IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 268

Suit No 67 of 2016
(Registrar's Appeal No 153 of 2016; Summons No 2465 of 2016)

Between

EA Apartments Pte Ltd

… Plaintiff

And

(1) Tan Bek
(2) Lew Chen Chen
(3) Lew Kay Tiong
(4) Lew Keh Lam
(5) Chambers Law LLP

… Defendants

GROUNDS OF DECISION

[Civil procedure] — [Pleadings] — [Amendment] — [Striking out]

[Tort] — [Misrepresentation] — [Fraud and deceit]

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v
Tan Bek and others

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9 May; 6, 15 June; 15 August 2016.

1 December 2016

Hoo Sheau Peng JC:

Introduction

1 This action concerned claims connected to a tenancy agreement entered into by the plaintiff, EA Apartments Pte Ltd, to lease certain premises for its use. The plaintiff's case, however, was obscured by extremely poor pleading. In the statement of claim ("the SOC"), as far as I could tell, the plaintiff alleged that there was misrepresentation by concealment of information on the suitability of the premises for use as a dormitory ("the misrepresentation claim"); that there was breach of the tenancy agreement ("the contract claim"); and that there was breach of the duty of care owed to the plaintiff by the lawyer and the law firm in the preparation of the tenancy agreement ("the breach of duty claim").

2 In due course, I shall deal with the specific problems with the SOC. For now, it suffices to say that the defendants succeeded in their application before the learned Assistant Registrar ("the AR") to strike it out, on the ground that it did not disclose any reasonable cause of action under O 18 r 19(1)(*a*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC").

3 The plaintiff took out Registrar's Appeal No 153 of 2016 to appeal against the AR's decision, and thereafter, took out Summons No 2465 of 2016 to substantially amend the SOC, annexing a proposed draft ("the draft amended SOC"). In it, the plaintiff completely revised the misrepresentation claim ("the new misrepresentation claim"), abandoned the contract claim and sought to shore up the breach of duty claim.

4 Having considered the parties' submissions, I disallowed the amendment application, as I concluded, *inter alia*, that the draft amended SOC still disclosed no reasonable cause of action. I affirmed the AR's decision. At the plaintiff's request, I heard further arguments. What I heard did not change my decision. The plaintiff has appealed against my decision to dismiss the appeal, and I set out my reasons.

The parties

5 The plaintiff is a company engaged in real estate activities.

6 The first defendant, Tan Bek, and the second defendant, Lew Chen Chen, are the owners of the premises in question – being two properties at Nos 8 and 10 Lorong 25 Geylang Singapore. The first defendant is the second defendant's mother. For convenience, I shall refer to them as "Mdm Tan" and "Ms Lew" respectively.

7 The third defendant, Lew Kay Tiong, apparently managed the premises on behalf of Mdm Tan and Ms Lew. The fourth defendant, Lew Keh Lam, is Mdm Tan's husband and Ms Lew's father. I shall refer to the third and fourth defendants as LKT and Mr Lew respectively.

8 The fifth defendant, Chambers Law LLP ("Chambers Law") is the law firm of which Ms Lew, a solicitor by profession, is a managing partner.

The Statement of Claim

9 The SOC was a brief three-page document comprising 12 paragraphs. The first three paragraphs introduced the defendants. In the remaining paragraphs, the plaintiff made the following allegations:

(a) Around early June 2015, Mr Lew had negotiated with the plaintiff regarding the plaintiff "leas[ing] the premises from the owners for a period of two years as a dormitory on an 'as is, where is' basis" (see para 4);

(b) During the negotiations, Mr Lew and Ms Lew had "knowingly concealed" from the plaintiff the fact that Ms Lew had been served with two Notices of Fire Safety Offences (the "Fire Safety Notices") by the Singapore Civil Defence Force (see para 5);

(c) The Fire Safety Notices showed that the premises had been converted to a dormitory without official approval, that illegal partitions had been constructed, that this had caused the fire safety measures to be inadequate, and that Ms Lew had been directed to alleviate the non-compliance within 14 days from the date of the Fire Safety Notices (see para 6);

(d) The defendants had "by the aforesaid suppression of information, and/or misrepresentation … induced the Plaintiffs to enter into a tenancy agreement with the Plaintiffs on 18 June 2015 on a 'as is , where is' and passed off the premises as fit for dormitory use" (see para 7);

(e) Mdm Tan and Ms Lew had subsequently breached the tenancy agreement by exercising the right to re-entry "on the same grounds as" the Fire Safety Notices (see para 8);

(f) The defendants had materially misrepresented to the plaintiff and had suppressed information relating to the Premises, and the plaintiff was "enticed to execute the [t]enancy [a]greement" (see para 9);

(g) Ms Lew and Chambers Law, as the solicitors who drew up the tenancy agreement, had "acted in a position of conflict and neglected to exercise reasonable skill, diligence and care" in discharging their duties to the plaintiff (see paras 10 and 11).

10 On the basis of the above allegations, in para 12, the plaintiff claimed to have suffered loss and damages, and sought the following reliefs:

(a) Reinstatement of the tenancy agreement under ss 18 and/or 18A of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) ("the CLPA"), with the defendants to regularise the infringements and apply for official approval for the premises to be used as a dormitory; or

(b) Alternatively, return of the deposit paid under the tenancy agreement and damages to be assessed.

The other pleadings

11 In the Defence, the defendants denied all the plaintiff's allegations, including the concealment of the Fire Safety Notices, and stated that Ms Lew acted solely for Mdm Tan who entered into the tenancy agreement in its preparation. More importantly for present purposes, at para 13 of the Defence, certain terms of the tenancy agreement (which the plaintiff did not dispute in its Reply to the Defence, and which formed part of the relevant context for assessing the SOC), stated that the plaintiff was, among other things, required:

> 2.10 To use or permit to be used the Premises for **approved purposes only**. …
>
> 2.11 To obtain all necessary permit, license and approval from the relevant authorities for the Tenant's usage of the Premises.
>
> 2.13 To obtain all necessary approval, permit or consent from the relevant authorities, as may be required under the rules, regulations and/or laws of Singapore, and comply with all requirements set out by the authorities for the Premises.
>
> …
>
> [emphasis in original]

12 In addition, pursuant to a request by the defendants, the plaintiff had provided Further and Better Particulars of the SOC ("FBP"), including these two relevant particulars:

> 3. Under [7] of the SOC
>
> …
>
> (a) Please state exactly the alleged misrepresentation made to the Plaintiffs and/or their representative(s)
>
> Answer
>
> The words to the effect that "everything is in order and proper and have confidence that EA Apartments Pte Ltd will do a better job of taking over and administer the premises [*sic*]
>
> (b) Please state the full name(s) of the person(s) who allegedly made the alleged misrepresentation

> Answer
>
> [Mr Lew]
>
> 7. Under [11] of the SOC
>
> …
>
> (a) Please state precisely the exact time, date[,] place and … how [Ms Lew and Chambers Law] came to under [*sic*] the 'works' on behalf of the [plaintiff] and whether it was orally made or … given in writing.
>
> Answer
>
> [Mr Lew] orally informed that the Plaintiffs' [Mr Lew] and Zhou Fengxing that his daughter, who is a lawyer, will prepare the Tenancy Agreement for their benefit and she will call to discuss when preparing the Tenancy Agreement on 3 June 2015 ...

While I found the phrase "[Mr Lew] orally informed that the Plaintiffs' [Mr Lew] and Zhou Fengxing" less than clear, I surmised that the plaintiff meant to say that Mr Lew had made the representation to Zhou Fengxing, who appeared to be one of the plaintiff's representatives.

The draft amended Statement of Claim

13 For ease of comparison with the contents of the SOC and the particulars in the FBP, I now turn to the draft amended SOC. This proposed deleting the entire contents of the SOC, and introducing 28 new paragraphs in substitution. The main proposed changes were as follows:

(a) LKT, the third defendant, would be removed as a party;

(b) The contract claim would be completely dropped;

(c) The new misrepresentation claim would be introduced, premised on completely new allegations. Plaintiff's counsel admitted in his submissions before me that this claim was founded on "a new

cause of action". In para 7 of the draft amended SOC, it was stated that Mr Lew represented to the plaintiff that Ms Lew and Mdm Tan "agreed to let the premises to the Plaintiff for it to operate a dormitory". In para 20(b), it was stated that the representation to the plaintiff through Mr Lew was that "it can operate the premises as [a] dormitory". In para 22(b), it was stated that Mr Lew was allowed to "orally and by conduct represent to the Plaintiff that it was allowed to operate the premises as a dormitory by introducing the Plaintiff to the hair salon operator and the occupants of the dormitory". The draft amended SOC also proposed fresh particulars to support this new cause of action.

(d) The misrepresentation claim founded on concealment or suppression of information would be virtually removed, with some of those matters recast as supporting facts.

(e) The breach of duty claim would remain, with the additional allegations that the plaintiff had retained Ms Lew and Chambers Law and had paid for the costs of the work done by them.

(f) In terms of relief sought, the prayer for reinstatement of the tenancy agreement would be dropped. Instead, the plaintiff sought damages to be assessed for being "deprived of the bargain" (see para 26). Such damages were to include the "rental income [the plaintiff] was earning and would have continued to earn for the duration of the tenancy agreement" (see para 27).

The appeal

The plaintiff's arguments

14 Before me, the plaintiff set out in its written submissions a number of factual propositions which it said could be "*gleaned/inferred* from the Statement of Claim and the proposed amendments" [emphasis added]. It stated that the plaintiff's "main cause(s) of action" were "misrepresentation inducing the Plaintiff to enter into a tenancy agreement" (as against Mdm Tan, Ms Lew and Mr Lew) and "breach of duty owed as solicitors to the Plaintiff" (as against Ms Lew and Chambers Law). The plaintiff then asserted that "[a] careful scruity [*sic*] of the Plaintiff's Statement of Claim, discloses the above cause[s] of action albeit not particularized or not particularized cogently".

15 The plaintiff cited the case of *Wright Norman and another v Oversea-Chinese Banking Corp Ltd* [1993] 3 SLR(R) 640 ("*Wright Norman*") for the proposition that amendment of pleadings should be allowed so long as it would allow the real issues between the parties to be ventilated and would not result in injustice. It submitted that any deficiencies were procedural irregularities (specifically, a breach of O 18 r 7(1) of the ROC) and that the AR should have addressed the irregularities before considering whether to strike out the claim. In any case, the draft amended SOC had been prepared for the court's consideration.

16 After receiving my unfavourable decision on 15 June 2016, the plaintiff requested (and was allowed) to present further arguments. In its request, in its further written submissions and through the plaintiff's counsel at the hearing on 15 August 2016, the plaintiff made the following arguments:

(a) Striking out should only be ordered when no possible amendment of a pleading would cure its defects (citing *The "Eishin Maru"* [1988] 1 SLR(R) 83 ("*The 'Eishin Maru'*") at [16]). The court had a wide discretion to order further amendments, and should exercise that discretion in respect of the missing material facts in the draft amended SOC. While the draft amended SOC lacked particulars, these particulars could be added;

(b) The defendants' silence could amount to an actionable misrepresentation as the defendants were aware of the plaintiff's false impression and chose not to correct it (citing *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR(R) 501 ("*Trans-World*") at [66] and [68]);

(c) The "as is, where is" provision in the tenancy agreement supported the plaintiff's case, as it meant that the premises could continue to be used for their current purpose as a dormitory (attempting to distinguish *Ajit Chandrasekar Prabhu and another v Yap Beng Kooi and another* [2015] SGHC 280 and *Chip Hup Hup Kee Construction Pte Ltd v Tng Peck Guek* [2010] SGDC 351); and

(d) A clause in the tenancy agreement (although not pleaded in the draft amended SOC) requiring the plaintiff to pay Mdm Tan's and Ms Lew's legal costs gave rise to a duty of care on the part of Ms Lew and Chambers Law, in the preparation of the tenancy agreement.

17 The plaintiff did not have any draft of its proposed further amendments for my consideration at the hearing on 15 August 2016. When queried, the plaintiff's counsel requested an additional week to prepare a draft, but did not explain why a draft had not yet been prepared.

The defendants' arguments

18 In relation to the SOC, the defendants' written submission repeated the main arguments before the AR, which were as follows:

(a) The misrepresentation claim should be struck out because there was no active representation pleaded and silence could not found an action except in a contract of utmost good faith.

(b) The contract claim should be struck out because:

(i) The plaintiff was relying on misrepresentation as the foundation of their claim (specifically, that exercising the right of re-entry "on the same grounds as the Notices of Fire Safety Offences" was a breach), but had not pleaded how the representation had become a term of the tenancy agreement; and

(ii) As against all but Mdm Tan and Ms Lew, the plaintiff had not pleaded how the defendants could have become parties to the tenancy agreement.

(c) The breach of duty claim should be struck out because the plaintiff had not pleaded how a solicitor-client relationship had arisen on the facts.

(d) The prayer for reinstatement of the tenancy agreement under ss 18 and/or 18A of the CLPA should be struck out because those provisions could not be invoked once a landlord had exercised the right of re-entry. It was also not a remedy available based on the misrepresentation claim.

19 Confronted with the draft amended SOC, and the request for further arguments, the defendants' counsel submitted as follows:

(a) The draft amended SOC still failed to disclose a reasonable cause of action as it was missing material facts, including particulars such as the precise representation made and their circumstances (citing *Bullen and Leake and Jacob's Precedents of Pleadings* (I H Jacob gen ed) (Sweet & Maxwell, 12th Ed, 1975) ("*Precedents of Pleadings 1975*") at 451 and 452), the relevant terms of the tenancy agreement, and the particulars for the breach of duty claim;

(b) *Trans-World* did not support the plaintiff's case as it required a wilful suppression of material facts and not a mere failure to correct a mistaken belief;

(c) "As is, where is" was a recognised legal term of art which the plaintiff could not twist to suit its purposes;

(d) The draft amended SOC was so radically different from the SOC that its "amendments" could not be considered to be true amendments. It would prejudice the defendants, who had faced great difficulty in formulating a defence to the vague SOC and would now have to adapt to a drastically different set of claims; and

(e) The plaintiff had been given multiple bites of the cherry and should not be given yet another chance to make major amendments to their SOC.

The legal principles

20 I first summarise the relevant general principles concerning what should be pleaded, the striking out and amendment of pleadings, which are well-established areas of law.

21 By O 18 r 7 and O 18 r 15(1) of the ROC, a party is required to set out in its pleadings all material facts on which he relies for his claim, and to state specifically the relief or remedy which he claims. Material facts are defined as those facts which are necessary for the purpose of formulating a complete cause of action (*Bruce v Odhams Press, Limited* [1936] 1 KB 697 ("*Bruce*") at 712, approved in *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd and others* [1992] 2 SLR(R) 382 at [29]). Also, these are "facts which will put the defendants on their guard and tell them what [case] they have to meet" (*Phillips v Phillips and others* (1878) 4 QBD 127 at 139, approved in *Shi Wen Yue v Shi Minjiu and another* [2016] 4 SLR 911 at [10]).

22 Furthermore, in relation to any allegation of misrepresentation and fraud, every pleading must contain the necessary particulars on which the party relies (see O 18 r 12(1)(*a*) of the ROC). In this regard, the defendants cited the *Precedents of Pleadings 1975* in support of the requirement to plead the precise representation made and their circumstances to found a misrepresentation claim (see [19(a)] above). I considered it desirable to supplement this old (albeit still useful) text by referring to *Bullen & Leake & Jacob's Singapore Precedents of Pleadings* (Prof Jeffrey Pinsler SC gen ed) (Sweet & Maxwell, 2016) ("*Singapore Precedents of Pleadings*") and *Bullen & Leake & Jacob's Precedents of Pleadings* (Mr Justice Blair *et al*, gen eds) (Sweet & Maxwell, 17th Ed, 2012) ("*Precedents of Pleadings 2012*"). The principles reflected in all three are substantially the same and are discussed in the course of the analysis below.

23 Turning to striking out of a pleading, the grounds to do so are provided within the four limbs of O 18 r 19(1) of the ROC. In the present case, the defendants relied primarily on O 18 r 19(1)(*a*), which allows a pleading to be struck out if it discloses no reasonable cause of action. In *Gabriel Peter &*

Partners (suing as a firm) v Wee Chong Jin and others [1997] 3 SLR(R) 649 ("*Gabriel Peter & Partners*"), the Court of Appeal stated (at [21]), citing and paraphrasing *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094 ("*Drummond-Jackson*") :

> … *A reasonable cause of action … connotes a cause of action which has some chance of success when only the allegations in the pleading are considered.* As long as the statement of claim discloses some cause of action, or raises some question fit to be decided at the trial, the mere fact that the case is weak and is not likely to succeed is no ground for striking it out. Where a statement of claim is defective only in not containing particulars to which the defendant is entitled, the application should be made for particulars under O 18 r 12 and not for an order to strike out the statement.
>
> [emphasis added]

24 In order for it to be said that a cause of action has some chance of success, it has to be supported by material facts (as earlier discussed). Thus, a statement of claim which omits material facts is defective and may be struck out as disclosing no reasonable cause of action: *Recordtv Pte Ltd v MediaCorp TV Singapore Pte Ltd and others* [2009] 4 SLR(R) 43 ("*Recordtv*") at [18]. Also relevant are O 18 r 19(1)(*b*), which permits a pleading to be struck out if it is "scandalous, frivolous or vexatious", and O 18 r 19(1)(*d*), which permits a pleading to be struck out if "it is otherwise an abuse of the process of the Court". The latter overlaps with the inherent power of the court under O 92 r 4 to "make any order as may be necessary … to prevent an abuse of the process of the Court". Both of these grounds offer alternative bases for striking out a statement of claim which omits material facts: *Recordtv* at [18].

25 Finally, O 18 r 19(1) of the ROC allows the court to order amendments to a pleading instead of striking it out. It is trite that amendment should generally be allowed where it would allow the real question between the parties to be determined, provided it would be just in all the circumstances of

the case to grant leave to amend: *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [113]. However, for obvious reasons, an amendment which would itself be liable to be struck out pursuant to O 18 r 19(1) will not be allowed.

Did the Statement of Claim disclose any reasonable cause of action?

26 At I observed at [2], there were problems with the SOC. The plaintiff did not properly characterise the three causes of action relied on, or plead the elements within. In fact, the SOC was bereft of the material facts and necessary particulars to support the claims. In addition, the plaintiff did not clearly identify against whom each cause of action was brought, or the relief or remedy claimed in relation to each cause of action. In my view, it could not be said that the SOC was merely deficient in particulars which the defendant was entitled to ask for but which were not crucial to the plaintiff's claims. Rather, there was a serious lack of material facts and necessary particulars without which the causes of action were incomplete and the claims founded upon them could not possibly succeed.

The misrepresentation claim

27 I elaborate. In relation to the misrepresentation claim, it was not expressly stated in the SOC which ground of misrepresentation – fraudulent, negligent or innocent – was being relied on. Based on the plaintiff's allegations of knowing concealment and suppression of material facts, and the absence of any alternative allegations which could relate to negligent or innocent misrepresentation, it appeared that fraudulent misrepresentation (*ie*, the tort of deceit) was the closest fit. In *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435, the Court of Appeal set out the elements of the tort of deceit as follows (at [14]):

> … First, there must be a representation of fact made by words or conduct. Second, the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff. Third, it must be proved that the plaintiff had acted upon the false statement. Fourth, it must be proved that the plaintiff suffered damage by so doing. Fifth, the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true.

28 Each element of the tort is a material fact that must be pleaded, with full and precise particulars. As stated in *Singapore Precedents of Pleadings* at para 20.20, such particulars include "the nature and extent of the misrepresentation, who the representor and representee are, [and] whether the representation was made orally or in writing". If any of the essential particulars are omitted, the pleading may be struck out: *Kim Hok Yung and others v Cooperative Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank) (Lee Mon Sun, third party)* [2000] 2 SLR(R) 455 at [6].

29 In the present case, the SOC was clearly defective. In the first place, the plaintiff failed to plead any positive representation of fact; it merely alleged concealment and suppression of the Fire Safety Notices (see para 7 of the SOC). The plaintiff argued that this silence could, on its own, give rise to a misrepresentation. On this point, although I could not accept the defendants' submission that silence could give rise to a misrepresentation *only* in contracts of utmost good faith, I also could not accept the plaintiff's submission that *Trans-World* stood for the proposition that failing to disabuse the plaintiff of a mistaken belief would, without more, constitute misrepresentation. At [66] of *Trans-World*, the court made it clear that this would not be enough:

> Misrepresentation by silence entails more than mere silence. A mere silence could not, of itself, constitute *wilful conduct designed to deceive or mislead*. The misrepresentation of statements comes from a w*ilful suppression of material and important facts* thereby rendering the statements untrue.

[emphasis added]

30 Examples of wilful suppression from the case law included keeping a vessel afloat (as opposed to in dry dock) so as to prevent its hull from being inspected for defects (*Schneider v Heath* (1813) 3 Camp 506) and the use of paint to cover up dry rot in an apartment to be leased (*Gordon v Selico Ltd* (1985) 275 EG 841 (Ch D)). In contrast, passively acquiescing in another's self-deception was not sufficient (*Smith v Hughes* (1871) LR 6 QB 597; *Arkwright v Newbold* (1881) 17 Ch D 301; see also *Singapore Precedents of Pleadings* at para 20.09). Moreover, even where wilful suppression was made out, its effect would be to modify a *positive statement* so as to make it untrue. It followed that a positive statement must still be pleaded, or else there would be nothing for the wilful suppression to modify.

31 From the SOC, the most that could be said was that Ms Lew and Mr Lew passively acquiesced in the plaintiff's self-deception that the premises were officially approved for use as a dormitory. Given the lack of clarity in the plaintiff's case, I noted that in the plaintiff's request for further arguments, the plaintiff's counsel explained that the source of the plaintiff's belief was that "[t]he plaintiffs were *given an impression*, when they inspected the premises that this would be allowed *since the previous tenant of the premises had partitioned the premises and had used the premises as a dormitory*" [emphasis added]. Read in the context of the SOC, I understood this submission to mean that this "impression" was one which the plaintiff's agents formed through their own observation and inference that the premises were suitable in that they were *officially approved* and therefore could be used as a dormitory. I did not think that merely omitting to mention the Fire Safety Notices could possibly count as "wilful suppression" (or, in the plaintiff's own words, having "knowingly concealed" the notices) as contemplated in *Trans-World*.

This was especially untenable when read in light of the specific provisions in the tenancy agreement requiring the plaintiff to obtain the necessary approvals/licenses (see [11] above). For better or worse, the law did not oblige parties dealing at arm's length to disclose to each other all that was detrimental to their bargaining position.

32 In any case, as stated above at [29], no positive statement was pleaded at all. In fairness to the plaintiff, I noted that in the relevant particular in the FBP, it was alleged that a positive statement was made by Mr Lew to the effect that "everything is in order and proper and have confidence that EA Apartments Pte Ltd will do a better job of taking over and administer the premises". However, nothing was stated as to how this positive statement was rendered untrue (nor did I see how it could be rendered untrue given the vague and neutral nature of the statement) by the alleged wilful suppression of the information.

33 For these reasons, I concluded that the plaintiff in its SOC had failed even to plead an actionable representation, which was the first element of the tort of deceit, and for that matter any other claim based on misrepresentation. Additionally, the plaintiff failed to plead (and did not attempt to add in the FBP) the equally essential elements of an intention that the representation be acted on and damage suffered as a result of acting upon it.

34 Finally, I should add that I did not consider the plaintiff's argument based on the use of the phrase "as is, where is" to have any merit. It was clear from the case authorities that the usual meaning of "as is, where is" was that the property was to be sold or leased in the condition it was found in, without any promise as to its state and condition. Although it was theoretically possible that the parties in this case had intended to use it in a further, atypical

sense that the premises were officially approved to be used as a dormitory (as suggested by the plaintiff), no facts were pleaded which would support such an interpretation. The use of the term was a further impediment to the plaintiff's case, not an aid to it.

The contract claim

35 On the contract claim, the only parties who had a plausible link to the tenancy agreement were Mdm Tan and Ms Lew, as it was pleaded in the SOC that both Mdm Tan and Ms Lew had exercised rights pursuant to it (although it appeared from the Defence that only Mdm Tan signed the tenancy agreement). In other words, the other defendants were not parties linked to the tenancy agreement. Regarding the alleged breach, at para 8 of the SOC, it was pleaded that Mdm Tan and Ms Lew exercised their right of re-entry "[i]n breach of the [tenancy agreement]". However, there was no explanation whatsoever as to how exercising the right of re-entry was a breach, and of what term of the tenancy agreement. I do not propose to say more about this claim as the plaintiff subsequently dropped the contract claim in its draft amended SOC.

The breach of duty claim

36 On the pleaded facts, it was simply not possible to see how a duty of care could have arisen between the plaintiff and Ms Lew and Chambers Law in their capacity as solicitors. Paragraphs 10 and 11 of the SOC did not contain any particulars at all as to the circumstances based on which it could be said that Ms Lew and Chambers Law acted on behalf of the plaintiff, rather than just for Mdm Tan, who entered into the tenancy agreement with the plaintiff. In the FBP, when pressed for details, the plaintiff stated that Mr Lew "orally informed" the plaintiff's representatives that Ms Lew "who is a lawyer, will

prepare the tenancy agreement *for their benefit* and she will call to discuss when preparing the tenancy agreement" [emphasis added]. However, there was no explanation of why Mr Lew would have any authority to make that representation on behalf of Ms Lew or Chambers Law. There was also no allegation that Ms Lew actually called or met the plaintiff to discuss the tenancy agreement. These bare facts simply could not give rise to a finding of a duty of care. Even with the added particular, the breach of duty claim could not be made out.

37 Consequently, I found that the SOC indeed disclosed no reasonable cause of action and the AR was right to strike it out on this ground. Alternatively, striking out could equally have been justified on the ground that the SOC was vexatious, frivolous, or otherwise an abuse of process.

Did the draft amended Statement of Claim disclose any reasonable cause of action?

38 It was apparent that the draft amended SOC contained substantial changes aimed at remedying the serious defects in the SOC (see [13] above). I agreed with defendants' counsel's submission that implicitly, there was a concession by the plaintiff that the AR's decision to strike out the SOC had been correct. Considering the width of the court's powers to amend, I would have been prepared to allow amendments to add new material facts and/or a new cause of action. However, it was incumbent on a party to ensure that the proposed amendments were in order. For the reasons set out below, I was of the view that the proposed amendments in the draft amended SOC still failed to disclose a reasonable cause of action and should not be allowed.

The new misrepresentation claim

39 In relation to the new misrepresentation claim, the plaintiff was no longer relying on mere silence. Instead, paragraphs 7, 8, 20(b) and 22(b) of the draft amended SOC contained *positive* representations by Mr Lew. Again, it was not entirely clear whether these new representations were alleged to be fraudulent or not; aside from a passing reference to "wilful suppression", nothing was said as to the intent or knowledge of the defendants. The paragraphs were also not consistent as to what the exact representations were. Broadly speaking, they appeared to be representations to the effect that the landlords would *allow* the plaintiff to use the premises as a dormitory. Thus pleaded, the statements in these paragraphs appeared to constitute statements of intention on the part of the landlords only, and not statements of fact regarding any particular state of affairs. It was well-established that statements of future intention were generally not actionable: *Precedents of Pleadings 2012* at para 58–02.

40 Certainly, these positive statements did not go far enough to constitute an actionable representation, such as a representation to the effect that no further approvals or licenses would need to be sought in order for the premises to be used as a dormitory. Even taking into account the alleged non-disclosure of the information in relation to the Fire Safety Notices pleaded at para 22(d) of the draft amended SOC, I was of the view that the allegations were insufficient. Again, I was mindful of the specific provisions in the tenancy agreement requiring the plaintiff to use the premises for approved purposes, and to obtain the necessary approvals/licenses for its use. In this regard, the reasoning discussed above at [31] to [33] would apply with the necessary modifications. At the end of the day, it appeared to me that all the plaintiff had

pleaded was a mistaken impression or belief reached on its own, rather than based on any actionable representation by the defendants.

41 Further, I noted that although the plaintiff had sensibly removed the prayer for reinstatement of the tenancy agreement – a relief which was not available for misrepresentation – paragraphs 26 and 27 of the draft amended SOC still sought a relief to which the plaintiff was plainly not entitled. In a claim for misrepresentation (including the tort of deceit), the measure of damages should be the reliance measure, which seeks to put a plaintiff in the position it would have been in had the misrepresentation not been made (*Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909 at [28]). This would mean that the plaintiff should be seeking to be put in the position it would have been in had it not entered the tenancy agreement. Instead, the plaintiff sought compensation for "the bargain", "the enjoyment of [the] premises", and "the rental income it was earning and would have continued to earn": in short, damages on the expectation measure, *ie*, on the basis that the tenancy agreement had been performed. This was misconceived in law. Effectively, the plaintiff had failed to plead any appropriate loss or damage – a key aspect – in relation to the new misrepresentation claim.

42 I was of the view that as it stood, the new misrepresentation claim was not sustainable, and the pleading thus disclosed no reasonable cause of action.

The breach of duty claim

43 With regard to the breach of duty claim, the draft amended SOC sought to introduce the additional particular that the plaintiff had paid for the costs of the work done by Ms Lew and Chambers Law. Given the vagueness of the allegation, the plaintiff's counsel was pressed for details on the amount

and circumstances of the payment, whereupon he stated that he was unable to provide any (pending discovery). It was left to the defendants' counsel to explain that there was a provision in the tenancy agreement for the plaintiff to pay the landlords' costs. The plaintiff's counsel then confirmed that it was the payment pursuant to that clause which the plaintiff was relying on to found the duty of care. That provision was also alluded to in the plaintiff's written submissions for the hearing of further arguments.

44 I found that this added particular did not change my view that there was no basis to allege that any duty of care arose between the plaintiff and Ms Lew or Chambers Law *qua* solicitors. It was obvious without further inquiry that a contractual obligation on the part of a tenant to pay for legal costs incurred by the landlord (which, as the defendants pointed out, is a common term in such agreements) could not, without more, give rise to a duty of care between the tenant and the landlord's lawyers. If the plaintiff had in mind a duty of care based on an implied retainer, the facts establishing the existence of such a retainer would have to be pleaded. If the plaintiff had in mind a more general tortious duty, the facts going toward, *inter alia*, the legal proximity between the plaintiff and Ms Lew and/or Chambers Law, would have to be pleaded. The particular that the plaintiff was obliged to pay Mdm Tan's and Ms Lew's legal costs, on its own, did not strengthen the plaintiff's case at all.

45 I should note that although the focus during the oral submissions was on the payment pursuant to the tenancy agreement, the draft amended SOC in fact went further than alleging that the plaintiff had paid for the work done. Paragraph 23 of the draft amended SOC asserted that "[t]he Plaintiff *retained [Ms Lew] and her law firm, [Chambers Law] to prepare the tenancy agreement*" [emphasis added]. If one were to read this pleading without the benefit of the oral arguments or the particular provided in the FBP, it would

appear to be alleging that the plaintiff, Ms Lew, and Chambers Law had entered into an *express* retainer. On that interpretation, not only was such a pleading unsupported by any particulars, it asserted a fact which the plaintiff and its counsel *knew to be untrue.* The pleading was mischievous or, at best, a further example of the vagueness and confusion which permeated the plaintiff's pleadings.

46 In sum, even with this opportunity to fix its case, the plaintiff's draft amended SOC remained lacking in particulars and material facts. Moreover, the draft amended SOC was confusing, vague and uncertain in many respects. The draft amended SOC would not fulfil the purpose of a pleading, which is to define the issues and clearly present the case to be met by the opposing party. For these reasons, I concluded that the draft amended SOC was still too deficient, disclosed no reasonable cause of action and should not be allowed.

47 Additionally, it appeared to me that allowing the amendments would be unfair to the defendants. Even with the filing of the draft amended SOC, there would – as the plaintiff's counsel conceded – have been at least one further application by the plaintiff to amend so as to put its pleadings in order. It was also likely that the defendants would have to request for further and better particulars so as to clarify the plaintiff's case. Although the financial waste of these further applications could be dealt with by the ordering of costs, it has also been recognised that where litigants are individuals, "justice cannot always be measured in terms of money and… a judge is entitled to weigh in the balance the strain the litigation imposes on litigants … the anxieties occasioned by facing new issues", and the like: *Ketteman and others v Hansel Properties Ltd and others* [1987] AC 189 at 220, cited by the Court of Appeal in *Ng Chee Weng v Lim Jit Ming Bryan and another* [2011] 1 SLR 457 at [26]. The defendants should not be put through the ordeal of fighting a case which

continually changed and evolved. I therefore agreed with the defendants' counsel that it would in any event have been an abuse of the process of the court, and prejudicial to the defendants, to allow the amendments to the SOC in these circumstances.

Should the plaintiff be given a further opportunity to amend its pleading?

48 In the request for further arguments, the plaintiff's counsel argued for another opportunity to rectify the pleading. It was submitted that a pleading should not be struck out unless no possible amendment could cure its defects. I found this argument to be unmeritorious. It appeared to be based on a fundamental misreading of *The "Eishin Maru"*. As the defendants pointed out, that case concerned a striking out application based not on O 18 r 19(1)(*a*), but on O 18 r 15(2). The latter rule prohibits allegations or claims tied to a cause of action which is not mentioned in the writ and which does not arise from the same facts as a cause of action which is mentioned in the writ. The High Court considered that non-compliance with O 18 r 15(2) was "only an irregularity" which should not lead to striking out if it could be cured by amendment (at [16]). There was no basis to contend that the case stood for the proposition that a pleading should not be struck out if some amendment could theoretically complete the cause of action.

49 Having dealt with the plaintiff's argument based on *The "Eishin Maru"*, I next considered the likelihood that a further opportunity to amend would bear fruit. In my view, based on the possible amendments which were sketched out in the course of further arguments, the plaintiff had still not shown how it would dispel the lack of clarity in its misrepresentation claim, the basis of its assertion that a solicitor-client relationship had been formed, what loss and damage it had suffered, and the other difficulties earlier

discussed. Taking the plaintiff's further arguments as an indication of what the further amendments would include, I did not see a reason to suppose that those amendments would sufficiently improve the plaintiff's case. I therefore rejected the plaintiff's request.

50 In any event, even assuming the plaintiff would have been able to fix the serious deficiencies in its pleadings, given all the prior opportunities given to the plaintiff, it did not strike me as just to allow the plaintiff a further opportunity to do so. While I recognised that the court's role was to decide the rights of the parties and not to punish them for their mistakes or misconduct (see *Wright Norman* at [25]), that guiding principle did not detract from the power and responsibility of the court to prevent abuses of process.

51 It must have been obvious to the plaintiff and its counsel that the specifics of the proposed further amendments would be critical. Despite this, the plaintiff did not have a draft of the proposed further amendments to place before the court. This was inexcusable given the generous time frame which the plaintiff had to work within. The plaintiff had already conceded at the hearing on 15 June 2016 that further amendments were necessary, and had received notice of my willingness to hear further arguments on 8 July 2016. Even considering only the period of 8 July 2016 to 15 August 2016, the plaintiff had over a month to prepare the proposed further amendments. Moreover, the draft amended SOC was only eight pages long including the portions to be struck out from the original SOC. I could not see – and the plaintiff's counsel did not attempt to offer – any good reason why a draft of the proposed further amendments could not have been prepared in time for the hearing of further arguments. In the absence of such an explanation, and in all the circumstances, it was difficult to avoid the conclusion that the plaintiff was needlessly prolonging these proceedings by offering its case in dribs and

drabs. I would thus have rejected the plaintiff's request as an abuse of process even if there had been reason to suppose that a further amendment could have saved its case.

Conclusion

52 For the above reasons, I disallowed the amendment application and dismissed the appeal. After hearing the parties on costs, I ordered the plaintiff to pay costs to the defendants of $7,500 (inclusive of the adjournment and disbursements) in respect of the appeal, $6,000 (inclusive of disbursements) in respect of the summons to amend the SOC, and a further $3,500 (inclusive of disbursements) in respect of the hearing of further arguments.

Hoo Sheau Peng
Judicial Commissioner

Udeh Kumar s/o Setharaju, Krishna Morthy S V and Dhanwant Singh (S K Kumar Law Practice LLP) for the plaintiff;
Lee Chay Pin Victor (Chambers Law LLP) for the defendants.