Midlink Development Pte Ltd v The Stansfield Group Pte Ltd
[2004] SGHC 182

Case Number : Suit 503/2003

Decision Date : 20 August 2004

Tribunal/Court : High Court

Coram : V K Rajah JC

Counsel Name(s) : Ranjeet Singh and Amerjeet Singh (Francis Khoo and Lim) for plaintiffs; Lim Kim Hong (Kim and Co) for defendant; Gregory Vijayendran and Mohamed Gul (Wong Partnership) for defendants with effect from 24 May 2004

Parties : Midlink Development Pte Ltd — The Stansfield Group Pte Ltd

Civil Procedure – Pleadings – Amendment – Application to amend pleadings made nine days after judgment entered – Whether application should be allowed

Civil Procedure – Pleadings – Whether necessary to expressly plead defence of non-compliance with s 6(d) Civil Law Act to rely on such defence at trial – Section 6(d) Civil Law Act (Cap 43, 1999 Rev Ed)

Contract – Formalities – Acceptance – Whether silence following offer tantamount to acceptance

Contract – Formation – Oral agreement between parties – Agreement not engrossed and executed – Whether subsequent conduct of parties consistent with conclusion of such tenancy agreement between them

20 August 2004

V K Rajah JC:

1 Silence is golden – so the saying goes. In a purported contractual setting, however, this is not always axiomatic. Silence or unarticulated intentions can sometimes lead to and culminate in acrimonious litigation. This is a paradigm case.

2 The plaintiff is the landlord of Midlink Plaza, a mixed user complex in Middle Road. The defendant is in the business of providing courses, preparing students for degree programmes as well as executive education.

3 In November 1995, the defendant leased a single unit from the plaintiff. As the defendant's business expanded, it progressively leased additional premises from the plaintiff. Between 1997 and April 2001, nine further units were leased ("the premises"). Units initially leased in 1997 and 1998 had their terms duly renewed. Eventually the parties agreed on a common termination date for the premises – the end of June 2002 ("the expiry date"). As the parties enjoyed a cordial relationship, their initial practice of documenting all issues ultimately crystallised into one where only important issues were documented.

4 Prior to the expiry date, the parties met to discuss future arrangements to lease the premises. On 25 April 2002, Tan Teng Siah ("TTS"), the plaintiff's manager, had discussions with Kanappan s/o Karuppan Chettiar ("KC"), the managing director of the defendant, as well as Cenobia Majella ("CM"), the defendant's executive director. KC and CM are husband and wife and to all intents and purposes function as the operating minds and hands of the defendant. TTS, on the other hand, was not an ultimate decision maker and had to refer critical issues to the plaintiff's managing director.

5 The meeting of 25 April 2002 ended inconclusively. There are varying accounts of what transpired between TTS, KC and CM. Surprisingly, even KC and CM seem to differ on crucial points.

The parties agreed to meet again to address unresolved issues.

6 TTS, KC and CM met again on 2 May 2002. TTS claimed that at this meeting an agreement was reached to lease the premises for a further period of two years at a reduced rental of $3.05 per square foot per month ("psf") as opposed to the earlier rental of $3.10 psf. KC and CM vigorously disputed this. As far as they were concerned, the matter was left unresolved at this meeting; TTS, they claimed, was to have followed up with draft documentation for the defendant's further consideration.

7 On 2 July 2002, the plaintiff issued a credit note in favour of the defendant for $2,628.45. The credit note was captioned "Reduction of Rental Deposit" and included the following description: "being reduction of rental deposit for *leases* of unit …" as well as "*Old deposit* $162,963.90 (17523 sf x $3.10 x 3) less *new dep* $160,335.15 (17523 sf x $3.05 x 3)" [emphasis added]. There is no question that this note was duly received by the defendant and that the benefit of the credit was accepted. On 5 July 2002, the plaintiff forwarded to the defendant engrossed new tenancy agreements for execution ("the tenancy agreements"). The tenancy agreements reflected the new rental and were substantially similar to the earlier agreements. The defendant has not taken serious issue with the contents of the tenancy agreements in its correspondence, pleadings, evidence or submissions, save for the absence of a termination clause. The covering letter addressed to KC reminded the defendant to "kindly sign, stamp (at stamp office) and return us the duplicate copy within the next 7 days". This the defendant did not do. However, it continued to duly and promptly pay the reduced rental charges ("adjusted rental") at the beginning of each month on receipt of the plaintiff's invoices, in accordance with the practice established during the earlier leases. Nothing eventful happened until the end of September 2002.

8 On 27 September 2002, the plaintiff sent a reminder to the defendant, stating that the duplicate copies of the "lease agreements" had yet to be received. It requested that these be returned within the next three days. This was not done. The parties tried to meet but were unable to do so until 12 December 2002. In the meantime, the defendant continued to duly pay the adjusted rental without reservation or qualification. It is also incontrovertible and of crucial significance that the defendant failed to inform the plaintiff of its position on the tenancy agreements until early December – assuming that its defence is accepted in the first place.

9 On 12 December 2002, TTS, KC and CM met again. KC had requested that Michael Cope ("MC"), the defendant's academic vice-president cum director, attend the meeting as well. Again, what the parties discussed is in dispute.

10 On 7 January 2003, the defendant submitted a tender to lease a building at 11 Penang Lane. The tender proved to be successful and the defendant was duly notified on that very same day. On 15 January 2003, the defendant gave the plaintiff notice of "termination of lease" of two units. CM's letter to TTS stated that the defendant "will not be requiring the … units" and would be returning both units by 31 March 2003. The plaintiff responded the very next day disputing the defendant's right to terminate the leases and insisting on adherence to the "contractual agreement to lease … the premises up to 30 June 2004". The relationship, not surprisingly, soured rapidly after mid-January 2003.

11 The defendant thereafter refused to make further rental payments. The plaintiff, in turn, initiated distress proceedings for outstanding rentals for the months of February and March 2003. On a without-prejudice basis, the defendant settled the rental claims but nevertheless vacated the premises in May 2003.

12 Cursory efforts by the defendant to assist the plaintiff in locating substitute tenants proved to be unfruitful. Sustained efforts by the plaintiff to secure new tenants were also to no avail. The rental market was admittedly weak throughout the relevant period. Not long after the defendant vacated the premises, the plaintiff initiated these proceedings.

13 In these proceedings, the plaintiff claims the outstanding rental under the alleged tenancy agreements as damages. The defendant in turn denies that there was a fresh two-year tenancy and demands the return of the rental deposit. At the conclusion of the proceedings, I granted judgment in favour of the plaintiff. The defendant has now appealed against my judgment.

14 It was clear to me from the outset that the contrasting versions given by TTS, KC and CM of the meetings on 25 April, 2 May and 12 December 2002 are irreconcilable. Careful attention must therefore be accorded to the credibility of the witnesses in assessing the strength of the rival contentions. It is also important to weigh the evidence against the conduct of the parties. In this connection, the exchange of correspondence between the parties is both illuminating and cogent.

The pleadings

15 The plaintiff alleges that the tenancy agreement commencing 1 July 2002 was evidenced "partly in writing and partly by conduct". In addition to the "oral agreement" reached on 2 May 2002 fixing rental at $3.05 psf for two years, it is alleged that the relevant aspects of the defendant's conduct pointing to a concluded contract include a reduction in the rental deposit and rent as well as subsequent adjusted rental payments from July 2002 to December 2003, and extended air-conditioning hours from 8.00am to 10.00pm instead of 8.00am to 6.00pm effective 1 July 2002. Reliance was also placed on the defendant's silence upon receipt of the engrossed tenancy agreements dispatched on 5 July 2002 (which the plaintiff construed as assent) and, finally, the defendant's renovations of the premises in June 2002.

16 The defendant denies the existence of any binding tenancy agreement. The defence asserts that there was a practice and course of dealing between the parties that contemplated the sending of a letter of offer as a precursor to a binding contract. The meeting on 2 May 2002 between the parties, it claimed, concluded with an agreement that the plaintiff would send to the defendant a letter of offer followed by a draft tenancy agreement for both one- and two-year terms for the defendant's "*perusal* and *election*" [emphasis added]. It is also asserted that the defendant took the very same position with its other landlord at Midlink Plaza. Furthermore, the defence contends that at two meetings on 27 September 2002 and 12 December 2002 the plaintiff was informed unequivocally that there was no binding tenancy agreement. The relationship was merely that of a tenancy at will or at most a monthly tenancy. The defence emphatically asserts that since the tenancy agreements were not signed there could have been no other manner of legal relationship between the parties.

Evidence

25 April 2002 meeting

17 The defendant's evidence relating to the discussions at this meeting is clearly incongruous with its pleadings. It was expressly pleaded that the rental of $3.05 psf was agreed upon at this meeting, leaving other "salient terms" that included a termination clause and rent-free period open for future discussion. In his affidavit, KC repeated what had been pleaded. CM, on the other hand, asserted in her evidence that the rent was never agreed to at all, let alone resolved at this meeting. This is wholly at variance with KC's evidence and totally belies the defendant's subsequent conduct in effecting payment of the adjusted rent. In addition, she added that the termination clause was

crucial in light of problems arising from "the building's central air-conditioning, pest control and toilet facilities".

18 TTS testified that during the discussions he had initially proposed leaving the rent at $3.10 psf. He had also offered to increase the air-conditioning hours for the premises and had given the defendant a worksheet detailing the additional costs that would be incurred as a consequence of this new concession. The defendant, according to him, counter-offered that the rent be fixed at $3.05 psf. This issue was to be resolved upon approval by his management.

19 In the course of the hearing the defence produced two handwritten minutes prepared by KC. These minutes were not part of the discovery documents. KC asserted that though the minutes had in fact been made contemporaneously, they were located only after the affidavit exchanges had been effected. He claimed he could not locate minutes of the third meeting that took place on 12 December 2002. Counsel for the plaintiff did not take issue with the authenticity of the minutes. In so far as the defendant is concerned it really cannot be gainsaid that the minutes recorded what KC perceived was important to it. Ironically, however, and contrary to defence counsel's submissions and KC's expectations, the minutes appeared to shore up the credibility of TTS's testimony and to undermine some salient facets of the defence. For instance, both KC and CM had initially claimed in their affidavit evidence as well as in their pleadings that a meeting had taken place on 27 September 2002 with TTS. The defendant had to concede at the trial that this was simply untrue. Why did they fabricate the existence of such a meeting?

20 KC attempted to downplay the differences between the affidavit evidence and his testimony in court. He unflinchingly claimed that he had inadvertently overlooked some of the points as he had not referred to the minutes when the affidavit evidence was prepared. This is troubling, to say the least, given that he was at the same time earnestly attempting to establish in the eyes of the court his credibility, consistency and meticulousness in having maintained records and adhering only to the facts. Lamentably, this was not the only troubling aspect of his testimony. It appeared that he was quite prepared to varnish the facts in order to sustain and substantiate the various lines of the pleaded defence. In fact, a slippery recurrent flexibility dubiously pervaded the entire defence: see [34] to [46].

21 Interestingly KC's minutes of the 25 April 2002 meeting included references to the increased air-conditioning hours and rental at "$3/-". This, if anything, serves paradoxically to corroborate part of TTS's testimony. There were also two further other items appearing as "rent free?" and "stamp ® draft agreement" which are equivocal. TTS testified that the auditors required the tenancy agreements to be stamped. KC agreed that this was correct. The reference to a draft agreement can only mean that the defendant was expecting or had asked for such a document.

2 May 2002 meeting

22 CM in her affidavit evidence asserted that the defendant had highlighted during this meeting the unresolved issues raised during the earlier April meeting. In view of these unresolved concerns, a request was made for both one- and two-year draft tenancy agreements for the defendant's further consideration. TTS was allegedly informed that the defendant was looking for other premises. She also testified that the defendant had started looking for alternative premises from June 2002. KC, on the contrary, testified that the defendant only started looking for alternative properties after the "unsuccessful" 12 December 2002 meeting. CM further claimed that TTS had *agreed* to provide the defendant with draft one- and two-year tenancy agreements and to deal with the other outstanding issues. To buttress her evidence, CM added that she had similarly asked the defendant's other landlord at Midlink, Nansei Tour Centre (S) Pte Ltd ("Nansei"), for *draft* one-year and two-year

tenancy agreements.

23 KC largely affirmed CM's evidence but added that TTS had agreed to send a "confirmation" of the defendant's terms by way of a letter of offer accompanied by drafts for one-year and two-year terms for further consideration.

24 The minutes KC adduced did not corroborate these details. They merely adverted to the plaintiff's rental proposal of $3.05 psf and the defendant's request for $3.00 psf with a further reference to TTS making a call in the afternoon in relation to the rental rate. Significantly, it also stated "either 2 or 3 year ® to get back to him". This was clearly a reference to the defendant "getting back" to the plaintiff only if there was an issue over the duration of the tenancy. It presupposes the tenancy was a fait accompli and contradicted the claim that a one- or two-year tenancy was merely being discussed; to that extent, it further undermines KC's and CM's credibility. The plaintiff on 5 July 2002 indeed duly sent a tenancy agreement for a two-year term. Assuming the minutes were correct, the onus lay on the defendant to get back to the plaintiff if there was an issue over the duration of the tenancy, not the other way around. Moreover, there was no new reference in the minutes to any "draft" agreement.

25 TTS, in his evidence, testified that there was a request to standardise all the tenancy terms, which would then run for two years effective from 1 July 2002. The rental deposit would be adjusted and the standard terms with the exception of the new rental of $3.05 psf would remain the same – KC later conceded that TTS had indeed called CM on the afternoon of 2 May after the meeting, confirming the rental at $3.05 psf. TTS further testified that KC had also asked him to prepare four separate sets of tenancy agreements to cover the different units. This request was duly acceded to.

12 December 2002 meeting

26 CM asserted she and KC had informed TTS at this meeting that the tenancy agreements would not be signed until the plaintiff attended to the outstanding items. MC was also present. TTS had allegedly stated that he would consult his management. KC, on the other hand, testified that he made it clear that the tenancy agreements would not be signed unless the plaintiff took "affirmative steps to improve the image of the building". MC claimed that the image of the building and the dilapidated state of the toilets on the third floor of the building were discussed. He went as far as to claim that the plaintiff was told by KC that the defendant would be prepared to invest considerable amounts in upgrading the facility once action was taken by the plaintiff to remedy the situation.

27 TTS painted an altogether different picture. He mentioned that the defendant merely urged the plaintiff to upgrade the toilets and façade of the building. There was no mention of the tenancy agreements or any intimation at all that the defendant would not respect the existing tenancy arrangements.

Subsequent events

28 After the defendant's 15 January 2003 notice of "termination", a spirited exchange of correspondence ensued. A letter dated 3 March 2003 ("the March letter"), wherein KC set out the defendant's position with detailed precision, is of particular significance.

29 The March letter contains factual assertions that are in some crucial aspects starkly inconsistent with the defendant's testimony. According to this letter, a rent-free period hinging on a two-year tenancy was allegedly contemplated at the 25 April 2002 meeting; in the defendant's affidavits, on the other hand, a *one- or two-year* tenancy was referred to. Finally, in KC's minutes, an

allusion was made to a *two- or three-year* tenancy. Precisely which version of the defendant's ever-shifting positions reflects the truth?

30 The defendant agreed in the March letter that TTS had insisted on a signed tenancy at the 2 May 2002 meeting. The defendant also admitted it had agreed to respond upon receipt of the tenancy agreements. This was purportedly to allow KC to ensure and affirm that "a provision for a termination clause" had in fact been included, in case the building modifications were not effected. KC's testimony in court, however, emerged somewhat differenty.

31 The March letter further claims that upon receipt of the 5 July 2002 letter and tenancy agreements from the plaintiff, the defendant learnt that there was no termination provision. CM then allegedly called the plaintiff to highlight the continuing shortcomings. At the hearing, quite remarkably, no credible evidence was adduced to substantiate this vital assertion.

32 The 12 December 2002 meeting was erroneously described as a meeting held in "November". KC stated that he had made it clear at that meeting that unless steps were taken "to improve the image of the building", the tenancy agreement would not be signed and the defendant would, furthermore, leave the building by May 2003. There was clearly no meeting in November. Nor could the defendant adduce any objective evidence to demonstrate that it had actually communicated these concerns to the plaintiff.

33 It is significant that, in contrast to the March letter, the plaintiff's own response letter on 27 March 2003 is largely consistent with their pleadings and testimony.

Evaluation of evidence

34 The issue to be resolved in these proceedings struck me as relatively straightforward. Did the parties have an agreement to lease the premises for a further term of two years commencing 1 July 2002? The plaintiff's pleaded case was broadly crafted and incorporated elements of an oral agreement fortified by part performance.

35 I am not oblivious to the fact that there are wrinkles in the plaintiff's evidence and, in particular, in their use of terminology in the distress proceedings they initiated earlier, the current proceedings, as well as some of the correspondence. With regard to TTS's handwritten note of 25 April 2002 (which, though adverted to in his affidavit, only surfaced in the course of the hearing), TTS admitted he had made a mistake in a handwritten annotation contained in this note and I accept his explanation as a plausible one. I also note that prior to the commencement of cross-examination TTS supplemented his affidavit evidence. This, the Defence rather disingenuously contended, irretrievably damaged his credibility. This contention conveniently ignores that KC and CM also gave supplemental evidence prior to being cross-examined. On the whole, TTS braved a rather rambling cross-examination with his credibility intact.

36 Defence counsel attempted to create a tempest in a teacup by wrangling over a number of relatively tangential issues such as the missing letter of offer and the plaintiff's somewhat cavalier approach in procuring the return of the tenancy agreements. Despite the cloudy verbosity generated by the Defence, the plaintiff's evidence in this connection impressed me as satisfactorily credible. The Defence's attempts to dissect and discredit the plaintiff's testimony was stigmatised by the whine of hindsight and appeared to be fraught with implausibility. It is indisputable that prior to January 2003 the parties wrote to each other on important issues. The defendant was the anchor tenant in Midlink Plaza. The plaintiff would not have risked failing to nail the defendant to a new tenancy if uncertainty prevailed or if the defendant had expressed reservations of any kind. The parties' conduct subsequent

to the meeting of 2 May 2002 was wholly consistent with reaching a new tenancy agreement. The plaintiff reduced the rental deposit to reflect the adjusted rental, a credit note was sent, signed engrossed tenancy agreements were dispatched, and the defendant duly paid the adjusted rent punctually *and* regularly without any qualification or reservation. That the plaintiff did not press for the return of the signed agreement is simply consistent with and a testament to their belief that this was purely a formality. Given the cordial relationship and the accord that had been reached, TTS was not unduly bothered that this perceived formality had not been complied with.

37 I find the defendant's conduct on receipt of the tenancy agreements wholly inexplicable and its subsequent stance underhanded, if not duplicitous. Its failure to respond was not a mere oversight. KC, in the March letter to TTS, boldly asserted that when the plaintiff's letter of 5 July 2002 enclosing the tenancy agreements was received, the absence of any termination provision was immediately detected. CM then allegedly called TTS to highlight both this and the continuing deficiencies in building maintenance. CM, in her affidavit, stated she contacted TTS to schedule a meeting for 27 September 2002. She claims to have informed TTS that the tenancy agreements would not be signed. It is, however plain, that no such meeting took place. There was, in point of fact, never any communication along these terms to the plaintiff. Indeed, even accepting KC's testimony, such a meeting can only have taken place on 12 December 2002.

38 The March letter made no reference to the defendant anticipating a letter of offer to precede or accompany the tenancy agreements. This was clearly another legal fig leaf. Why would the defendant need a letter of offer? It was not a new tenant. It was familiar with the terms as amply evidenced by KC's own minutes. Assuming for the sake of argument that KC was in fact expecting a draft agreement, what purpose would such a letter of offer serve? The defendant's frail attempt to rely on a purported previous course of dealing requiring a letter of offer as a matter of practice was yet another red herring. Had this been an important issue, KC or CM would immediately have insisted on such a letter upon receiving the plaintiff's letter of 5 July 2002. That they did not bother to respond *at all* wholly undermines this assertion. The defendant's alacrity in subverting facts is thoroughly disconcerting.

39 KC claimed in his affidavit that he perused the tenancy agreements and, upon noticing the absence of any provision for termination, *immediately* instructed CM to contact TTS to voice their concerns. He also referred to the wholly fictitious 27 September 2002 meeting. It is axiomatic that nothing "*immediately*" took place. The defendant was in no hurry to inform the plaintiff of any concerns or, for that matter, to sign the tenancy agreements at all. It appears to me that KC acted as his own lawyer throughout the charade. He appeared to think that if he did not sign the tenancy agreements he could renege on the agreement reached – a notion that persisted even during the proceedings: see [49]. All this was in spite of the oral agreement reached with TTS and the defendant's subsequent conduct which, if anything, only reinforced the plaintiff's conviction that an agreement had been reached. KC obviously wanted to have his cake and eat it. It is abundantly clear from his evidence that he assumed the defendant would have the upper hand in dealing with the plaintiff simply by delaying the signing of the agreement. In a depressed rental market, KC took the position he could play his cards as and when he liked, his illusory ace being the absence of a signed tenancy agreement.

40 The so-called "termination clause" was another diversionary stratagem adopted by the Defence. There is no reference to this in KC's minutes. Indeed, in a letter dated 27 March 2003, KC had informed TTS that "we *would* have negotiated the termination clause *from the onset if required* given the current market situation a year ago and presently" [emphasis added]. Why did the defendant require a termination clause if it was purportedly contemplating the option of electing between a one-, two- or three-year tenancy? It was further alleged that the termination clauses

were necessary because of problems pertaining to the toilets on the third floor and pest control. There was no preceding correspondence to substantiate these dubious assertions. The parties invariably communicated on all important issues in writing. The defendant's failure to communicate in writing between 5 July 2002 and 15 January 2003 when it purportedly terminated the lease for two units is, in the final analysis, most telling. KC's suggestion that, in failing to respond to the plaintiff's letters requesting for the return of the tenancy agreements he had in fact implicitly communicated his unarticulated intention not to sign the tenancy agreement, is wholly untenable. The failure to return the tenancy agreements was in itself equivocal. The plaintiff understandably did not vehemently press for the signed tenancy agreements because of the prevailing cordial relationship. What served as both revealing and compelling evidence was the defendant's calculated, wilful silence compounded by the concomitant payment of the adjusted rent.

41 KC struck me as a shrewd and astute businessman. Armed with two law degrees, he imagined he had a sound grasp of the law. I am certain he would not have hesitated to place his position on record if he felt it was in the defendant's interests to do so. He proclaimed with obvious and justifiable pride that the defendant had been awarded the ISO 9000 and "Singapore Quality Class" industry standards. These standards required important matters to be documented. He was, however, compelled to concede in this context that "the minimum was that we would reduce it into writing, at least the minimum details *so that there would not be disagreements due to memory lapses later*" [emphasis added]. It was plain he consciously and wilfully chose to keep silent after the tenancy agreements were received. I am satisfied that TTS was correct in asserting that on 2 May 2002 all outstanding issues were settled and an agreement had been reached. Though there was some uncertainty whether the actual amount of rental at $3.05 psf was fixed at the meeting or thereafter, this was not material. KC himself conceded that TTS called CM to confirm the adjusted rent on the afternoon of 2 May 2002. It is imperative to stress that the defendant paid the adjusted rental and accepted the credit note without any qualms or conditions whatsoever. There can be no question at all that the adjusted rent had been agreed upon by the parties.

42 I had earlier pointed out other material discrepancies in the evidence of KC and CM. KC had stated that they had only started looking for new premises after 12 December 2002. CM, on the other hand, stated that this exercise started in June 2002. CM stated that the rental for the new lease was never agreed on. KC stated it was settled on 2 May 2002. In cross-examination, KC stated he did not see the tenancy agreements until September 2002. CM, in her affidavit evidence, stated that in July 2002 KC informed her that the defendant had received the engrossed tenancy agreements. When specifically queried by the court on the date of the discussion with TTS, she was evasive. She asserted, "I would have thought it was July or August. Could have been September. All I know was that I was asked to follow up because of my delay."

43 KC and CM were unsatisfactory witnesses. While KC proclaimed that integrity was a core value of his business enterprises, the manner in which the defendant presented its evidence, riddled as it was with discrepancies and half-truths, considerably diminished his standing and credibility in these proceedings. I noticed that when he produced the minutes, he attempted to insouciantly sweep earlier inconsistencies such as the purported 27 September 2002 meeting under the carpet by dismissing them as mere oversights – a consequence, he claimed, of being overstretched by work commitments. KC and CM clearly did not see the need to be accurate or scrupulous when they prepared their affidavit evidence: they elected to fabricate facts from the outset. CM, in addition, was obviously uncomfortable through much of the cross-examination. She could barely disguise the fact that she was not telling the truth.

44 I have concluded, as a result, that KC and CM lacked candour in asserting that no agreement had been reached with TTS. They deliberately chose to mislead the plaintiff: first allowing TTS to

believe that an agreement had been reached, and then consciously delaying the signing of the tenancy agreements, believing – wrongly as it turns out – that they had *carte blanche* to walk out of the unsigned tenancy agreement. Portions of KC's testimony unwittingly betrayed the dissemblance:

> *I am a little bit aware of tenancy agreements. I know about offer and acceptance*. I was under impression that Joe Tan was not concerned whether 1 year or 2 year tenancy. *At most I could say it was a 1 year tenancy and given the market conditions, he would have no choice but to accept what we told him.* [emphasis added]

45 A brief reference to the 12 December 2002 meeting is in order at this juncture. It strikes me as anomalous that MC, who had nothing to do with the earlier meetings, was invited by KC to attend this meeting. MC conceded that he met the plaintiff on operational matters "very, very rarely". Was the groundwork being laid for an additional "witness of fact" for the defendant? I do not think MC was completely candid. It also seems rather strange that KC could not locate his minute of this meeting. I accept TTS's version of the meeting. Quite apart from finding him a credible witness, I do not think he would have stood by passively until 15 January 2003 if the defendant had intimated, however slightly, that it was refusing to sign or intending to renege from the tenancy agreements. He would have instantly communicated his concerns in writing if anything had been amiss at that meeting. As explained earlier, the tenancy arrangements with the defendant were of great significance to the plaintiff, given that the defendant was the plaintiff's anchor tenant. Defence counsel, in her written submissions, had characterised both parties "as very experienced and professional". This raises the troubling question why the defendant did not, even by its own admission, communicate their position until 12 December 2002, and why this alleged communication was not in writing.

46 There is one further point that merits attention and emphasis. The defendant pleaded that it had also asked its other landlord in Midlink Plaza, Nansei, to send a draft tenancy agreement. Presumably this was intended to show consistency in its dealings. An officer of Nansei was summoned by the Defence to confirm this. The documentary evidence tendered showed that Nansei had, contrary to the pleaded defence, delivered to the defendant on 11 June 2002 engrossed tenancy agreements for two-year tenancies for its signature. The rent and the rental deposit had also been reduced, mirroring the defendant's arrangement with the plaintiff. Again, the defendant did not sign these agreements or communicate a contrary position in writing. It is noteworthy to observe that this evidence, when tendered, took Defence counsel completely by surprise. The defendant had been hoisted by its own petard. Equally interesting, in similar vein, was the fact that KC had earlier described the "locating" of his minutes as a "godsend." He had obviously thought they would help to fortify the defence. If anything, they had a contrary effect and drastically undermined it.

Salient principles of law

47 The Defence extravagantly emphasised that the tenancy agreements were never signed by the defendant. Defence counsel fervently contended that silence on the defendant's part was neither acceptance nor unequivocal conduct. This contention might have borne further scrutiny if there was a finding there was no concluded agreement on or about 2 May 2002 had been found to exist. In light of my finding that there was in fact an oral agreement this issue is no longer crucial. Nevertheless, I proceed to examine the points raised by the Defence for the sake of completeness, in the event my primary findings are not accepted.

48 Acceptance in a contractual setting must be ascertained objectively. Acceptance can be signified orally, in writing or by conduct. When there is a history of negotiations and discussions, the court will look at the whole continuum of facts in concluding whether a contract exists. The subjective intention of a party and silent mental conduct that may incorporate dissemblance is neither

relevant nor legally admissible.

49 A contract may be concluded on the terms of even a draft agreement, if the parties are perceived by their conduct to have acted on it. *Brogden v Metropolitan Railway Company* (1877) 2 App Cas 666 provides a germane illustration. A draft agreement for the supply of coal was submitted by a railway company to a merchant. The merchant made a number of alterations to the draft, marked it "approved" and then returned it. The railway company never expressly agreed to the amendments but nonetheless accepted deliveries. It was held that a contract on the terms of the draft agreement had been reached upon the acceptance of these deliveries.

50 It is also hornbook law that silence *per se* is equivocal and does not amount to a clear representation. In *Tacplas Property Services Ltd v Lee Peter Michael* [2000] 1 SLR 637 at [62], Chao Hick Tin JA, delivering the judgment of the Court of Appeal, observed:

> Mere silence and inactivity *will not normally suffice*, and in the words of Robert Goff LJ in *The Leonidas D; Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA* [1985] 1 WLR 925 at p 937 "it is difficult to imagine how silence and inaction can be anything but equivocal" (endorsed by this court in *Fook Gee Finance Co Ltd v Liu Cho Chit and another action* [1998] 2 SLR 121). [emphasis added]

This stands to reason. Silence is a midwife that may ultimately deliver a contractual offspring that is stillborn or live. Silence and implicit acceptance are not invariably antagonistic concepts. Silence can signify affirmation at one end of the spectrum, disinterestedness or abandonment at the other end of the spectrum. It is a chameleon utterly coloured by its contextual environment. Silence will usually be equivocal in unilateral contracts or arrangements; in bilateral arrangements or negotiations on the other hand, there will usually never be *true* or *perfect* silence. In many such cases, while there may not be actual communication of acceptance, the parties' positive, negative or even neutral conduct can evince rejection, acceptance or even variation of an existing offer.

51 To say that silence can *never* be unequivocal evidence of consent may be going too far: see *Cheshire, Fifoot & Furmston's Law of Contract: Second Singapore and Malaysia Edition* (1998) by Professor Andrew Phang Boon Leong at 112. It is always a question of fact whether silent inactivity after an offer is made is tantamount to acceptance. Indeed, in some matters there could be a duty to speak arising from the relationship between the parties. In such instances, silence is likely to amount to a representation. Buckley LJ in *Spiro v Lintern* [1973] 1 WLR 1002 at 1011 observed:

> … if A sees B acting in the mistaken belief that A is under some binding obligation to him and in a manner consistent only with the existence of such an obligation, which would be to B's disadvantage if A were thereafter to deny the obligation, A is under a duty to disclose the non-existence of the supposed obligation.

52 George Spencer Bower and Alexander Kingcome Turner in *The Law Relating to Estoppel by Representation* (3rd Ed, 1997) at para 59 on p 52 incisively state apropos negotiating parties:

> Where A and B are parties to a negotiation or transaction, and, in the course of the bargaining or dealings between them, A perceives that B is labouring under a mistake as to some matter vital to the contract or transaction, he may come under an obligation to undeceive B, at all events if the circumstances are such that his omission to do so must inevitably foster and perpetuate the delusion. In such cases silence is in effect a representation that the facts are as B mistakenly believes them to be, and A is accordingly estopped from afterwards averring, as against B, any other state of facts.

In the final analysis, the touchstone is whether, in the established matrix of circumstances, the conduct of the parties, objectively ascertained, supports the existence of a contract. Reduced to its rudiments, it can be said that this is essentially an exercise in intuition. Legal intentions, whether articulated or unarticulated, should not be viewed in isolation but should be filtered through their factual prism. Silence, depending on whether it is conscious or unconscious, may also from time to time entail altogether disparate legal consequences.

Tenancy arrangements

53 In the absence of any further agreement, a tenant who holds over premises becomes, upon the expiry of the tenancy, a tenant at will. Payment of rent *qua* occupier is, however, an acknowledgement of the existence of a fresh tenancy. In each case the conundrum is what terms govern the tenancy. Absent a written agreement, this ought to be decided in the context of the prior relationship, the parties' negotiations and sometimes their subsequent conduct. In *Roberts v Hayward* (1828) 3 C&P 432; 172 ER 489, a case involving the holding over of a tenancy, it was incisively observed:

> The tenancy under the agreement expired at Midsummer, 1826. Immediately after that time, the plaintiff was a trespasser; but the landlord was not obliged to treat him as such, *but might make proposals to him, to renew the relation of landlord and tenant between them. This he did, and the plaintiff did not say, I will go out directly. His silence on the subject is tantamount to his saying, I will continue in on the terms of your proposal.* [emphasis added]

54 It is therefore axiomatic that "*silence*" in the context of the formation of a landlord and tenant relationship can be pregnant with legal implications. A tenant can simply accept an offer of tenancy or create a new tenancy merely by remaining in possession and paying rent. Upon the characterisation of the payment for the right to occupy the premises as "rent" the landlord-tenant relationship is constituted.

55 In this case, it is unassailable that the critical issue of rent for the new tenancy had been consensually agreed upon. It bears emphasis that there is no real dispute, save for the termination clause, as to what terms the tenancy agreements were to include. This is clearly a case where "execution of a lease by the tenant was no more than an incident of the performance of the agreement reached by the parties. … There was nothing more for the parties to do except to execute the lease": *per* Lim Teong Qwee JC in *Masa-Katsu Japanese Restaurant Pte Ltd v Amara Hotel Properties Pte Ltd* [1999] 2 SLR 332 at [11]–[12]. In other words, the sterile formality of a signature is not always necessary in law to breathe life into contractual undertakings. Incompleteness in form is not tantamount to legal inefficacy. Subject to any specific statutory requirements, the law almost invariably allows substance to take precedence over inadequacies in form.

56 In this case all the material terms had been settled. The defendant never took issue with the terms of the engrossed tenancy agreements between 5 July 2002 and 15 January 2003. The mere failure to execute a tenancy agreement does not *per se* undermine its enforceability. Equity looks on that as done which ought to be done. It will hold parties, who for valuable consideration have agreed to a lease, to their bargain. The *locus classicus* is, of course, the decision of *Walsh v Lonsdale* (1882) 21 Ch D 9 where Jessel MR observed at 14–15:

> The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted … *That being so, it appears to me that being a lessee in equity he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed.* [emphasis added]

57 The Court of Appeal *per* L P Thean JA in *Golden Village Multiplex Pte Ltd v Marina Centre Holdings Pte Ltd* [2002] 1 SLR 333 at [12] had occasion to observe in the context of equitable leases that:

> [t]he agreement operates as a contract and the terms thereof and the rights of the parties thereunder are enforceable in equity under the doctrine of *Walsh v Lonsdale* (1882) 21 Ch D 9. *It will be treated as an equitable lease for the term agreed upon and as between the parties to the agreement is equivalent to a lease at law*. The authorities in support are legend. [emphasis added]

This is clearly not a case of inconclusive negotiations. Neither is it a case of mistaken expectations nor one of a catalogue of oversights. The defendant's omission to sign the tenancy agreements was hardly accidental. The defendant's silence for some six months was a deliberately calculated attempt to exploit what they thought was a contractual ace – an unsigned lease. The silence during the initial months of the new tenancy was not equivocal. The defendant took advantage of its cordial relationship with the plaintiff. The plaintiff did not press for the signed tenancy agreement precisely because of such cordiality. The defendant's gesture of convenient and canny passivity after the rental was adjusted spoke for itself. Given the prior history of negotiations it is extremely unlikely, and completely at variance with the parties' previous conduct and dealings, for them to have parted from the 2 May meeting without any further communication *unless* there were nothing other than mere formalities to attend to prospectively.

58 All said and done, the defendant's "silence" viewed against the factual backdrop was in reality not the dramatic trump card that it had intended to play at a convenient juncture, but rather its Achilles heel. Through its charade of deliberately maintaining all the outward manifestations of a new tenancy agreement – by paying the adjusted rent and accepting the credit given by the adjusted deposit – the defendant had commenced a course of conduct, both prior to and subsequent to the expiry of the earlier leases, that was clearly referable to the contract alleged by the plaintiff. The defendant was fully aware that the plaintiff believed a binding agreement had been reached and was acting upon it. The plaintiff had also acted on the agreement by increasing the air-conditioning hours and reducing the rent. The defendant was content to go along "passively" and, indeed, benefit from this arrangement until it found alternative premises. If in truth no agreement had been reached, after receiving the engrossed lease the defendant could simply have written a short note to the plaintiff stating its position. It chose not to do so. In the final analysis, it was unable to reconcile its silence with its avowed business practice of placing important matters on record. This was patently not a case of a simple slip or accidental oversight on the part of the defendant.

Result

59 In the result, I decided that the plaintiff should succeed in its claim for breach of contract, with an entitlement to damages that would compensate it for the loss of rental arising from the defendant's repudiation of the tenancy agreements. With regard to the issue of mitigation, the defendant claimed feebly that it had introduced some potential tenants to the plaintiff. This half-hearted attempt to attenuate the effects of its conduct was futile, to say the least. The plaintiff took reasonable steps to follow up but to no avail. It was also apparent to me that the plaintiff regularly and diligently took steps to look for substitute tenants. Given the depressed property market, its attempts to lease the premises even at lower rental rates were unsuccessful. Defence counsel made a lame effort to establish that due diligence had not been evidenced or established.

60 Quite apart from the fact that the Defence had not appropriately pleaded this issue, this was an entirely implausible assertion. The plaintiff had in fact placed numerous advertisements and held

several discussions with potential tenants. Its conduct ought not to be judged in retrospect nor audited technically: *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR 288. It was for the Defence to establish what else the plaintiff ought to have reasonably done. This it failed to do.

61 Judgment was therefore granted in the plaintiff's favour for the sum of $679,928.08 (being $824,031.81 less the security deposit of $86,457.37 and part payment of rent of $57,646.36) with damages for the month of June 2004 to be assessed by the registrar. The plaintiff's legal costs were directed to be taxed.

Further arguments

62 Some rather dramatic developments transpired soon after I delivered judgment on 18 May 2004. The defendant discharged its solicitors. Its new solicitors made an application on 25 May 2004 for further arguments on the sole basis that s 6(d) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA") had not been complied with. Section 6(d) CLA is *in pari materia* with s 40(1) of the English Law of Property Act 1925 (c 20), which in turn was inspired by s 4 of the Statute of Frauds 1677 (29 Charles II c 3). It was argued that the undated tenancy agreements were unenforceable by reason of the absence of any "sufficient memorandum or note … signed by the party to be charged" as mandated by s 6(d) CLA.

63 It was also contended that s 6(d) CLA need not be pleaded specifically. The English White Book (*The Supreme Court Practice* (1997 Ed) vol 1), however, states in no uncertain terms in para 18/8/16: "Statute of Frauds or s 40 of LPA 1925 – Must be specifically pleaded". In the Singapore context it has long been the position, as reflected in *Shayna Mustan Rowter v Kana Shaik Ibrahim* (1888) 4 Ky 344, that the Statute of Frauds should be pleaded. In *Ku Yu Sang v Tay Joo Sing* [1993] 3 SLR 938 at 947, [37], Warren L H Khoo J curtly observed in relation to s 6(d) CLA's progenitor that "if the defendant had intended to raise a point about the sufficiency of the memorandum, he not only would have had to plead that the memorandum was not sufficient, but he would also have had to plead specifically in what way it was not sufficient".

64 This requirement for an express pleading is not a mere technicality to be blithely glossed over. The courts have always been anxious to ensure that the Statute of Frauds, its progeny included, do not evolve into instruments of sharp practice. The express pleading requirement has the salutary effect of mitigating any possibility of surprise and or prejudice that might arise from springing an arid technical defence at the last moment. Indeed, this is precisely what the defendant was attempting to effect through the guise of further arguments. In my view s 6(d) CLA has to be expressly pleaded if it is to be deployed in legal proceedings.

65 Be that as it may, I also did not accede to Defence counsel's application, in the alternative, to amend the pleadings so as to expressly plead s 6(d) CLA as a defence. The application was made nine days after judgment was entered, and struck me as being wholly inappropriate. The defendant had had ample opportunity to consider how to plead its case. Indeed it had made two earlier amendments to the defence. Its new solicitors gave no credible explanation why this defence had not been pleaded earlier. Was it another "oversight"? Indeed, the truth of the matter may well be that the defendant's previous solicitors had considered this a mere technicality and had discarded it accordingly. Plaintiff's counsel also rightly pointed out that if the amendment were allowed, the plaintiff in turn also had to be accorded an opportunity to lead further evidence. Furthermore, plaintiff's counsel submitted that his cross-examination might have been conducted quite differently, adding that there must be finality in the matter. I fully agree. In *Invar Realty Pte Ltd v Kenzo Tange Urtec Inc* [1990] SLR 791 at 797, [21], it was forcefully declared by Yong Pung How J, as he then

was:

> While a court may have a wide power of amendment even after a final judgment, the appropriate cases in which such a power should be exercised *must necessarily be very limited*. Whether or not a court should do so will be in the discretion of the court, and will depend on the facts of each case, including in particular the nature and implications of the amendment sought. *In all cases, a court will have to bear in mind the fundamental principle of all courts that there must be a finality to litigation*. [emphasis added]

66 For the sake of completeness, I should add that even if the application to amend the defence were allowed, this new defence would be doomed to fail even on the basis of the evidence before me. To assuage the rigour of the requirement for a "memorandum or note" the courts have invariably taken a pragmatic approach in recognising the applicability of the doctrine of part performance. Any independently-established objective evidence tilting towards the existence of a contract is almost inevitably admitted to circumvent the statutory requirement of a "memorandum or note". This approach aims to thwart unconscionable behaviour. While the intrinsic statutory purpose of s 6(d) CLA is to nip any fraudulent claims in their bud, it is not to be used as an instrument that will allow unscrupulous conduct to flourish. There have been a number of authorities buttressing this approach ranging from dispositions of land involving sales to leases. For instance, *Miller & Aldworth, Limited v Sharp* (1899) 1 Ch 622, was a decision involving the enforcement of an oral lease. In pursuance of and/or in part performance of an oral agreement, the tenants effected payment of a higher rent upon the expiry of the earlier lease. The landlord subsequently refused to execute the lease and relied on the Statute of Frauds. Byrne J held at 626 that the payment of the adjusted rental placed the matter outside the purview of the mischief of the statute:

> … [W]hat was done could not refer to the old tenancy, *but is in my judgment an unequivocal act referable to some new contract, and that could only be a contract of tenancy.* Evidence must, therefore, be admitted to shew what the contract was. [emphasis added]

67 In the present scenario, the plaintiff offered and the defendant accepted the adjusted rent. The plaintiff issued a credit note reducing the deposit. That note expressly referred to a "lease". This could only mean the lease at the adjusted rent. The adjusted rent was paid by the defendant in full, punctually and without reservation or qualification. Invoices were sent; receipts were given. Furthermore, the plaintiff had acted on the new arrangement by extending the air-conditioning hours. These acts, cumulatively, more than suffice for the purposes of evidencing part performance. The acid test that requires acts to be "referable to" an alleged contract has been satisfied. The defendant's new solicitors' frantic attempt, well past the eleventh hour, to plead an arid technicality was at best misguided and at worst farcical.

Claim allowed.