Thode Gerd Walter *v* Mintwell Industry Pte Ltd and others
[2010] SGHC 33

Case Number : Suit No 351 of 2007 (Notice of Appointment for Assessment of Damages No 44 of 2009)

Decision Date : 29 January 2010

Tribunal/Court : High Court

Coram : Peh Aik Hin AR

Counsel Name(s) : Sugidha Nithi and Renu Menon (Tan Rajah & Cheah) for the plaintiff; Anthony Lee Hwee Khiam and Sarah Tan (Bih Li & Lee) for the defendants.

Parties : Thode Gerd Walter — Mintwell Industry Pte Ltd and others

Contract

Damages

Tort

29 January 2010 Judgment reserved.

Peh Aik Hin AR:

Introduction

1 The present assessment of damages arises out of two leases signed between the plaintiff, Mr Gerd Walter Thode, and the first defendant, Mintwell Industry Pte Ltd ("Mintwell"), for two units in Mintwell Building, an industrial building located at No 55 Ubi Avenue 3, Singapore 408864 ("Mintwell Building"). Although the hearing of the assessment of damages took only half a day before me, the parties subsequently raised a myriad of legal issues in their written and oral submissions. As will be demonstrated, most of these seemingly complicated issues can in fact be resolved having regard to first principles.

The facts

2 The facts of this case are undisputed and reference can be made to the judgment of the trial judge, Belinda Ang Saw Ean J, in *Thode Gerd Walter v Mintwell Industry Pte Ltd* [2009] SGHC 44 ("*Thode Gerd Walter*") (at [1]–[13]). For purposes of the present proceedings, the facts can be briefly summarised as follows.

3 The plaintiff is the sole-proprietor of Euromal Precision Engineering ("Euromal") and is in the business of mechanical engineering works. At the material time, Mintwell was the lessor of Mintwell Building and had granted leases of various units in Mintwell Building to others, including the plaintiff. The second defendant is Mr Seah Bak Kheow ("Seah"), who was alleged by the plaintiff, and found by Belinda Ang J in *Thode Gerd Walter* (at [46]), to be the key controlling mind behind Mintwell at the material time, notwithstanding that he was not a director of Mintwell. The third defendant is Mr Tan Kee Hock, Eddy ("Eddy"), a director of Mintwell at the material time.

4 Mintwell had granted the following two leases to the plaintiff:

(a) a lease dated 16 February 2005 for unit #01-02 at a monthly rent of $15,643.60, which commenced on 1 May 2005 and was for a period of two years up till 30 April 2007 with an option to renew for a further two years; and

(b) a lease dated 1 August 2006 for unit #03-02 at a monthly rent of $5,940.00, which commenced on 1 August 2006 and was for a period of 33 months up till 30 April 2007 with an option to renew for a further two years.

The plaintiff had taken up the second lease for unit #03-02 as he needed more space to expand his growing business, and the term of the second lease was 33 months so as to ensure that the expiry dates of both leases would coincide.

5 Previously, Mintwell had mortgaged Mintwell Building to Overseas-Chinese Banking Corporation ("OCBC") and covenanted, *inter alia*, not to let any part of the property without the consent in writing of the bank. Unknown to the plaintiff, OCBC had obtained an order of court dated 2 September 2002 against Mintwell for vacant possession of Mintwell Building (in Originating Summons No 1106 of 2002 ("OS 1106/2002")) after Mintwell defaulted in mortgage repayments and had subsequently filed a writ of possession on 30 June 2006 to enforce the order. In breach of its covenant, Mintwell had also leased the two units to the plaintiff without the consent of OCBC.

6 It was only on 2 August 2006 when the plaintiff was served with a copy of Summons No 3453 of 2006 ("SUM 3453/2006"), an application by OCBC for the execution of the writ of possession, that the plaintiff first found out about the true situation. In order to avoid eviction, the plaintiff contested the summons at the hearing on 1 September 2006, but was unsuccessful. The Assistant Registrar ordered that OCBC be at liberty to enforce the order of court dated 2 September 2002 and to execute the writ of possession, albeit a stay of execution was granted until 1 December 2006, 4 pm.

7 The plaintiff eventually found alternative premises for his business at 45 Changi South Avenue 2, #03-01, Techplas Industrial Building, Singapore 486133 ("Changi South premises") and entered into a lease for this new premises on or about 22 November 2006 at a monthly rent of $23,000. Prior to the Changi South premises, the plaintiff had considered another premises at 9 Tai Seng Drive ("Tai Seng premises") but found the place unsuitable. The plaintiff vacated unit #03-02 at Mintwell Building on or about 4 October 2006 and vacated unit #01-02 on or about 28 November 2006. Although the plaintiff had incurred expenses renovating unit #03-02, he never commenced operations there.

8 On 8 June 2007, the plaintiff commenced the present action against the three defendants. He sued Mintwell for breach of contract (in respect of Mintwell's breaches for the two leases), negligence and fraudulent and/or negligent misrepresentation and Seah and Eddy for fraudulent and/or negligent misrepresentation. On 25 August 2008, the parties entered into a consent judgment whereby interlocutory judgment was entered for the plaintiff against Mintwell for breach of contract with damages to be assessed by the Registrar. On 23 February 2009, Belinda Ang J, after the trial of the action, entered interlocutory judgment for the plaintiff against Mintwell and Seah for negligent misrepresentation with damages to be assessed by the Registrar. She, however, did not find Eddy liable. As such, the present proceedings are only against Mintwell and Seah (reference hereafter to "the defendants" in this judgment will refer only to Mintwell and Seah).

The present assessment of damages and the heads of damages claimed by the plaintiff

9 The present assessment of damages was a consolidated hearing (pursuant to an order of court dated 25 August 2009) for the assessment of damages due to the plaintiff under both judgments. The plaintiff claimed in total a sum of $251,902.53, which can be broadly divided into four categories:

(a) $191,195.38 for expenses incurred in relation to the move to the Changi South premises, which formed the bulk of the claim;

(b) $15,964 for expenses incurred for unit #03-02, in which operations never commenced there;

(c) $27,551.95 for labour costs (for the plaintiff's staff and for the plaintiff himself) incurred in relation to the move to the Changi South premises; and

(d) $17,191.20 for legal costs incurred for contesting the eviction and title searches/conveyancing fees for the Tai Seng premises and the Changi South premises.

10 At the hearing of the assessment of damages, the defendants elected not to call their witness, *ie*, Eddy, to give evidence at the end of the plaintiff's case. Eddy's affidavit of evidence-in-chief ("AEIC") was thus not admitted.

Preliminary issue – the measure of damages

11 Before I proceed with my decision on the damages to be awarded, it will be necessary to deal with a preliminary issue first.

12 At the start of the hearing of the assessment of damages on 9 October 2009, counsel for the plaintiff, Ms Sugidha Nithi ("Ms Nithi"), represented to me that parties have agreed that the assessment of the damages due under both judgments would result in the same figure, and no issue was raised by either party as to what was the proper measure of damages. Ms Nithi explained that this was also the reason why consolidation was sought in the first place and granted. However, at the oral submissions on 20 November 2009, counsel for the defendants, Ms Sarah Tan ("Ms Tan"), raised for the first time the issue that the plaintiff should elect his measure of damages and decide whether to proceed with damages in contract or tort. Although the defendants had alluded briefly to the different measures of damages in contract and tort in their written submissions [note: 1], they had not explained the significance of such difference or what the consequences of non-election of the measure of damages were in this case. Indeed, the bulk of the defendants' written submissions were focused on the legal issues of proof of damage, mitigation and remoteness.

13 At the oral submissions, Ms Tan explained that if the plaintiff chooses to proceed in tort, he would only be entitled to recover damages in respect of the expenses he incurred for the *two* units in Mintwell Building (it should be noted, however, that the plaintiff is only claiming for expenses incurred for *one* unit, *ie*, unit #03-02, as part of the total damages claimed (see [9] above)) and nothing more because the aim of damages in tort was to restore him to the position he would have been in if the tort (*ie*, the misrepresentation in this case) had not been committed. And if the tort had not occurred in the first place, she reasoned that the plaintiff would not have taken up the two leases at Mintwell Building and would have simply taken up another place. Consequently, he would not have had to move to the Changi South premises and incur all the other expenses claimed. His loss would therefore only be confined to the wasted expenditure for the two units in Mintwell Building. However, if the plaintiff chooses to proceed in contract, the plaintiff would be entitled in principle to claim for the expenses he expended for moving to the Changi South premises as well as the rest of the damages claimed here. She did not, however, submit that the plaintiff should choose the measure of damages in tort or that that was the correct measure for the present case. Rather, her position was simply that the plaintiff should make an election.

14 On the other hand, Ms Nithi reiterated the position at the start of the hearing of the

assessment of damages. She contended that no election was necessary and that, in any event, the same amount of damages would be ascertained under either measure.

15 It does not appear to me that the defendants are pressing the point strongly that an election should be made or that the measure of damages in tort is the right measure. In any case, I do not agree with the defendants' view that if the measure of damages is to be based in tort, then it follows that the plaintiff can only recover the expenses incurred for the two units at Mintwell Building and nothing more. This argument appears to be based on a misunderstanding of the principle that the aim of damages in tort is to put the claimant in a position he would have been in if the tort had not been committed. There is no doubt that this is the guiding principle of the object of damages in tort, which is *different* from that in contract, which aims to put the claimant in as good a position, as far as money can do it, as if the promise had been performed (see the Court of Appeal decision of *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR 909 ("*Wishing Star*") at [28]).

16 However, there is no reason to draw an artificial and arbitrary line to limit damages to only expenses incurred for the two units if the measure of damages is based in tort in the present case. Could it not be said similarly that had the tort not been committed (*ie*, if there had been no misrepresentation), the plaintiff would not have gone on to incur and would have avoided all other expenses he had incurred such as those in relation to the move to the Changi South premises? Indeed, as a matter of general principle, a claimant in tort is entitled to recover not only the basic pecuniary losses he suffered as a result of the tort, but also the *consequential* pecuniary losses which will include other expenses necessitated by the tort (see generally Harvey McGregor QC, *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009) at paras 2-043 to 2-045 and paras 2-051 to 2-053; see also *Grosvenor Hotel Company v Hamilton* [1984] 2 QB 836 where a tenant recovered in an action for nuisance the expenses of setting up a new place from the landlord). Apart from proof of damage, the limit to the recovery of such losses would be the remoteness of damage, and in this respect, I note that the test of remoteness of damage in tort is generally considered to be wider than that in contract (see *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 ("*The Heron II*") at 385–386, *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 ("*Robertson Quay*") at [71]–[74] and *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR 853 ("*Sunny Metal (HC)*") at [138]). Bearing this in mind and the fact that both judgments in this case arose out of the same factual matrix, it would appear odd that the defendants are taking the position that all the other expenses claimed by the plaintiff are in principle claimable and recoverable if the measure of damages is based in contract, but not so if the measure of damages is based in tort.

17 In my view, the correct position is simply this. There are two judgments here – one against Mintwell for breach of contract and the other against both Mintwell and Seah for misrepresentation in tort. As a matter of principle, the plaintiff is entitled to damages based on the measure of damages in contract for the judgment in contract as well as damages based on the measure of damages in tort for the judgment in tort. Under both judgments, damages are recoverable so long as they are not too remote. However, at the end of the day, there should be no *double recovery*. Thus, if there is any overlap in losses under both judgments, the court should only grant one set of damages for the same loss. It should also be appreciated that the present case is not exactly one where there are concurrent duties in tort and contract (see for example *Sunny Metal (HC)*) and more will be said about this later (see [74] below).

18 On the facts of the present case and bearing in mind that the claims put forward by the plaintiff relate mainly to the *expenses* he had incurred as a result of the breach of contract and/or misrepresentation, I agree with the plaintiff that the damages which he is entitled to in contract would actually be the same as those he is entitled to in tort. This is not unusual, but it should be noted that this is only by way of factual coincidence (*Wishing Star* at [43]):

> … there could be a coincidence in quantum between the contractual and the tortuous measures of damages, depending on the precise facts of the case concerned, although… , this would be more by way of a *factual* coincidence and does *not* signify any coincidence in the *purposes* that the law of contract and the law of tort, respectively, serve… [emphasis in original]

In arriving at this conclusion, I took into account the important fact that the present case is not one where the plaintiff is trying to recover loss of profits that he would have made in his business if the representations made by the defendants had been true. Recovery of such loss of profits would not have been permissible in tort, though they may be recoverable in contract, given that the objective of damages in tort, unlike contract, is not to compensate the claimant for the loss of bargain but to restore him to *status quo ante* (see *Wishing Star* at [28] and *McGregor on Damages* at para 19-003).

19 Lastly, I am also of the view that, in any case, it is not open to the defendants now to contend that the damages would be different under the judgment in contract and the judgment in tort, having not objected to the consolidation of the assessment of damages when the plaintiff first applied for one and subsequently not raising any objections at the start of the assessment of damages or at any time throughout the proceedings until the day of oral submissions. Indeed, the entire assessment had proceeded on the basis that the damages were the same until the issue was raised (half-heartedly it seems) at the oral submissions. I turn now to my decision on the award of damages for the various heads of damages claimed by the plaintiff.

My decision

Expenses incurred in relation to the move to the Changi South premises

20 The damages claimed by the plaintiff under the first head consisted of, *inter alia*, the various costs of renovation, electrical, shifting and air-conditioning works undertaken by the following contractors engaged by the plaintiff for the Changi South premises:

(a) Qian Cheng Electrical Renovation Engineering ("Qian Cheng") for electrical works and lighting;

(b) KL Fong General Contractor for partitioning and carpeting works;

(c) ACIS Air-Conditioning Centre ("ACIS") for air-conditioning works;

(d) Boge Kompressoren Asia Pacific Pte Ltd ("Boge") for piping and other fittings required for the operation of the plaintiff's machinery;

(e) Sterling Agencies Pte Ltd ("Sterling") for the shifting of the plaintiff's machinery from Mintwell Building to the Changi South premises;

(f) Hock Siang Transport for the shifting of the office furniture and equipment from Mintwell Building to the Changi South premises;

(g) EKTH Marketing & Services for voice and data cabling and dismantling and re-installing the PBX system; and

(h) GY Chow Consulting Engineers for load consultation for the layout of the machinery at the Changi South premises.

21 The defendants have essentially two main objections to these various claims. First, and this appears to be the defendants' main contention, the defendants contended that the plaintiff had failed to mitigate his losses for two reasons. The first reason is that the plaintiff had chosen to lease the Changi South premises (22,008 square feet in floor area), which is 23.8% *larger* in floor area compared to the combined floor area of units #01-02 and #03-02 at Mintwell Building (17,774 square feet in floor area in total). The defendants argued that the increase in space would necessarily mean that "the amount the [p]laintiff expended to renovate/fit out the Changi South premises [would be] higher" [note: 2]. They submitted that the court should take this increase in floor area into account as a factor in awarding damages and "not have [the defendants] pay for the [p]laintiff's own expansion plans and ambitions" [note: 3]. Further, they pointed out that if the plaintiff had leased the same floor area as Mintwell Building at the Changi South premises, the monthly rent (at the same rent per square feet) would only be $18,662.70 instead of the present sum of $23,000, which would work out to a savings of $4,337.30 per month and a total savings of $125,781.70 over 29 months from 1 December 2006 to 30 April *2009* (it should be noted that the defendants had mistakenly taken the expiry date of the two leases as 30 April *2009* where the correct date should be 30 April *2007* (see [4] above); thus instead of 29 months, it should only be 5 months and the alleged savings should only be $21,686.50) [note: 4]. The second reason is that in respect of all the renovation, electrical, shifting and air-conditioning works done at the Changi South premises, the plaintiff had failed to source for quotations from other contractors and to bargain for a more favourable price. Instead, the plaintiff had accepted the quotations he obtained from the first contractors he approached.

22 Secondly, the defendants contended that the plaintiff had failed to prove all the expenses that he had allegedly incurred in relation to the Changi South premises. The defendants took the position that it was insufficient for the plaintiff to produce the quotations and invoices for the various works done. The complaint was that the plaintiff did not call the different contractors to give evidence in court so as to justify and explain why certain works were necessary and why certain amounts were charged.

23 As a matter of principle and logic, the issue of proof should be dealt with first followed by the issue of mitigation (see *Robertson Quay* ([16] *supra*) at [27]). However, in light of the arguments canvassed by the defendants and their emphasis on the issue of mitigation, it would be more convenient for me to deal with the latter issue first.

Mitigation

24 It is trite law that a claimant must take reasonable steps to mitigate the loss arising from the defendant's wrong, be it a tort or breach of contract, and the claimant will not be entitled to recover damages in respect of any part of the loss which is due to his neglect to take such steps (see the speech of Viscount Haldane LC in the leading case of *British Westinghouse Electric and Manufacturing Company, Limited v Underground Electric Railways Company of London, Limited* [1912] 1 AC 673 at 689, which was followed locally in *GIB Automation Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2007] 2 SLR 918 ("*GIB Automation*") at [98]; see also *McGregor on Damages* ([16] *supra*) at para 7-014). The onus is on the defendant to show that the claimant has failed to take such steps (*GIB Automation* at [98] and *McGregor on Damages* at para 7-019).

25 However, the standard of reasonableness is not high in view of the fact that the defendant is an admitted wrongdoer. As stated by Lord Macmillan in *Banco de Portugal v Waterlow and Sons, Limited* [1932] 1 AC 452 at 506:

> *It is often easy after an emergency has passed to criticize the steps which have been taken to*

meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party *placed in a difficult situation* by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken. [emphasis added]

26 It is oft said that the question of mitigation is a question of fact (see *Payzu, Limited v Saunders* [1919] 2 KB 581 at 588 and 589; see also *Robertson Quay* at [27]). Indeed, as would be implicit in Lord Macmillan's quoted passage above, what is reasonable must be judged in the *circumstances* that the claimant is placed in.

27 Returning to the facts of the present case, can it be said that the plaintiff has failed to take such reasonable steps given that he had chosen a bigger premises and/or failed to source for alternative quotations for the various works done at the Changi South premises? I do not think so. The circumstances were such that the plaintiff only first found out of the various breaches by the defendants in August 2006. After SUM 3453/2006 for the execution of the writ of possession was heard on 1 September 2006, it then became a certainty that the plaintiff had to move out of Mintwell Building and that he had only up to 1 December 2006, *ie*, three months, to find alternative premises and to shift there.

28 The plaintiff first found and considered the Tai Seng premises but found it unsuitable for various reasons before he eventually found the Changi South premises sometime around end September 2006 and settled for it. He testified that he was running against time then as he had to find new premises quickly and thereafter carry out the necessary renovation works, which would again take time (he testified that it took about two months for the renovation works), to make the new premises fit for his machinery and business. He testified that although the Changi South premises were bigger, the extra space was unnecessary and he had in fact kept the extra space empty. I accept the plaintiff's explanation. It was certainly not a case where the plaintiff had sought to expand his business when he moved to the Changi South premises as claimed by the defendants. Indeed, any such expansion would already have taken place when the plaintiff took up the extra unit, *ie*, unit #03-02, at Mintwell Building.

29 It should be further borne in mind that the plaintiff is not claiming for the *additional rent* he has to pay for the Changi South premises as a result of the larger floor area. As such, the figures put forward by the defendants (see [21] above), which they claimed are savings to the plaintiff are, in my view, irrelevant for the present assessment of damages. The defendants also did not submit (and rightly so) that these savings should be deducted from the total damages awarded to the plaintiff. However, I should mention that the defendants did raise a further point about deducting unpaid rent from the damages awarded. They contended that the plaintiff did not pay them rent for unit #01-02 for the months of August to December 2006 when he was still in possession of the unit and had thus saved some $78,218 in rent (the plaintiff has, however, challenged this amount [note: 5]). They also contended that no rent was ever paid for unit #03-02, though no figure was submitted as to the arrears in rent. Accordingly, the defendants submitted that the amount of rent that the plaintiff withheld, especially the sum of $78,218, should be deducted from the award of damages [note: 6] . I am of the view that no such deduction can be made given that the defendants themselves did not counterclaim for the unpaid rent or plead the defence of set-off in the first place. In any event, the defendants have also not adduced any statements to prove the arrears in rent.

30 There is of course the defendants' further contention that a larger floor area would necessitate a larger amount being spent on the renovation works at the Changi South premises (though the defendants did not substantiate this contention in their submissions). I do not think this is necessarily

so. If one looks at the list of expenses set out at [20] above, it would be noted that the bulk of the items such as the costs of the electrical works, the shifting of the plaintiff's machinery and the piping and fittings required for the plaintiff's operations pertains specifically to the plaintiff's machinery and it is hard to see how the costs for such expenses would be determined or affected by the floor area. The same can be said of the expenses for shifting of the office furniture and equipment. No doubt some items would invariably be affected by the floor area; the plaintiff testified that as there was a longer distance from the compressor to the air-conditioning units at the Changi South premises, additional copper and tubings had to be used for the air-conditioning, and that for the ceiling, additional ceiling boards had to be purchased given the larger area. However, this alone does not mean that the plaintiff had failed to take reasonable steps to mitigate in the given circumstances. To begin with, the plaintiff had in fact brought over the air-conditioning compressor and units as well as the ceiling boards from Mintwell Building to be reused at the Changi South premises in a bid to save costs. Apart from these items, the plaintiff also moved over all other useable office furniture and equipment, including power points, wirings, cables, lights and carpets so as to incur less expenses for the renovation works at the Changi South premises. The truth is that the plaintiff did make considerate efforts to mitigate his losses.

31 The defendants, during the cross-examination of the plaintiff, also sought to point out that the costs charged by ACIS for air-conditioning and Sterling for shifting the machinery in relation to the Changi South premises were higher than the costs previously charged when the plaintiff moved from Betime Building at Macpherson Road into Mintwell Building (the plaintiff had engaged their services then as well). In respect of the costs charged by ACIS, the plaintiff explained that as the new premises had no brackets for the compressor, these had to be installed and additional costs were thus incurred. As for Sterling, the plaintiff explained that a higher fee was charged given that the Changi South premises were located on the third floor. Again, I do not think that the fact alone that these costs were higher for the Changi South premises would mean that the plaintiff's claims were inflated and the plaintiff had failed to mitigate his losses. To begin with, it would be unrealistic to expect the costs for both moves to be the same given that the scope of the works undertaken by ACIS and Sterling for the two premises would likely be different. The defendants have also not adduced any contrary evidence to show that such expenses were excessive or inflated (*cf GIB Automation* ([24] *supra*) where the defendant in that case had adduced evidence that the plaintiff had inflated the value of the items it ordered in order to claim a larger sum of damages (*id* at [81]–[97])).

32 As for the failure to obtain quotations from other contractors, the plaintiff explained that the contractors he hired for the renovation works at the Changi South premises were mostly his regular contractors who had done similar renovation works for him in the past at his premises at Mintwell Building as well as his premises prior to Mintwell Building at Betime Building. This evidence was not challenged by the defendants, who in fact relied on this fact for their cross-examination and submissions. The plaintiff said that he had engaged these contractors again for the Changi South premises as he knew they were reliable, they knew exactly what his requirements were and he trusted their workmanship. He candidly agreed with the suggestion of the counsel for the defendants, Mr Anthony Lee Hwee Khiam, during cross-examination that there could perhaps be other contractors who would charge a lower price for the same work, but he testified that he believed his contractors would not over-charge him for the works, given the trust and rapport they have built up with each other. He also explained that he had negotiated and bargained for a lower price with these contractors before they quoted/invoiced him. He further explained that given the short time frame he had, it was not quite feasible to source for and obtain quotations from other contractors, especially since he would have to spend time telling these new contractors his requirements all over again. For Boge, which was engaged by the plaintiff for the first time, the plaintiff explained that he had decided to engage them as Boge was the company that manufactured his machinery, and he thus felt safer

that they did the piping and fittings for the machinery (which ran on compressed air) at the Changi South premises in the short span of time he had. I accept all the plaintiff's explanation above which, in my view, is entirely reasonable in the circumstances. I would also add that the plaintiff struck me as a truthful witness throughout the proceedings.

33 On the totality of the facts and the evidence before me, I am of the view that the defendants did not discharge their burden of proving that the plaintiff had failed to mitigate his losses. No doubt perhaps more savings could have been achieved if the plaintiff had the luxury of time to think or to source for alternative quotations, but this does not as a matter of course mean that the plaintiff had failed to mitigate his losses. In *Darbishire v Warren* [1963] 1 WLR 1067, Pearson LJ said (at 1075):

> … it is important to appreciate the true nature of the so-called "duty to mitigate the loss" or "duty to minimise the damage." *The plaintiff is not under any actual obligation to adopt the cheaper method: if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else*. The true meaning is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss. In short, he is fully entitled to be as extravagant as he pleases but not at the expense of the defendant. [emphasis added]

In my view, the plaintiff has already done what was *reasonable in the circumstances* to mitigate his losses and we should not, as Lord Macmillan suggested (see [25] above), on hindsight, nip-pick on what he could have done better and criticise and penalise him for that.

Proof of damage

34 I turn now to the defendants' second main contention, *ie*, the lack of proof for the expenses.

35 As held by Andrew Phang Boon Leong JA, delivering the judgment of the Court of Appeal, in *Robertson Quay* ([16] *supra*) at [27], it is fundamental and trite that a claimant claiming damages must prove his damage, *ie*, he must satisfy the court both as to the fact of damage and as to its amount. Summarising the position at law, Andrew Phang JA said at [31]:

> To summarise, a plaintiff cannot simply make a claim for damages without placing before the court sufficient evidence of the loss it has suffered even if it is otherwise entitled in principle to recover damages. On the other hand, where the plaintiff has attempted its level best to prove its loss *and* the evidence is cogent, the court should allow it to recover the damages claimed. [emphasis in original]

36 Unlike *Robertson Quay* where the court found that there was no *factual link* between the additional interests claimed and the breach of contract (*ie*, it was not shown that the delay in construction had led to additional interest (claimed by the appellant in that case as damages) actually being incurred) to begin with, this is not the case here. The plaintiff has certainly incurred the expenses as evidenced in the invoices which are undisputedly for renovation works done at the Changi South premises, the move to the Changi South premises and the renovations being necessitated by the defendants' breach. Indeed, the defendants are not contending otherwise.

37 However, as mentioned, the defendants' main complaint here is that the plaintiff did not call the various contractors to come to court to explain the renovations works that were carried out, why certain items of work had to be done and/or why such works were warranted. They took the view that the plaintiff's explanation of what works were carried out was simply not enough. For instance, in

respect of the invoices rendered by Qian Cheng, the defendants complained as follows [note: 7] :

> 43. The person behind Qian Cheng… , Mr David Tang, was not called as the Plaintiff's witness to justify his recommendations as well as to the nature and extent of the works done.
>
> …
>
> 45. *Because Mr David Tang was not called as a witness, there is therefore no direct evidence as to what was done, whether what was done was warranted in the ordinary course of events*.
>
> [emphasis added]

Similar assertions were made in respect of the other expenses in the defendants' written submissions as well as throughout the cross-examination of the plaintiff.

38 Bearing in mind the guidelines laid down by Andrew Phang JA in *Robertson Quay*, I am of the view that the plaintiff by adducing the various quotations and invoices, which showed clearly that the works listed there were for the Changi South premises, has done his level best to adduce sufficient and cogent evidence to prove his losses.

39 The defendants make a general unqualified assertion that the production of quotations and invoices was insufficient and it was necessary to call the contractors to explain these documents. Taken to its logical conclusion, it would mean that in every assessment of damages where a quotation/invoice is produced by a claimant to prove certain expense/loss he has incurred (and this would be the case in most cases), the maker of the quotation/invoice has to come to court to explain it. This would be most impractical especially if a large number of quotations/invoices from different contractors are tendered. In my view, there cannot be such a general requirement in law.

40 This is not to say that it would always be sufficient just to adduce quotations/invoices to prove one's alleged expenses/losses. As pointed out by Andrew Phang JA in *Robertson Quay* (at [27]), the process of proof of damage is an "intensely factual one" (even more so than mitigation) and it would not be possible to lay down any general rules or principles as to what would constitute adequate proof of damage since the particular factual circumstances of a case could take literally a myriad of forms. There are cases such as that in *Robertson Quay* where the adduction of invoices or receipts would be insufficient when to begin with, there appears to be no factual link at all between the damage claimed and the breach. There could also be a situation where the quotation/invoice may call for some explanation such as where the figures in the quotation/invoice may appear to be inflated or certain items appear to be unusual or special, and in such a case, there may be a need to call the maker of the quotation/invoice to court to explain the figures or why the items were indeed necessary.

41 In the present case, it should be first borne in mind that the defendants are not at all disputing the *admissibility* of the quotations and invoices tendered by the plaintiff. The works listed in the various quotations and invoices did not appear to be unusual or special to suggest that they were unconnected to the renovation of the Changi South premises for the purposes of the plaintiff's business. It is noteworthy that most of these quotations/invoices were from the plaintiff's regular contractors who had undertaken similar works for the plaintiff in the past whenever he shifted premises. As mentioned (at [31] above), the defendants pointed out that the costs for certain works were higher (when compared to similar works done for the two units at Mintwell Building) but for reasons given above (at [31]), I have accepted the plaintiff's explanation for the difference in costs. By adducing the quotations and invoices for the various works done at the Changi South premises,

the plaintiff has satisfied the burden of proof of damage.

Conclusion

42 In conclusion, for the reasons above, I award the plaintiff the full sum of $191,195.38 he claimed for the expenses he incurred for the renovation works at the Changi South premises.

Expenses incurred for unit #03-02

43 The plaintiff also claimed a sum of $15,964 spent on renovating and fitting unit #03-02 at Mintwell Building. The plaintiff, as mentioned, did not commence operations at this unit.

44 According to the plaintiff, this claim in respect of unit #03-02 is a claim for reliance damages and not expectation damages, unlike the rest of his claims for damages [note: 8]. The plaintiff argued that the lease for unit #03-02 was a separate contract and he was entitled to elect the basis of his recovery. The defendants, on the other hand, argued that the plaintiff could not claim for this amount because to claim for both expectation and reliance damages at the same time would be double recovery. In support of their argument, the defendants relied on the cases of *Cullinane v British "Rema" Manufacturing Co Ld* [1954] 1 QB 292 ("*Cullinane*") and *Hong Fok Realty Pte Ltd v Bima Investment Pte Ltd* [1992] 2 SLR(R) 834 ("*Hong Fok Realty*").

45 Given that the plaintiff had incurred money to renovate unit #03-02 but never had the chance to utilise it, it would appear intuitively that he should be allowed to recover his wasted expenditure. However, there is merit in the defendants' argument. Notwithstanding the plaintiff's point that there are two leases and hence two contracts here, the plaintiff has claimed, and I have already awarded him, the expenses incurred in relation to the Changi South premises, which is a *replacement* premises for *both* units #01-02 and #03-02 at Mintwell Building. Together with the rest of the damages I am awarding below, the plaintiff would be placed in a position he would have been in if *both* the contracts had been performed (having been awarded in this case, as commonly said, the "costs of cure"). In other words, the plaintiff has effectively claimed expectation damages in respect of the lease for unit #03-02 as well. And if the contract had been performed, the plaintiff would necessarily have to incur the $15,964 to renovate unit #03-02. Hence, it would be wrong in principle to award the plaintiff the sum of $15,964 in addition to the expenses for the Changi South premises. In this regard, the following passage from *McGregor on Damages* ([16] *supra*) is instructive (at para 2-018):

> It is important to note… that not only must the defendant be credited with the amount that the claimant has saved by no longer having to perform his side of the bargain, but *the claimant cannot also recover, in addition to the basic loss which is intended to represent the loss of his bargain, any expenses he has incurred in preparation or in part performance. Such expenses represent part of the price that the claimant has to incur to secure his bargain*. If he recovers for the loss of his bargain, it would be inconsistent that he should in addition recover for expenses which were necessarily laid out by him for its attainment. [emphasis added]

46 Thus, in *Cullinane*, the English Court of Appeal rejected the plaintiff's claim insofar as it sought to recover both expectation and reliance damages. Evershed MR, delivering the judgment of the court, said at 302:

> It seems to me, as a matter of principle, that the full claim of damages in the form in which it is pleaded was not sustainable, in so far as the plaintiff sought to recover *both the whole of his original capital loss and also the whole of the profit which he would have made*. I think that that is really a self-evident proposition, because a claim for loss of profits could only be founded upon

the footing that the capital expenditure had been incurred. [emphasis added]

47 There is no doubt that a claimant generally has a discretion to choose between a claim for reliance damages or a claim for expectation damages unless the defendant can show that the claimant has made a bad bargain and hence should not be entitled to recover reliance damages (see *CCF Films (London) Ltd v Impact Quadrant Films Ltd* [1985] 1 QB 16). However, he cannot have both for the same loss. The cases of *Cullinane* (at 302–303 and 308) and *Hong Fok Realty* (at [60]–[62]) cited by the defendants also make it clear that it would be wrong in principle to award a claimant both expectation and reliance damages for the same loss.

48 In short, for the reasons above, I would disallow the plaintiff's claim for $15,964.

Labour costs

49 I turn now to the plaintiff's claim for damages of $27,551.95 in respect of the labour costs for himself and his staff that were incurred as a result of the move. These are manhours for the period 18 November 2006 to 3 December 2006 where the move to the Changi South premises was carried out, and the breakdown is as follows:

(a) $22,400 for the plaintiff himself for the over-time hours he spent doing work for the move. This is based on an hourly rate of $200 and the plaintiff claimed he had spent a total of 112 over-time hours on the move. According to the plaintiff, the hourly rate of $200 is the rate that he charges his customers. As evidence, he adduced four commercial invoices to his customers which reflected his work time charges as $200 per hour [note: 9]. He explained that he had to spend time to design and make plans for the machine layout and to configure the machines subsequently at the Changi South premises.

(b) $5,151.95 for the plaintiff's staff for work done for the move. The plaintiff explained that this figure is made up of: (i) the over-time hours spent on the move by his salaried employees during the shifting period; and (ii) the hours spent by his contract workers purely for the move (a detailed breakdown of the hours spent on the move by each of the plaintiff's staff can be found in a summary table exhibited at p 37 of the plaintiff's supplementary AEIC ("summary table")). He also explained that for his salaried employees, they are paid 1.5 times their basic hourly rate if they are required by him to work over-time on a day that falls on Monday to Saturday, twice their basic hourly rate if they are required to work by him on Sundays and their basic hourly rate if they themselves request to work over-time [note: 10]. The plaintiff further clarified that for his salaried employees who earn more than $2,000 a month (and there are five of them), as a general rule, they are not paid any over-time work they do in relation to the daily operations at Euromal. However, as the work for the move was not part of their usual job scope, they had to be compensated for the over-time work they put in. For these salaried employees, they are simply paid their basic hourly rate for the over-time hours spent on the move [note: 11]. As for the contract workers, they are paid a standard fee of $5.64 per hour for working in the day and $5.91 per hour for working at night [note: 12].

50 The plaintiff explained that the during the shifting period, the only working day in which no operations took place at Euromal was the actual day of the move itself, *ie*, 23 November 2006, Thursday. However, as 23 November 2006 was a normal work day and his salaried employees and himself would be remunerated for the normal work hours as part of their basic salaries, he is not claiming for the hours that they spent on the move during office hours [note: 13]. The plaintiff is also not claiming for the hours spent by the salaried employees and himself on the move during office

hours for the other days during the shifting period as it would be difficult to separate exactly how much time they spent on the daily operations from the time they spent on the move during office hours on those days [note: 14].

51 The defendants do not take issue with the rates or the method of calculation put forward by the plaintiff; their objection for this head of damages is simply that the plaintiff has not proved these damages. In respect of the manhours for the plaintiff himself, the defendants argued that there was simply no evidence that because the plaintiff had spent time on the move, he was deprived of the opportunity to service his customers as a professional engineer. They also argued that the plaintiff, apart from a bare assertion, has not adduced any evidence, such as drawings or sketch plans, to prove that he had actually done work for the move as he has claimed. They pointed out that ultimately there was simply no record of what the plaintiff did for the 112 hours. In respect of the other staff, though, *inter alia*, punch cards and their pay slips have been adduced by the plaintiff to prove that the staff had worked over-time during the shifting period, the defendants argued that there was nonetheless no evidence as to how they spent the time allegedly spent on the move, given that the staff were not called by the plaintiff as witnesses.

52 For the manhours claimed by the plaintiff for himself, I find that there are merits in the defendants' submissions. No doubt the plaintiff would have to spend time on the move (would this not be so in all cases of breach, where the claimant would arguably have to expend time (which could have been spent elsewhere either for work or leisure) to deal with the inconveniences or problems created by the defendant's breach), but it does not appear to me that he has actually suffered a pecuniary loss as a result. Notwithstanding the fact that the plaintiff charges his customers $200 per hour for work done, it should be borne in mind that the plaintiff's own evidence is that he has not lost any business nor suffered any loss of profits because of the eviction or move. He stated in his supplementary AEIC that he had managed to fulfil all his orders despite the inconveniences caused by the eviction and the move to Changi South premises [note: 15]. That is also why the plaintiff is not claiming for any loss of profits. There was no evidence that those 112 hours he allegedly spent on the move would have been spent servicing clients; in fact, the evidence I just pointed out would suggest the contrary. More importantly, I agree with the defendants that there was simply no evidence save for the plaintiff's own bare assertion that he had spent the 112 hours on the move. Unlike his staff, the plaintiff does not have a punch card that records his work hours. The plaintiff has not adduced any other records or any plans or drawings that he had allegedly spent time coming up with for the move to substantiate his claim. I would therefore disallow the plaintiff's claim for $22,400.

53 Turning to the manhours for the staff, punch cards, pay slips and invoices paid to the company who supplied the contract workers have been adduced to prove that the staff had to work over-time during the shifting period and such additional labour costs were incurred. The defendants, however, submitted that there was still no evidence on whether the staff in fact spent those hours on the move, especially since they were not called to give evidence. They contended that this claim was put in merely to inflate the plaintiff's claim. I disagree as it could be inferred from the punch cards as well as the summary table that the over-time hours were for the shifting period and that the bulk of the hours (especially for the contract workers) were for 23 November 2006, the actual day of the move. The plaintiff has taken the trouble to explain carefully how the figures were arrived at and how, in fairness, he had excluded those office hours spent by the salaried employees on the move to claim only the over-time hours. I am satisfied that the plaintiff has done enough to prove that he has to pay his salaried employees for the over-time hours spent on the move, as well as for the hours spent by his contract workers on the move. I disagree with the defendants that there is a need to call all 22 staff (salaried and contract) to court to give evidence.

54 There is one more minor objection I should deal with for the manhours claimed by the plaintiff for his staff. It came up during cross-examination that the plaintiff has yet to pay all the staff the extra salaries they earned for the move. The plaintiff explained that he had reached an agreement with his staff whereby the latter agreed that they would be paid after the plaintiff's claim against the defendants is concluded in court. In this regard, the defendants submitted in their written submissions that the "alleged cost of the manhours has not even crystallised" [note: 16]. I do not see this as a hurdle for the plaintiff. The plaintiff has clarified in his written submissions that it is only the plaintiff and the five salaried employees who have yet to been paid [note: 17]. The bottomline is that the staff are *entitled* to the over-time pay. As the plaintiff stated in his submissions, "[t]he obligation to pay exists" [note: 18] and it is only "a function of timing and not of the obligation to pay" [note: 19]. The plaintiff is entitled to recover damages for the unpaid salaries *owed* to the salaried employees. I will therefore allow the claim of $5,151.95.

Legal costs

55 The last head of damages claimed by the plaintiff is legal costs incurred for the following matters:

(a) $15,099.91 incurred for contesting the eviction; and

(b) $2,091.29 incurred for the title searches/conveyancing fees for the Tai Seng premises and the Changi South premises.

56 The defendants' objection to the first set of legal costs of $15,099.91 is rather peculiar. Unlike the second set of legal costs, the defendants did not contest that this sum is too remote but that the plaintiff should have taxed the invoice of his solicitors for the costs of $15,099.91 [note: 20]. In support of this contention, the defendants made reference to the cases of *Great Western Railway Company v Fisher* [1905] 1 Ch 316, *Butterworth v Kingsway Motors* [1954] 1 WLR 1286 and *British Racing Drivers Club Ltd v Hextall Erskine & Co* [1996] 3 All ER 667. In respect of the second set of legal costs, they took the position that the plaintiff ought not recover costs in respect of legal work done in relation to the Tai Seng premises given that such a loss was too remote to be recovered as "it [was] not reasonably foreseeable that the [p]laintiff [would] incur more than 1 tranche of legal fees in his search for alternative premises" [note: 21].

57 For the first set of legal costs for contesting the eviction, I find that the defendants' argument is misconceived and the cases cited are distinguishable and unhelpful. In fact, the defendants' written submissions appear to conflate different principles. Essentially, what the defendants have done is to refer to English cases where a claimant had sought to recover costs he incurred in previous proceedings as damages in the current proceedings against a defendant in two situations, namely:

(a) where the claimant had been *successful* in the previous action and had recovered costs from the unsuccessful party, and he now sought to recover the shortfall between the actual costs incurred and the costs awarded from the defendant whose wrong had been the cause of the previous action; and

(b) where the claimant had been *unsuccessful* in the previous action and had to pay costs to the successful party and his own costs, and he now sought to recover both sets of costs from the defendant whose wrong had been the cause of the previous action.

58 The positions in the United Kingdom for both situations prior to and after 1986 are different

given the change to the costs regime made in 1986 to move from necessary costs to reasonable costs (see generally *McGregor on Damages* ([16] *supra*) at paras 17-003 to 17-019). Without differentiating the two situations and citing cases pre and post 1986, the defendants referred to these cases as supporting the proposition that only taxed costs can be recovered (and hence my remark about conflating the different principles in their submissions). Without going into the details of these cases and the law (and the position in England for situation (b) post 1986 appears to be open and unsettled (see *McGregor on Damages* at para 17-009)), it would be clear that the present case does not quite fall under either situation. The plaintiff is not strictly speaking a party in SUM 3453/2006 or OS 1106/2002 but had merely intervened at the hearing for the execution of the writ of possession by OCBC. Although he was unsuccessful in resisting the eviction, he did not have to pay the costs for OCBC; in fact, he was awarded $1,000 costs (payable by the defendants) by the Assistant Registrar. On this ground alone, it would be sufficient for me to dismiss the defendants' argument.

59 In my view, it would have be within the contemplation of the parties (from a contract's perspective) and/or reasonably foreseeable (from a tort's perspective) (see [61]–[74] below for the tests of remoteness for contract and tort) in this case that the plaintiff would have to incur legal fees to contest the eviction as a result of the defendants' breach, and the defendants are not contending otherwise at least in respect of this set of legal costs. The plaintiff should thus be allowed to recover the legal costs he incurred for contesting the eviction. However, the damages awarded for this set of legal costs should rightly take into account the $1,000 the plaintiff was awarded as costs at the hearing of SUM 3453/2006. As such, I will award the plaintiff the sum of $14,099.91 ($15,099.91 - $1,000).

Remoteness of damage

60 I turn now to consider the issue of remoteness in relation to the second set of legal costs.

61 As reaffirmed by the Court of Appeal in *Robertson Quay* ([16] *supra*), the test of remoteness for contract in Singapore is the famous and hallowed rule laid down by Alderson B in *Hadley v Baxendale* (1854) 9 Exch 341 at 354 ("the rule in *Hadley*"), as restated by Asquith LJ in *Victoria Laundry (Windsor) Ld v Newman Industries Ld* [1949] 2 KB 528. The test is premised on the criterion of "reasonable contemplation" of the parties and comprises of two limbs – damages under the first limb are known as "ordinary damages" which flow naturally from a breach of contract and damages under the second limb are known as "extraordinary damage", which do not flow naturally from a breach of contract, but rather are due to special circumstances (*Robertson Quay* at [59]; see also [81]–[82]):

> … the criterion of "reasonable contemplation" applies to both limbs of the rule in *Hadley*, although a difference exists between its application with respect to each of the two limbs. For the first limb of *Hadley*, the horizon of contemplation is confined to loss which arises naturally in the usual course of things and which is therefore presumed to have been within the contemplation of the parties. For the second limb of the rule in *Hadley*… , by reason of the special knowledge possessed by the party who breaches the contract… , the horizon of contemplation is extended to loss that does not arise in the usual course of things (see *The Heron II* at 415–416).

62 The rationality and functionality of the rule in *Hadley* was also given elucidation by Andrew Phang JA in *Robertson Quay*, who gave two main reasons for the rule. First, he explained that the rule in *Hadley* served as a useful distinction between the rules and principles relating to remoteness in the law of contract and those in tort (*Robertson Quay* at [71]). Secondly, and more importantly, the rule in *Hadley* "most appropriately" described the rules relating to remoteness in the context of the law of

contract (*id* at [74]), having regard to the concept that the law of contract, put simply, is about agreement (*id* at [75]). He explained that save for instances where the contractual parties have made provision for remedies and damages in the event of breach by including a liquidated damages clause in their contract, the parties would not have fixed in advance the type as well as the amount of monetary loss recoverable. The courts would thus have to formulate "default rules" of universal application as to what would be recoverable and what would be too remote to be recoverable, bearing in mind that the parties had the opportunity to communicate with each other in advance and the need to preserve the sanctity of contract (*id* at [76]–[79]). The two limbs in the rule in *Hadley* thus provided such default rules that were both just and fair.

63 Shortly after *Robertson Quay* was decided by the Singapore Court of Appeal, the House of Lords reconsidered the rules of remoteness for contract in *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61 ("*The Achilleas*") and appeared to favour a shift from the orthodox approach premised on the reasonable contemplation of the contracting parties (as embodied in the rule in *Hadley*) to one premised on the assumption of responsibility, *ie*, a contractual party is only liable for such losses that he has assumed responsibility. Such a view was put forward most strongly by Lord Hoffmann who held at [12]:

> *It seems to me logical to found liability for damages upon the intention of the parties (objectively ascertained) because all contractual liability is voluntarily undertaken*. It must be in principle wrong to hold someone liable for risks for which the people entering into such a contract in their particular market, would not reasonably be considered to have undertaken. [emphasis added]

64 *The Achilleas* was a case involving a claim by the owners of a vessel for loss of profits against a charterer for the *entire* duration of a follow-on charter caused by the late redelivery of the vessel. The owners had fixed the follow-on charter at a lucrative rate. Due to the delay in redelivery by the charterer, they had to reduce the rate in consideration of an extension of the cancellation date in the follow-on charter and in the light of a sudden fall in the market rate. The majority of the arbitrators awarded the loss of profits claimed on the basis that such loss arose naturally from the breach of contract, despite having found that there was a general understanding in the shipping market that a charterer would only be liable for damages for the *period of late delivery*. The arbitrators' decision was upheld by both the first instance judge and the Court of Appeal but was reversed by the House of Lords. Lord Hoffmann held that, if one considered what the parties, contracting against the background of market expectations found by the arbitrators, would have considered the extent of the liability they were undertaking, it would be clear that the charterer could not have assumed responsibility for such loss of profits on the follow-on charter (*The Achilleas* at [23]).

65 It would appear that the approach based on the assumption of responsibility would be a more stringent approach, given that a claimant would not recover, even for losses that were not unlikely to occur in the usual course of things, if the defendant cannot reasonably be regarded as having assumed responsibility for losses of the kind suffered (*Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) ("*Chitty*") in vol 1 at para 26-100A).

66 Interestingly, the difference in approach taken by our Court of Appeal in *Robertson Quay* and the House of Lords in *The Achilleas* were considered recently in the local context by AR Teo Guan Siew in *Chee Peng Kwan v Toh Swee Hwee Thomas* [2009] SGHC 141 ("*Chee Peng Kwan*") and Goh Yihan in a case commentary on *Robertson Quay* (see (2009) 9 OUCLJ 101 ("Goh's commentary")). Both, in my view, provided invaluable insight on this issue. In his judgment (at [38]–[39]), AR Teo pointed out that the fundamental difference between the two approaches is essentially a point of principle – the Court of Appeal saw the rule of remoteness as an *external* rule of law imposed upon

the parties to every contract in default of express provision to the contrary, while the House of Lords saw the rule of remoteness as a *prima facie* assumption about what the parties may be taken to have intended to assume responsibility for, but rebuttable in cases where the context and circumstances show that a party would not reasonably have been regarded as assuming responsibility for such losses (see also *The Achilleas* at [9] *per* Lord Hoffmann). Goh opined that, on a closer examination, the two approaches may not be that different if the Court of Appeal's approach is seen as providing default rules applicable in the absence of agreement, *accompanied* by an *implicit* allocation of risk and responsibility (see Goh's commentary at pp 105–106). However, he was of the view there were still "practical differences in how [the] conceptual understanding [of remoteness principles] is to be given effect" (Goh's commentary at p 107). In this regard, he said (at p 107):

> While the Court of Appeal uses allocation of risk and responsibility as a justification for the rule in *Hadley v Baxendale*, it is not imported as a requirement. Indeed, the mere requirement of knowledge (actual or imputed), and the equation of knowledge with liability, would mean that the justificatory reason of agreement is imputed instead of actual. There is no need for actual agreement, even implied, to bear such loss. On the other hand, the approach of Lord Hoffmann and Lord Hope in *The Achilleas* is to bring the justification to bear in terms of the requirement; what needs to be objectively ascertained is whether there is really assumption of responsibility for the type of loss in question by the contracting parties.

67 Leaving aside the difference in principle between the two, it would not be wrong to say that at the heart of both approaches is still the ultimate desire to provide for the recoverability of damages for breach of contract in a way that gives the *best* effect to the concept of a contract as an *agreement*. We have seen the emphasis placed by Lord Hoffmann on discerning the intention of the parties so as to determine effectively the losses the parties have *agreed* to undertake for their breach (see [63] above). Likewise, Andrew Phang JA made it clear that the rule in *Hadley* should continue to be applied by the courts because "the two limbs of the rule in *Hadley* are wholly consistent with – and, in fact, give effect to – the concept of contract as an *agreement*" (*Robertson Quay* ([16] *supra*) at [83]). On a practical note, it would be more likely than not that both approaches will lead to the same outcome in most cases. The losses which are within the reasonable contemplation of the parties will most probable than not coincide with the losses that the parties can be taken to have assumed responsibility on an *objective* assessment of their intention (in Lord Hoffmann's own words, the parties' intention is to be "*objectively* ascertained" [emphasis added] (see [63] above)). Lord Hoffmann himself had in fact stressed that departure from the orthodox rule based on individual circumstances will be unusual (*The Achilleas* ([63] *supra*) at [11]; see also Edwin Peel, "Remoteness Revisited" (2009) 125 LQR 6 ("Peel") at p 9). Thus, even on the facts of *The Achilleas*, Lord Hoffmann opined that the same outcome could perhaps have been reached on the orthodox approach, contrary to what the arbitrators, the first instance judge and the Court of Appeal had thought (at [24]):

> The findings of the majority arbitrators shows that they considered their decision to be contrary to what would have been the expectations of the parties, but dictated by the rules in *Hadley v Baxendale* as explained in *The Heron II* [1969] 1 AC 350 . *But in my opinion these rules are not so inflexible; they are intended to give effect to the presumed intentions of the parties and not to contradict them*. [emphasis added]

Likewise, Lord Walker of Gestingthorpe allowed the appeal on grounds that were reminiscent of both approaches (see *The Achilleas* at [69], [86] and [87]). Two other members of the House, Lord Rodger of Earlsferry and Baroness Hale of Richmond (who agreed with Lord Rodger's reasons), in fact decided on the orthodox approach (see *The Achilleas* at [52], [60] and [93]). Given that the two approaches can be said to share a common ultimate aim and the likelihood of similar outcomes in most cases, it

could perhaps be said that the two are not wholly irreconcilable (a point similarly shared by Goh), though admittedly the point of principle as pointed out by AR Teo remains.

68 Turning then to this more difficult question of principle, should the rule of remoteness be seen as an external rule of law or an assumption of responsibility? The former, in my view, would appear to accord more to the *realities* of the contracting process. It would not be wrong to say that for contracts where there is an absence of express provisions providing for breach and/or remedies, the parties usually do not apply their minds during the formation of the contract to what is to happen in the event of a breach and what kind of losses the party in breach should be liable (see *McGregor on Damages* ([16] *supra*) at para 6-171 and Andrew Robertson, "The Basis of the Remoteness Rule in Contract" (2008) 28 Legal Studies 172 ("Robertson") at p 176 where it is cogently argued that parties usually contemplate performance rather than breach). For if they have done so, they would in the ordinary course of things have made express provisions for such event in their contract. It has thus been observed that discerning the intention of the parties under the assumption of risk approach may be an *artificial* exercise since there would usually be little or no evidence of the parties having thought about the risks they were accepting (Peel at p 11 and *Chee Peng Kwan* at [36]; see also Robertson at pp 185–186 and 196). It follows that there are limits to the extent that it is feasible to determine liability by reference to an assumption of responsibility, and such an approach may engender more uncertainties than a simple rule that the party in breach is liable for all losses that are sufficiently likely to occur in the usual course of things, or whose likelihood has been brought home to him when the contract was made, unless he has validly excluded or restricted his liability (see *Chitty* at para 26-100G and *McGregor on Damages* at para 6-171).

69 The assumption of responsibility approach which gives primacy to the intention of parties may also not be entirely consonant with the accepted concept that the rule of remoteness is essentially one of *policy*. As pointed by VK Rajah JA in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR 782 ("*Sunny Metal (CA)*") (at [51] and [56]), the rule of remoteness "[embodies] legal principles strictly founded upon reasons of policy", where legal policy and accepted value judgment must be the "final arbiter" on what is the right balance to strike between a claimant's right to full compensation and indeterminate liability for a defendant (see also *McGregor on Damages* at paras 4-023, 6-080 and 6-155, Edwin Peel, *Treitel on the Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) at para 20-082 and *Chee Peng Kwan* at [40]). From a policy perspective, it may be questionable why the courts should provide additional protection to defendants in *all* cases by imposing a higher threshold in insisting that a defendant should only be liable for losses that he could be said to have reasonably assumed responsibility (see also [65] above). As noted by Lord Reid in *The Heron II* ([16] *supra*) (at 385–386) and Andrew Phang JA in *Robertson Quay* (at [71] and [75]–[76]), parties in a contract case, unlike those in tort, have the opportunity to direct each other's attention to the unusual risks and either can take extra precautions to safeguard his position. Leaving aside the more unusual cases like *The Achilleas*, why should the courts provide additional protection in most other cases then (see *Chitty* at para 26-100G)?

70 Lastly, it should perhaps be noted that insofar as the approach of assumption of responsibility is concerned, the House of Lords in *The Achilleas* does not appear to be unanimous on this point. Lord Hoffmann and Lord Hope of Craighead were the only two in favour of the assumption of responsibility approach and decided on that basis. As pointed out, Lord Walker seemed to have decided on grounds embodying both approaches, while Lord Rodger and Baroness Hale simply decided on the orthodox approach and declined to express any firm views on Lord Hoffmann's approach. It is thus not surprising that the learned authors of *McGregor on Damages* have argued that that view of Lord Hoffmann and Lord Hope did not command a clear majority so as to make it into the *ratio decidendi* of *The Achilleas* (at para 6-173). The assumption of responsibility approach also appears to run precariously close to the implied term approach that was previously rejected by the House of Lords in

The Heron II (at 422 *per* Lord UpJohn). What then can one make of the decision of the House of Lords in *The Achilleas*? In the recent case of *Supershield Limited v Siemens Building Technologies Fe Limited* [2010] EWCA Civ 7, Lord Justice Toulson, delivering the judgment of the English Court of Appeal, had this to say about the effect of *The Achilleas* on the law of remoteness in contract (at [43]):

Hadley v Baxendale remains a standard rule but it has been rationalised on the basis that it reflects the expectation to be imputed to the parties in the ordinary case, i.e. that a contract breaker should ordinarily be liable to the other party for damage resulting from his breach if, but only if, at the time of making the contract a reasonable person in his shoes would have had damage of that kind in mind as not unlikely to result from a breach. However, …Transfield Shipping [ie, *The Achilleas*] [is] authority that there may be cases where the court, on examining the contract and the commercial background, decides that the standard approach would not reflect the expectation or intention reasonably to be imputed to the parties. In those two instances the effect was exclusionary; the contract breaker was held not to be liable for loss which resulted from its breach although some loss of the kind was not unlikely. But logically the same principle may have an inclusionary effect. If, on the proper analysis of the contract against its commercial background, the loss was within the scope of the duty, it cannot be regarded as too remote, even if it would not have occurred in ordinary circumstances. [emphasis added]

Similarly, the learned authors of *Chitty* ([65] *supra*) are also in favour of confining *The Achilleas* to only exceptional circumstances (see para 26-100G). All that can be safely said for now is that it remains to be seen if the assumption of responsibility would become the governing rule for remoteness in contract in the United Kingdom.

71 Insofar as Singapore is concerned, the law since *Robertson Quay* has been settled, albeit the Court of Appeal has yet to have the opportunity to consider the case of *The Achilleas*.

72 Turning now to the test of remoteness in tort, the test is simply one based on reasonable foreseeability (see in particular the classic Privy Council decision of *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] 1 AC 388, *Ho Soo Fong v Standard Chartered Bank* [2007] 2 SLR 181 at [39] and *Sunny Metal (CA)* at [56]).

73 As alluded to above (at [16]), the test in tort is broader than that in contract. The difference between the two tests has been explained in *Sunny Metal (HC)* ([16] *supra*) at [138] (although the decision of the High Court was reversed, this point was not disapproved by the Court of Appeal):

> It is clear that, *ceteris paribus*, the *tortious* principles of remoteness are *broader* than the corresponding *contractual* principles. Indeed, it would conduce towards more clarity if the phrase "reasonable *foreseeablity*" was utilised to describe the *tortious* principles of remoteness, and the phrase "reasonable *contemplation*" was utilised to describe the *contractual* principles of remoteness. Put simply, the tortious principles of remoteness are broader and more "generous" simply because, apart from situations where there is *concurrent* liability in both tort and contract, a situation involving tortuous liability would relate to parties who have had *no prior relationship with each other*. This is, of course, in *stark contrast* to a situation involving *contractual* liability where there would, *ex hypothesi*, be an existing (contractual) relationship between the parties. In such a situation, the parties would be expected to provide for any reasonable contingencies that might be expected to arise. In any event, it would be easier to *infer* what the parties might have provided even if no express term covered the contingency concerned (for example, a term could possibly be *implied* either "in fact" or "in law"). It is only logical and commonsensical, therefore, that *stricter* rules and principles of remoteness obtain in

the contractual – as opposed to the tortious – sphere. [emphasis in original]

74 It has been held by the High Court that where there is concurrent liability in both contract and tort that arises out of legal duties owed in both contract and tort, the stricter rules and principles of remoteness in contract ought to prevail (*Sunny Metal (HC)* at [139]–[140]). The present case does not strictly concern concurrent liability/duties as that envisaged by the High Court in *Sunny Metal (HC)*, given that there are two separate judgments here, one in contract against Mintwell and the other in tort against Mintwell and Seah (and the latter is for misrepresentation). However, it can be safely said that if the stricter test of remoteness in contract is satisfied in this case, then the lower test of remoteness in tort should also be satisfied given that both judgments arose out of the same facts. The same, however, cannot be said for the converse situation. Given the difference in the tests between remoteness in contract and tort, it is plausible that there may be a situation where a certain loss is too remote to be recovered under the judgment in contract, but not so under the judgment in tort. Fortunately, I am of the view that no such situation arises in the present case (for the reasons given below). In any event, I also note that the parties appear to be in agreement that the rules of remoteness in contract should govern and they have submitted on that basis with no reference to the rules in tort [note: 22]. I turn now to the application of the law to the facts.

75 Generally, courts have allowed a claimant to recover legal costs incurred as a result of a defendant's breach, be it in contract or tort (see generally *McGregor on Damages* ([16] *supra*) at paras 2-031 and 2-053). The cases cited by the defendants in respect of the legal costs of contesting the eviction (though distinguishable) (see [56] above) also show that legal costs incurred by a claimant in an earlier proceedings brought about by a defendant's breach may be recoverable in law as damages.

76 Turning to the second set of legal costs of $2,091.29, I am of the view that the legal costs incurred on the Changi South premises are recoverable under the first limb of the rule in *Hadley*. It would have been within the reasonable contemplation of both parties that the plaintiff would in the ordinary course of things have to incur another set of conveyancing fees if he had to give up the premises at Mintwell Building prematurely and to take up alternative premises for his business. Such damage would have flowed naturally from the defendants' breach. I note that the defendants have themselves acknowledged that such costs would not be too remote to be recoverable, having taken the position that the plaintiff is entitled to one tranche of legal fees in his search for alternative premises (see [56] above).

77 However, the same cannot be said for the legal costs incurred for the Tai Seng premises. I do not think it would have been within the contemplation of the parties that the plaintiff would actually incur more than one set of legal fees for title search/conveyancing. When they entered into the leases, neither party could have reasonably thought that the breach in the present case would have entitled the plaintiff to run checks on all alternative premises that he considered but has yet to make up his mind whether to take up or not and to recover all legal costs incurred in the process. Such legal costs would be too remote to be recoverable under the first limb of the rule in *Hadley*. There are also no special circumstances that would justify the application of the second limb of the rule in *Hadley* in this case. The plaintiff should therefore recover no more than one set of legal costs for the alternative premises. Leaving aside disbursements, I note that the invoice rendered by the plaintiff's solicitors unfortunately do not show the breakdown of the legal costs incurred in respect of the Tai Seng premises and the Changi South premises but only a general figure of $1,700 (without GST) for work done in relation to both premises [note: 23]. In these premises, I would only award the plaintiff half the amount claimed, *ie*, $1,045.65.

Conclusion

78 For all the reasons above, I award the plaintiff a total of $211,492.89 in damages, and the breakdown is as follows:

(a) $191,195.38 for expenses incurred for renovation works at the Changi South premises;

(b) $5,151.95 for labour costs for the plaintiff's staff incurred in relation to the move to the Changi South premises;

(c) $14,099.91 for legal costs incurred for contesting the eviction in SUM 3453/2006; and

(d) $1,045.65 for the title search/conveyancing fees for the lease of the Changi South premises.

79 I will hear the parties on the question of interest and costs.

[note: 1] See the defendants' written submissions at paras 6–11.

[note: 2] Defendants' written submissions at para 24.

[note: 3] Defendants' written submissions at para 25.

[note: 4] Defendants' written submissions at paras 28–31.

[note: 5] See the plaintiff's written submissions at para 65.

[note: 6] Defendants' written submissions at para 33.

[note: 7] Defendants' written submissions at paras 43–45.

[note: 8] Plaintiff's written submissions at paras 12 and 14.

[note: 9] Plaintiff's supplementary affidavit of evidence-in-chief ("AEIC") at pp 62–66.

[note: 10] Plaintiff's supplementary AEIC at para 21.

[note: 11] Plaintiff's supplementary AEIC at para 20.

[note: 12] Plaintiff's supplementary AEIC at para 23.

[note: 13] Plaintiff's supplementary AEIC at para 13.

[note: 14] Plaintiff's supplementary AEIC at para 17.

[note: 15] Plaintiff's supplementary AEIC at para 13.

[note: 16] Defendants' written submissions at para 98.

[note: 17] Plaintiff's written submissions at paras 118–119.

[note: 18] Plaintiff's written submissions at para 118.

[note: 19] Plaintiff's written submissions at para 119.

[note: 20] Defendants' written submissions at para 116.

[note: 21] Defendants' written submissions at para 124.

[note: 22] See the plaintiff's written submissions at para 19 and the defendants' written submissions at para 123.

[note: 23] See the plaintiff's AEIC at p 87.