Tan Wee Fong and Others v Denieru Tatsu F&B Holdings (S) Pte Ltd
[2009] SGHC 290

Case Number	: Suit 461/2008
Decision Date	: 31 December 2009
Tribunal/Court	: High Court
Coram	: Belinda Ang Saw Ean J
Counsel Name(s)	: N Sreenivasan and Heng Wangxing (Straits Law Practice LLC) for the plaintiffs; Kelvin Tan (Instructed, Counsel), Lawrence Lim (Mathew Chiong Partnership) for the defendant
Parties	: Tan Wee Fong; Ng Seng Guan; Heng Boon Thai — Denieru Tatsu F&B Holdings (S) Pte Ltd

Contract – Breach

Contract – Remedies

Damages – Liquidated damages or penalty

Equity – Relief – Against forfeiture

31 December 2009

Belinda Ang Saw Ean J:

Introduction

1 This case involved two agreements that gave effect to the plaintiffs' purchase from the defendant of the right to operate a country master franchise, namely, the Country Master Partner Agreement dated 1 May 2008 ("CMPA"), and the Confidentiality and Non-Competition Agreement also dated 1 May 2008 ("CNCA"). Shortly after the conclusion of the two agreements, on 29 May 2008, the defendant gave written notice of immediate termination of the CMPA on the basis of the plaintiffs' breach of a non-solicitation provision in the CNCA. The plaintiffs responded by suing the defendant on 4 July 2008 for wrongful termination of the CMPA. The plaintiffs denied that they were in breach of the CNCA, or that the defendant was entitled to terminate the CMPA.

2 In this action, the plaintiffs sought (i) damages amounting to $321,120.15 for wrongful termination of the CMPA; (ii) loss of profits amounting to some $5m; (iii) a refund of the partnership and outlet fees amounting to US$205,000 paid to the defendant; and (iv) a refund of $77,541.60 paid to the defendant on 26 May 2008 for food products and packaging material that were never delivered. In response, the defendant contended that it was entitled to terminate the CMPA and filed a counterclaim against the plaintiffs for liquidated damages in the sum of US$1.025m. The defendant also maintained that it was entitled under the terms of the CMPA to retain the partnership and outlet fees. As for the $77,541.60, the defendant argued that it was entitled to retain the money to set off in part the liquidated damages that was due to the defendant.

Undisputed background facts

3 The defendant is the owner and franchisor of the Shihlin Taiwan Street Snacks and its Quick Service System ("the franchise"). The defendant has two franchise models outside Singapore – a

single unit franchise and a country master franchise. A single unit franchise allows the franchisee to operate one franchise outlet. A country master franchise allows the franchisee to operate multiple franchises and to sub-franchise a single unit franchise to a third party. The plaintiffs are Malaysian citizens with business interests in Malaysia. The first plaintiff, Tan Wee Fong ("Tan"), and the third plaintiff, Heng Boon Thai ("Heng"), already operate a single unit franchise in Johor Bahru. The second plaintiff, Ng Seng Guan, was brought in by Tan and Heng to jointly purchase a country master franchise for Malaysia.

4 The negotiations to purchase the country master franchise commenced in late December 2007 or early January 2008 between Tan and Wong Chee Tat, who was known to the plaintiffs as "Melvyn". Melvyn is a 50% shareholder and director of the defendant. The other 50% shareholder and director of the defendant is Daniel Tay Kok Siong ("Daniel"). Eventually, the parties agreed that the plaintiffs would purchase from the defendant the right to operate the country master franchise in Malaysia for a period of eight years from 1 May 2008. The CMPA and CNCA were signed on 20 April 2008 but were dated 1 May 2008.

5 There were several matters in relation to the CMPA that were indisputable. First, the terms of the CMPA were openly negotiated. Tan was sent a copy of the CMPA for the plaintiffs' consideration. In an email dated 31 March 2008 to the defendant's employee, Mike Tan Boon How ("Mike"), and copied to Heng, Tan, who signed off his email as "Wee Fong & Partners" raised with Mike for discussion several clauses in the CMPA. One of them was cl 9.4 (see [10] below). In that email, Tan requested that the benefit of the provision conferring the right to terminate the CMPA be given to both the plaintiffs and the defendant. He wrote:[note: 1]

> Please add "vice versa" at the back of all the sentence (sic) "owner reserves the right to terminate this agreement immediately and without compensation for any sort should there be any breach of this agreement by the master partner or vice versa".

Tan sought a revised version of the CMPA in the event that his proposal was accepted. His proposal was, however, rejected. The reason for the refusal was that the amendment requested was not necessary as advised by the defendant's lawyers. The other query raised by Tan in his email related to the royalty payable to the defendant under cl 7.2. Tan's proposal for waiver of the partnership royalty in cl 7.2 for the first year was accepted by the defendant.

6 Second, the partnership and outlet fees amounting to US$205,000 were expressly stated to be non-refundable and payable upfront (see cll 7.1 and 9.4 of CMPA quoted below in [10]). As borne out by Tan's conduct, the plaintiffs appeared to be comfortable with the non-refundable provisions. For instance, the plaintiffs through Tan queried the defendant on cl 7.2 but not cl 7.1. Similarly, the plaintiffs queried one part of cl 9.4 but not the other part of the clause relating to the non-refundable fees. Quite clearly, the plaintiffs before they signed the CMPA were aware (and it was not their case that they did not know) that the sum of US$205,000 was non-refundable; and above all, they did not object to the provisions that gave the defendant a right to retain fees paid prior to termination of the CMPA.

7 Third, the breach concerned a restrictive covenant relating to a franchise agreement. In such a case, the court normally makes a distinction in its approach between restrictive covenants as they appear in franchise agreements, in contrast to those in employer-employee contracts. As far as franchise arrangements are concerned, the covenants are to be approached on the basis that they are, in essence, somewhat closer to the vendor-purchaser type of case in contrast to that of employer and employee (see *Dyno-rod Plc v Reeve* [1999] FSR 148 at 153). No such concern as outlined existed in the present case. The plaintiffs did not object to the validity of the non-solicitation

clause. It was not the plaintiffs' case that the clause did not pass legal muster based on the applicable principles relating to restrictive covenants of this nature. There was no plea that the non-solicitation clause was unenforceable for being too wide or otherwise unreasonable. Furthermore, the plaintiffs must be treated as being aware of the restrictive covenants in the CNCA because each page of the CNCA was initialled by them. Although the CNCA was handed to the plaintiffs after the CMPA was signed, Tan who testified on behalf of himself and the other plaintiffs acknowledged in the witness box that he was probably "careless" in not reading through the CNCA before signing it.[note: 2] It was thus not surprising that the plea that onerous provisions were not brought to the notice of the plaintiffs was not pursued in the plaintiffs' closing submissions, and as such the plea was treated as abandoned. The sole debate was on the true construction of cl 4 of the CNCA. I will deal with the construction point below (at [12]).

8 Finally, the full sum of US$205,000 was paid *before* 1 May 2008. This sum of US$205,000 (described in cl 7.1 of the CMPA as "the initial upfront fee") was made up of a one-time partnership fee of US$100,000 ("the partnership fee") and a further payment of US$105,000 ("the outlet fee") being 60% of a individual outlet fee of US$7,000 for each of the 25 outlets the plaintiffs would have to set up in Malaysia over a period of eight years. On 29 May 2008, the defendant's solicitors wrote to the plaintiffs stating that the defendant was terminating the CMPA because the plaintiffs had breached cl 4 of the CNCA by "solicit[ing] the employment and/or attempting to employ one of [the defendant's] employees".[note: 3] In the same letter, the defendant also demanded payment of US$1.025m as liquidated damages and legal costs of $1,000. After receipt of the notice of termination, Tan tried to contact the defendant to talk about the termination. He was informed in an email dated 30 May 2008 that the defendant's management would only speak with him about the mode of payment of the liquidated damages and nothing else.[note: 4] Eventually, the plaintiffs commenced this action on 4 July 2008 for wrongful termination of the CMPA.

The issues

9 The principal issues were as follows. The first question was whether the plaintiffs were in breach of cl 4 of the CNCA on which the defendant had relied upon for the immediate termination of the CMPA, and if so, whether the breach entitled the defendant to terminate the CMPA. If the defendant was entitled to terminate the CMPA, the plaintiffs' action for wrongful termination must fail, and the claim for damages would be dismissed. As for the defendant, the consequential question following an affirmative ruling in its favour on the first question was whether the defendant would be entitled to (a) claim the sum of $1.025m as liquidated damages, or alternatively general damages; (b) retain the sum of $77,541.60; and (c) retain the partnership and outlet fees of US$205,000 (*ie*, the initial upfront fee).

Discussions and conclusions on liability

The relevant clauses of the CMPA and CNCA

10 I now go straight to the CMPA itself. The particular clauses with which I was concerned were the following clauses:

> [Clause 2.1 of the CMPA]
>
> The use of the Shihlin Taiwan Street Snacks ® Quick Service System and the Proprietary Marks must cease immediately upon termination or expiry of the [CMPA]. In the event of failure to comply or any violation of the Confidentiality and Non-Competition Agreement, the Owner

reserves the right to seek liquidated damages from the Master Partner, jointly and severally, for an amount equivalent to 5 times the initial upfront fee payable, as well as for all legal costs.

[Clause 7.1 of the CMPA]

The Owner charges a one-time partnership fee of US$100,000.00 and an outlet fee of US$7,000.00 per outlet opened. A non-refundable initial upfront fee of US$205,000 (inclusive of 60% of the outlet fee for a base of 25 outlets over 8 years- see Appendix II) is payable in full upon signing the [CMPA]. The remaining 40% of the outlet fee for the base is payable prior to the opening of each outlet or in accordance with the Development Schedule (see Appendix III), whichever is earlier. These fees are for the use of the Shihlin Taiwan Street Snacks ® Quick Service System and the Proprietary Marks for a period of 8 years. This is not to be confused with any other chargeable services rendered to the Master Partner.

[Clause 9.4 of the CMPA]

Should the Master Partner [the plaintiffs] be found in default of this Agreement, the Country Operations Manual or any policies, procedures, standards and specifications set by the Owner, in part or in whole, the Owner reserves the right to terminate this Agreement immediately, without compensation of any sort and to seek liquidated damages from the Master Partner, jointly and severally, for an amount equivalent to 2 times the initial upfront fee payable, as well as for all legal costs. However, the Master Partner may alternatively, at the Owner's sole discretion, be granted the option to compensate the Owner and/or be given up to 5 working days to rectify the problem, failing which the Owner will immediately terminate this Agreement for the general well-being of other partners. Generally, in the case of non-curable defaults, namely the conviction of crime, fraud, misinformation, repeated defaults, abandonment, misuse of the Proprietary Marks or a breach of the Confidentiality and Non-Competition Agreement [the CNCA], the Owner will immediately terminate this Agreement [the CMPA] without prior notice. For all termination cases, there will not be a refund of any fees already paid to the Owner.

11 As for the CNCA, the relevant clauses were as follows:

[Clause 4 of the CNCA]

The Master Partner [the plaintiffs] will not, during the course of this relationship [the relationship between the parties as franchisor and franchisee] and for one year thereafter, directly or indirectly, employ or attempt to employ or solicit for any employment any of the Owner's employees [i.e. the defendant's employees].

[Clause 7 of the CNCA]

The Master Partner hereby acknowledges and agrees that any breach of Clauses 1 through 6 above, inclusive, will cause damage to the Owner and the Shihlin Taiwan Street Snacks Quick Service System in an amount difficult to ascertain. Accordingly, in addition to any temporary, preliminary, and/or permanent injunctive relief to which Owner may be entitled to, the Owner will also be entitled to seek liquidated damages from the Master Partner, jointly and severally, for an amount equivalent to 5 times the initial upfront fee payable, as well as for all legal costs, for any breach or threatened breach by the Master Partner of any of the terms of Clauses 1 through 6 above, inclusive.

Interpretation of clause 9.4 of the CMPA

12 Clause 9.4 of the CMPA (at [10] above) was central to the defendant's case. It provided for termination of the CMPA in the situations specified. The general structure of cl 9.4 suggests a "graded" system of termination. First, the defendant may terminate and claim liquidated damages for breach of the CMPA, the operations manual, policies and standards set up by the defendant. In short, the first system provides for termination only if the defendant wished it to terminate. Second, the defendant may terminate following a demand for performance within a time limit of five days in certain specified cases. Third, on breach of particular provisions and upon certain events, the owner will be entitled to terminate without prior notice. That said of the graded system, it must be remembered that the interpretation of the termination clause (cl 9.4) is, above all, a matter of construction. Simply put, all that the defendant needed in order to prove that it had lawfully terminated pursuant to cl 9.4 was to establish that the circumstances specified in the clause had occurred.

13 It was not disputed that the notice of termination would take effect immediately. The disagreement, however, was mainly on the events giving rise to a right to immediate termination and that discourse concerned the true construction of cl 9.4. Counsel for the plaintiffs, Mr N Sreenivasan, contended that cl 9.4 was concerned with material breaches. Mr Sreenivasan argued that the distinction was between a breach that was capable of remedy within a period of five working days and a breach that was said to be "non-curable". Mr Sreenivasan said that the word "non-curable" in cl 9.4 meant that the defendant would be entitled to terminate the CMPA only if the default was not curable.

14 I agreed with counsel for the defendant, Mr Kelvin Tan, that the plaintiffs had misconstrued the meaning of "non-curable" breach in cl 9.4. The word "namely" inserted after the words "generally, in the case of non-curable defaults" was glossed over by the plaintiffs so much so that its usage and meaning was not given effect. The usage of the word "namely" in the context of the sentence was to identify and create a list of defaults considered by the parties to be non-curable. A breach of the CNCA was regarded by the parties as one type or a specified instance of a non-curable default which entitled the defendant to terminate without notice.

Was there a breach of the non-solicitation provision in cl 4 of the CNCA

15 I now turn to the "non-curable" breach in question: the alleged breach by the plaintiffs of the CNCA; in particular cl 4 of the CNCA (see [11] above). It was not disputed that apart from the two directors, Melvyn and Daniel, the defendant had a small staff of four or five persons. The defendant led evidence that, during the prohibited period, Tan had solicited the employment of two of the defendant's employees, Mike and Elaine Yow Yih Tyng ("Elaine"), on 6 May 2008. Further, on 9 May 2008, Tan again attempted to solicit the employment of Elaine in an exchange of emails. Mike and Elaine testified at the trial in support of the defendant's assertion of the plaintiffs' breach of cl 4 of CNCA. Both Elaine and Mike were trained and experienced personnel in the defendant's franchising business. Mike was the defendant's administrative executive. At the material time, his responsibilities included business development, negotiating with parties interested in entering into a single unit franchise or country master franchise with the defendant and dealing with single unit franchisees and country master franchisees on general operation issues. Elaine was the administrative and accounts executive of the defendant. At the material time, she was the defendant's accounts personnel in charge of the accounts of the defendant.

16 The plaintiffs denied that they had breached cl 4 of the CNCA. The most significant and compelling evidence against the plaintiffs was the tape recorded conversations between Tan and Elaine, and between Tan and Mike. As both employees were experienced in the franchise business, Tan's obvious interest in them was borne out from the substance what passed between Tan and Elaine and recorded on tape on 6 May 2008 at a meeting that was held on 6 May 2008 to discuss the

implementation of the franchise arrangement. Unknown to Tan and the defendant's staff, that meeting was secretly recorded by Daniel. The tape recording was transcribed by Chin-Puar Yow Hoy ("Ms Chin"), a certified interpreter, who testified at the trial. The other witness was the defendant's expert witness, C Girishanker. His testimony confirmed the technical integrity of the tape recording. Material parts of the conversation between Tan and Elaine on 6 May 2008 as shown in the transcripts are set out below (words in italics were spoken in Mandarin and transcribed into English)[note: 5]:

ELAINE:	Hey.
[Tan]:	*Who are you?*
ELAINE:	Huh?
[Tan]:	Huh?
ELAINE:	Elaine lah!
[Tan]:	*Orh, so it's you*.
ELAINE:	(inaudible) lah.

[Elaine and Tan discuss accounting procedures]

ELAINE:	*This I do not know*, but so far *I help you* to prepare *your* admin paperwork *those things, so this one I also have to check---*
[Tan]:	[First Statement] *Or you* transfer *over directly, it's easier*.
ELAINE:	*When you see him* [Melvyn], *you tell him*.
[Tan]:	[Second Statement] Okay, *never mind, you* tender resignation *to him will do already mah*.
ELAINE:	(Laughter) *Cannot, then he says that (when) we resign, I cannot work for* related business.
[Tan]:	*Is that so? Cannot be lah*.
ELAINE:	Shhh…
[Tan]:	*Hey it's true, are you interested?*
ELAINE:	*What?*
[Tan]:	[Third Statement] *Come up to* KL *and work for me lor*. KL.
ELAINE:	*You are based* in KL *now?*

[Tan]:	*I am in* KL, I am *in* KL
ELAINE:	*You see, he is poaching*.
[Tan]:	I feel that it's easy. *I feel that in this way it's easy*, ***I don't want inconvenience*** *because you know how to do* accounts*, right?*
ELAINE:	*I am doing accounts* ah.
[Tan]:	Okay, *good*.
ELAINE:	*You see that we know how to do accounts, right?*
[Tan]:	*Correct, correct. So, so---*
ELAINE:	*So you want to* offer *me?*
[Tan]:	[Fourth Statement] *Okay, you think---you consider about it lor. I want to employ you*.
ELAINE:	[Fifth Statement] *Cannot speak so loudly*.
[Tan]:	[Sixth Statement] *Close* [the door] *a bit tightly, he doesn't hear anything*.
ELAINE:	*He is inside, can easily hear (us). He* (inaudible) *he* (inaudible).
[Tan]:	*Can or not? Do you want or not?*
ELAINE:	*What? In* KL? *How come you are based in* KL huh?

...

[Elaine and Tan continue discussions on the franchise arrangement]

[Tan]:	*Don't talk about these. Can? You want?*
ELAINE:	*What?*
[Tan]:	[Seventh Statement] *You give me a price then let me decide*.
ELAINE:	*Huh? How would I know how much is the* market rate?
[Tan]:	*What do you think* (inaudible)---
ELAINE:	*Hey, don't want, can you let me think over first*.

[Tan]: *You think about it*, KL, *after all* KL *you have friends there, last time your school was in* KL.

…

[Elaine and Tan continue discussions on accounting procedures]

[Tan]: *You think you want?*

ELAINE: (inaudible)---huh?

[Tan]: *You want?*

ELAINE: *I don't know* (laughs), KL leh! *I don't know!*

[Tan]: KL (inaudible)

ELAINE: (inaudible) *because I don't intend to stay here* [in Singapore] *for long*.

[Ng]: *Just nice lor*.

ELAINE: Shhh…*quiet*.

[Tan]: *You tell me then I can---then I can---*

ELAINE: *Why? You couldn't employ people is it?* (inaudible)

[Tan]: *No. I want to hire a---no, I want to hire. No*, ***I don't want inconvenience*** *now, I don't want to recruit those* (inaudible), *I don't want---don't want---*

…

[emphasis in bold]

17 Mr Sreenivasan took issue with the accuracy of the transcripts relating to parts of the conversation that were in Mandarin in his cross-examination of Ms Chin. In my view, Mr Sreenivasan's cross-examination did not dent Ms Chin's credibility. The plaintiffs' main point of contention was the difference in a particular phrase in the earlier transcripts prepared by Ms Chin and a later set of transcripts. The phrase, "I don't want inconvenience" ("the disputed phrase"), in bold in the quote above, was translated as "I pay double" in the earlier transcripts. I accepted Ms Chin's explanation that she had made a transcribing error. On the first occasion, she was not provided with the complete recording and that made transcribing more challenging. On the second occasion she had the benefit of the recording of the entire conversation and her earlier error was then picked up. In any case, the phrase "I don't want inconvenience" would not diminish the weight of the incriminating evidence against the plaintiffs. In fact, in my view, the phrase "I don't want inconvenience" was inherently damaging for it was plainly indicative of the reason for Tan's interest in Elaine. With a person of Elaine's experience in the plaintiffs' team, they would not have to be put through the inconvenience

of training someone new.

18 Even if we were to ignore both the disputed phrase and the phrase "I want to pay double", the plaintiffs would still have difficulties overcoming the other incriminating evidence in the transcripts. The substance of what passed between Tan and Elaine was evidence of a clear breach of cl 4 of the CNCA. By the First Statement, Tan suggested that Elaine be "transfer[red]" to his company. That was not an innocent suggestion for Elaine to be seconded to work for him. Tan's Second Statement advising Elaine to resign made his intention clear. Not only did Elaine laugh off what he said, her reply that she would not be allowed to work "for [a] related business" was material. Even at that point, it could not be said that Tan's statements were, as he wanted the court to believe, nothing more than a casual conversation between two Malaysians from the same town. Furthermore, Tan persisted in asking Elaine to leave the defendant's employ to work for him. In his Third Statement, Tan tried to persuade Elaine to work for him by highlighting that she would be able to return to Malaysia. Tan even went on to say to Elaine outright in the Fourth Statement: "I want to employ you." By the Seventh Statement, Tan was asking Elaine to state her "price" for his consideration. At that point, Elaine asked for time to "think over" his proposal. The statements were variations of the same theme, namely that Elaine should leave the defendant's employ to work for him. I rejected Mr Sreenivasan's submissions that Tan's statements were only made in jest. Elaine's responses were telling. She was conscious that she could not openly discuss the matter with Tan. For instance, in the Fifth Statement, Elaine had told Tan not to speak too loudly and in reply, Tan in the Sixth Statement asked her to close the door, ostensibly to prevent other people from overhearing the conversation (at the time, Mike had earlier stepped out of the meeting). It was evident that Tan was serious about hiring Elaine and that both of them knew that it was improper.

19 Tan again raised with Elaine the prospect of employment in an email exchange between Tan and Elaine on 9 May 2008. Tan sent Elaine an email on 9 May 2008 at 1113 hours stating:

> "[W]e are hiring an admin and account, once I got the personnel I will forward to you, or are you?"

[Elaine replied at 1158 hours:]

> Thanks, Wee Fong. I feel is better for you to find a new staff based in KL Lah. =) But if you have any questions about admin/account, feel free to contact me.

[Tan replied at 1409 hours:]

> Thanks for your prompt reply too … anyway, just consider it, by anyway i will find somebody first, if you are interested sometime later, feel free to give me a call.

20 Mr Sreenivasan maintained that Tan's first email of 1113 hours to Elaine was vague and made no mention of any intention on Tan's part to employ Elaine. That may be so but Elaine fully understood Tan's cryptic message. Elaine had background and contextual knowledge; she understood Tan's message and was able to unequivocally reply. She read the email as a further attempt by Tan to persuade her to work for him. In her email reply, Elaine told Tan that it would be better for him to hire someone else. Tan's response, encouraging Elaine to call him if she was interested in the future to work for him, was further confirmation of Tan's attempt to employ or solicit for the employment of Elaine.

21 As for Tan's conversation with Mike on 6 May 2008, the material parts of the transcript of the 6 May 2008 meeting are as follows (words in italics were spoken in Mandarin and transcribed into

English):[note: 6]

MIKE:	*Correct, and moreover would be er, there are other* location which---that I mentioned like Sungei Wang all these thing, right, even er, beside Low Yat which is Bukit Bintang Plaza, *we are also* in touch lah, with the landlord, but they are still looking at our---
[Tan]:	*But you will give me all these, this* (inaudible)?
MIKE:	This one not a problem. This one not a issue.
[Tan]:	*Okay, like this will do*.
MIKE:	This one we actually give you the contact list all these thing is not a issue lah. Then typically *what we* follow-up *will be let you* follow-up, *this is what it means lor*.
[Tan]:	[Eight Statement] *Then you are a Malaysian also, right?*
MIKE:	*Right*.
[Tan]:	*Where huh?*
MIKE:	*Ipoh*.
[Tan]:	[Ninth Statement] *Ever thought of going back? Huh?*
MIKE:	*No, for the time being still no. I have already been here for 6 years already*.
[Tan]:	*6 years already hor*.
MIKE:	Because---*because* all along *I have been* in F&B, so, I am quite---
[Tan]:	*Before that, where were you working?*
MIKE:	*In er, western food*. Some sort of like *western food, it's also* management's (work) lor.
[Tan]:	*So not going back already?*
MIKE:	[Tenth Statement] *Why? You are hiring people huh?* (Laughter)
[Tan]:	[Eleventh Statement] *I want to hire people. I want to hire those that are already*…..

MIKE:	[Twelfth Statement] Basically, er, I understand also lah. But, *this one should be---because I*, to be frank with you, *I will still be in Singapore for the time being because I have already obtained the* PR [permanent residency] *here*.
[Tan]:	PR?
MIKE:	[Thirteenth Statement] *Right*. That's a point, right? Actually *if I am not a* PR, *I may consider*. *But if it is* Malaysia, a lot of considerations as well lah.

22 Arguably, Tan's statements to Mike in conversation were less direct than his statements to Elaine in terms of evincing an intention on the part of Tan to hire the respective parties. In isolation, Tan's Eight Statement could be viewed as casual small talk; an innocent query on Mike's nationality to make conversation. However, Tan's Ninth Statement went a step further beyond mere chit-chat as it introduced the idea of Mike leaving the defendant's employ to return to Malaysia to work. It must be remembered that Tan had recently purchased the country master franchise and would be setting up his operations in Kuala Lumpur. It seemed to me that Tan's query was not as innocuous as the plaintiffs had wanted the court to believe. More importantly, Mike understood Tan's intention. Evidence of that understanding was borne out by Mike's rhetorical response: "Why? You are hiring people huh? (Laughs)". Mike certainly caught the drift of Tan's approach and the latter's interest in hiring Mike which Mike confirmed, in cross-examination, was his impression of the conversation at the time.[note: 7] Tan's immediate answer was to confirm that he was hiring. Mike testified that in rejecting Tan's approach, he had informed Tan that, having obtained permanent residency in Singapore, he would not be returning to Malaysia so soon. Considered in totality, the substance of what passed between the two of them as seen from the transcripts (quoted in [21] above) confirmed that Tan had attempted to employ or had solicited for the employment of Mike as well.

23 I now turn to Mr Sreenivasan's reasons for refuting the breach of cl 4 of the CNCA. First, the conversations did not amount to solicitation because neither Mike nor Elaine had reported Tan to their superiors. Second, in interpreting cl 4 of the CNCA, the word "attempt" in the phrase "attempt to employ" bore the same meaning as an "attempt" in criminal jurisprudence and Tan's actions had fallen short of the criminal standard required of an attempt. There was little merit in either argument. Evidentially, nothing significant turned on Elaine or Mike not reporting the incident to the defendant. It was Tan's conduct and his statements that must be examined to determine if he and the other two plaintiffs had contravened cl 4 of the CNCA. The incriminating evidence resided in the tape-recording which had been transcribed and the email thread of 9 May 2008.

24 The second argument was equally untenable. It was completely wrong and utterly inappropriate to refer to criminal jurisprudence to interpret the word "attempt" in cl 4 of the CNCA. Clause 4 of the CNCA referred not only to an "attempt to employ" but also "solicit[ing] for any employment." As for the plain and ordinary meaning of the word "solicit," counsel for the defendant, Mr Tan, referred the court to *Black's Law Dictionary* (St Paul. Minn: West Group, 7th ed., 1999) which defined "solicitation" (at p 1398) as "the act or an instance of requesting or seeking to obtain something; a request or petition." Mr Tan also referred the court to *Hellmann Insurance Brokers v Peterson* [2003] NSWSC 242. In that case, Campbell J in considering the meaning of "solicitation" in the context of a clause prohibiting the solicitation of clients relied on the meaning of "solicitation" as elucidated in some Australian and New Zealand authorities:

11 The meaning of "solicitation" is elucidated by a decision of Wood CJ at CL in R v Laws [2000] NSWSC 880 (2000) 50 NSWLR 96, at 98. His Honour, at [8] recorded the remarks of Spigelman CJ and Hidden J in R v Azzopardi, 1 October 1998, unreported, which in turn approved remarks of Stout CJ in Sweeney v Astle [1923] NZLR 1198 at 1202 which I quote:

> "The word 'solicit' is a common English word and it means in a simplied form, 'to ask'. In various English dictionaries this simple meaning is given, but other simple words are also used to explain other meanings it possesses, such as 'to call for', 'to make a request', 'to petition', 'to entreat', 'to persuade', 'to prefer a request'."

12 Whether an employee is soliciting a former client is not something which depends upon whether it is the employee who telephones or arranges to meet the former client, or the other way around. Rather, whether solicitation occurs depends upon the substance of what passes between them once they are in contact with each other. There is solicitation of a client by a former employee if the former employee in substance conveys the message that the former employee is willing to deal with the client and, by whatever means, encourages the client to do so.

25 In the premises, contrary to Mr Sreenivasan's assertion, there need not be a discussion of the terms of employment for a person to be said to have attempted to employ or to have solicited for the employment of another. In the present case, there was evidence of solicitation, which I accepted, and I found that the plaintiffs had breached cl 4 of the CNCA.

Whether a breach of cl 4 of the CNCA entitled the defendant to terminate the CMPA

26 I have earlier set out the text of cl 9.4 of the CMPA and cl 4 of CNCA (see [10]-[11] above). Clause 9.4 was a clear example of an express termination clause which fell under "Situation 1" as outlined by the Court of Appeal in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 ("*RDC Concrete*") at [91] and reaffirmed in the recent decisions of the Court of Appeal in *Sports Connection Pte Ltd v Deuter Sports Gmbh* [2009] 3 SLR 883 ("*Sports Connection*") at [51]-[56]; *Fu Yuan Foodstuff Manufacturer Pte Ltd v Methodist Welfare Services* [2009] 3 SLR 925 at [27]-[36] and *Chua Chian Ya v Music & Movements (S) Pte Ltd* [2009] SGCA 54 at [35]. What it means is that the defendant's entitlement to termination by reason of an express provision of the contract upon the occurrence of a specified event, may be exercised without the need to determine the severity of the breach, or whether that breach would deprive the defendant (as the innocent party) of the substantial benefit of the contract (see also *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR 663 ("*Man Financial*") at [154]).

27 Having held the plaintiffs in breach of cl 4 of the CNCA, I went on to hold that as the breach fell within cl 9.4 of the CMPA, the defendant was entitled to terminate the CMPA by virtue of cl 9.4. I also held that the CMPA was terminated on 29 May 2009, the date on which the defendant's solicitors had informed the plaintiffs of the defendant's decision to terminate (see [8] above).

The defendant's counterclaim

28 This part of the judgment considers the defendant's claim for liquidated damages for breach of contract. A relevant consideration would be the effect of termination under an express contractual provision on the wrongdoer's secondary obligation to pay the full measure of damages which is distinct from an innocent party's general entitlement to nominal damages for breach of contract. The answer to the question – was the defendant entitled to recover damages for the loss of the benefit of the plaintiffs' future performance under the contract ("loss of bargain damages") having terminated

the CMPA pursuant to an express contractual provision - depended on whether the defendant had a concurrent right to terminate for breach under general law. In that regard, it was necessary to examine whether cl 4 of the CNCA was a condition of the contract. If cl 4 was a condition, the defendant could both terminate the contract and recover loss of bargain damages which would be the sum of US$1.025m if the liquidated damages clause was a genuine pre-estimate of the defendant's full loss, or alternatively damages to be assessed if the liquidated damages clause was unenforceable as a penalty clause.

Express termination and damages for loss of bargain

(1) The applicable principles

29 The Court of Appeal in *Man Financial* (at [154]-[158]) helpfully summarised the four situations identified in *RDC Concrete* as entitling an innocent party to terminate a contract. The four situations are:

> 154 The *first* ("Situation 1") is where the contractual term in question clearly and unambiguously states that, should an event or certain events occur, the innocent party would be entitled to terminate the contract (see *RDC Concrete* at [91]).
>
> 155 The *second* ("Situation 2") is where the party in breach of contract ("the guilty party"), by its words or conduct, simply *renounces* the contract inasmuch as it clearly conveys to the innocent party that it will not perform its contractual obligations at all (see *RDC Concrete* at [93]).
>
> 156 The *third* ("Situation 3(a)") is where the term breached ... is a *condition* of the contract. Under what has been termed the "condition-warranty approach", the innocent party is entitled to terminate the contract if the term which is breached is a condition (as opposed to a warranty): see *RDC Concrete* at [97]. The focus here, unlike that in the next situation discussed below, is not so much on the (actual) consequences of the breach, but, rather, on the *nature of the term* breached.
>
> 157 The *fourth* ("Situation 3(b)") is where the breach of a term deprives the innocent party of substantially the whole benefit which it was intended to obtain from the contract (see *RDC Concrete* at [99]). (This approach is also commonly termed the "*Hongkong Fir* approach" after the leading English Court of Appeal decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; see especially *id* at 70.) The focus here, unlike that in Situation 3(a), is not so much on the nature of the term breached, but, rather, on the *nature and consequences of the breach*.
>
> 158 Because of the different perspectives adopted in Situation 3(a) and Situation 3(b), respectively (as briefly noted above), which differences might, depending on the precise factual matrix, yield different results when applied to the fact situation, this court in *RDC Concrete* concluded that, as between both the aforementioned situations, the approach in Situation 3(a) should be *applied first*, as follows (*id* at [112]):
>
> If the term is a *condition*, then the innocent party would be entitled to terminate the contract. *However*, if the term is a *warranty* (instead of a condition), then the court should nevertheless proceed to apply the approach in Situation 3(b) (*viz*, the *Hongkong Fir* approach).
>
> [emphasis in original]

30 The difference in the remedial consequences of cases falling *only* within Situation 1, on the one hand, and cases falling within Situations 2, 3(a) and (b), on the other, was reaffirmed by the Court of Appeal in *Sports Connection* where Andrew Phang JA (delivering the judgment of the court) at [55] observed as follows:

> It should, however, be noted, at this juncture, that whilst Situation 1 entails (in substance) the same legal effect as a condition (pursuant to the condition-warranty approach), this is only with regard to the termination of the contract. However, this does not necessarily mean that, from a remedial perspective, the innocent party is also entitled to the full measure of damages if there has, in fact, been no breach which would have entitled it to terminate the contract at common law (see the English Court of Appeal decision of Financings Ltd v Baldock [1963] 2 QB 104 ("Financings") as well as the High Court of Australia decision of Shevill v The Builders Licensing Board (1982) 149 CLR 620; but cf Afovos Shipping and (more importantly) the English Court of Appeal decision of Lombard North Central Plc v Butterworth [1987] QB 527 ("Lombard") (which demonstrates that the effect of Financings could be avoided by appropriate drafting and which is noted in G H Treitel, "Damages on Rescission for Breach of Contract" [1987] LMCLQ 143 as well Hugh Beale, "Penalties in Termination Provisions" (1988) 104 LQR 355); reference may also be made to Stocznia Gdynia SA as well as Carter on Termination Clauses ([53] supra) and Brian R Opeskin, "Damages for Breach of Contract Terminated Under Express Terms (1990) 106 LQR 293); indeed, even if the contract itself stipulates the damages recoverable, the term concerned might still be unenforceable as constituting a penalty clause (see, for example, Financings and Lombard).

31 At this juncture it is useful as a reminder to view the difference in remedial consequences under two scenarios. The first scenario is where a party terminates pursuant to express contractual provisions but has no concurrent right to terminate at the common law, and the only remedy available to the innocent party is the recovery of damages for unperformed accrued obligations up to the date of termination. In other words, the innocent party is not entitled to claim loss of bargain damages having terminated pursuant *solely* to an express contractual provision to do so. Authority for this legal proposition may be traced to the decision in *Financings Ltd v Baldock* [1963] 2QB 104 ("*Financings*"). In that case, the English Court of Appeal held that a clause for payment by the hirer of two-thirds of the total hiring costs in the event of the termination of the agreement by the owner for non-payment of rent was void as a penalty clause. In those circumstances, the owner having elected to terminate the hiring for non-payment of two instalments of hire cannot claim damages for any loss after the date of termination. The defendant hirer paid the initial £100 but made no further payments. When the instalments were two months in arrears the plaintiff owner terminated the contract under an express contractual provision which entitled it to terminate if the hirer failed to pay any instalment within 10 days of the due date, repossessed the truck and eventually sold it for £140. Lord Denning MR succinctly stated the position thus (at 114):

> Suffice it to say that in this case there was no repudiation [under common law], but only non-payment, for which the plaintiffs themselves, under an express stipulation in that behalf, terminated the agreement. In that situation they can only recover the unpaid instalments with interest.

32 In *Financings*, the hirer had at the date on which the owners exercised their option to terminate the contract said nothing to indicate his unwillingness or his inability to pay either these or any future instalments. In the absence of any express contractual provision to the contrary, the non-payment of the two instalments would not of themselves go to the root of the contract or evince an intention on the part of the hirer no longer to be bound by the contract (*ie*, the facts do not fall within Situations 2 or 3(b) identified in *RDC Concrete*). Thus, the owners only had a right to terminate under express

contractual provisions; no right to terminate had arisen under the common law. In the result, the owners were only entitled to recover damages for unperformed obligations which had accrued at the date of the termination.

33 The second scenario is where the party who had terminated pursuant to express contractual provisions had a *concurrent right* to do so under the common law, and as such, he would be entitled, in principle, to recover loss of bargain damages. As Lombard North Central Plc v Butterworth [1987] QB 527 ("*Lombard*") illustrates, the non-payment there breached a condition of prompt payment. The defendant leased equipment from the plaintiff under an agreement that provided for the payment of rentals at quarterly intervals on a specified day. Clause 2(a) of the contract stipulated that punctuality in making payments "is of the essence". Clause 5(a) additionally provided for a right to terminate in the event of default in punctual payment by the lessee. The court found that because of cl 5(a), the lessee's delay in making payment was a repudiatory breach. As a result, the owner's right to terminate had arisen under both express contractual provisions and the common law. The court thus allowed the claimant to recover loss of bargain damages. In *Lombard*, the inclusion of cl 5(a) had led to the conclusion that cl 2(a) was a condition, and because a condition had been breached, the innocent party was entitled to terminate under the common law, and thus could recover loss of bargain damages. As noted (at [32] above), there was no repudiatory breach in *Financings* to give rise to a right to terminate under the common law which would have allowed the court to reach the same conclusion as that in *Lombard*.

34 *Chitty on Contract* at para 22-049 helpfully summarised the legal position as follows:

> Thus, where a contracting party terminates further performance of the contract pursuant to a term of the contract, and the breach which has caused it to exercise that power is not a repudiatory breach, the party exercising the right to terminate may only be entitled to recover damages in respect of the loss which it has suffered at the date of termination and not for loss of bargain damages. Where, however, the breach is also repudiatory and that repudiatory breach has been accepted, loss of bargain damages can be recovered by accepting the contractual right to do so or by accepting the other party's repudiation of the contract.

35 Hence, whether the defendant could recover loss of bargain damages depended on the existence of a concurrent right to terminate under the common law.

(2) The nature of cl 4 of the CNCA

36 I now turn to consider the nature of cl 4 of the CNCA. The clause in question was not expressly designated as a condition. Even if it was, it must be remembered that the designation of a term as a condition or the use of words to similar effect would not invariably (although it would usually) lead to the conclusion that the term was a condition (see *Man Financial* at [165]-[166]). In determining whether or not a particular term was a condition, the court would ascertain the objective intention of the parties themselves by construing the actual contract in the light of the surrounding circumstances as a whole (see *Sports Connection* at [67]-[69]). If the circumstances in which the contract was concluded suggested that a term was not truly a condition although so designated, the court would not allow recovery of loss of bargain damages for a minor breach of the term since the right to terminate would not have arisen under the common law.

37 On a related point, a term is not automatically classified as a condition simply because the contracting parties have agreed to a right to terminate upon breach of a particular term; something more is required for the court to reach this conclusion (as illustrated by the difference in the results of *Financings* and *Lombard*). It bears repeating that the court will have to construe the term in

context in order to determine whether it is a condition or a warranty.

38 The Court of Appeal in *Man Financial* (at [162]-[173]) identified some factors that may assist the court in determining whether or not a contractual term is a condition. The four factors are classification by statute, express classification by the parties, availability of a prior precedent, or use of the term in mercantile transactions. On the evidence before the court, none of the four factors mentioned here were applicable. In such a situation, the court had to ascertain the objective intention of the contracting parties themselves by construing the actual contract itself (including the contractual term concerned) in the light of the surrounding circumstances as a whole (see *Man Financial* at [161] and [174]).

39 Turning to the background circumstances leading to the conclusion of the CNCA to ascertain the parties' objective intention, the key focus here (as was in *Man Financial* at [187]) was on whether or not the contracting parties intended cl 4 of the CNCA to be a condition. The plaintiffs did not share the same intention to treat cl 4 as an important term. The CNCA itself was hardly the focus of the parties' negotiations and played a relatively incidental role when compared to the time and effort spent on the terms of the CMPA. The correspondence between the parties from November 2007 to April 2008 showed that negotiations revolved solely around the terms of the CMPA and that modifications were made to the CMPA as late as 3 April 2008.[note: 8] Significantly, the defendant only extended a copy of the CNCA to the plaintiffs at the tail-end of the negotiations on 26 March 2008[note: 9] which was then signed soon after on 20 April 2008 (on the same day as the CMPA) without amendment. In those limited circumstances, it did not seem to me that it was the objective intention of *both* contracting parties to treat cl 4 of the CNCA as a sufficiently important term to be classified as a condition. Accordingly, I concluded that cl 4 was not a condition.

40 Before moving on to the next issue, I wish to comment on the defendant's contention that by describing the CNCA as a non-curable default the parties had agreed that such a breach would go to the root of the contract between the parties and that observance of the terms of the CNCA was a condition of the CMPA. Whilst the CMPA and CNCA provided for the consequences of the various events with which the parties were concerned, the defendant's argument must be examined with cl 7 of the CNCA and/or cl 2.1 of the CMPA in mind. It must be remembered that cl 2.1 of the CMPA as a matter of construction applies to post termination breach and not the present situation. Clause 2.1 of the CMPA as a matter of construction applies to the continued use of the franchise and the proprietary marks after termination. The consequences of a breach of the non-solicitation clause are dealt with under cl 7 of the CNCA, and not the CMPA. Therefore, the allegation that observance of the CNCA was a condition of the CMPA by virtue of cl 2.1 of the CMPA was obviously untenable. There is one other comment and it relates to the defendant's argument that cl 4 of the CNCA was important because of the defendant's reliance on the collective effort of its small number of staff members with their respective specific and complementary role in the defendant's business. In my view, the argument was untenable as it was based on ex post facto reasoning and not on any of the facts in evidence.

41 I now come to the next issue. A finding that cl 4 was not a condition of the contract would not automatically result in the classification of the term as a warranty (see *Man Financial* at [177]). The court would have to apply the *Hong Kong Fir* approach embodied in Situation 3(b) (see *RDC Concrete* [99]) to consider whether there was a serious breach of the term. In the present case, while the plaintiff had breached cl 4 of the CNCA, the breach was not serious as it did not deprive the defendant of the overall benefit which it was intended to obtain under the CNCA and the CMPA. Neither Elaine nor Mike took up the plaintiffs' offer of employment. Both Elaine and Mike did not resign and were, at least up to the trial, still in the defendant's employ. Moreover, the plaintiffs could have

proceeded with the country master franchise if the contract was not terminated. Therefore, while the defendant was entitled to terminate pursuant to express contractual provisions (cl 9.4 of the CMPA), no concurrent right to terminate had arisen under the common law. Consequently, the defendant was not entitled to recover loss of bargain damages. Notably, there were also no unperformed obligations that had accrued as at the date of termination. The CMPA and the CNCA were terminated on 29 May 2008, only a month or so after the contracts had been concluded on 20 April 2008. At the time of the termination, the parties were still in the early stages of implementing the franchise arrangement. There were thus no unperformed obligations which had accrued on 29 May 2008. In the circumstances, for the breach of cl 4 of the CNCA, the defendant was only entitled to nominal damages, and I awarded the defendant $10 as nominal damages.

The liquidated damages claim of US$1.025m

42 Having concluded in the preceding paragraph that the defendant had no right to claim loss of bargain damages, the defendant's claim for liquidated damages must fail. There was no justification for payment of liquidated damages based on a genuine pre-estimate of the loss of bargain by reason of the breach. Consequently, the enforceability of the liquidated damages clauses relied on by the defendant, which was for the purposes of estimating loss of bargain, did not arise for determination. Be that as it may, having heard the arguments on both sides, I was persuaded that the liquidated damages clauses were, in any event, unenforceable as penalties.

43 The defendant's claim for liquidated damages was made under cl 2.1 of the CMPA and cl 7 of the CNCA ("the disputed clauses"). I again set out the clauses for convenience and they read as follows:

> [Clause 2.1 of the CMPA]
>
> The use of the Shihlin Taiwan Street Snacks ® Quick Service System and the Proprietary Marks must cease immediately upon termination or expiry of the [CMPA]. In the event of failure to comply or any violation of the Confidentiality and Non-Competition Agreement, the Owner reserves the right to seek liquidated damages from the Master Partner, jointly and severally, for an amount equivalent to 5 times the initial upfront fee payable, as well as for all legal costs.
>
> [Clause 7 of the CNCA]
>
> The Master Partner hereby acknowledges and agrees that any breach of Clauses 1 through 6 above, inclusive, will cause damage to the Owner and the Shihlin Taiwan Street Snacks Quick Service System in an amount difficult to ascertain. Accordingly, in addition to any temporary, preliminary, and/or permanent injunctive relief to which Owner may be entitled to, the Owner will also be entitled to seek liquidated damages from the Master Partner, jointly and severally, for an amount equivalent to 5 times the initial upfront fee payable, as well as for all legal costs, for any breach or threatened breach by the Master Partner of any of the terms of Clauses 1 through 6 above, inclusive.

44 Mr Sreenivasan argued that cl 2.1 of the CMPA and cl 7 of the CNCA were unenforceable as penalties. I noted earlier that the plaintiffs did not object to the relevance of cl 2.1 of the CMPA. Contextually, cl 2.1 of the CMPA as explained in [40] was irrelevant as it was inapplicable to a breach that occurred prior to termination. That said there was still cl 7 of the CNCA to contend with. For purposes of the discussion below, the relevance of cl 2.1 of the CMPA was assumed.

45 In determining whether the disputed clauses constitute unenforceable penalties, the following

principles stated by Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Ltd* [1915] AC 79 at 87-88 ("*Dunlop*") and affirmed by the Court of Appeal in *Hong Leong Finance Ltd v Tan Gin Huay* [1999] 2 SLR 153 are apposite:

> [1] It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.
>
> [2] It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid.
>
> [3] There is a presumption (but no more) that it is a penalty when a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trivial damages.
>
> [4] It is no obstacle to the sum stipulated being a genuine pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that the pre-estimated damage was the true bargain between the parties.

46 Applying the first and third principles stated in *Dunlop*, the disputed clauses were as Mr Sreenivasan rightly submitted unenforceable penalties. With regard to the first principle, the defendant contended that the US$1.025m was a genuine pre-estimate of its losses. In support, it relied on calculations from figures in its sales receipts and Monthly Sub-Partner Reports provided by its single-unit franchisees for sales made by them in the months prior to the conclusion of the CMPA to demonstrate that its greatest total loss would be US$1,200,317.90 had the contract been performed. As such, the US$1.025m was a genuine pre-estimate of the defendant's loss of the benefit of the plaintiffs' performance of the contract. However, the defendant was, as I found, *not entitled* to claim loss of bargain damages having terminated pursuant *solely* to an express contractual provision. Hence, the disputed clauses could not be said to be a genuine pre-estimate of the defendant's losses which were losses suffered for unperformed accrued obligations (see also *Financings* where the court also regarded a clause (clause 11) which would have *effectively* allowed the innocent party to recover loss of bargain damages although not so entitled as a penalty).

47 Further, the disputed clauses could also be regarded as penalties under the third principle stated in *Dunlop*. Mr Sreenivasan rightly pointed out that the US$1.025m was a single fixed sum payable regardless of whether the breach was serious or trifling; whether the breach took place at the earlier part of the parties' relationship or towards the end of the eight year period and whether it caused actual loss or not. In short, the disputed clauses were so broad as to require the payment of a single fixed sum regardless of the nature of the breach of cll 1 to 6 of the CNCA when such breaches could vary drastically in their effects.

48 For the reasons stated, I concluded that cl 7 of the CNCA in so far as it required the plaintiffs to pay the defendant five times the initial upfront fee of US$205,000 was a penalty clause and was thus unenforceable. Even if for the sake of argument cl 2.1 of the CMPA was applicable, it would also for the same reasons be unenforceable as a penalty clause.

The plaintiffs' various claims for return of moneys paid prior to breach

Return of the $77,541.60

49 The plaintiffs had previously paid S$77,541.60 to the defendant for an order placed with STSS Integrated Pte Ltd ("STSS"), a food and packaging products supplying arm of the defendant, for the purchase of packaging products and food stuff for the franchise. When the plaintiffs requested that the money mistakenly paid to the defendant be transferred to STSS, they were told that the money could only be transferred upon the approval of the defendant's management. On the facts, the supplies ordered were never delivered to the plaintiffs. The plaintiffs thus rightly claimed $77,541.60 from the defendant on the ground of total failure of consideration. The defendant did not contest primary liability but instead claimed a right to set-off the plaintiffs' claim against the defendant's counterclaim for liquidated damages or in the alternative general damages after assessment. Having failed in its counterclaim, the defendant must repay the plaintiff the sum of $77,541.60.

Refund of the partnership and outlet fees

50 The defendant claimed that it was entitled to retain the initial upfront fee of US$205,000 (see [10] above). The plaintiffs' argued that the clauses entitling the defendants to retain the sum of US$205,000 were unenforceable as penalties.

51 Normally a characterisation of the nature of the payment is necessary in order to determine if the money paid is legally retainable. The position on deposits and advance payments is well-summarised in *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537 at [84] ("*Lee Chee Wei*") as follows:

> The invariable judicial approach to forfeitable deposits at common law is that the deposit will be forfeited to the payee upon the discharge of the contract on the default of the payer, irrespective of whether it would have been deemed part-payment had the contract been completed. The payer cannot insist on abandoning the contract and yet expect to recover the deposit as this would enable him to take advantage of his own wrong (*Howe v Smith* (1884) 27 Ch D 89 at 98). An advance payment, on the other hand, does not fall within the category of forfeitable deposits and is neither designed nor intended to secure performance (*Lim Lay Bee v Allgreen Properties Ltd* [1999] 1 SLR 471 ("*Lim Lay Bee*")). This is underscored by the premise that the vendor is already amply protected by the recovery of damages he has sustained (*Dies v British and International Mining and Finance Corporation Limited* [1939] 1 KB 724).

52 On this point, Mr Sreenivasan argued that on a proper construction of the CMPA, the partnership and outlet fees were not forfeitable deposits. In support, reference was made to Appendix II of the CMPA which sets out the calculation of the partnership and outlet fees as follows: [note: 10]

Calculation of Initial Upfront Fee Payable

Partnership Fee (for 8 years wef 25 March 08):	US$100,000
Initial Upfront Fee Payable (based on US$4,200 x 25 outlets**]:	US$205,000
less deposit:	***US$ 10,000***

Remaining Initial Upfront Fee Payable:	US$195,000

** The remaining 40% of the outlet fee will be payable prior to the opening of each outlet or in accordance with the Development Schedule (see Appendix III), whichever is earlier. From the 26th outlet onwards, the full outlet fee of US$7,000 will be payable prior to the opening of each outlet.

[emphasis in bold and italics]

53 Mr Sreenivasan thus argued that only the US$10,000 referred to as a deposit in the calculation quoted above (in bold and italics) was a deposit. It must be remembered that the plaintiffs were to pay 60% of US$7,000 for each outlet upfront and to pay the remaining 40% prior to the opening of each outlet. In the present case, the distinction between deposits and advances was inconsequential because the initial upfront fee of US$205,000 was agreed to be non-refundable. Clause 7.1 expressly stated that the "initial upfront fee of US$205,000" was non-refundable and that it was payable in full upon signing of the CMPA. Edwin Peel, *Trietel: The Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) at para 20-136 noted:

> A contract may provide that one party shall make an advance payment but fail to specify what is to happen to the payment if the contract is not performed. …A deposit is a sum of money paid as "guarantee that the contract shall be performed". At common law, it is generally irrevocable unless the contract otherwise provide. A part-payment is simply a payment of part of the contract price: it is generally recoverable unless the contract validly provides the contrary.

54 Clause 9.4 of the CMPA expressly provided that "For all termination cases, there will not be a refund of any fees already paid to the Owner." The court must give effect to the parties' intention as objectively ascertained from the contractual terms. Above all, the sanctity of the contract must be observed unless the provision, for example, is unenforceable as a penalty. In *Ng Gian Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR 518 at [81], the Court of Appeal observed that the courts would ordinarily refrain from rewriting contracts.

55 Mr Sreenivasan sought to get round the express contractual provision on three grounds: (a) total failure of consideration; (b) the clause was unenforceable as a penalty; and (c) the court has the discretion to grant an equitable relief against forfeiture. I will deal with each ground in turn.

(a) Total failure of consideration

56 The doctrine of total failure of consideration would not assist the plaintiff as the consideration for securing the country master franchise was the payment of the partnership fee of US$100,000 and outlet fee of US$105,000 upon the signing of the CMPA. The CMPA was signed by both parties and a legally valid and binding CMPA was concluded on or by 1 May 2008. In exchange for the US$205,000 as required by the defendant the plaintiffs obtained the country master franchise in Malaysia for eight years, and this right was granted by the duly executed CMPA. As Mr Tan rightly submitted, the initial upfront fee of US$205,000 was earned as soon as the parties entered into the CMPA. The plaintiffs did not dispute the fact that the defendant had handed operational manuals and other material including confidential information such as contacts for material and food supplies, and organised and held briefings and meetings in order to prepare the plaintiffs for the master franchise. In my view, there was no total failure of consideration. The fact that subsequent events resulted in the termination of the CMPA and discharged the parties from their future performance was a matter that was conceptually different from a total or partial failure of consideration.

(b) Penalty

57 In response to Mr Sreenivasan's second and third reasons, Mr Tan submitted that the non-refundable clause was agreed to by the parties, and that at any rate, the court would not have jurisdiction to grant relief from forfeiture in this case. Mr Tan also argued that even if the court had jurisdiction, it should as a matter of discretion refuse to grant relief. I propose to first deal with the question of whether the non-refundable provision was in effect a penalty clause and then the jurisdiction point. I shall deal with the question of discretion to grant relief separately.

58 I should mention that the jurisdiction to strike down penalties and the jurisdiction to relieve against forfeiture are distinct though related (see *Jobson v Johnson* [1989] 1 WLR 1026). It is settled law that a provision is penal when a sum is payable upon breach. This distinction is explained in *Halsbury's Laws of Singapore*, 2005 Reissue, Vol 7 thus (at [80.573]):

> The inquiry whether a provision is penal is only relevant when it is a sum payable upon breach. Where the stipulated sum is payable upon other events (eg exercise of a right to terminate), it is not susceptible to invalidation on the ground that it is a penalty clause.

59 Further, the rule on penalty clauses is inapplicable to clauses which are not concerned with specifying the consequences of the breach but with defining the parties' rights and obligations (see *Lancore Services Ltd v Barclays Bank plc* [2008] EWHC 1264 at [94]-[101]).

60 In the present case, the non-refundable provisions related to the initial upfront fee already paid *before* the breach. Clause 7.1 stipulated that the upfront fee of US$205,000 was payable upon entry into the CMPA and that fee was non-refundable. Neither cl 7.1 of the CNCA nor cl 9.4 of the CMPA in so far as they provided for *retention* of the fees were penalty clauses for they were not concerned with payment of a sum *upon* a breach. Clause 7.1 of the CNCA simply defined the defendant's right to retain the initial upfront fee and cl 9.4 affirmed the non-refundable nature of the initial upfront fee by providing that the defendant was not required to refund fees paid even if the contract was terminated.

61 Consequently and applying *Lancore Services Ltd v Barclays Bank plc*, cl 7.1 of the CNCA and cl 9.4 of the CMPA in so far as they provided for the defendant's right to retain the fees were not penalty clauses.

(3) The relief from forfeiture

62 The plaintiffs' pleaded case in para 16A of the Statement of Claim as amended read as follows:

> Further or in the alternative, it will be unconscionable for the [defendant] to forfeit or otherwise retain the said total fee of US$205,000 (S$276,759). Such forfeiture or retention will also amount to an enforcement of a penalty. In the premises, the [defendant] should be ordered to return the said sum of US$205,000 (S$276,759) in full.

63 There are a number of established areas in law where equitable relief is available against harsh or unconscionable bargains, such as in the law relating to penalties, forfeiture and relief against unconscionable bargains. On the general plea of unconscionability, the observations of Browne-Wilkinson J (as he then was) in *Multiservice Ltd v Marden* [1979] Ch 84 at 110 are apposite. The passage reads:

> ... a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say in a way which affects his

conscience.

64 In submitting that the non-refundable clauses were potentially in the nature of forfeiture and/or penalty clauses, Mr Sreenivasan did not distinguish the two concepts on the facts. The parties agreed that the plaintiffs would pay the partnership fee and the outlet fees (60% of the fee of US$7,000 per outlet) as an upfront payment on the signing of the CMPA. Notably, payment was independent of any breach. In other words, the money was not something that was payable or would be forfeited following termination of the contract. To repeat, US$205,000 was payable on the signing of the CMPA and stated to be a non-refundable payment under cl 7.1. As the contract provided, the non-refundable initial upfront fee of US$205,000 was for the right to operate the franchise in Malaysia and for the right to use the proprietary marks for a period of eight years. That was the bargain struck. A bad bargain does not in itself suggest unconscionable conduct.

65 There was no suggestion by the plaintiffs that the defendant had acted in a morally reprehensible manner at the time of the contract. There was no plea in the statement of claim that the defendant had acted in bad faith or in an underhanded manner. The evidence I heard did not suggest that this might have been the case. The contractual arrangement was freely entered into between the parties (see also [5] and [39] above).

66 Finally, I noted that traditionally, the court's equitable jurisdiction to grant relief from forfeiture was against the forfeiture of property and the transfer or creation of proprietary or possessory interests as opposed to mere contractual rights (see *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 69; *Sport International Bussum BV v Inter-Footwear Ltd* [1984] 1 WLR 776). Equity also intervened in cases involving proprietary rights in chattels or their proceeds of sale under a court order (see *On Demand Information plc v Michael Gerson (Finance) plc* [2003] 1 AC 368).

67 It is still an open question in Singapore whether relief from forfeiture might be granted in contracts unconnected with any interest in land. In *Pacific Rim Investments Pte Ltd v Lam Seng Tiong* [1995] 3 SLR 1 at [42], the Court of Appeal inclined towards the position that the power to grant relief from forfeiture was confined to contracts connected with interests in land. In *Triangle Auto Pte Ltd v Zheng ZI Construction Pte Ltd* [2001] 1 SLR 370, GP Selvam J took the view that the power extended to cases involving sale of goods. More recently, in *Metro Alliance Holdings & Equities Corp v West LB AG* [2008] 1 SLR 193 at [20]-[22], Lee Seiu Kin J considered but left open the question of whether relief from forfeiture might be granted in contracts unconnected with any interests in land. Some caution is understandable given the uncertainty in the scope of equity's power to grant relief and the need to observe contractual sanctity and certainty in business. Lord Hoffmann delivering the judgment of the Privy Council in *United Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 rejected the notion that the court's jurisdiction to grant relief against contractual penalties and forfeitures was "unlimited and unfettered". His lordship explained (at 519):

> The principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth. But the reasons why the courts have rejected such generalisations are founded not merely upon authority (see per Lord Radcliffe i n *Campbell Discount Co Ltd v Bridge* [1962] AC 600 at 626) but also upon practical considerations of business. These are, in summary, that in many forms of transaction it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce a contract on the ground that thus would be unconscionable" is sufficient to create uncertainty. Even if it is most unlikely that a discretion to grant relief will be exercised, its mere existence enables litigation to be employed as

> a negotiating tactic. The realities of commercial life are that this may cause injustice which cannot be fully compensated by the ultimate decision in the case.

68 The opposite view as canvassed by the editors of *Goff & Jones, The Law of Restitution* (7th Ed, Sweet & Maxwell, 2007) ("*Goff & Jones*") at 545, [20-046]) is that the court ought to have the power to grant relief against forfeiture in cases which may not concern proprietary and possessory interests but that the power should be exercised only in exceptional circumstances:

> The cases suggest that the courts may relieve against the forfeiture of proprietary or possessory interests if the forfeiture can be characterised as unconscionable. It is doubtful whether the certainty of commercial transactions would be endangered if, following Lord Denning in Stockloser v Johnson, the courts were to accept a jurisdiction to relieve against the consequence of forfeiture of instalment payments, even if there was no forfeiture of a proprietary or possessory right, if the forfeiture would be penal and out of proportion to the loss suffered. Equity already relieves against the payment of penalties, and may raise an estoppel against person if it would be unconscionable for him to assert his legal rights, It would be regrettable, therefore, to conclude that the courts never have jurisdiction to relieve against the forfeiture of such payments, made in the course of the performance of commercial contracts, although it is proper to affirm that relief should be granted only in exceptional circumstances and that the burden should be on the party in breach to demonstrate that the retention of any payment was unconscionable.

69 The commentary in *Goff & Jones* suggests (at [20-041]) that a deposit may be recoverable in equity by the party in breach if the forfeiture clause is penal so that it would be unconscionable for the recipient to retain the money. In *Stockloser v Johnson* [1954] 1 QB 476, the English Court of Appeal held that it had the equitable jurisdiction to order relief against forfeiture of instalments already paid should it prove oppressive and unconscionable for the seller to keep the instalments. Denning LJ in *Stockloser v Johnson* helpfully provided guidance on when relief against forfeiture should be granted (at 490-492):

> Two things are necessary [to give rise to the relief in equity]: first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damage, and, secondly, it must be unconscionable for the seller to retain the money.
>
> …
>
> The equity operates, not because of the plaintiff's default, but because it is in the particular case unconscionable for [the other party] to retain the money. In short, he ought not unjustly enrich himself at the plaintiff's expense. This equity of restitution is to be tested, I think, not at the time of the contract, but by the conditions existing when it is invoked.

70 Romer LJ dissented. In Romer LJ's view, there is "nothing inequitable *per se* in a vendor, whose conduct is not open to criticism in other respects, insisting upon his contractual right to retain instalments of purchase money already paid." For completeness, I should mention the contrasting case cited to me, namely, *Workers Trust Bank Ltd v Dojap Ltd* [1993] AC 573 which is on the recovery of a deposit at common law and is not helpful to the discussion on the court's equitable jurisdiction to grant relief against forfeiture.

71 Having concluded (in [65] above) that there was no evidence of unconscionability in this case, I found it unnecessary to decide whether to adopt the liberal views of the majority on equitable relief against forfeiture in *Stockloser v Johnson*. Even if the approach in that case was adopted and followed, there would have been no basis to grant equitable relief against forfeiture in the present

case since there was no evidence of unconscionability on the part of the defendant.

Conclusion

72 In conclusion, for the reasons stated, (i) the termination of the CMPA was not unlawful; (ii) the defendant was awarded the sum of $10 as nominal damages for breach of cl 4 of the CNCA; (iii) the defendant had rightly retained the initial upfront fee of US$205,000 which represented the partnership fee of US$100,000 and outlet fee of US$105,000; (iv) the defendant was ordered to repay the plaintiffs the sum of $77,541.60 being money paid for food supplies and packaging material which were never delivered. Accordingly, judgment was entered for the plaintiffs in the sum of $77,541.60 with interest thereon at the rate of 5.33% from the date of the writ to judgment.

73 I directed that the issue of costs be heard at a later date.

[note: 1]1AB 119

[note: 2]Transcripts of Evidence, 20 April 2009 pp28-29

[note: 3]1AB 191-192.

[note: 4]1AB 198.

[note: 5]3AB 49-70

[note: 6]3AB 88-90.

[note: 7]Transcripts of Evidence 23 April 2009, p 31

[note: 8]Tan Wee Fong's AEIC, Exhibit TWF-31.

[note: 9]Transcripts of Evidence, 23 April 2009 p 26.

[note: 10]See 1AB 162.