

Thode Gerd Walter v Mintwell Industry Pte Ltd and Others
[2009] SGHC 44

Case Number : Suit 351/2007
Decision Date : 23 February 2009
Tribunal/Court : High Court
Coram : Belinda Ang Saw Ean J
Counsel Name(s) : Sugidha Nithiananthan (Tan Rajah & Cheah) for the plaintiff; Anthony Lee and Sarah Tan (Bih Li & Lee) for the defendants
Parties : Thode Gerd Walter — Mintwell Industry Pte Ltd; Seah Bak Kheow; Tan Kee Hock, Eddy

Contract – Breach

Contract – Misrepresentation

23 February 2009

Judgment reserved.

Belinda Ang Saw Ean J

1 The plaintiff, Gerd Walter Thode, is the sole proprietor of Euromal Precision Engineering and in this action he claims damages for breach of contract, misrepresentation and breach of duty.

2 At all material times, the first defendant, Mintwell Industry Pte Ltd ("D1"), was the owner of the leasehold property known as Mintwell Building, an industrial building developed on land leased by D1 from the Housing and Development Board ("HDB") in 1996 ("the property"). D1 mortgaged its interest in the property and covenanted, *inter alia*, not to let any part of the property without the consent in writing of the mortgagee bank, Tat Lee Bank Limited, who subsequently merged with Keppel Bank of Singapore Limited to become Keppel Tat Lee Bank Limited. D1 fell into arrears with its mortgage repayments and Keppel Tat Lee Bank Limited on 25 May 2001 obtained judgment in default of appearance against D1. Following the merger between Oversea-Chinese Banking Corporation Limited ("OCBC") and the former Keppel Tat Lee Bank Limited, OCBC took over the equitable mortgage. On 2 September 2002, OCBC obtained an Order for possession of the property ("the Order for possession"). OCBC did not seek to enforce the Order for possession until 30 June 2006. In the interim period, on 16 February 2005, D1 granted to the plaintiff a tenancy of one of the vacant units in Mintwell Building known as Unit 01-02. The letting was for a term of two years with an option for an additional two years. On 1 August 2006, D1 granted to the plaintiff a tenancy in respect of Unit 03-02. To ensure that the expiry date of both units coincide, the second tenancy agreement was for a term of 33 months with an option for an additional two years.

3 On 30 June 2006, OCBC enforced the Order for possession. A Writ of Possession was filed on 30 June 2006. A notice of eviction dated 6 July 2006 ("the eviction notice") was served on four tenants of Mintwell Building on 6 July 2006. I should mention that the eviction notice was not served on the plaintiff who had no notice of the Writ of Possession or the eviction notice until 2 August 2006. D1 did not oppose the Writ of Possession. The plaintiff unsuccessfully opposed the enforcement proceedings so much so that by Order of Court dated 1 September 2006, OCBC was granted liberty to enforce the Order for possession and to execute the Writ of Possession. At the hearing, the Assistant Registrar, Ms Tan Wen Shan, ruled that the Writ of Possession was validly issued on 30 June 2006. The Assistant Registrar ordered a stay of execution on the Writ of Possession till 4.00pm on 1 December 2006. The plaintiff gave up Unit 03-02 on 4 October 2006. He vacated Unit 01-02 on or about 28 November 2006. It is noted that the plaintiff occupied Unit 01-02 for over a year before the

eviction. On the other hand, no operations commenced at Unit 03-02. It is also noted that D1 and OCBC finally reached an amicable settlement of the judgment against D1. By agreement, the Writ of Possession was treated as withdrawn on 28 February 2007.

4 The plaintiff blames the defendants for the loss of the tenancies. He not only sued D1, he also sued the second and third defendants claiming that the court should hold them personally liable for D1's breaches. An overview of the plaintiff's case is set out at [8] to [13] below.

5 It is now a convenient juncture to introduce the second and third defendants. The second defendant is Seah Bak Kheow ("D2"). According to the plaintiff, at all material times, D2 was the person who controlled D1. He was the main decision maker in D1 and was the person who negotiated and/or concluded the transactions with its bankers and tenants. He was the person whose directions and instructions the management of D1 was accustomed to act.

6 The third defendant is Tan Kee Hock, Eddy ("D3"). Again, according to the plaintiff, D3 was, at all material times, a director and controller of D1. He was authorised to act and did, *inter alia*, negotiate and/or conclude transactions on behalf of D1. The management of D1 was accustomed to act in accordance with D3's directions and instructions.

7 The trial before me is limited to the issue of liability. Damages recoverable, if any, will fall to be decided at a separate hearing. The plaintiff's claim for the return of the rental deposit of \$31,287.20 was no longer a live issue at the trial as the plaintiff had earlier in the proceedings obtained judgment in his favour. On 19 January 2009, both sides were directed to consider the effect of the Order for possession, if any, on the status of D1 in relation to its occupation of the property, and its ability to grant the tenancies in question.

Overview of the plaintiff's case

8 I start with the claims against D1. The plaintiff's claims against D1 are put in a number of different ways: as a claim in contract, as a claim in negligence and as a claim for negligent or fraudulent misrepresentation. It must be noted that the pleaded averments relied upon in support of the various causes of action against D1 are all the same. The plaintiff has also sued D2 and D3 personally. The real question here in this action is whether D2 and D3 can be personally liable for breach of duty, fraudulent or negligent misrepresentation.

9 D1 admitted liability for breach of the tenancy agreements. The breach of covenant for quiet use and enjoyment was in the landlord's failure to provide and complete the tenure agreed upon. The occupation was interrupted by OCBC who successfully evicted the plaintiff. A consent judgment was entered against D1 on 25 August 2008, the first day of the trial.

10 It is common ground that no written consent to the tenancies to the plaintiff was ever given by OCBC. The plaintiff acquired no rights against OCBC under the tenancy agreements for they had been entered into by D1 in breach of the mortgage. It was agreed (since there was no evidence) that OCBC did not by conduct accept the tenant as its own. However, the tenancies subsisted between the parties by estoppel. It is not disputed that the well-settled doctrine of tenancy by estoppel applies to a tenancy where the tenant took possession with the permission of the landlord. The tenant is estopped from denying his landlord's title and the landlord from his tenant's. Estoppel continues to operate and bind the parties even after the term has ended except where the tenant is dispossessed by a third party with a superior title to his landlord. As stated, D1 consented to judgment for breach of contract. Separately, and in the context of the misrepresentation claim, D1's defect in title or lack of it, if any, is relevant as it will form a part of the state of affairs existing at

the time the tenancies were negotiated and concluded.

11 Despite obtaining consent judgment, the plaintiff continued to press on with his claim for damages based on other pleaded causes of action against D1. His decision has everything to do with the plaintiff's desire to separately pin personal liability on D2 and D3. It is settled law that directors are not personally liable for the company's breach of contract. This general rule is grounded on the principle in *Salomon v Salomon & Co Ltd* (1897) AC 22. In this case, the plaintiff seeks to deviate from the separate legal personality of a company to impose personal liability on D2 and D3 by urging the court to lift the corporate veil. In my view, there is, on the evidence, no basis for the corporate veil to be lifted and this is elaborated in the judgment at [17] to [25].

12 The claim in negligence – failure to obtain OCBC's written consent was said to constitute a failure in the duty of care owed to the plaintiff – is without merit for the reasons stated in [14] to [16] below. In respect of the plaintiff's claim for misrepresentation against the defendants, the pleaded case on misrepresentation by conduct alleges that the defendants in entering into negotiation for the tenancies negligently or fraudulently represented by implication to the plaintiff that he would be able to peacefully and quietly hold and enjoy the premises for the respective terms agreed between them. I take the plaintiff as alleging that the defendants' participation in the negotiation carried with it an implied representation that it could support the tenancies when plainly that was not the case because the defendants knew that OCBC had obtained an Order for possession following an unsatisfied judgment against D1, and there was no written consent to the tenancies. I should add that OCBC enforced the Order for possession by causing to be issued a Writ of Possession on 30 June 2006. By the eviction notice of 6 July 2006, OCBC was stating its intention to take possession on 20 July 2006. However, OCBC did not proceed with eviction on 20 July 2006, but instead filed an application to validate the issuance of the Writ of Possession on 28 July 2006. Those developments took place before the conclusion of the tenancy agreement for Unit 03-02 on 1 August 2006. As stated, the Assistant Registrar confirmed that the Writ of Possession was validly issued on 30 June 2006.

13 The other allegation against D2 and D3 is that they had procured or directed the commission of the tort of deceit or negligent misrepresentation by D1, and they are, therefore, personally liable for the tort and the damage flowing from it. It is not disputed that the defendants did not inform the plaintiff that written consent of OCBC was needed. However, that of itself is not enough to amount to a misrepresentation unless there was an obligation to disclose it and, by reason of the failure to do so, the representation was impliedly made. The question is (a) whether the defendants were or came under a duty to disclose the consent clause in the mortgage; and (b) whether an implied representation was in fact made.

Duty to obtain written consent and disclose material facts

14 Before moving on to the real issue in dispute, I propose, as it is a relatively short point, to deal with the alleged free standing duty to obtain written consent and then the failure to disclose (a) the consent clause in the mortgage, and (b) the absence of written consent to the tenancies to the plaintiff. D1 is also accused of failing to disclose to the plaintiff the Order for possession, the Writ of Possession and eviction notice.

15 The plea is that D1 (and not D2 and D3) owed the plaintiff a free standing duty of care to obtain the written consent of OCBC to grant the tenancies. As a consequence of D1's failure to obtain written consent, OCBC was able to evict the plaintiff from Unit 01-02 and Unit 03-02 thereby causing the plaintiff to suffer loss and damage. Such a duty of care, if it exists at all, must arise out of the contract between the parties or under the general law. Counsel for the defendants, Mr Anthony Lee,

maintains that there is no duty to obtain written consent. I agree. First, the contractual relationship giving rise to rights and obligations is defined in the tenancy itself. The contract did not impose expressly or impliedly an obligation on D1 as landlord to seek the prior consent of OCBC. There is no law against letting property that is subject to the consent clause; the tenant's remedy is upon his contract, if any. Second, there is no evidence, and hence no basis to superimpose obligations in negligence going beyond those carefully defined in the contractual documentation. Nothing could be clearer that D1 was not assuming any separate responsibility to the plaintiff under common law. The expression "assumption of responsibility" has on occasions been used in cases where it would be more accurate to speak of the court imposing a responsibility, but I can see no ground on which to impose on D1 the duty of care contended for by the plaintiff.

16 I now come to the alleged duty to disclose to the plaintiff the consent clause in the mortgage. As a general rule, a person involved in negotiations towards a commercial venture of this nature owes no duty of disclosure towards another prospective party. Needless to say, a duty of disclosure may be undertaken, but no such duty was undertaken by D1 in this case either expressly or impliedly. An exception to the general rule (which is relevant to the issue of what representations were made as was the allegation in this case) arises in instances where a party has to correct a representation if he knows it is not true before the agreement is made (see Trietel, *Law of Contract*, 12th Ed (Sweet & Maxwell, 2007) at para 9-123 to 9-124 & 9-129). A question which has to be decided in this action is whether an implied representation was in fact made by not correcting an impression given by the defendants' conduct (see [26] to [37] below). In addition, if a representation was made, the next question is whether it was fraudulent or negligent. As the claim is also brought against D2 and D3, the question arises as to whether, if a representation was made, D2 and D3 can be personally liable for such representation. Misrepresentation is discussed later in this judgment. As I see it, it is expedient first clear away the lifting of corporate veil argument.

The corporate veil argument

17 As stated, D1 admitted liability and consent judgment was entered against D1 on 25 August 2008 for breach of contract. In this case, the plaintiff seeks to deviate from the separate legal personality of a company to impose personal liability on D2 and D3. It must be remembered that it is rare that a director of a company (including a shadow director) will be personally liable for a breach of contract entered into by the company.

18 Counsel for the plaintiff, Ms Sugidha Nithi, argues that this is a case where the corporate veil should be lifted to impose personal liability on D2 and D3 for the contractual breach, and for D1's alleged negligence in failing to, *inter alia*, obtain the written consent of OCBC. In seeking to deviate from the separate legal personality of the company, the plaintiff's pleaded case is set out in paras 27 and 31 of the Statement of Claim (Amendment No 1). Paragraph 27 reads as follows:

The 2nd and 3rd Defendants were the controllers and the 3rd Defendant was a director of the 1st Defendant. The 2nd and 3rd Defendants had procured the Plaintiff to enter into the Unit 01-02 Lease and the Unit 03-02 Lease without obtaining OCBC Bank's written consent to the Unit 01-02 or the Unit 03-02 Lease, by failing to inform the Plaintiff of the Consent Clause and that OCBC Bank had not granted written consent for the Unit 01-02 Lease or the Unit 03-02 Lease, by failing to inform the Plaintiff of the Order of Court, the Writ of Possession or the Notice of Eviction and by leading the Plaintiff to believe that the Plaintiff would be able to peacefully and quietly hold and enjoy Unit 01-02 and Unit 03-02 for the terms of the Unit 01-02 Lease and the Unit 03-02 Lease respectively. The justice of the case requires that the corporate veil be lifted and the 2nd and 3rd Defendants be [made] liable to the Plaintiff for the breach of contract set out in

paragraph 25 and the Plaintiff's loss and damage as particularised in paragraph 26.

19 The same particulars in para 27 are repeated in para 31 of the Statement of Claim (Amendment No 1) and they form the plaintiff's grounds for ignoring the separate legal personality of a company to claim against D2 and D3 for the alleged negligence of D1. I have earlier found on the evidence that there was no free standing duty of care owed by D 1 as alleged.

20 The courts have on occasions looked behind the legal personality to the real controllers. Those occasions fall within recognised exceptions where the courts have shown themselves willing to lift the veil of incorporation. This case is not one falling under the categories of cases where the veil was lifted (such as (a) agency, (b) fraud, (c) group enterprises, and (d) trusts). The plaintiff argues that the strict application of the principle of corporate entity in this case is unwarranted citing justice of the case as a reason for the corporate veil to be lifted. I agree with Mr Lee that the court does not disregard the corporate personality of a limited company save in exceptional circumstances. The plaintiff has not shown that exceptional circumstances exist to warrant this court to ignore the separate legal personality of D1 in order to impose personal liability on D2 and D3.

21 The starting point is that any suggested departure from the doctrine laid down in *Salomon v Salomon & Co Ltd* ([11] *supra*) should be "watched very carefully". [\[note: 1\]](#) This is particularly so in the case such as the present where there is no suggestion that D1 was in some way used to create a sham or façade. The plaintiff accepted that D1 was a genuine company and was at one time involved in the business of the manufacture and assembling of high precision parts for video and magnetic storage cylindrical drum and was the lessee of the land leased from the HDB to build Mintwell Building. The plaintiff was D1's tenant of Unit 01-02 for over a year before the eviction. During the tenancy, monthly rent was paid to D1. Whilst the plaintiff has alleged that D2 controls D1, he has not asked the court to lift the corporate veil because D2 is the alter ego of the company. Instead, Ms Nithi asserts that the court has power to lift the corporate veil and the facts brought this case within the proposition that the consequences of separate corporate personality may be disregarded whenever required by justice (see *In Re a Company* [1985] BCLC 333 at 337-8). She submits that D1 acted on the instructions of D2 and/or D3, and that D2 and/or D3 was its directing mind. There is, as she submits, evidence of impropriety sufficient to satisfy the order sought by the plaintiff. The impropriety related to the matters particularised in paras 27 and 31 of the Statement of Claim (Amendment No 1).

22 The proposition said to be derived from in *Re a Company* was denied in *Adams v Cape Industries plc* [1990] Ch 433. Slade LJ at 536 said:

... save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v Salomon and Co Ltd* [1897] AC 22 merely because it considers that justice so requires.

23 Slade LJ's statement was accepted and followed by Morritt V-C in *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177 to be the law and the court declined to apply so broad a proposition laid down in *Re a Company*, citing *Ord v Belhaven Pubs Ltd* [1998] BCC 607 at 614-615 in support. In that case, Hobhouse LJ expressed the same reservations as Slade LJ.

24 Two Singapore cases, *Sri Jaya (Sdn) Bhd v RHB Bank Bhd* [2001] 1 SLR 486 and *Gerhad Hendrick Gispén v Ling Lee Soon Alex* [2001] SGHC 350 illustrate the reluctance of the Singapore courts to adopt and apply the proposition in *Re a Company* (see also Halsbury's Laws of Singapore, (2006 Reissue), Vol 6, para 70.080). Rajendran J in *Sri Jaya (Sdn) Bhd v RHB Bank Bhd* at [63] stated that whilst the ambit of exceptions is not closed, the power to lift the corporate veil is to be exercised sparingly.

25 It appears to me that this is not a case to decide whether to adopt and apply so broad a proposition as that stated in *Re a Company* and for which the plaintiff contends in this case. On the facts, I cannot see any valid reason or authority for lifting the veil in this case to make D2 and D3 personally liable for the liabilities of D1. The short point is that the consent judgment was premised on a contractual relationship between D1 and the plaintiff and the admission by D1 that it had breached its terms. The real question is whether D2 and D3 are, in addition to D1, personally liable to the plaintiff. This inquiry does not involve an exercise in lifting the corporate veil. There is a separate plea against D2 and D3 for fraudulent or negligent misrepresentation.

Misrepresentation

Was a representation made?

26 The present case, on the evidence, can be seen as involving representation implied from conduct. The starting point of the implied representation the plaintiff relies upon would be the principle of law as stated in Treitel, *The Law of Contract* ([16] *supra*) at para 9-008:

Statement of intention as implied assertion of capacity to fulfil it. A person may similarly state his intention of doing something and thereby impliedly assert that he has reasonable grounds for thinking that he has the capacity to do it. There is no logical reason why such an implied assertion should not also be regarded as one of fact.

27 KR Handley, *Spencer Bower, Turner and Handley Actionable Misrepresentation*, (Butterworths, 4th Ed, 2000) at para 53 noted:

The person selling or letting property impliedly represents that it exists, that he has power to sell or let it, as the case may be, and in the case of an agreement to sell, that he intends it to be unencumbered on completion; if he offers to let premises for offices he represents that planning permission for this use is available or not required.

28 The author cites as authority in support of his commentary in para 53, Romilly MR in *Wilbraham v Livesey* (1854) 18 Beav 206 who at 209 stated:

[W]hen a person simply contracts to take a lease, he naturally assumes that the person who proposes to grant a lease has really the power to do so.

29 From this perspective, a landlord's negotiations leading to the contract carries with it an implied representation that he is in a position to support the tenancy, and hence has the capacity to fulfil everything that the tenancy purports to grant. Pausing there, it has been said that "[d]ispossession [of a tenant by a superior title] is a breach of the landlord's implied representation that he had a title which would support the lease" (see KR Handley on *Estoppel by Conduct and Election* (Sweet & Maxwell, 2006) at 9-017). Coming back to the various instances of implied representation, there is *Richardson v Silvester* (1873) LR 9 QB 34 where the court there held that a lessor represents that he has good title to lease to an intending lessee once he advertises his property for rent. Another case of implied representation is *Spice Girls Ltd v Aprilia World Service BV* [2002] EMLR 27. In that case the pop group was held to have made an implied representation when they continued with arrangements to publicise the defendant's products in the knowledge that one member of the group was intending to leave the group shortly. That departure would prevent the contract being carried out and the defendants deriving any benefit from the arrangement.

30 Chitty on Contracts, 30th Ed (Sweet & Maxwell, 2008) Vol 1, at para 6-011 observed that cases

of implied representation can overlap that of representation by conduct. All the same, the essence of the implied representation in the cases is to an existing condition or state of affairs that was required by the contract to exist but in truth did not. Guidance on how one decides whether such a representation was made is set out in para 6-011 as follows:

The essential issue is whether in all the circumstances it has been impliedly represented that there exists some state of facts different from the truth. In evaluating the effects of the statement or conduct in such circumstances, a helpful test is whether a reasonable representee would naturally assume that the true state of facts did not exist and that, had it existed, he would in all circumstances necessarily have been informed of it.

31 Mr Lee on behalf of the defendants submits that there was no representation. D2 and D3 did not meet the plaintiff, Mr Thode, to negotiate the respective tenancies. In contrast, Mr Thode said he met D2 but not D3 before the tenancy of Unit 01-02 was legally concluded. D1's case is that D2 spoke to Randy Chan from DTZ Debenham Tie Leung (SEA) Pte Ltd ("DTZ") on the first tenancy agreement, and D3 signed the tenancy agreement as director of D1. The second tenancy agreement was handled by D1's administrative and finance manager, Shirley Ang Poh Geok ("Shirley"). She and Mr Thode's operations manager, Sukhwinder Singh Nijer were the ones directly involved in the negotiations to let Unit 03-02 to the plaintiff.

32 So far as witness assessment is concerned, I have no reason to doubt the honesty of Mr Thode or Randy Chan. D2 was not always convincing as a witness. So was D3. I am satisfied that Mr Thode met D2 before concluding the tenancy agreement in respect of Unit 01-02. In any case, it is not necessary for them to meet before a representation is made out. Contrary to Mr Lee's assertion, a representation may be made even if the persons concerned did not meet to negotiate the contract. The law does not require the representation to be made directly to the plaintiff. It is sufficient (as was the case here) if the representation is made to a third person to be communicated to the plaintiff or a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view of it being acted on, and the plaintiff, as one of the public acts on it and suffers damage as a result (see *Richardson v Silvester* at 36 citing with approval the judgment of the court in *Swift v Winterbotham* 8 LR QB at 253; Chitty on Contracts, *supra*, at para 6-028).

33 Mr Lee's other argument is on the plaintiff's omission to engage lawyers to act for him in the tenancy and that omission, he argues, was the reason why Mr Thode did not find out about the mortgage and the consent clause. Like in the case of a sale of property, the doctrine of caveat emptor (so the argument develops) applies to a lease of property to create a landlord-tenant relationship. Ms Nithi brought to the court's attention *Redgrave v Hurd* (1881) 20 Ch D1. It illustrates the proposition that it is no answer to a claim for rescission or damages that the claimant could with reasonable diligence discover that the representation (even innocent) was untrue. In *Peekay Intermark Ltd v ANZ Banking Group Ltd* [2006] 2 Lloyd's Law Rep 511, Moore-Bick LJ, in the context of a claim under s 2(1) of the Misrepresentation Act 1967 (UK), held that once a misrepresentation has been made, "it is not enough to show that the claimant could have discovered the truth, but that he did discover it." Treitel, *The Law of Contract* at para 9-020 opined that the rule in *Redgrave v Hurd* no longer applies after the decision of *Peekay Intermark Ltd v ANZ Banking Group Ltd* and that a preferable explanation for this decision is simply that a claim for misrepresentation, other than for fraud, may be defeated where it is reasonable to expect the representee to take the opportunity of discovering the truth (and he did not). Ultimately, it is a question of fact whether a person has been induced by misrepresentation to enter into a contract. Other than for fraud, it is always open to the defendant to show, if he can, that since the claimant was aware of the true facts, he was not induced by the misrepresentation to act as he did.

34 In the present case, Randy Chan recounted that D1 gave DTZ the right to market and lease the vacant units in Mintwell Building. In that connection, he was given a partial floor plan of the building and in that document, D2 was identified as the managing director of D1. Randy Chan testified that after he obtained the requisite permission from D1, he advertised the property for rent in the CATS Classified segment of the Straits Times. The plaintiff seeing the advertisement responded to it, and that was how the plaintiff came to lease Unit 01-02. Before execution of the tenancy agreement, DTZ prepared a letter of intent for the prospective landlord and tenant to sign to signify their in-principle agreement to rent Unit 01-02. D2 on behalf of Mintwell agreed to the terms therein by signing on the acceptance page of the letter of intent. So did the plaintiff. It is not disputed that DTZ was entitled to commission for securing the tenancy. A lease commission agreement was signed by D2 on behalf of D1 on 7 December 2004. By this agreement, D1 agreed to pay to DTZ as commission the sum of \$7,821.80 plus GST. Separately, DTZ also received a smaller commission from the plaintiff. DTZ's advertisement in CATS Classified must be read as if the representation was made to the plaintiff, as one of the public, who responded to the advertisement. The plaintiff's pleaded case, though ventilated through a different slant, contains factual averments to support in a broader context the following contention. The starting point is that the essence of a contractual tenancy is that a tenant has a right to exclusive possession of the demised premises. By allowing DTZ to advertise the property for rent, D1 represented that it was in a position to let Unit 01-02 to an intending tenant. By entering into negotiations leading to the contract, D1 on each occasion impliedly represented to the plaintiff as intending tenant that it had the capacity to fulfil everything that the tenancy purported to grant. Closely allied to that representation is the pleaded assertion that the plaintiff would be able to quietly hold and enjoy the two units for the term of the respective tenancies.

35 In cross-examination, Mr Thode explained the representation by conduct as follows:[\[note: 2\]](#)

A: ... [M]y impression is that ... at that time ... the person I am dealing with...has the capacity of doing this deal with me.

...

Q: That's all ... that was the impression?

A: I mean that he is ... able to ... negotiate with me all the terms and conditions.

...

Ct: ... [T]he person you are dealing with ... had the capacity to deal with you; and by that, you are also saying "to be able to perform the contract"?

A: That is correct ...

...

Q: When you say that that person was also capable of performing that contract, what do you mean by that, Mr Thode?

...

Q: What is your understanding?

A: My understanding is that ... he is allowed to ... act for ... the company.

36 I take Mr Thode as saying in evidence that the company itself would be capable of performing the contract on the terms as agreed. Mr Thode confirmed in re-examination that it was his impression when he discussed with D2 that he could stay for four years if he signed the tenancy agreement for Unit 01-02. Similarly, the tenancy agreement for Unit 03-02 was to be for 33 months to coincide with the "2 plus 2 of #01-02" and his impression from D1 agreeing to this 33 months was that he would be allowed to stay for 33 months at Unit 03-02 if he signed the lease.[\[note: 3\]](#)

37 In my judgment, the essence of the representation by conduct was to an existing condition or state of affairs that was required by the contract to exist. What was the existing state of affairs at the material time? At that time, there was an unsatisfied judgment against D1 who had all but ceased business. Rental was its only source of income. D1 was required by the terms of the Order for possession to deliver up possession to OCBC. Whilst the first tenancy was created at the time OCBC did not seek to enforce the Order for possession, it must be remembered that the Order for possession remained in force. So long as the Order for possession was in force (and it was so on the facts), it had to be obeyed and Mintwell who did not deliver up possession was in default (see *Hillgate House Limited v Expert Clothing Services* [1987] 1 EGLR 65 applying *Grafton Issac v Emery Robertson* [1985] AC 97). Even though OCBC did not enforce the Order for possession in 2005, all that can be said is that the OCBC refrained from ejecting D1 from the property. That is not to say that the fact that D1 was allowed to remain in occupation of the property could itself in any way preclude the mortgagee from evicting D1 if and when it desired to do so. It is not easy to characterise the status of D1 in occupation under the shadow of the Order for possession. OCBC by taking action for possession and obtaining an Order for Possession had the immediate right to possession of the property. Conceptually, D1 remained in occupation subject to the Order for possession up to the time OCBC entered into possession. D1's occupation was precarious as D1 could be evicted at anytime. Notwithstanding the existing state of affairs, D1 went ahead to grant the tenancies without the written consent of OCBC. It even went ahead to grant the 33-month tenancy despite the earlier eviction notice. The tenancy for Unit 03-02 was discussed in July 2006 and concluded on 1 August 2006 after OCBC had issued a Writ of possession to enter into possession. D1's administrative and finance manager, Shirley, testified that the eviction notice was served on 6 July 2006 and she informed D2 about it. D3 admitted that he learned of the eviction notice in July 2006. He was aware that OCBC was intending to evict the tenants in Mintwell Building. In fact, Mr Lee's firm on behalf of Nikko Industries & Services Pte Ltd (D3's company), M-Precision Centre Pte Ltd and Fotronics Incorporated (S) Pte Ltd (D2's companies) wrote to OCBC's lawyers on 19 July 2006 for clarification on the Writ of Possession. The evidence showed that Nikko Industries & Services Pte Ltd, M-Precision Centre Pte Ltd and Fotronics Incorporated (S) Pte Ltd and Upek Pte Ltd, who were D1's tenants before the plaintiff signed on in 2005, did not in the end resist eviction by OCBC. There is nothing in the evidence to show that D1 believed (having not got the written consent of OCBC) that the facts impliedly represented – that D1 was in a position to support the tenancy and hence had the capacity to fulfil everything that the tenancy purported to grant – was true. I therefore find that the implied representation was in fact made by not correcting an impression given by D1's conduct.

Was the representation fraudulent or negligent?

38 The next question is whether the representation was fraudulent or negligent. At this stage, it must be remembered that since D1 and the plaintiff were parties to the contract under which D1 leased premises to the plaintiff, the misrepresentation would be one to which the Misrepresentation Act applied. If that Act did not, for any reason provide a remedy, there could be no room for the plaintiff being able to succeed against D1 on some other case of negligent misstatement (see *IFE Fund SA v Goldman Sachs International* [2007] 2 Lloyd's Law Rep 449 at [28]).

39 Section 2(1) of the Act entitles the party who has been misled to claim damages in respect of its

losses unless the other party can prove that it had reasonable grounds to believe, and did believe, that the facts represented were true. Section 2(1) provides as follows:

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

40 I am satisfied that the representation by conduct was negligently made. The plaintiff has established that D1 by offering to let the premises, entering into negotiation and the contract was by implication representing to the plaintiff as a fact that D1 was in a position to support the tenancy and hence had the capacity to fulfil everything that the tenancy purported to grant. Specifically, D1 was representing to the plaintiff as a fact that the existing state of affairs were such that in the ordinary course of the contract, he could have quiet use and enjoyment of the units for the fixed period of time agreed upon. That representation by implication was not true at the conclusion of the contract. I am equally satisfied that the representation was made with the intention of the plaintiff acting upon it. The plaintiff did act upon the representation, signed the contract and took over the units. I agree that any person who is likely to take a letting or might be reasonably contemplating in taking a unit, acting on the advertisement (in the case of Unit 01-02), negotiating the contract and incurring expense in consequence of that false representation have a valid claim in damages (see per Quain J in *Richardson v Silvester* at 37). The plaintiff testified that his impression back then was that the person he was dealing with could perform the contract.[\[note: 4\]](#) As all these matters have been established, it is for D1 to establish that it had reasonable grounds for its belief. No question of a defence under s 2(1) of the Act arises. There was no written consent to the tenancies in place; the property was under the shadow of the Order for possession and then the Writ of Possession, and D1 as mortgagor and judgment debtor and D2 as guarantor were unable, financially, to satisfy the judgment in favour of OCBC.

41 The difficult financial situation persisted and continued from September 2002 to June 2006. In his written testimony, D2 disclosed:[\[note: 5\]](#)

24. As for the negotiations, it was still a long and difficult exercise to arrive at any form of settlement with OCBC. The debt grew larger each day because of the penalty interest imposed by OCBC. I did not have that amount of money to settle with the bank and the value of the building did not appreciate at all.

Negotiations broke down and were aborted around June 2006 after OCBC demanded \$12m in settlement of the judgment. D2 testified that Mintwell Building was worth no more than \$8m and he did not have the money to make up the shortfall. Settlement negotiations were aborted in or around June 2006 and that was when the bank issued the Writ of Possession on 30 June 2006 to enforce the Order for possession. D2 knew about the eviction notice on 6 July 2006 and OCBC's intention to enter possession on 20 July 2006. Certainly D2 should have corrected the representation that D1 had the capacity to meet its obligation and fulfil the terms of the tenancy of Unit 03-02. The fact that D2 settled with OCBC in February 2007 is completely irrelevant.

42 In my view, D1 had no reasonable ground to believe and did not believe up to the time the contract for Unit 01-02 and Unit 03-02 were made that the facts represented by implication were true. As for the allegation that OCBC had impliedly consented to the tenancies, that allegation was unsubstantiated and I find it to be self serving. The fact that D2 hoped that it would be true is not

relevant to the finding of negligent misrepresentation.

Personal liability of D2 and D3

43 The plaintiff submits that directors could be liable in tort in relation to their activities on behalf of the company. In general, only the company is liable under such a contract, not its shareholders or directors unless they guaranteed the company's performance. Consistent with this general approach, directors for instance are not liable for the tort of inducing breach of contract, where in exercising their functions as directors they have caused the company to breach its contract (see *Said v Butt* [1920] 3 KB 497). It is not disputed that the carrying out of the duties of a director would not of itself be sufficient to make a director personally liable. In his analysis of situations where a director is made personally liable, Aldous LJ held in *Standard Chartered Bank v Pakistan National Shipping Corporation* [2000] 1 Lloyd's Law Rep 218 that a director could be capable of becoming a joint tortfeasor by procuring and inducing the company for which he works to carry out a tortious act. Aldous LJ said at 233:

Since *Saloman v Saloman Ltd* in 1897 AC 22, companies have been recognised as separate legal entities to their shareholders, their directors and employees. Leaving aside certain cases not applicable in this case, where it has been held permissible to lift the corporate veil e.g. where the company is a mere façade, directors or employees acting as such will only be liable for tortious acts committed during the course of their employment in three circumstances.

First, if a director or an employee himself commits the tort he will be liable ... The second way... is a branch of the first. A director or an employee, may when carrying out his duties for the company, assume a personal liability.

The third ground of liability arises when the director does not carry out the tortious act himself nor does he assume liability for it, but he procures and induces another, the company, to commit the tort.

44 Of relevance to this case is the third ground of liability. The exact scope of this type of liability has been discussed in cases like *Performing Right Society Ltd v Caryl Theatrical Syndicate Ltd* [1924] 1 KB 1 and *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 1 WLR 317. I should mention for completeness that the House of Lords in *Standard Chartered Bank v Pakistan Shipping Corporation* [2002] 3 WLR 1547 overruled the Court of Appeal on the question of whether Arvind Mehar, the managing director of Oakprime Ltd, was personally liable for his deceit. His lordships found against Mr Mehar who was not sued for the company's tort but for his own tort and all the elements of the tort were proved against him.

45 The factors in this case persuaded me that the conduct of D2 falls on the personal liability side of the line. First the misrepresentation was, in my judgment, made with the intention of securing the plaintiff as a tenant of the two units. As at 10 July 2002, D1 was indebted to OCBC in the sum of \$12,264,043.17, Japanese Yen 314,744,493 and US\$1,086,822.15. D1 had ceased to do any business. D1 was in no position to settle the indebtedness. Second, D2 was the guarantor of D1's indebtedness to the OCBC. D2 as guarantor was at serious risk of being called upon to satisfy the judgment against D1. He was keen to secure the tenancies so as to pacify D1's creditors (HDB, the Inland Revenue for property tax and OCBC) and to stave off a call on his guarantee whilst he continued negotiations with OCBC. It is not disputed that there were settlement negotiations between the bank and D2 representing D1 and himself as guarantor. D2 testified that he did not have the money to settle with OCBC and the value of Mintwell Building was insufficient to cover the indebtedness. Settlement negotiations were aborted in or around June 2006 and that was when the bank issued the Writ of

Possession on 30 June 2006.

46 I accept the plaintiff's contention that D2 controlled D1. I find that he was the puppet master who by s 4(1) of the Companies Act (Cap 50 Rev Ed 2006) is considered a director of D1. He admitted to arranging for his friends to buy over D1 from the liquidators in November 2003 at a small price of \$2,000 so that he could, as he testified, "still play a part in the sale or refinancing of Mintwell Building. This was critical if I were to reach a settlement with OCBC."[\[note: 6\]](#) His control of D1 is evident from his ability to appoint and replace at will D3 as director of D1. D3 maintained that he was a nominee director with no executive functions. That points to D2 being in full control of the direction of D1. D3 also had to obey the instructions of D2.

47 There is also Shirley's testimony. She testified that she took instructions from D2 who was "overseeing the affairs of the 1st Defendant". She testified that Mr Singh from the plaintiff's company had informed her that the plaintiff was looking to rent another 6,000 sq feet of space. Shirley said she informed D2 about it and she was told by D2 to "go ahead" to show the plaintiff some units.[\[note: 7\]](#) It was her job to, *inter alia*, oversee the letting of the units in the building and she was required to meet prospective tenants, negotiate the rental and tenure of the contract. It was D2 who told Shirley to approach D3 to mark out an area of 6,000 sq feet and she acted on his instructions. Shirley sought and obtained D2's approval for the rental required for Unit 03-02. She testified that it was vital to keep D1 "going" as the rental income would be applied towards the payment of the monthly rent to HDB, property tax and to OCBC.

48 D2 certainly had a personal interest as guarantor in securing the tenancies and that he, and I so find, assumed personal liability for the lettings. His involvement in the transactions went beyond what would be appropriate for a mere intermediary acting on behalf of D1. If he had not agreed to let the two units to the plaintiff, D1 would not have done so. I conclude on the facts that D2 did direct or procure the negligent misrepresentation, and I find D2 liable as joint tortfeasor with D1.

49 I now turn to D3's involvement. I accept that not every contract signed by a director contains implied representations by the director. Every case will depend on its own facts. The tenancy agreement for Unit 01-02 was signed by D3 as director of D1. D3 was the nominee director who was simply carrying out the duty of a director of D1 at the time he signed the tenancy agreement in respect of Unit 01-02. Furthermore, it was not established as the evidence was inconclusive whether his involvement with Unit 03-02 was as director of D1. D3 claimed that he assisted D1 in his capacity as D1's contractor to mark up an area of 6000 sq feet in Unit 03-02. At the time the contract was concluded on 1 August 2006 he had been reappointed as director but he did not execute the agreement on behalf of D1. I conclude on the evidence that D3 did not direct or procure the negligent misrepresentation.

Result

50 For the reasons stated, I conclude that the plaintiff succeeds on the issue of liability against D1 and D2 but not D3. Accordingly, there will be judgment for the plaintiff against D1 and D2 with damages to be assessed by the Registrar and costs. The claim against D3 is dismissed with costs.

[\[note: 1\]](#) Lord Denning in *Littlewoods Mail Order Stores Ltd v Commissioners of Inland Revenue* [1969] 1 WLR 1241 at 1254

[\[note: 2\]](#) Transcripts of Evidence dated 26 August 2008 at p6 -7

[\[note: 3\]](#) Transcripts of Evidence dated 26 August 2008 at p 35-36

[\[note: 4\]](#) Transcripts of Evidence dated 26 August 2008 at p 7

[\[note: 5\]](#) D2's Affidavit of Evidence-in-chief paras 24 - 25

[\[note: 6\]](#) D2's Affidavit of Evidence-in-Chief at para 18

[\[note: 7\]](#) Transcripts of Evidence dated 28 August 2008 p 72

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