the application of the proper principles to the particular facts before the court*. This *must* entail an assessment of the *entire factual matrix*; it would be a mistake to fix the judicial attention on *isolated facts* instead of considering them in their *full context*. The focus of the inquiry before us is the reasonableness (or otherwise) of the Appellant's grounds for believing that the representation it had made to the Respondent was true, *and not* on whether the Appellant ought or ought not to have taken merely one particular course of action or another. Instead, the Appellant's failure to check the State Lease or with the SLA, although not unimportant, must be assessed (objectively) against *all* the circumstances that were present to its mind throughout the relevant period.

101 In our considered judgment, the *relevant circumstances*, which were indubitably present to the Appellant's mind, were as follows:

> (a) A differential premium, by its very definition, was payable at the point at which a property was developed, or subsequently enhanced through any change in use.

(b) From its inception, the Property had been developed (and approved for such development) as a "5 storey single-user light industrial development comprising showroom at 1st storey and warehouse from 2nd to 4th storey and ancillary office at 5th storey".

(c) The developer RLG was obliged to develop the land in accordance with this approved use.

(d) There was no evidence on record of any further "change" to this use that might have put the Appellant on notice that SLA's right to charge a differential premium might have been triggered.

(e) There was only one apparent restriction in relation to how the showroom could be used – there could no retail sales.

(f) There was no other evidence on the record of any other restrictions whatsoever on the use of the Premises.

(g) All the approvals referenced in the Letter of Offer, the Lease and the negotiations leading up to it, *did not* refer to the approval *of the SLA of a change in use on payment of a differential premium*. Instead, the Lease was *predicated* on the Premises being approved for use as a showroom, albeit one with restrictions on retail trade.

(h) Mr Kamphorst had inquired of URA whether further approvals were required and was told nothing more was needed (see above at [14]).

(i) Mr Kamphorst had also inquired the same of the lessor, AMB, and received an answer in similar terms.

102 We are of the view that, judged against these circumstances *taken as a whole*, the misrepresentation complained of in this case was, in the final analysis, *innocently made*, and therefore did *not* render the Appellant liable under s 2(1). We cannot see how it would be reasonable to expect any person in the shoes of the Appellant, faced with *those facts* and in *those circumstances*, to have realised *before the Lease was entered into* that *the SLA* might have a right to charge a differential premium. From the time the Property was developed in 2006 up to the time the Respondent signed the Lease, the (mis)understanding of all the relevant parties – the developer RLG, the head lessor AMB, the Appellant, and the Respondent – was that the Premises *could* be used as a showroom, albeit one in which retail activities were not permitted. That a differential premium was, in fact, payable, was a fact that could *only be known by the SLA*; and the SLA, for reasons best known to itself, kept this crucial piece of information to itself. In our view, the present litigation had its genesis in *this* unfortunate misunderstanding that had its roots in the very development of the Property. To the mind of the Appellant, that was the default or starting point; the inquiry must therefore focus on what (if anything) happened in the interim to put the Appellant on notice, and we can find nothing in the record that could have had this effect.

103 Hence, we do not think, *in the context of these circumstances and these circumstances only*, that a reasonable person in the shoes of the Appellant would have checked the State Lease or inquired with the SLA as to whether there were any clogs on its ability to lease the Premises out for use as a showroom. We note that the Appellant did check the position with the URA, the only check which, from its perspective, was necessary. Further, the issue of the SLA's approval was *not* such an obvious or apparent issue that the fact of the Appellant's failure to check the State Lease or with the SLA would, *ipso facto*, render the Appellant liable under s 2(1). We should add (as we have in fact observed above at [93] and [96]) that we are unsure if any such checks, *even if* carried out with the

assistance of competent legal advice, would have uncovered the *specific issue* relating to the necessity of seeking the SLA's approval *in these circumstances*. A check *might* have uncovered the fact that SLA had a *general* right to charge a differential premium for approving any change in use, but that is not the same thing at all.

104 We therefore respectfully disagree with the Judge's finding (see [124] of the Judgment) that the Appellant did not pass the test of reasonable belief under s 2(1) as it had failed to check the State Lease.

105 In so far as the question as to whether the Appellant ought to have checked the position with the SLA is concerned, the objective evidence was that *the SLA had remained silent on its right to charge a differential premium for almost four years*. There was no evidence to explain this delay at all, let alone in terms that *might* have put the Appellant on notice. Furthermore, there was evidence that the SLA would only have been willing to communicate with only those parties privy to the State Lease (AMB/Prologis) instead of the Appellant, who was their sub-tenant (see the Judgment at [57]–[59]). In our view, it would not be reasonable to expect that any prior checks with the SLA would have uncovered the true position sooner.

106 We make one further observation – *if* the true position *had* been readily apparent from a reference to the State Lease, this *might* have been *objective* evidence for the drawing of an inference that, *subjectively*, the Appellant had been careless or even wilfully blind to the existence of the SLA's specific rights under the State Lease to charge a differential premium *in this case* (a clear illustration of this is the decision in *Shepheard* (see also above at [72] and [73]). Conversely, if the position was not quite as clear as one might have expected (which is what we have found), then such an inference *would not readily be drawn*. We should add that in this case, given the Appellant's failure even to check the State Lease, it *cannot* rely on the apparent imprecision with which the State Lease was drafted to argue that such imprecision *was a reasonable ground* for its belief in the truth of its representation. As we have said, the *only* grounds on which a representor may rely are those that were *subjectively present to its mind* at the relevant time.

107 Finally, whilst we have said that we express *no* definitive position on the *correctness* of SLA's right to charge a differential premium in this case, given the SLA's view that its right in this particular regard dated from 24 April 2007 (when RLG obtained Written Permission from the URA for its development plans (see above at [9])), we are of the view that *had the SLA asserted its right early on in the process, much of the present litigation might have been avoided*. As we have noted above at [105], the SLA's unfortunate silence on the matter, *over a period of almost four years*, coupled with the serendipitous manner in which its right came to light in 2011 (see above at [23]–[24]), would, in our judgment, have led a reasonable person in the shoes of the Appellant to conclude that no other approval other than the URA's was required for the Premises to be used as a showroom. As we observed above at [32], it has never been satisfactorily explained to-date why the SLA had not simply imposed a differential premium from the very beginning of the process, in 2007, when the development of the Property was first approved, or at any rate whilst the developer RLG was still negotiating the terms of the State Lease. The only explanation given was found in the SLA's letter to Prologis of 26 July 2011 (see above at [32]), in which the SLA referred to a developer's professional consultants seeking as a matter of course the SLA's views on whether a differential premium might be chargeable. We note that there was no evidence before us as to whether the professional consultants in this case had or had not done so. In any case, this would *not* be relevant to the assessment of the reasonableness of the *Appellant's* beliefs because the Appellant was *not* the developer of the Property and had no right, in that capacity, to seek any approvals or clarifications from any authority.

108 As, in our judgment, the Appellant has demonstrated that it had reasonable grounds to believe in the truth of the representation, and that the Appellant did believe in the truth of the representation up to the time the contract was made, it must follow that the Respondent would *not* be entitled to damages under s 2(1).

Whether liability for misrepresentation was excluded by Clause 6.9 of the Lease

109 For completeness, we deal with the Appellant's further fall-back position which is that even if it is unable to avail itself of the statutory defence in s 2(1), it can rely on the exclusion clause in the Lease. The Appellant's case is that, as a matter of principle, entire agreement clauses *can* preclude liability for misrepresentation, and further, that Clause 6.9 *has* such an effect. Clause 6.9 reads as follows:

> **No representations**
>
> The Tenant shall accept [the Premises] "as is where is" on the Handover Date. The Landlord shall not be bound by any representations or promises with respect to the Building and its appurtenances, or in respect of [the Premises], except as expressly set forth in this Lease with the object and intention that the whole of the agreement between the Landlord and the Tenant shall be set forth herein (save for any terms or modifications thereof or supplements thereto which may be expressly agreed in writing between the parties), and shall in no way be modified by any discussions which may have preceded the signing of this Lease. The landlord does not expressly or impliedly warrant that [the Premises] are now or will remain suitable or adequate for all or any of the purposes of the Tenant and all warranties (if any) as to suitability and adequacy of [the Premises] implied by law are hereby expressly negated.
>
> [emphasis in original]

110 Prof Goh advanced the following propositions in so far as this particular argument was concerned:

(a) Entire agreement clauses *can* preclude liability for misrepresentation.

(b) The words of exclusion must be clear, but this turns on the facts (and, in this case, they were clear).

(c) The effect of Clause 6.9, read in the proper context, is to deny the existence of any representation.

111 Prof Goh relied on the English Court of Appeal decision of *AXA Sun Life Services Plc v Campbell Martin Ltd & Ors* [2011] 2 Lloyd's Rep 1, in particular, the following passage at [94] from the judgment of Rix LJ:

> In my judgment, this jurisprudence confirms my provisional conclusion on the wording of clause 24. No doubt all such cases are only authority for each clause's particular wording: nevertheless it seems to me that there are certain themes which deserve recognition. Among them is that the exclusion of liability for misrepresentation has to be clearly stated. It can be done by clauses which state the parties' agreement that there have been no representations made; or that there has been no reliance on any representations; or by an express exclusion of liability for misrepresentation. *However, save in such contexts, and particularly where the word "representations" takes its place alongside other words expressive of contractual obligation, talk*

of the parties' contract superseding such prior agreement will not by itself absolve a party of misrepresentation where its ingredients can be proved. [emphasis added]

112 Prof Goh placed emphasis on Rix LJ's characterisation of the three ways in which exclusion of liability may be effected: first, by the parties agreeing that no representations were made; secondly, by the parties agreeing that there was no reliance on any representation; and, finally, by an *express* exclusion of liability for misrepresentation. Prof Goh said that Clause 6.9 works in the first and third ways: it is both an agreement that no representations were made (exemplified by the heading to the clause, which read "No representations"), as well as an express exclusion of liability clause.

113 With respect, we do not agree that Clause 6.9, read as a whole, is either clear enough or goes far enough to exclude liability for the Appellant's misrepresentation. The second sentence of that clause states clearly that the Appellant expressed itself to be bound *only* by those "representations or promises with respect to the Building and its appurtenances" that have been expressly set forth in the Lease. When this sentence is read as a whole, it is clear that the *entire* clause is an entire agreement clause, in the sense that it stipulates that no representations or promises except those expressed in the Lease can have *contractual* effect. The landlord's right not to be bound by any representations thus has to be read in conjunction with the "object and intention" of the parties that the whole agreement was contained in the four walls of the Lease. In this regard, the italicised portion of Rix LJ's judgment, reproduced above at [111], is entirely on point – in Clause 6.9, the word "representations" is employed alongside words expressive of contractual obligations dealing, in particular, with when a "representation" may be taken to have become a contractual term, and *not* whether any representation is denuded of legal effect in a claim for misrepresentation. Thus, Clause 6.9 has no application whatsoever to *pre-contractual* representations leading to a claim in misrepresentation. In our judgment, Clause 6.9 does not *clearly* exclude liability for misrepresentation and the Appellant *cannot* avail itself of the clause.

The first miscellaneous issue: whether the Respondent could have recovered what it claimed under an indemnity for innocent misrepresentation

114 We turn to a consideration of the Respondent's argument that the Respondent could still recover all the sums it claimed under an indemnity for *innocent* misrepresentation. This was the Respondent's fall-back argument in the event that, as we have found, the Appellant *did* have reasonable grounds to believe in the truth of the representation.

115 The general position is that the victim of an innocent misrepresentation, who relies on that misrepresentation and enters into a contract thereby suffering loss, has a right to rescind the contract and be restored to his original position. As Prof Koh put it (see *Koh* at para 11.098):

> … This involves first the *avoidance* of the transaction *ab initio*, and second the *restoration* of the parties to the position occupied prior to the entry into the contract. The effect of the first is the cancellation of all future obligations, and the second involves the retrospective restoration of any benefits that may already have been transferred at the date of the rescission. This involves the "giving and taking back on both sides". [emphasis in original]

116 The basis for an order for the giving and taking back on both sides was explained by Lord Wright in the House of Lords decision of *Spence v Crawford* [1939] 3 All ER 271 in the following terms (at 288):

> … A case of innocent misrepresentation may be regarded rather as one of misfortune than as one of moral obliquity. There is no deceit or intention to defraud. The court will be less ready to pull a

> transaction to pieces where the defendant is innocent, whereas in the case of fraud the court will exercise its jurisdiction to the full in order, if possible, to prevent the defendant from enjoying the benefit of his fraud at the expense of the innocent plaintiff. *Restoration, however, is essential to the idea of restitution.* To take the simplest case, if a plaintiff who has been defrauded seeks to have the contract annulled and his money or property restored to him, it would be inequitable if he did not also restore what he had got under the contract from the defendant. *Though the defendant has been fraudulent, he must not be robbed, nor must the plaintiff be unjustly enriched, as he would be if he both got back what he had parted with and kept what he had received in return.* [emphasis added]

117 The distinction between the indemnity to which the plaintiff is entitled for innocent misrepresentation and damages was discussed by Bowen LJ in the English Court of Appeal decision of *Newbigging v Adam* (1886) 34 Ch D 582 ("*Newbigging*") as follows (at 592–593):

> If we turn to the question of misrepresentation, damages cannot be obtained at law for misrepresentation which is not fraudulent, and you cannot, as it seems to me, *give in equity any indemnity which corresponds with damages*. … [B]ut when you come to consider what is the exact relief to which a person is entitled in a case of misrepresentation it seems to me to be this, and nothing more, that he is entitled to have the contract rescinded, and is entitled accordingly to all the incidents and consequences of such rescission. It is said that the injured party is entitled to be replaced in *statu quo*. *It seems to me that when you are dealing with innocent misrepresentation you must understand that proposition that he is to be replaced in statu quo with this limitation – that he is not to be replaced in exactly the same position in all respects, otherwise he would be entitled to recover damages, but is to be replaced in his position so far as regards the rights and obligations which have been created by the contract into which he has been induced to enter*. [emphasis added]

118 We agree. Where the misrepresentation is innocent and the representor has satisfied the test of reasonable belief in s 2(1), care must be taken that the plaintiff is not to be placed in the same position as before *in all respects*, but *only* as regards those *obligations* which have been created by the contract into which he has been induced to enter by the misrepresentation. We therefore endorse the observation made by this court in *Forum Development Pte Ltd v Global Accent Trading Pte Ltd and another appeal* [1994] 3 SLR(R) 1097 ("*Forum Development*") (at [26]) that:

> … The proper relief to be granted in the case of innocent misrepresentation is a rescission of the contract and an indemnity of all *obligations* under the contract. [emphasis added]

119 Applying this principle to the present case, we are of the view that the undisputed result of the indemnity given to the innocent representee is that the Respondent could recover certain payments made to the Appellant being the security deposit of $345,625; pre-paid rent of $73,963.75; and double payment of rent of $69,125, as these sums had been paid under the Lease. These were indubitably obligations under the Lease.

120 The nub of the argument before us, however, is whether the further and larger sum of $888,685.90, being the cost of fitting out works incurred by the Respondent, could be recovered by way of an indemnity, instead of in damages as originally pleaded (see above at [36(c)(ii)]). We observe, parenthetically, that while there were other sums claimed for in damages, which *might* equally have been claimed for under an indemnity, the Respondent focused on the cost of fitting out works as that constituted, in terms of the quantum involved, the majority of its claim.

121 The Judge below found, at [155] of the Judgment, that:

> … It suffices to point out that such an indemnity is available to indemnify the rescinding party only against losses suffered as a result of performing its obligations under the rescinded contract. [The Respondent] can therefore recover its losses… under such an indemnity only to the extent that it can prove that it incurred those losses in performing its *obligations* under the [Lease]. With respect to the largest of these claims, the fitting out costs, I am not satisfied that that can correctly be characterised as an obligation under the [Lease]. Certainly, if the [Lease] had not been rescinded and [the Respondent] had failed to carry out the fitting out works but continued to pay rent as and when due, I doubt that [the Appellant] would have had any action for breach of contract. That suggests to me that the fitting out works were not an obligation under the [Lease]. [emphasis in original]

122 Mr Singh, relying on the passage cited above from *Newbigging* (see above at [117]), argued for the Respondent that the correct principle is that the plaintiff victim is to be replaced in his position so far as regards the *rights and obligations* which have been created by the contract into which he has been induced to enter. Thus, even if the Respondent was not *obliged* to fit out the Premises, it indubitably had the *right* to do so, and having paid that very substantial sum in the exercise of its *right* to fit out the premises, was entitled to an indemnity for that sum. Mr Singh relied on *Forum Development* at [28] in which this court allowed the plaintiff's claim for expenses incurred in setting up the demised premises for business, in effect, costs for renovations which in principle were fitting out costs. Mr Singh's fall-back position was that, in any case, the fitting out costs were incurred as an *obligation* under the Lease.

123 With respect, we disagree. We doubt, in the first place, that the right to an indemnity in respect of an innocent misrepresentation extends to sums expended in the exercise of *rights* under a contract; and, in the second place, that there was a positive *obligation* under the Lease to fit out the Premises. Let us elaborate.

124 In our view, whilst the sum expended in fitting out the Premises was no doubt a *loss* to the representee, it ought to be recoverable *only in an action for damages*. From the authorities we have referred to above, the true principle is that the victim is *not* to be made good in *every* respect, *but only* in respect of *obligations* under the contract, and on this point we do not think that that passage in *Newbigging* relied on by the Respondent (see above at [117]) is authority for the wider proposition that an indemnity can be stretched to cover sums expended in exercise of rights under a contract entered into in reliance on an innocent misrepresentation. The word "rights" has to be read in context, and in particular the following passage from the same judgment of Bowen LJ (at 594–595):

> … I must assume that the Master of the Rolls spoke with full knowledge of the equity authorities, and he treats the relief as being the giving back by the party who made the misrepresentation of the advantages he obtained by the contract. Now those advantages may be of two kinds. He may get an advantage in the shape of an actual benefit, as when he receives money; he may also get an advantage if the party with whom he contracts assumes some burthen in consideration of the contract. *In such a case it seems to me that complete rescission would not be effected unless the misrepresenting party not only hands back the benefits which he has himself received – but also re-assumes the burthen which under the contract the injured person has taken upon himself.* Speaking only for myself I should not like to lay down the proposition that a person is to be restored to the position which he held before the misrepresentation was made, nor that the person injured must be indemnified against loss which arises out of the contract, unless you place upon the words "out of the contract" the limited and special meaning which I have endeavoured to shadow forth. *Loss arising out of the contract is a term which would be too wide. It would embrace damages at common law, because damages at common law are only given upon the supposition that they are damages which would naturally and*

reasonably follow from the injury done. … There ought, as it appears to me, to be a giving back and a taking back on both sides, including the giving back and taking back of the obligations which the contract has created, as well as the giving back and the taking back of the advantages. [emphasis added]

125 As Farwell J noted in the subsequent (and oft-cited) English High Court decision of *Whittington v Seale-Hayne* (1900) 82 LT 49 ("*Whittington*") (at 51), the speeches in *Newbigging* do not agree entirely, but the correct position of law was that stated in the passage above from the judgment of Bowen LJ. In *Whittington*, the plaintiffs were breeders of valuable prize poultry who had leased premises from the defendant for the purpose of housing their poultry business. It emerged that the premises were unsanitary and the water supply was bad, so that the plaintiffs were not only obliged (under the terms of the lease) to repair the premises but also lost much of their stock of poultry. The plaintiffs sued on the basis that the defendant had misrepresented that the premises were in sanitary condition. It was found that the misrepresentation was innocent, and the issue before Farwell J was whether the value of the poultry stock lost, as well as loss arising from the loss of breeding season, costs incurred for removal of storage and other incidental losses, could be claimed under the indemnity for innocent misrepresentation. Applying that passage we have cited from *Newbigging*, Farwell J found that these items were "really damages pure and simple" (at 51) but that rents, rates and the cost of repairs, which were obligations under the lease, were recoverable.

126 We agree with the holding in *Whittington*, and in our view the principle espoused there, and in the passage we have cited from *Newbigging* (see above at [117]), is an important principle of limitation that clearly demarcates, on principled grounds, the essential difference between, on the one hand, the equitable remedy that is an indemnity for obligations incurred under the rescinded lease, and damages on the other hand. The indemnity for innocent misrepresentation applies to *both parties*, as the formula "giving and taking back on both sides" suggests; and it follows that the representee can recover only those benefits which he was *obliged* to give, and in return the representor re-assumes those burdens which he was *obliged* to pass under the contract, and *vice versa*. Any other loss would be recoverable only by way of a claim for damages, because such loss cannot be linked to an unwinding or a reversal of the parties' obligations. Thus, we do not think that the fitting out cost should be part of the indemnity, for the simple reason that it is *neither* a contracted-for benefit received by the Appellant, *nor* is it a burden that had passed to the Respondent under the contract. The sum expended in fitting out costs is, in fact, *a dead loss to both parties*. *As a matter of principle*, it therefore ought to fall outside the indemnity afforded as a remedy for innocent misrepresentation.

127 We also doubt the correctness of the Respondent's fall-back argument that there was in fact an obligation on the Respondent to fit out the Premises. To our minds, this is simply not apparent from the terms of the Lease at all. Mr Singh, however, relied on the following clause 3.9.1 of the Lease:

> To carry out at the Tenant's own cost and expense all works *required by the Tenant* for purpose of fitting out [the Premises] including the installation of air-conditioning units to [the Premises] and to comply with Fitting Out Plans as approved by the Head Landlord, Landlord, Main Contractor, Project Consultants, and all relevant authorities. The Tenant shall, on demand by the Landlord, at its own costs carry out any rectification to the Tenant's Works which are considered necessary or desirable by the Main Contractor, the Project Consultants, the Head Landlord, Landlord and/or the competent authorities within the time stipulated by the Landlord. [emphasis added]

128 With respect, we do not see this clause as supporting Mr Singh's case in any way. The tenant (the Respondent) is only obliged to carry out fitting out works *in accordance with the approved*

plans; there is *no obligation* on it to carry fitting out works at all. Further, and crucially, such fitting out is necessary *only to the extent* "required by the Tenant" and therefore *cannot* be said to be an obligation arising out of the Lease. If the Respondent had sat on its hands and refused to carry out any fitting out works at all, we do not think that the Appellant would have any cause of action for breach of contract, so long as the rents stipulated for were paid. In this regard, *Forum Development* can be distinguished as, in that case, the court found that the expenses incurred in setting up the premises "were in fact carried out to the satisfaction of the landlord and *pursuant to the tenant's obligations under the lease*" [emphasis added] (at [28]).

129 Given our finding that the misrepresentation was wholly innocent, we note that it *might* have been open to the Respondent to claim damages in lieu of rescission of the Lease under ss 2(2) and 2(3) of the Misrepresentation Act, which state as follows:

> (2) Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.
>
> (3) Damages may be awarded against a person under subsection (2) whether or not he is liable to damages under subsection (1), but where he is so liable any award under subsection (2) shall be taken into account in assessing his liability under subsection (1).

130 Whilst the Respondent *did not* include an alternative claim for damages in lieu of rescission under s 2(2), this would not *per se* be a bar to such relief because the remedy of damages in lieu of rescission is, on the plain words of the section, an exercise of the court's discretion that turns on whether the court is "of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party". In our view, this discretion is to be exercised *only in accordance with established principles*, the foremost of which is that, where the misrepresentation is slight or relatively unimportant in the circumstances of the case, so that rescission *may* be a disproportionately harsh on the *representor*, damages *may* be awarded in lieu thereof. As the 1962 Report put it at para 11:

> … In some cases the result could be as harsh on the representor as the absence of a right to rescind under the present law can be on the representee. …

131 We agree and endorse the view of *Koh* at para 11.244 (referring to the English Court of Appeal decision of *William Sindall plc v Cambridgeshire County Council* [1994] 1 WLR 1016 at 1036) that *in general*, where the misrepresentation is relatively unimportant in relation to the subject matter of the contract, damages in lieu of rescission *may* be an appropriate relief. This is the rationale for the balancing exercise that the court is required to perform before awarding relief under s 2(2) (see also *Koh* at paras 11.243–11.244). However, we are reluctant, in this case, to perform this exercise, first, because neither party had presented arguments on whether a remedy under s 2(2) would have been appropriate; and, secondly, and more importantly, because the misrepresentation in this case *went to the heart of the contract* so that the Lease could not, realistically, have been performed, and there would therefore be little merit or common sense in upholding it.

132 Thus, in this case, the misrepresentation was *not* relatively unimportant in relation to the

subject matter of the contract. More crucially, the situation was not only extreme *but also an extremely clear one*. In the premises, it would have been considerably simpler to analyse the case as a question of whether a straightforward action for breach of contract could have been maintained by the Respondent, and it is to this second miscellaneous issue that our attention now turns.

The second miscellaneous issue: Whether this appeal could have been resolved on the basis of the finding of a breach of contract instead

133 The Respondent did plead, as one of its causes of action, damages for breach of contract, but the Judge declined (see [157]–[158] of the Judgment) to render a decision on this point on the basis that first, damages had already been assessed as owing to the Respondent under s 2(1); and secondly, it was a less advantageous way of framing the Respondent's case because it affirmed the contractual relationship between the parties and therefore left the Respondent open to the Appellant's counterclaim for damages.

134 With respect, it is unfortunate that the Judge declined to render a decision on this point as it seems to us that analysing the case as a simple one involving a breach of contract might have been more appropriate in the circumstances of this case. Under the terms of the Lease, the Appellant had the obligation to make the Premises available for the Respondent's use as a showroom. Upon the SLA's demand for a differential premium, the Appellant could have done one of two things. First, it could have taken the position, *vis-à-vis* its own landlord AMB, *either* that the SLA had no right to impose that differential premium, *or* that it was not permissible under the Head Lease to pass that differential premium on to the Appellant. Secondly, it could have accepted and paid the differential premium. In either case, what it *indisputably could not do was to pass that differential premium on to the Respondent under the terms of the Lease*. It had no basis to do so in law. But this was, in fact, what it attempted to do, and we are satisfied that in making that attempt, the Appellant evinced by word or conduct an intention that it was unable or unwilling to perform its obligation to lease the Premises to the Respondent (see, for example, the decisions of this court in *San International Pte Ltd (formerly known as San Ho Huat Construction Pte Ltd) v Keppel Engineering Pte Ltd* [1998] 3 SLR(R) 447 at [20] and *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413, especially at [93]), and was therefore in repudiatory breach of the Lease, for which damages would be assessable.

135 The Respondent pointed to a number of communications that made this clear: up to the end of July 2011, its solicitors were urgently pressing the Appellant's solicitors to explain the status of the discussions with the SLA and to give a date on which the fitting out works could resume and business could commence. The parties met on 25 August 2011 at which time the Appellant proposed that the differential premium be passed in its entirety to the Respondent. On 21 September 2011, the Appellant wrote to the Respondent, now proposing that Prologis would pay a reduced differential premium to the SLA, but that the sum would be amortised over the term of the Lease and passed to the Appellant, which in turn would pass the same to the Respondent as a supplement to the monthly rent under the Lease. This would have resulted in an increase of 57 cents psf on the rent, an increase of over 30%. Unsurprisingly, the Respondent refused to accept this proposal. We are satisfied that the operative date on which the Appellant evinced an intention not to be bound by the terms of the Lease is therefore 21 September 2011.

136 Before us, Prof Goh for the Appellant raised the defence that the Appellant had not breached the Lease because clauses 3.14.2 and 3.14.3 of the Lease passes to the Respondent the obligation to check with any "relevant government authorities" whether the Premises were authorised for the given use, including SLA's approval under the State Lease. With respect, we do not agree with this submission. The relevant words of the Lease are that the Respondent had the burden of obtaining

from the "relevant government authorities" such approvals and consents as were necessary for the stipulated use of the Premises, but we do not think this phrasing could reasonably be stretched to include the SLA's approval *vis-à-vis* the charging of a differential premium, because, while the SLA is a "government authority", it was not in fact acting here as a "government authority" but as a landlord, or, more precisely, as a body standing in the shoes of the lessor under the State Lease. As the Judge astutely noted at [101] of the Judgment:

> … But in the parties' contractual arrangements, the fact that the SLA is a government authority is a mere coincidence. The SLA's approval for [the Appellant] to lease the Premises to [the Respondent] as a showroom was not required in the same sense as the URA's approval was required. …

137 However, given our finding that the Appellant *had* made a misrepresentation to the Respondent, albeit an innocent misrepresentation, the Respondent *must* therefore choose whether to rescind the Lease *ab initio* for misrepresentation, albeit without the award of damages under s 2(1) (and we would *not* endorse a finding that damages would be available under s 2(2) for the reasons at [130]–[131] above), *or* to rescind it (for repudiatory breach of contract) and claim damages for such breach.

138 We should add, for the sake of clarity, that whilst we have used the same term "rescission" in both cases, the remedy afforded to the Respondent in the *latter* option is *not*, strictly speaking, rescission of the contract such as to *unwind it from the beginning* (rescission for *misrepresentation*, in contrast, involving an allegation that there was a defect in the *formation* of the contract), but is, rather, legal shorthand for *accepting* a repudiatory breach of contract, *absolving* either party from further *performance*, *and allowing* the innocent party to claim damages for breach (see, for example, the English Court of Appeal decision of *Howard-Jones v Tate* [2012] 2 All ER 369 at [15] as well as *Treitel* at para 9-082). Should the Respondent elect in favour of this latter option, it would be entitled to have its damages assessed by the Registrar, but it also remains open to the Appellant to assert its counterclaim for damages against the Respondent, an issue to which we now turn.

The Appellant's counterclaim

139 The Appellant's counterclaim is, in essence, for loss of rental from the moment the Lease was repudiated by the Respondent (which it claims was 24 October 2011), to the end of the Lease. We are satisfied that this counter-claim is, to a large extent, without merit. As the Judge found (at [56] of the Judgment), on 6 June 2011, the Appellant's Mr Kamphorst agreed that, due to the discussions with the SLA, the Respondent would *not* have to pay rent throughout the period that the fitting out works were suspended. The Respondent halted fitting out works later that day and fitting out never resumed; it appeared that the Respondent then commenced *reinstatement* works in October 2011 with a view to returning the Premises to the Appellant. In view of the Appellant's concession on the point of rent, the only rent that was payable to the Appellant was from 1 June 2011 to 06 June 2011, being the period *after* the two-month rent-free period for fitting out, but *before* the Respondent halted fitting out works in response to Mr Kamphorst's assurances. As the Respondent had pre-paid the June rent in full, the Appellant's counterclaim must fail, except that the Appellant would be entitled to a set-off for that period which we have referred to.

Conclusion

140 For the reasons set out above, the appeal is allowed in part. We find that the Appellant's misrepresentation was innocent, entitling the Respondent to rescind the Lease and to a consequential indemnity for sums paid over as part of its obligations under the Lease.

141 The Appellant has not succeeded in full in the present appeal because we *also* find that the Appellant, in attempting to pass on the differential premium, was in *repudiatory breach* of the terms of the Lease. The Respondent is therefore put to an election between rescinding the Lease for a wholly innocent misrepresentation (see the preceding paragraph) *or* rescinding the Lease for a repudiatory breach of contract accompanied by a claim in damages for that breach. In this last-mentioned regard, the Respondent would be entitled to damages to be assessed on the normal principles, save for the set-off which we have referred to above at [139].

142 As neither party has fully succeeded in the present appeal, we will hear the parties on costs.