Teo Teo Lee v Ong Swee Lan and Others
[2002] SGHC 183

Case Number : Suit 1481/2001

Decision Date : 16 August 2002

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : Victor Leong and Joan Lim (Chan Kam Foo & Associates) for the plaintiff; KK Yap and Julie Tok (KK Yap & Partners) for the defendants

Parties : Teo Teo Lee — Ong Swee Lan

Contract – Contractual terms – Tenancy agreement – Delay in completion – Memorandum providing for signing of tenancy agreement within stipulated time – When to consider time as being of the essence – Whether time of the essence

Contract – Formation – Certainty of terms – Memorandum containing phrase 'subject to the tenancy agreement' – Interpretation of phrase – Whether valid and binding agreement between parties – Whether all necessary provisions present and certain

Landlord and Tenant – Agreements for leases – Delay in completion – Memorandum providing for signing of tenancy agreement stipulated time of completion – Delay in preparation and signing of agreement exists – Plaintiff lessee proposing amendments to agreement – Defendants regarding this as repudiation – Plaintiff seeking specific performance of agreement

Words and Phrases – 'Subject to the tenancy agreement'

Judgment

GROUNDS OF DECISION

Background facts and evidence

1 The plaintiff has been in the business of baking and selling cakes and pastries for many years. He has been operating a dozen cake and pastry shops, all of them at Housing and Development and Board (HDB) shop units. He wanted to secure yet another HDB outlet for his business, either on rental or for outright purchase, especially in the vicinity of the Toa Payoh Mass Rapid Transport Station. He soon came to learn that a shop unit would be available in that area. The defendants were then in the process of becoming the unit's owners.

2 All the eight defendants are siblings. They were once lessees of a shop unit at Block 79 Toa Payoh Central, #01-47, a property that was subsequently acquired by the HDB. They were then given a right to purchase a replacement shop unit which was being developed in that area and to choose one of the four shop units available at Block 520, Lorong 6, Toa Payoh.

3 A real estate agent, by the name Ms Fiona Lim Tai Ni ('Fiona Lim'), brought them together and negotiations between them ensued in earnest. Prior to the selection of the shop unit at Block 520, Lorong 6, Toa Payoh, the plaintiff and the defendants agreed and settled the terms of the lease in regard to any one of the four potential shop units ie, Unit(A) #01-60, Unit (B) #01-58, Unit (C) #01-61 or Unit (D) #01-64. The defendants were fourth in the queue for the selection of the above-mentioned shop units. As it happened, they were eventually successful in securing Unit (A) #01-60.

4 On 10 October 2001, after discussions, the plaintiff signed and delivered to the defendants a memorandum intituled "Offer to Lease", together with a sum of S$10,000 being the deposit sum as

stipulated in the document. The said memorandum was admittedly prepared by Fiona Lim, who was then representing the defendants in this transaction. On 10 October 2001 itself, the defendants accepted the offer and the terms and conditions spelt out in the said memorandum. They also acknowledged receipt of the deposit paid and all this was done in the presence of the agent.

5 The memorandum around which the whole dispute revolved was a concise document. Insofar as is material, it reads as follows:

> **Jet Realty Network**
> **Offer To Lease**
>
> From: The Tenant
> Teo Teo Lee
>
> Block 513 #01-506
> Bishan Street 13
> Singapore 570513
>
> To: The Landlord
> Ong Chin Hong, Ong Chin Kiong,
> Ong Chin Nam, Ong Swee Leng
>
> Block 79 #01-47
> Toa Payoh Central
> Singapore
>
> Dear Sir/Mdm
>
> Re: Block 520 Lorong 6 Toa Payoh Unit (A) #01-60 or Unit (B) #01-58 or Unit (C) #01-61 Singapore or Unit (D) #01-64 (hereinafter called the 'Property')
>
> Subject to the Tenancy Agreement, I/we enclosed a sum of S$10,000/- in cash being non-refundable booking deposit to lease the 'Property' at the following terms and conditions:
>
> 1. Monthly rent: Unit (A) S$15,500 or Unit (B) S$25,000 or Unit (C) S$16,000 inclusive of maintenance and service charges or unit (D) $25,000.
>
> 2. Security deposit: Three months' rental deposit payable upon signing of the Tenancy Agreement.
>
> 3. Lease period: Three (3) years with option to renew for a further period of three years.
>
> 4. Lease commencement: Upon expiration of the fitting-out period (to be confirmed).
>
> 5. Stamp fees: To be borne by the Tenant.
>
> 6. Fitting-out period: 4 weeks rent free for fitting-out upon keys being handed over by HDB or Landlord approx 1st Qtr of 2002.

7. Other Terms & Conditions:

(a) Tenant to accompany Landlord on shop selection day and to be given the choice of leasing either one of the above-mentioned units (A), (B) or (C) or (D).

(b) Tenancy Agreement to be executed within two weeks after shop had been selected.

(c) PUB charges to be borne by the Tenant.

(d) Rental for the next 3 years to be capped at a maximum increment of up to 10%.

In the event *I/we, the Tenant withdraws my/our interest to proceed with the lease of the said 'Property', the Landlord shall be entitled to forfeit the booking deposit and neither party shall have any claims against the other.

Should you agree to the above offer, the booking deposit shall formed part of the Security deposit payable for the lease and the Landlord will be bind by this offer by signing the 'Acceptance Copy' below.

Dated this 10th day of October 2001.

(signed) (signed)

_____ _____

Signed by the Tenant In the presence of

Fiona
Lim
1403376I

_____

Acceptance Copy

We, the undersigned owners of the 'Property' hereby confirm and accept the offer and the above terms and conditions. We hereby acknowledge receipt of the booking deposit.

Dated this 10th day of October 2001.

(signed) (signed)

_____ _____

Signed by the Landlord In the presence of Fiona Lim

6 On 31 October 2001, the parties and Fiona Lim were at the HDB Centre at Bukit Merah for the

selection of the shop unit and, in the event, unit #01-60 was selected. One would have expected everything to proceed smoothly thereafter. But it was not to be. The defendants started dragging their feet. It was alleged by the plaintiff and Fiona Lim that the defendants did not appear to be in any hurry to get on with the execution of a formal tenancy agreement, as envisaged in the memorandum signed between the parties. Fiona Lim's offer to make use of her firm's standard tenancy agreement was also not taken up by the defendants. According to both of them, the defendants wanted the plaintiff to increase the monthly rental to $22,500, an increase of $7,000 per month. Apparently, parties met twice between 6 November and 9 November 2001 but the outcome was not fruitful.

7 The story narrated by the defendants as to the developments since the signing and the selection of the shop unit was different. There was no mention of any demand for an increase in rental in their accounts. The material segments in the affidavit of evidence in chief of Ong Chin Hong, the second defendant (similar in content, substance and wording to that of Ong Swee Kheng, the fifth defendant) are as follows.:

> 7. I informed Ms Fiona Lim that the Defendants were only interested in leasing the said replacement shop.
>
> 8. On or about 10 October 2001, Ms Fiona Lim arranged a meeting for me to meet the Plaintiff. The 5th Defendant was present with me at the said meeting. At the said meeting we did discuss about the letting of the said replacement shop.
>
> 9. Later that night, that is, on or about 10 October 2001, the 4th, 6th, 8th Defendants and I met the Plaintiff and the Offer To Lease was signed (hereinafter referred to as "the Offer To Lease"). It was the intention of the Plaintiff and the Defendants that the Offer To Lease was to be subject to a formal Tenancy Agreement being entered into, for purposes of the rental of the said replacement shop. At the time the Offer To Lease was executed, the said replacement shop has yet to be selected. Accordingly, the exact monthly rental, the lease commencement period, fitting out period and even the handing over of the keys were not determined at the material time, although four (4) different units with four (4) different monthly rentals were stated in the Offer To Lease. A copy of the Offer To Lease is annexed hereto and marked "OCH-1".
>
> 10. The rental amount for the respective units were agreed upon based on the advice given by Ms Fiona Lim who had assured me that the same were the best in the market at that point in time.
>
> 11. The said replacement shop at unit #01-60 was eventually selected on or about 31 October 2001 (hereinafter referred to as "the Shop Unit") and the rental for the same was S$15,500.00 as stated in the Offer To Lease.
>
> 12. The understanding between the Defendants and the Plaintiff had always been that the Plaintiff would rent the Shop Unit to operate the same as a cake shop. The Plaintiff had also assured the Defendants that the said cake shop would only be used as a retail outlet only and that he does not require manufacturing, baking or cooking in the Shop Unit.
>
> 13. In the course of the discussion, the Plaintiff had pointed out that he has

more than forty (40) other cake shops of which some of them he uses to manufacture, bake or cook whatever that is necessary to run his cake shop businesses.

14. As the Shop Unit was selected sometime on or about 31 October 2001, Clause 7(b) of the Offer To Lease required a Tenancy Agreement to be executed within two (2) weeks therefrom, that is, on or before 14 November 2001.

15. The Offer To Lease was drafted by Ms Fiona Lim and the Defendants and I as laymen, had expected Ms Fiona Lim to likewise prepare the Tenancy Agreement for parties' execution.

16. However, not only was there any Tenancy Agreement forthcoming from Ms Fiona Lim, Ms Fiona Lim had failed, refused and/or neglected to call either the Defendants or I nor remind us about the execution of a tenancy agreement pursuant to the Offer to Lease. Knowing that a tenancy agreement has to be executed by 14 November 2001, the Defendants frantically sought legal advice and finally appointed M/s K. K. Yap & Partners on the 13 November 2001 to draft the Tenancy Agreement (hereinafter referred to as the "Tenancy Agreement"). M/s K.K. Yap & Partners upon our instructions drafted the Tenancy Agreement and forward the same to the Plaintiff on the same day.

17. The Tenancy Agreement essentially contained all terms, which have been set out in the Offer To Lease including all the other covenants usually found in the Tenancy Agreement. Whilst some of the terms may not ordinarily be found in other Tenancy Agreement, the same have been included in the Tenancy Agreement by reason of the fact the Plaintiff would be running a cake shop in the Shop Unit. A copy of the Tenancy Agreement is annexed hereto and marked "OCH-2".

18. Although the Tenancy Agreement was drawn up on time in accordance with the terms of the Offer To Lease, the Plaintiff had failed, refused and/or neglected to execute the same. This was so even after various amendments were made to the Tenancy Agreement pursuant to the Plaintiff's requests.

19. Copies of M/s Chan Kam Foo & Associates' letters and M/s K.K. Yap & Partners' letters pertaining to the said amendments to be made to the Tenancy Agreement are annexed hereto and collectively marked "OCH-3".

20. It is without a doubt that "time is of the essence" as far as the execution of the Tenancy Agreement is concerned. Despite the same, and notwithstanding that the Defendants have agreed to the various amendments to be made to the Tenancy Agreement as requested by the Plaintiff, the Plaintiff has failed, refused and/or neglected to execute the Tenancy Agreement.

8 In their letter dated 13 November 2001, solicitors for the defendants wrote as follows:

We act for Ong Swee Lan, Ong Chin Hong, Ong Swee Yeong, Ong Chin Nam, Ong Swee Kheng, Ong Swee Leng, Ong Chin Aik and Ong Chin Kiong.

We refer the Offer To Lease dated 10 October 2001. Pursuant to the same, we forward herewith the

original Tenancy Agreement (in duplicate) for your execution and return on or before 15 November 2001 for our further action.

9 The draft tenancy agreement thus forwarded to the plaintiff at about 4.30pm on 13 November 2001 (on the eve of Deepavali) and required to be executed and returned to the defendants' solicitors on or before 15 November 2001, contained several new terms, a few flagrantly onerous, and some plainly contrary to those specified in the memorandum. The glaring differences between the memorandum and the draft tenancy agreement need recapitulation and can be stated in the following terms:

> (a) Clause 1.1 of the draft tenancy agreement stipulated that the rental payable upon renewal of the tenancy agreement would have to be "mutually agreed", whereas Clause 7 (d) of the memorandum expressly capped the increase to not more than 10% of the prevailing monthly rental of $15,500.
>
> (b) Clause 4 of the draft tenancy agreement required the plaintiff to deposit with the defendants, upon the signing of the tenancy agreement, a renovation deposit of $50,000 in addition to the security deposit of $46,500 whereas under clause 2 of the memorandum the plaintiff was required to provide only $46,500 (equivalent to three months' deposit) as security deposit and no more.
>
> (c) Clause 5 (c) of the draft tenancy agreement required the plaintiff to pay all rates, taxes, assessments and outgoings including the maintenance fees and conservancy charges imposed in respect of the subject property, whereas under clause 1 of the memorandum, the monthly rent was inclusive of maintenance and service charges.
>
> (d) The following clutch of sub-clauses introduced some unusual and outlandish restrictions seemingly intended to obstruct the very nature of the plaintiff's proposed bakery and cake-shop in the premises offered to him for lease.
>
> > (i) Under clause 5 (q), the premises could be used only for the purposes operating a cake shop and that too only for the sale of bread, cakes and biscuits only. The plaintiff apparently cannot sell candies or other assortments of confectionery.
> >
> > (ii) Under clause 5 (s), the defendant was prevented to bring into the premises any ovens or any baking equipment. Presumably, the plaintiff might not even be able to bake cakes or warm any of his products which would be displayed for sale.
> >
> > (iii) Under clause 5 (dd), the plaintiff was not allowed to have, at any given time, more than six employees, servants, licensees or invitees.
> >
> > (iv) Under clause 5 (ff), the plaintiff was not allowed to have more than ten customers inside the premises at any given time.

(v) Under clause 5 (gg), the plaintiff cannot conduct any sales promotions that might attract more than 10 persons outside the premises. Obviously, if by a dint of pure chance, an additional passer-by happened to join and swell the gathering to eleven, the plaintiff would have fallen foul of the covenant, thereby disabling him from applying for the renewal of the lease when the time came.

(vi) Lastly, under clause 5 (j), the plaintiff was required to serve a 12-month notice to renew the lease and then the rental payable upon renewal was to be stipulated by the defendant. Besides the unusually long notice requirement, the stipulation as to the rental payable upon renewal not only ran counter to Clause 7 (d) of the memorandum, it also contradicted clause 1.1 of the draft tenancy agreement.

10 Started by such unreasonable demands and requirements by the defendants, the plaintiff's solicitors promptly replied to the defendants' solicitors on 15 November 2001, suggesting that the draft tenancy agreement be amended. The proposed amendments were nothing extra-ordinary and were, on the face of them, in amity with the memorandum. However, the response from the defendants' solicitors was not one of accommodation but indignation. The defendants regarded the plaintiff's solicitors' comments and suggestions as an act of repudiation. By their letter dated 20 November 2001, the defendants' solicitors informed the plaintiff's solicitors as follows:

We refer to your letter dated 15 November 2001 and the Offer To Lease dated 10 October 2001.

With reference to your said letter, we are instructed that save that an increase in the rental (if any) is to be capped at not more that (sic) 10% of the agreed monthly rental of S$15,500.00, all the amendments suggested by your client are not agreeable by our clients.

In any event, pursuant to clause 7(b) of the said Offer To Lease, you will note that the Tenancy Agreement ought to have been executed by your client latest on or before 15 November 2001, in view of the fact that the said Shop Unit has been selected on 31 October 2001.

Your client has failed, refused and/or neglected to execute the said Tenancy Agreement. In the premises, your client has breached the said term of the Offer To Lease, thereby repudiating the same.

We are instructed to and do hereby give you notice that our clients accept your client's repudiation of the said Offer To Lease.

TAKE FURTHER NOTICE THAT our client shall be looking for prospective tenants with the view to mitigating their losses as a result of your client's said repudiation. In the event that our clients should suffer any losses and/or damages, our clients will hold your client liable for the same.

11 The plaintiff's solicitors wrote to the defendants' solicitors on 21 November 2001. They pointed out to their opponents that the draft tenancy agreement forwarded to their client at about

4.30pm on 13 November 2001, on the eve of a public holiday contained terms which were neither agreed upon nor indicated previously and that some of the terms were uncommon and unusual. The plaintiff's solicitors also placed it on record that the real reason why the defendants were unwilling to proceed with the agreement was that the defendants had received offers of rental higher than what had been agreed to between the parties. The plaintiff's solicitors further asserted in their letter that the plaintiff did not repudiate the agreement and that they did not wish to accept the act of repudiation on the part of the defendants.

12 There ensued an exchange of correspondence between the solicitors. The upshot was that the defendants would still not back out from their demand for the renovation or reinstatement deposit. They also did not want to agree that the rental was inclusive of maintenance and service charges. Even as respects the use of the premises, the defendants did not seem to agree that the plaintiff could use it for a bakery. They were still intent on limiting the number of employees the plaintiff could have in his shop unit. And it was in this milieu, this action commenced.

Pleadings

13 In the plaintiff's statement of claim, the main relief claimed was for specific performance of the agreement for lease. The plaintiff's other prayer was for an injunction in the interim. In para 6 of the statement of claim, he averred that the defendants' demand for a substantial increase in the rental amount was turned down by the plaintiff.

14 The defendants, in their original defence, (para 7) denied that they demanded an increase in the rental. However, they later retracted this denial and admitted the plaintiff's allegation in this regard. Insofar as is material, paras 8 to 16 of their defence read as follows:

> 8. Save that on the 13th day of November 2001 the Defendants' solicitors did forward the Tenancy Agreement for the Plaintiff's execution pursuant to the said Offer To Lease, Paragraph 7 of the Statement of Claim is admitted.
>
> 9. Paragraph 8 of the Statement of Claim is denied. The Defendants aver that the Tenancy Agreement contains terms found in the said Offer To Lease dated the 10th day of October 2001 that were agreed to between the Plaintiff and the Defendants, the usual covenants as well as other covenants. The Defendants further aver that some of the terms of the Tenancy Agreement were subsequently amended pursuant to the mutual agreement between the Plaintiff and the Defendants.
>
> 10. Paragraph 9 of the Statement of Claim is not admitted and the Plaintiff is put to strict proof thereof.
>
> 11. Paragraph 10 of the Statement of Claim is denied. The Defendants aver that pursuant to the said Offer To Lease, it is a condition that the Tenancy Agreement is to be executed within two (2) weeks after the shop unit was selected. The shop unit was selected on the 31st day of October 2001 and the two (2) weeks ended on the 14th day of November 2001.
>
> 12. The Defendants further aver that it was a condition in the said Offer To Lease that the said Offer To Lease is "Subject to the Tenancy Agreement".

13. The Defendants further aver that on the 13th day of November 2001, when the Plaintiff and the estate agent, one Fiona Lim Tai Ni were not forthcoming with the Tenancy Agreement, the Defendants proceeded to appoint a firm of solicitors to draw up the Tenancy Agreement in compliance with the said condition of the said Offer To Lease. The Tenancy Agreement was then served on the Plaintiff, on the same day for his execution. The Plaintiff in breach of the said Offer To Lease, has failed, refused and/or neglected to execute the Tenancy Agreement.

14. The Defendants aver that by a letter dated the 20th day of November 2001, the Defendants had rightfully put the Plaintiff on notice that the Plaintiff had repudiated the said Offer To Lease.

15. Paragraph 11 of the Statement of Claim is not admitted and the Plaintiff is put to strict proof thereof. The Defendants reiterate that it was the Plaintiff who had breached the terms and conditions of the said Offer To Lease by his failure to execute the Tenancy Agreement pursuant to Clause 7(b) of the said Offer To Lease. The Defendants aver that as the Plaintiff had failed, refused and/or neglected to execute the Tenancy Agreement, there is no concluded contract in existence between the Plaintiff and the Defendants.

15 The defendants had earlier filed a counterclaim against the plaintiff seeking damages for breach of contract but it was discontinued midway through the hearing of this action.

Arguments

16 The defendants' contention, as submitted by their counsel, was that the document captioned "Offer to Lease," dated 10 October 2001 was subject to the parties executing a formal tenancy agreement, time was of the essence for the execution of the said tenancy and that the execution ought to have taken place before 15 November 2001. Counsel for the defendants argued that since there was no tenancy agreement signed between the parties by 15 November 2001, there was no tenancy at law to enforce as such.

17 Another segment in the defendants' submission which I found to be rather quaint, reads as follows:

> The Defendants also urge this Honourable Court to rule that the factual matrix of this case is insufficient to justify granting the Plaintiff his claim for specific performance in that there is no agreement to speak of, that the true victims in this case are the Defendants. One of the principles of equitable jurisdiction is *He Who Comes Into Equity Must Come With Clean Hands*. The Plaintiff is facing this Honourable Court with stained hands by not being truthful about the number of cake shops he actually owned, such that the Court should not grant him a remedy available only in equity.
>
> It is our humble submission that the Plaintiff had by himself and/or through, Ms Fiona Lim Tai Ni lied about the number of cake shops the Plaintiff actually owns, that is, informing the Defendants that the Plaintiff owns about 40 cake shops when in fact he is owner of only about 12, just to secure the Defendants' trust that the Plaintiff would be a reliable and financially sound prospective tenant,

> who would not delay rent payments. The Defendants were thereby induced into entering the Offer To Lease dated 10th October 2001 on that basis.

18 Shorn of excess, the argument presented on behalf of the defendants was that they were misled into believing that the plaintiff owned about 40 cake shops, and had the defendants known that the plaintiff had been operating only 12 cake shops, they would not have agreed in the first instance to lease the property to him. Counsel conceded, however, that this particular aspect was not pleaded in their defence.

19 Counsel for the plaintiff, in his closing speech, submitted that all the requisite 'P's (ie, price, property, parties and other material provisions) were clearly and without any ambiguity specified in the memorandum. That was not all. According to counsel, the plaintiff was also required to pay, which he did, a non-refundable deposit sum of $10,000, to the defendants as stipulated in the memorandum. That sum formed part of the security deposit of three months' rental.

20 It was further submitted on behalf of the plaintiff that time was never stipulated to be of the essence of the contract and, at any rate, the forwarding of the purported draft tenancy agreement by the defendants just two days before the alleged deadline, with terms which ran counter to those in the memorandum, made it well-nigh impossible for the plaintiff to meet the timetable provided in the memorandum. Plaintiff's counsel further submitted that the phrase 'subject to the tenancy agreement', appearing in the opening paragraph of the memorandum, did not in any way neutralise the binding effect of the memorandum. He argued that the formal tenancy agreement envisaged under the memorandum was to govern the form and not to alter the binding nature of the agreement reached. He added that the defendants' plea of repudiation in para 14 of the defence was anachronistic to the defendants' plea in para 16 of the defence where they had averred that there was no concluded contract in existence between the parties.

Conclusion

21 The primary issue in this case was whether the memorandum signed by the contestants constituted an enforceable contract. Built into this issue was a sub-question: whether the phrase 'subject to the tenancy agreement', appearing in the opening paragraph of the memorandum, lent itself to the construction that there was no concluded contract between the parties until a formal tenancy agreement was signed. The next issue was whether time was the essence of the contract in relation to the execution of the tenancy agreement. It must be mentioned at this stage that the 'time issue' was the one thrust in front by the defendants, in their solicitors' letter dated 13 November 2001, as well as in their defence and finally in the defendants' closing submission. I therefore propose to deal with the 'time issue' first.

Time issue

22 Dealing with the defendants' contention that time was of the essence of the contract for the execution of the tenancy agreement, it should be said at the outset that there was no mention of any such stipulation in the memorandum. The modern law on this issue concerning contracts of all types, is summarised in ***Halsbury's Laws of England*** (Vol 19, 4th Ed), reissue, para 931 at page 685:

> The modern law, in the case of contracts of all types, may be summarised as follows. Time will not be considered to be of the essence, except in one of the following cases: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered

to be of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence.

23 As to what circumstance would make time to be of the essence, the learned authors of ***Halsbury's Laws of England*** (*supra*) further comment at paras 932 and 933 (pages 686 and 687) as follows:

> Apart from express agreement or notice making time of the essence, the court will require precise compliance with stipulations as to time wherever circumstances of the case indicate that this would fulfil the intention of the parties. Whilst the time of performance will not ordinarily be considered to be of the essence, it will readily be so construed in a 'mercantile contract'. For example, time will be considered of the essence in stipulations specifying a fixed date for performance in such a way as to show that the date was esential, such as in a sale of goods, or of shares, or in a charterparty. Generally, time will be considered of the essence in other cases where the nature of the contract or of the subject matter or of the circumstances of the case require precise compliance. However, although stipulations as to the time for delivery of goods are considered essential unless a contrary intention is shown, stipulations as to time for payment in contracts for the sale of goods are not deemed to be of the essence unless a different intention appears.

24 In dealing with a dispute concerning a time-table specified in a rent review clause for completion in a lease document, the House of Lords in ***United Scientific Holdings Ltd v Burnley Borough Council*** [1978] AC 904, held that in the absence of any contra-indications in the express words of the lease or in the interrelation of the rent review clause itself and other clauses or in the surrounding circumstances the presumption is that the time-table specified in a rent review clause for completion of the various steps for determining the rent payable in respect of the period following the review date is not of the essence of the contract.

25 The applicable principles in relation to stipulations as to time, are recapitulated by Lord Diplock in his speech at page 928A-G (*supra*):

> My Lords, I will not take up time in repeating here what I myself said in the *Hongkong Fir* case, except to point out that by 1873:
>
> > (1) Stipulations as to the time at which a party was to perform a promise on his part were among the contractual stipulations which were not regarded as "conditions precedent" if his failure to perform that promise punctually did not deprive the other party of substantially the whole benefit which it was intended that he should obtain from the contract;
> >
> > (2) When the delay by one party in performing a particular promise punctually had become so prolonged as to deprive the other party of substantially the whole benefit which it was intended that he should obtain from the contract it did discharge that other party from the obligation to continue to perform any of his own promises which as yet were unperformed;

> (3) Similar principles were applicable to determine whether the parties' duties to one another to continue to perform their mutual obligations were discharged by frustration of the adventure that was the object of the contract. A party's ability to perform his promise might depend upon the prior occurrence of an event which neither he nor the other party had promised would occur. The question whether a stipulation as to the time at which the event should occur was of the essence of the contract depended upon whether even a brief postponement of it would deprive one or other of the parties of substantially the whole benefit that it was intended that he should obtain from the contract.
>
> In one respect the Court of Chancery had introduced a refinement in the way it dealt with stipulations as to time in contracts for the sale of land, which had no close counterpart in the rules that had by 1873 been adopted in the courts of common law. Once the time had elapsed that was specified for the performance of an act in a stipulation as to time which was not of the essence of the contract, the party entitled to performance could give to the other party notice calling for performance within a specified period: and provided that the period was considered by the court to be reasonable, the notice had the effect of making it of the essence of the contract that performance should take place within that period. Hence the reference in the statutory provisions that I have cited to time being deemed to "have become" of the essence of the contract.

26 In the same case, Lord Simon of Glaisdale added (page 945E-F, *supra*): 'The law does not purport to bring parties into a relationship of contractual obligation which they themselves have failed to create'.

27 It should be mentioned at this juncture that equity and the common law were fused by the Supreme Court of Judicature Act 1873 (UK). Section 25(7) of that Act provides:

> Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity.

28 In 1925, s 25(7) of the Supreme Court of Judicature Act 1873 was now replaced by s 41 of the Law of Property Act of 1925. The wording differed slightly.

29 In Singapore, s 4(9) of the Civil Law Act (Cap 43) is almost identical to that of the UK provisions referred to in the preceding paragraphs.

30 The Court of Appeal in Singapore approved and adopted the principles expounded in the ***United Scientific Holdings*** case (*supra*) in ***Tian Teck Construction Pte Ltd v Exklusiv Auto Pte Ltd*** [1992] 2 SLR 390. It was held in that case that time would not be considered to be of the essence unless: (a) the parties expressly stipulate that conditions as to time must be strictly complied with; or

(b) the nature of the subject matter of the contract or the surrounding circumstances showed that time should be considered to be of the essence; or (c) a party who had been subject to unreasonable delay, gave notice to the party in default, making time of the essence.

31 Returning to the facts of the present case, there was no express stipulation in the memorandum that time was to be the essence of the contract. Clause 7(b) of the memorandum on which the defendants lay emphasis did not even employ the imperative auxiliary "shall"; nor could I find any circumstance to justify a finding that time was intended to be of the essence in relation to the execution of the tenancy agreement. At any rate, even if there was such an intention, it was clearly thwarted by the defendants' deliberate attempts to bloat the draft tenancy with many unusual and strange conditions. The plaintiff was not taking a tenancy for a cinema hall or a cattle pound where a limit to the number of bodies to be admitted could be justifiably imposed. Why did the defendants come up with such unheard of conditions? A compelling inference was that the defendants did not intend to honour their obligations and hence all the legalese.

32 Given the background, I found the argument by defendants' counsel that time was of the essence, in relation to the signing of the tenancy agreement, totally unmeritorious and unsustainable.

The construction issue

33 The next issue for determination was whether the phrase 'subject to the tenancy agreement' appearing in the memorandum, rendered it unenforceable and not binding.

34 Counsel for the defendants argued that the phrase adverted to cannot in law give rise to the construction that the memorandum was binding and enforceable. I now propose to deal with some of the learning referred to and relied on by counsel on the construction of the phrase, 'subject to the tenancy agreement', which seemed to take centre stage in the dispute between the parties: Significant amongst them were: ***Winn v Bull*** (1877) 7 Ch D. 29; ***Raingold v Bromley*** [1931] 2 Ch D 307; ***Spottiswoode, Ballantyne and Company Limited v Doreen Appliances Limited*** [1942] 2 KB 32 (CA); and ***Thomson Plaza (Pte) Ltd v Liquidators of Yaohan Department Store Singapore Pte Ltd (in liquidation)*** [2001] 3 SLR 437.

35 In ***Winn v Bull*** (*supra*), the defendant agreed to take a lease of a house for a certain time at a certain rent, "subject to the preparation and approval of a formal contract." In holding that there was no enforceable contract, Jessel MR said at page 31:

> … When you bargain for a lease simply, it is for an ordinary lease and nothing more; that is, a lease containing the usual covenants and nothing more; but when the bargain is for a lease which is to be formally prepared, in general no solicitor would, unless actually bound by the contract, prepare a lease not containing other covenants besides, that is, covenants which are not comprised in or understood by the term "usual covenants." It is then only rational to suppose that when a man says there shall be a formal contract approved for a lease, he means that more shall be put into the lease than the law generally allows. …

36 Later at page 32, the Master of the Rolls further commented:

> … where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. …

37 In ***Raingold v Bromley*** (*supra*), the facts as they appear in the headnotes of the call are as follows. The defendant employed house agents to let shop premises at 155 High Street, Bromley, Kent, and on December 9, 1930, the plaintiff, after inspecting the premises, offered to take a lease. In reply the house agents wrote to him on the same day: "*Corner shop, 155 High Street, Bromley. Referring to our conversation this morning on the telephone, we confirm that, subject to the terms of a lease, our client is prepared to accept your offer to take the above premises on a 7, 14, or 21 years' lease at a rent of 350l. per annum for the first 14 years, rising to 375l. for the last 7 years. …. We have instructed Mr Bromley's solicitors to put the draft lease in hand immediately to forward to your solicitors*. ..." The draft lease was forwarded on the same day, and after negotiations as to its terms the defendant's solicitors wrote on December 29, 1930, to the plaintiff's solicitors : "*We have now received our client's instructions on the draft lease, and he is prepared to accept your client's alterations. We are, therefore, having the lease engrossed, and will forward you a counterpart for execution by your client in due course*." This was done, but the defendant then refused to execute the lease, and on January 24, 1931, granted a lease of the premises to some one else. On February 3, 1931, the plaintiff commenced proceedings for specific performance, or (alternatively) damages.

38 In the context of the facts presented, the court held (per Lawrence LJ) that there was no binding contract to grant a lease, as the expression 'subject to the terms of a lease' in the letter of December 9, 1930, meant 'subject to the terms to be contained in a lease executed by the lessor'.

39 In ***Spottiswoode*** (*supra*), the facts as set out in the headnotes are as follows. The plaintiffs, who were the owners of a lease of premises, by a letter written by their agents, agreed to let the premises to the defendants subject in the usual way to your references being satisfactory, and to the terms of a formal agreement to be "prepared by their [the plaintiffs'] solicitors." They also said that, if the references were approved, and the defendants paid a quarter's rent in advance, they would do certain work to the premises and would allow the defendants to enter into possession, provided that the defendants gave an undertaking to vacate the premises if no agreement was entered into. The defendants paid the quarter's rent in advance and entered into possession of the premises. The plaintiffs' solicitors drew up a draft lease, which was sent to the defendants, who agreed the terms with the plaintiffs' agents. A few days later the plaintiffs refused to proceed with the agreement to let the premises to the defendants and called on them to remove their machinery and to vacate the premises. As the defendants refused to do so, the plaintiffs brought an action to recover possession, and the defendants counterclaimed for specific performance of the agreement by the plaintiffs to give a lease of the premises to them.

40 The Court of Appeal, in reversing the decision of the judge in the first instance, held that the letter of the plaintiffs' agents did not serve to complete a binding contract, and that the true meaning of the words 'subject to the terms of a formal agreement to be prepared' was that no contract was to exist between the parties unless and until a formal agreement had been entered into. Lord Greene MR in his judgment pointed out (pages 34-35, *supra*) that '[if] any doubt could remain as to the true construction of the phrase, the matter is entirely settled, in my judgment, by the words referring to the undertaking to vacate when called on if no agreement is entered into'.

41 In ***Thomson Plaza*** (*supra*), the applicants were owners of premises where the respondents had been lessees since 1979. Prior to the expiry of the then existing lease on 31 July 1997, the parties agreed in principle to a new lease term of one and a half years, subject to a formal lease being executed on or before 1 August 1997. The respondents did not execute the formal lease but continued to occupy the premises, paying rental on a monthly basis. Later, when the respondents wanted to give up the premises, the following clause fell for determination by the Court: 'The tenancy shall be subject to all the terms and conditions contained in the specimen Lease Agreement. On or

before commencement of the tenancy, a formal Lease of the same form as the specimen Lease Agreement shall be executed between you and the Landlord.'

42 The Court held that the foregoing clause meant that unless and until a formal contract had been executed and exchanged by the parties, there was no binding and enforceable contract.

43 It must be said presently that the decisions in the foregoing cases did not in any way appear to undermine the principle that it is invariably a question of construction whether the execution of a further contract is a condition or term of the bargain or a mere expression of the parties' desire as to how the transaction already agreed to should in fact proceed to completion.

44 In ***Von Hatzfeldt-Wildenburg v Alexander*** [1912] 1 Ch 284 at pages 288-289, Parker J (as he then was) observed: 'If the document or letters relied on a constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction will in fact go through'.

45 In ***Crossley v Maycock*** (1874) LR 18 Eq 180 at page 181, Jessel MR, observed: 'If there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into more formal terms, the mere reference to such a proposal will not prevent the Court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified or specified by the party making it, or his solicitor, then until those conditions are accepted there is no final agreement such as the court will enforce.'

46 Reference now ought to be made to two Singapore decisions which in my view seemed to possess features somewhat similar to the question at hand: ***Klerk-Elias Liza v KT Chan Clinic Pte Ltd*** [1993] 2 SLR 417 (CA) and ***Climax Manufacturing Co Ltd v Colles Paragon Converters (S) Pte Ltd*** [2000] 1 SLR 245.

47 In ***Klerk-Elias Liza*** the facts as appear in the headnotes of the report are as follows.

48 The respondents owned premises ('the premises') which they had leased to a company called Perrodo Offshore (S) Pte Ltd ('Perrodo'). The appellant had two businesses, a beauty salon and a jewellery retail shop which she ran from premises at a hotel. The offices of these two businesses were at another building. In early 1983, it became known that both the hotel and the building where the appellant had her offices were to be demolished. Alternative premises were found for the beauty salon and in mid-1983, the appellant reached an agreement with Perrodo whereby Perrodo would sublet the premises to her for the remaining months of their lease for $8,100 per month provided the respondents agreed.

49 On 7 July 1983, the respondents wrote to the appellant on a letterhead which read 'KT Chan Clinic' referring to earlier discussions with the appellant and confirming the terms of rental of the premises. The material terms were as follows: rent was fixed at $7,740 per month, maintenance charges of $1,440 per month would be borne by the tenant, the lease was to be for three years commencing 1 December 1983, subletting was permitted 'details of which will be in the lease' and the lease was to be legally drawn up 'with the usual terms that apply in Singapore'. The letter called for the appellant to sign the attached copy of the letter and to return it to the respondents if she agreed to the terms, following which, the respondents would authorize Perrodo to sublet the premises to the appellant. The letter was signed on the appellant's behalf and returned to the respondents, accepting the terms. In late July or early August, the appellant moved into the premises.

50 On 13 September 1983 a formal lease naming 'KT Chan Clinic' as landlord and the beauty salon as tenant, as the appellant had requested, was prepared by the respondent's solicitors and sent to the appellant. Clause 3(17) of the lease provided for the prior written consent of the landlord to be obtained before any assignment, sublease or parting or sharing of possession of the premises. Clause 3(21) provided that the premises could only be used as an office for the tenant's business and cl 5(5) provided, inter alia, an option to renew the lease for a period of one year and the terms for such renewal. The appellant refused to sign the lease on the ground that the terms therein were unacceptable. On 14 December 1983, the respondents requested that the appellant vacate the premises in the course of the week; however, on 27 December, he countermanded his request and sought instead specific performance of the agreement for the lease of the premises entered into on 7 July 1983. The appellant denied the existence of any agreement and vacated the premises on 31 January 1984. The respondents eventually leased the premises to Blitz Advertising Pte Ltd ('Blitz') for 24 months commencing 9 November 1984 at $6,300 per month.

51 The respondents commenced proceedings for damages for breach of the tenancy agreement evidenced by or contained in the letter of 7 July 1983. The learned trial judge held that the appellant had breached the lease agreement contained in the letter of 7 July and gave judgment for the respondents for $167,378 and costs to be taxed. The appellant appealed and the respondents cross-appealed for interest on the judgment sum under s 9 of the Civil Law Act (Cap 43, 1988 Ed).

52 On the foregoing facts, the Court of Appeal, by a majority of two to one, dismissed the appeal and cross-appeal and held that:

> (1) On the evidence, the appellant's discussions with the respondents were with a view to securing for herself a tenancy or lease of the premises for a fixed term of years with an option for renewal for another fixed term of years and the respondents only consented to the sublease by Perrodo to the appellant because an agreement had been concluded between him and the appellant for a lease of the premises as contained in the letter of 7 July 1983.
>
> (3) An agreement had been reached on both the question of the option for renewal and that of subletting and although the details to be incorporated into the lease had not been agreed, there was no uncertainty which would render those two provisions void for uncertainty resulting in there being no concluded contract.
>
> (5) All the essential terms for a valid agreement for a lease being either clearly defined in the letter of 7 July or there being no mistaking what they were, the letter of 7 July and the signed acceptance thereof constituted a valid and binding agreement for a lease of the premises.
>
> (6) The evidence leading to the signing of the letter of 7 July indicated that it was the parties' intention that the document was to constitute a binding agreement between them for the lease of the premises on those terms pending the finalization and execution of a formal lease. An agreement to execute a formal agreement does not prevent there being a valid and concluded agreement in the meanwhile.

53 In ***Climax Manufacturing*** (*supra*) the facts as they appear in the headnotes are as follows.

54 The defendants were manufacturers of repositional adhesive memo pads. They developed a

system for production of these pads at lower costs, the heart of the system being the machine designed by the defendants. The defendants were seeking a business partner to help them penetrate the Hong Kong and China markets. They were keen on marketing the technical know-how required to convert and print on special repositional adhesive paper. This would involve selling the machine developed for this process and the know-how to convert and market the product. The plaintiffs found the defendants' proposition interesting. On 24 November 1995, their Chief Executive Officer, one Mr Fung Kin Yuen Kenneth, visited the defendants at their factory in Singapore. The parties subsequently decided to go ahead with the project and they signed a memorandum of understanding expressing the intention of the parties to enter into a joint venture agreement.

55 On 30 November 1995, the defendants sent the plaintiffs an agreement, which they had pre-signed, for the execution by the plaintiffs. The plaintiffs were not happy with the terms of the agreement and, on 15 December 1995, they wrote to the defendants giving their detailed comments on its various clauses. One of these comments was that they wished the defendants to amend the agreement by adding the 'name, specification, machine number and photo for the Machine'. The 'Machine' in question was described in cl 2.2 as 'one (1) unit 2-colour Web Offset Printing Machine dedicated to the printing of Repositional Adhesive Memo Pads'. The defendants proceeded to redraft the agreement. However, they did not add all the particulars which the plaintiffs had requested in relation to the Machine. After the amendments, cl 2.2 of the agreement read: 'Supply of raw material plus one (1) unit 2-Colour Web Offset Printing Machine dedicated to the printing of Repositional Adhesive Memo Pads (the Machine). The specifications of the Machine is (sic) attached hereto.' The sentence 'the specifications of the Machine is attached hereto' was added after the defendants had received the plaintiffs' comments, as had been the schedule with the specifications.

56 On 8 January 1996, the defendants' Chief Executive Officer brought the amended agreement to Hong Kong for execution, and the agreement was signed that same day. However, this was only after Mr Fung made some further handwritten amendments. The amendments included, *inter alia*, the addition of the words 'to be agreed by both parties' behind cl 2.2.

57 Under the agreement, the plaintiffs were to pay the defendants 30% of the contract price of $500,000 upon signing of the agreement. The remaining 70% was to be paid by letter of credit which the plaintiffs were to forthwith establish in favour of the defendants. After the signing on 8 January, there was a lot of correspondence between the parties, wherein the plaintiffs sought details of the Machine. The defendants then replied with a certain amount of information but the plaintiffs considered the information supplied inadequate and asked for further specifications. The correspondence thus continued.

58 On 6 February 1996, the plaintiffs paid the defendants $150,000 being the 30% down payment. They did not then or thereafter, despite various requests from the defendants, establish the letter of credit for the remaining 70% of the purchase price. The defendants considered this failure to be a repudiation of the agreement on the part of the plaintiffs and, on 10 June 1996, they purported to accept the plaintiffs' repudiatory breach of the agreement. The plaintiffs commenced this action in January 1997 for the return of the $150,000 down payment. The basis of their action was that the agreement was void for uncertainty because it provided for the specifications 'to be agreed by both parties'. Alternatively, they claimed that there was breach of an implied term to supply certain information relating to the machine so that the plaintiffs could assess the suitability of the Machine to their needs before deciding whether or not to agree to the Machine's specifications.

59 On the application of the plaintiffs pursuant to O 14 r 12, the question of construction came before the court as to whether the agreement was a valid and legally binding document or, as the plaintiffs termed it, an 'illusory agreement'. The assistant registrar came to the conclusion that the

agreement was not an illusory one. The plaintiffs appealed.

60 Upholding the assistant registrar's decision and dismissing the plaintiff's appeal, the High Court held that:

> (1) In constructing a particular clause of an agreement one must not do so in isolation but must have regard to the contract as a whole and also, to a more limited extent, to the factual matrix in which the contract was negotiated or concluded. This principle holds true also when one was trying to decide whether a contract had actually come into existence. The words 'to be agreed' in cl 2.2 had to be construed in their context and their mere presence in the agreement did not ipso facto mean that no concluded contract was formed (see 25-26).
>
> (3) In the present case, everything necessary to be concluded between the parties had been concluded. The defendants were selling to the plaintiffs their system for the production of the pre-printed repositional memo pads and not just a machine. Reflecting that, the agreement went far beyond an agreement for sale and purchase of a single piece of equipment. When the terms of the agreement were looked at as a whole, it could be seen that the parties had a more complex arrangement in mind involving the transfer of know-how and the appointment of the plaintiffs as the distributor for the defendants' product in a new market which the defendants wished to penetrate. They had agreed on all the basic issues that were relevant to this relationship (see 27-28).

61 Reverting to the facts of the present case, the inclusion of the phrase 'subject to the tenancy agreement', by Fiona Lim was, in my view, merely an expression of a desire by the parties to draw up a formal document to incorporate the terms agreed. To ensure the binding nature of the agreement, the plaintiff was further required to deposit a non-refundable sum of $10,000 - not an insignificant amount. If, as contended by the defendants' counsel, there was never intended to be a binding agreement until the formal tenancy agreement was executed, why make the plaintiff pay a sum of $10,000 as a non-refundable deposit? None of the cases cited by the defendants seemed to feature this non-refundable deposit feature.

62 Whichever angle I looked at, the conclusion that the parties intended to be bound by the terms and conditions spelt out in the duly accepted 'Offer to Lease', ie, the memorandum, was inescapable. The said memorandum, in my determination contained all the requisite P's (Parties, Price, Property and the other Provisions) to make it stand on its own. The inclusion of the phrase "subject to the tenancy agreement" was, in my view, no more than reflective of the parties' desire to have a formal document for the sake of regularity and nothing else. In my finding, the defendants, no doubt, having been fully apprised of the binding effect of the memorandum, tried, as they did, to renege on the agreement by calling on the plaintiff to submit to terms flagrantly contrary to those agreed between themselves. In fact, some of the terms demanded by the defendants were not only unreasonable but also plainly unconscionable.

63 Having reviewed all the evidence adduced and considered the submissions made, I concluded that the memorandum intituled 'offer to lease' a shop unit, dated 10 October 2001, signed by the plaintiff and duly accepted by the defendants on the same date along with a deposit sum of $10,000 paid by the plaintiff, was a valid and binding instrument. The phrase 'subject to the tenancy agreement', appearing in the opening paragraph of the memorandum as well as condition 7(b) of the said document envisaging the execution of a tenancy agreement within two (2) weeks of the selection of the said shop unit, did not in any way, in my view, alter the character and binding effect

of the said document.

64 There cannot be any dispute that the parties had entered into the agreement voluntarily and for valid consideration. In my finding, the price, the parties and the property had been determined with certainty. This was not all. The other provisions in regard to security deposit, lease period, commencement of lease, stamp fee and PUB charges obligations, fitting out period, and terms of renewal had also been clearly spelt out in the said document.

65 The defendants' present attempt to back out of the agreement, on grounds that the said document was void for uncertainty and that the plaintiff has failed to execute the tenancy agreement within the prescribed period, was redolent of pure unreason. I found their argument that the plaintiff should have signed and returned the tenancy agreement, forwarded to him by the defendants' solicitors at about 4.30pm on 13 November 2001, the eve of a public holiday, on or before 15 November 2001, particularly when the said tenancy agreement contained terms clearly contrary to what had been stipulated in the said 'offer to lease', to be steeped in irrationality. A legitimate response from the plaintiff's solicitors suggesting amendments to the draft tenancy agreement and pointing out terms which did not even feature in the memorandum was immediately and in my view, unreasonably characterized by the defendants' solicitors as an act of repudiation of the agreement. I found the arguments presented on behalf of the defendants untenable and entirely devoid of merit.

66 In the premises, I allowed the plaintiff's claim with costs and ordered specific performance of the agreement entered into between the parties, adding that the covenants agreed to by the plaintiff's solicitors in their letters to the defendants' solicitors should apply. I further ordered that the interim injunction granted earlier by the court be continued until the defendants had complied with the order herein made.

Order accordingly

.

Sgd:

MPH RUBIN

[Judge]