Lemon Grass Pte Ltd v Peranakan Place Complex Pte Ltd
[2002] SGHC 113

Case Number : Suit 1311/2001

Decision Date : 24 May 2002

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean JC

Counsel Name(s) : Tan Teng Muan and Kwok Mei Yui Deanna (Mallal & Namazie) for the plaintiffs; Lawrence Quahe and Chenthil Kumarasingam (Harry Elias Partnership) for the defendants

Parties : Lemon Grass Pte Ltd — Peranakan Place Complex Pte Ltd

Contract – Contractual terms – Tenancy agreement – Right of access and right of way – Plaintiffs claiming such rights – Plaintiffs claiming against defendant landlord for breach of agreement – Plaintiffs alleging existence of such rights pursuant to collateral agreement – Whether provision of such rights in agreement – Whether breach of agreement – Whether existence of collateral agreement proven – Whether collateral agreement admissible in evidence – Whether plaintiffs have proprietary interest over such rights – s 94(b) Evidence Act (Cap 97, 1997 Ed)

Judgment

Cur Adv Vult

GROUNDS OF DECISION

1. The Plaintiffs, Lemon Grass Pte Limited ("Lemon Grass"), until 5 March 2002, carried on business in the name of Esmirada Mediterranean & Wine Cellar ("Esmirada") at rented premises in Peranakan Place Complex ("Peranakan Place"). Peranakan Place is a row of restored conservation shophouses situated along Orchard Road, next to Centrepoint.

2. In 1993, Esmirada occupied units 01-01/02 ("the Original Space"). The tenancy agreement dated 13 December 1993 was between GGW Gastrofun Pte Ltd ("GGW") and the Defendants, Peranakan Place Complex Pte Ltd. Wolfgang Lapper (PW1) and two others were at all material times the owners of GGW. In 1994, GGW rented more space ("the Extension") in Peranakan Place.

3. Following a joint venture in March 1995, Lemon Grass acquired the restaurant business from GGW and, by a Novation Agreement dated 19 March 1996, took over the tenancies with effect from 1 June 1995.

4. In 1996, Esmirada was doing very well. The common corridor was often crowded with people waiting for a table. On 26 August 1996, Lemon Grass rented a section of the corridor immediately outside the restaurant ("the Additional Space") for $2,000 a month, effective 1 October 1996. It became a bar-cum-waiting area for the patrons of Esmirada.

5. Subsequently, all three areas occupied by Esmirada were brought under one tenancy agreement dated 30 January 1997. During the course of that two-year tenancy, in November 1997, the Defendants leased unit 01/09A ("the Frontage") to Lemon Grass. On 4 January 1999, Lemon Grass renewed the tenancy for all four areas - the Original Space, Extension, Additional Space and Frontage - for a period of one year.

6. The last renewal was in December 1999 for a three-year term, effective 1st January 2000. That tenancy agreement dated 29 December 1999 was to expire on 31 December 2002 ("the December 1999 lease").

7. In March 1995, Wolfgang Lapper and Ong Kok Thai, a director and shareholder of the Defendants, entered into a joint venture to operate various food outlets in Peranakan Place. Consequently, four joint venture companies were set up.

8. Lemon Grass was one of the joint venture companies and it was incorporated on 1st June 1995. Another was Mustard Seed Investment Holdings Pte Ltd ("Mustard Seed"). Peppercorn Restaurant Pte Ltd operated Papa Joe's Grill Cantina Bar ("Papa Joe's") on the second floor of Peranakan Place. The fourth joint venture company PJ's Restaurant Pte Ltd, to all intents and purposes, was a dormant company.

9. Mr. Lapper and Mr. Ong were equal shareholders and directors of the joint venture companies. All profits and losses of the four joint venture companies were shared equally between both Mr. Lapper and Mr. Ong. Mustard Seed handled the administrative needs of the joint venture companies. Leong Siew Geok was in charge of the day-to-day running of Mustard Seed. Ms Leong is Mr. Ong's wife and the other director and shareholder of the Defendants.

10. Besides being the Plaintiffs' landlords, the Defendants owned the business known as Chilli Buddys (now renamed Papa Joe's Outdoor). The arrangement between Mr. Lapper and Mr. Ong was for Mr. Lapper to manage Esmirada and two other food outlets - Papa Joe's and Chilli Buddys - for a monthly management fee of $10,000 payable by Mustard Seed to GGW. Mr. Lapper and Mr. Ong were to equally share all of Chilli Buddys' profits and losses.

11. The joint venture ended on 31 March 1998.

12. At all material times, Delifrance Singapore Pte Ltd ("Delifrance") was a tenant of adjoining premises in Peranakan Place. It is the Defendants' case that a section of the common corridor on the Delifrance side was reconfigured to lettable space and leased to Delifrance. At the doorway separating Delifrance and Esmirada, was a rope curtain and behind that a roller shutter door. During business hours, customers could walk through the rope curtain from Esmirada across Delifrance to the ground floor toilets. The roller shutter door would be pulled down whenever the establishment was closed for business.

13. Delifrance gave up its premises on 15 September 2001. BreadTalk Pte Ltd ("BreadTalk"), the new tenants required their side of the doorway boarded up for business and operational reasons. According to the Defendants, the doorway was boarded up on 3 September 2001 for reinstatement works by Delifrance and subsequently on 21 September 2001 after BreadTalk took over the premises.

14. Lemon Grass objected to the doorway being sealed as it deprived their customers of the short cut to the ground floor toilets. For the past five years, members of the public including patrons of the other outlets in Peranakan Place had also made use of that short cut.

15. Lemon Grass claimed that they would not be able to continue to operate a fine dining establishment at the premises. Without that internal access, Lemon Grass claimed that Esmirada's business had suffered and continues to suffer losses as a consequence.

16. At the commencement date of the 1993 lease, there was a common corridor outside Esmirada. Access to the ground floor toilets located within the common parts of Peranakan Place was through that corridor. The Plaintiffs' pleaded case is that in August 1996, Mr. Ong on behalf of the Defendants represented that the way to the ground floor toilets would be the same as before. The Plaintiffs then designed and renovated the Additional Space to accommodate a passageway to the ground floor

toilets.

17. The Defendants deny any such conversation, understanding or agreement.

18. At all material times, access to the ground floor toilets could be through two external routes. In these proceedings, they are referred to as the "Orchard Road" route or "Alley Bar " route. The Plaintiffs' contention is that the external routes are inconvenient for their customers.

19. Lemon Grass issued proceedings on 16 October 2001. In this action, the right of access and right of way claimed by them are put forward on four alternative basis:

> (i) Breach of Clause 1(b) of the December 1999 lease;
>
> (ii) An enforceable collateral contract with the Defendants pursuant to which right of access and right of way were granted;
>
> (iii) A proprietary interest based on proprietary estoppel; and
>
> (iv) Derogation from grant of the December 1999 lease.

20. In paragraph 11 of the Re-Amended Statement of Claim, Lemon Grass averred that it was an implied term of the December 1999 lease that the rights claimed were for the duration of that tenancy. Moreover, the doorway was an exit and was part of the December 1999 lease.

21. It is common ground that the day after the conclusion of the hearing, the Plaintiffs on 5 March 2002 vacated the premises before the end of the tenancy. Lemon Grass are now pursuing their alternative claim for damages; and for a declaration that they are entitled to rescind the December 1999 lease as the Defendants had by their conduct repudiated or breached that lease and/or had derogated from the grant of the December 1999 lease.

22. The Defendants filed a Counterclaim to seek reimbursement of electrical and water charges consumed by Lemon Grass. The Defendants are no longer pursuing their other claim for breaches of the December 1999 lease.

The December 1999 lease

23. It is only logical to first look at the terms of the tenancy agreement dated 29 December 1999 ("December 1999 lease") and then the Delifrance lease before considering the Plaintiffs' alternative claims based on collateral contract or proprietary estoppel.

24. The Plaintiffs' pleaded case in paragraph 9 of the Re-Amended Statement of Claim is that Clause 1(b) of the December 1999 (and for that matter all previous tenancy agreements) granted to them a right of access to the ground floor toilets from Esmirada and through adjoining premises occupied by Delifrance ("Adjacent Premises").

25. In approaching this claim, I had in mind the observations of Mummery L.J. in ***West v Sharp*** [2000] 79 P & CR 327 at p332:

> "The nature and extent of a right of way created by an express grant depends on the language of the deed of grant, construed in the context of the circumstances surrounding its execution including the nature of the place over

which the right is granted. …"

26. Clause 1 of the December 1999 lease reads:

> "1. In consideration of the rent service charge and Tenant's agreements and stipulations hereinafter reserved and contained the Landlord hereby lets unto the Tenant and the Tenant takes ALL the premises more particularly described in the Schedule hereto (hereinafter referred to as the "Premises") being part of the complex of buildings known as "PERANAKAN PLACE" (hereinafter referred to as "the Buildings") together with (but to the exclusion of all other liberties easements rights or advantages and subject to the Landlord's right to refuse access hereinafter contained):-
>
> a. the right for the Tenant and others duly authorised by the Tenant but only so far as necessary and as the Landlord can lawfully grant the same of ingress to and egress from the Premises in over and along all the usual entrances landings and passage-ways leading thereto in common with the Landlord and all others so authorised by the Landlord and all other persons entitled thereto;
> b. the right for the Tenant and others duly authorised by the Tenant to the user of such sufficient toilet facilities in the Buildings as shall be designated from time to time in writing by the Landlord but such user shall be in common with the Landlord and all others so authorised by the Landlord and all other person so entitled thereto;…."

27. In the ordinary and natural meaning of the language, Clause 1(b) simply gives to the tenant and those authorised by it permission to use the toilet facilities located in the common parts of Peranakan Place. The word "sufficient" in Clause 1(b) relates to the toilet facilities themselves. In my view, the right granted in Clause 1(b) does not carry with it a necessary means of access. Access to the toilets within Peranakan Place is found in Clause 1 (a).

28. Clause 1 (a) grants to the tenant and all persons authorised by it the right to pass and repass along, over passageways in common with the landlord. That, in my view, includes either of the external routes, which other tenants in Peranakan Place including Lemon Grass could use to gain access to the ground floor toilets located in the common parts of the building.

29. I cannot find anything in the December 1999 lease giving the Plaintiffs an unfettered right of access and right of way over adjoining premises occupied by another tenant. Neither the wording of Clause 1(b) nor the physical circumstances of the tenanted property and its immediate surrounding area justify the rights claimed. I would have expected that if such rights had been intended, they would have clearly been spelled out in writing.

30. In fact, Clause 1 of the December 1999 lease plainly excludes the rights claimed by the Plaintiffs. The relevant portion of sub-clause (b) provides:

> "…to the exclusion of all other liberties easements rights or advantages and subject to the Landlord's right to refuse access hereinafter contain."

31. There is also Clause 5(17), which prohibits enforcement of a right of way, if any, over adjoining premises tenanted to others. Clause 5(17) reads:

> "Nothing herein contained shall confer on the Tenant any right to enforce any covenant or agreement relating to other portions of the Buildings demised by the Landlord or limit or affect the right of the Landlord in respect of any such other premises to deal with the same and impose and vary such terms and conditions

in respect thereof in any manner as the Landlord may think fit".

32. Equally relevant is the absence of any reservation, by the Defendants for themselves and on behalf of Lemon Grass or person so authorised by them, of a right of way through or over premises occupied by Delifrance in both the Delifrance lease of October 1996 and February 2000.

33. The importance of such a reservation is illustrated in ***Sanderson v Berwick-Upon-Tweed Corp*** [1884] 13 QBD 547. In that case, the corporation let a farm to Sanderson. It reserved in favour of Cairns, another tenant farmer, the rights to use a drain across one of Sanderson's fields and to enter and repair it. Water discharged by Cairns leaked through the drain and flooded Sanderson's land. He sued the landlord on the covenant for quiet enjoyment. Fry LJ, giving the judgment of the Court of Appeal, said at p 551:

> "…the damage here has resulted to the plaintiff from the proper user by Cairns of the drains passing through the plaintiff's land which were improperly constructed. In respect of this proper user Cairns appears to us to claim lawfully under the defendants by virtue of his lease, and to have acted under the authority conferred on him by the defendants. The injury caused to the field appears to us to have been, within the meaning of the covenant in that behalf contained in the lease to the plaintiff, a substantial interruption by Cairns, who is a person lawfully claiming through the defendants, of the plaintiff's enjoyment of the land, and so to constitute a breach of the covenant for quiet enjoyment for which the defendants are liable in damages."

34. In my judgment, not only is there no breach of Clause 1(b), there is no basis to imply a term in the December 1999 lease that access would continue for the duration of that lease.

35. For completeness, I now turn to consider the external means of access. Mr. Lapper had this to say in cross-examination about the Orchard Road route and Alley Bar route (NE96):

> "Q : .. period commencing from 1/11/2001 your patrons could access the ground floor toilets in Peranakan Place?
>
> A : That is correct.
>
> Q : Patrons of Esmirada restaurant today can still use the first route through Alley Bar to access the toilets on [the] ground floor of Peranakan Place?
>
> A : The Alley Bar route at night is not acceptable route for my clients. I won't send anybody there.
>
> ….
>
> Q : Patrons of Esmirada restaurant today can still access ground floor toilets in Peranakan Place by second route known as the Orchard Road route?
>
> A : Agree
>
> Q : Both these routes – Alley Bar route and Orchard Road route – collectively provide the patrons of Esmirada restaurant with access to the ground floor toilets in [Peranakan Place]?

A : Have to agree that people can walk through these 2 ways to the toilets.

Q : Put: Both the Alley Bar route and Orchard Road route provide sufficient access for the patrons of Esmirada restaurant to access the ground floor toilets.

A : Object to 'sufficient'. Not sufficient for my clients."

36. Both routes would require a customer to exit the restaurant before making either a right turn for the Alley Bar route or left turn for the Orchard Road route. Mr. Lapper agreed with Mr. Quahe that it would take one minute to reach the ground floor toilets using the Alley Bar route and seven seconds more using the Orchard Road route.

37. Mr. Marcus Chipchase, a regular customer, testified on behalf of the Plaintiffs. Mr. Chipchase said that when he dined at Esmirada, he found the toilets inaccessible and his guest unnecessarily inconvenienced by the inaccessibility of the toilets. He registered his dissatisfaction with the toilets in a letter dated 5 November 2001 to the Plaintiffs. Mr. Chipchase's testimony is unpersuasive and peripheral. On that particular evening, he had to use the toilets on the second floor as the ground floor toilets were closed for renovations. At that time, other upgrading works were ongoing at Peranakan Place. Since his letter of complaint, he had twice dined at Esmirada despite his earlier declaration that he would not patronise the restaurant unless the situation with the restroom improved.

38. Juraidah bte Jamri, a restaurant hostess at Esmirada also testified to the complaints she had received from customers who found the ground floor toilets rather far from the restaurant after the doorway was sealed. A regular customer, whom she was not able to name and had not seen for a while, had informed her that he would not entertain at the restaurant because visiting the restroom was too much of an inconvenience. Overall, her testimony is inadmissible as it is hearsay evidence.

39. A petition was maintained from 25 October to 5 November 2001. The entries in the petition were made during the time Peranakan Place was undergoing renovations. The petition was tendered to prove the truth or validity of views, opinions and comments of customers who found the external access an inconvenience. The use of the petition for such a purpose offends the hearsay rule and the petition is therefore inadmissible: ***Saga Foodstuffs Manufacturing (Pte) Ltd*** [1995] 1 SLR 739 at 740.

40. As for Justin Quek, his testimony has no evidential value.

41. In my view, the Plaintiffs have not established that the Alley Bar route and Orchard Road route are inconvenient external means of access to the ground floor toilets.

Adjacent Premises occupied by Delifrance

42. On 6 January 1996, Delifrance wrote indicating its desire to renew the lease before its expiry on 6 April 1996. Delifrance wanted to expand and rent the units fronting Orchard Road. Mr. Hugues Prince, the former managing director of Delifrance, Singapore who was subpoenaed by the Plaintiffs, testified that Delifrance acquired the common corridor space so as to combine all units into a single shop. Owing to the high rental, it was important, he explained, to average out the rent per square foot. Mr. Prince also marked out on a plan the area leased by Delifrance in 1996 and that clearly included a section of what was then the common corridor at the Delifrance end. See NE 242, 248 & 256.

43. Counsel for the Plaintiffs, Mr. Tan, did not question Mr. Prince that Delifrance had never leased the common corridor space. An opposite approach was taken by Counsel after close of the Plaintiffs' case during cross-examination of Mr. Ong and again repeated in Closing Submissions. Counsel for the Defendants, Mr. Quahe, submitted that the Plaintiffs' argument should be disallowed, as it was not pleaded. I disagree with Mr. Quahe. It was pleaded in the Re-Amended Defence that by a tenancy agreement dated 21 October 1996, the Defendants let what used to be part of the common corridor to Delifrance. It is enough for the Plaintiffs in the Re-Re-Amended Reply to join issue with the Defendants on that plea.

44. Mr. Ong deposed in his affidavit of evidence-in-chief that the total area leased to Delifrance was 1593 square feet. But the Schedule to the Delifrance lease stated a smaller area of 1352 square feet. Mr. Tan deduced from this discrepancy that the common corridor space was never rented to Delifrance and was retained by the landlords all the time. That conclusion in my judgment is unfounded.

45. During cross-examination, Mr. Ong categorically disagreed with Mr. Tan's suggestion that the Defendants never leased the common corridor space to Delifrance. He was asked about the apparent discrepancy and he replied (NE 572):

> "Q: ……Why is there a discrepancy in the schedule of [the] demised area when compared to paragraph 30?
>
> A: Usually when [Defendants] sign the lease we would have an approximate area which is described as being estimated in the lease. It will be subject to survey based on the plan annexed to it. In this case [I] refer to the area demised as the floor plan attached. For accuracy, we did a measurement before I submitted this affidavit."

46. Mr. Ong admitted that he did not verify the accuracy of the total area of 1593 square feet advised by his wife. That part of Mr. Ong's testimony is inadmissible as it is hearsay evidence. The court is entitled to reject hearsay evidence even though Counsel did not object: ***Aw Kew Lim v PP*** [1987] 2 MLJ 601*;* ***Mui Bank Bhd Johor v Tee Puat Kuay*** [1993] 3 MLJ 239.

47. Even so, the overall evidence before the court is against Mr. Tan's contention that what used to be part of the corridor space was never leased to Delifrance.

48. Not only was the area stated in the Schedule as demised to Delifrance a mere estimation, the Plaintiffs did not challenge a more important and relevant piece of evidence, which is that the area edged in red on the plan annexed to the lease was for the entire Adjacent Premises and that included the area that was formerly part of the common corridor.

49. In a fax dated 26 June 1996 (DB314), Delifrance wrote to Mr. Ong to finalise the terms for the areas they wanted to rent. A term that was raised related to exclusive use of the corridor. In 9 of the fax, Mr Pham wrote:

> "We agree in principle on the terms stated in your Fax dated 30/5/96:
>
> …….
>
> 9. The corridor will be exclusively for our use and we should be able to put our tiling upon your approval of the design."

50. Mr. Tan submitted that the inference to be drawn from 9 is that the corridor space was not leased to Delifrance. He argued that Delifrance would not have needed the Defendants' approval for tiling if the corridor space had indeed been leased to Delifrance.

51. Mr. Ong explained the approval. He said (NE 575):

> "Q : Why would Delifrance require your approval for the design of tiles? See DB 314 item 9.
>
> A : Refer to Annex A – Defendants' Opening Statement. When leased out premises edged in green, it was agreed that they do the tiling even for the front. Meaning space in front of the staircase which is not their space so that it would look to outsider/visitor that it is part of Delifrance and we had no objection to that.
>
> …..
>
> Q : Same tiles were used for the entire Deli[france] and the front?
>
> A : Yes"

52. I accept his evidence. Approval of the landlords even for tiles to be laid within the demised premises is required under clause 3(4)(i)(d) of the Delifrance lease dated 21 October 1996. Sub-clause (4)(i)(d) of that lease provides:

> "The Tenant hereby agrees with the Landlord as follows:-
>
> …….
>
> (4)(i) To carry out within the Premises at its own cost and expense all or any of the following works as the Tenant may consider necessary subject always to the prior written approval of the Landlord and if the Landlord shall consent the Tenant shall at its own expense obtain all necessary planning permission and other permission necessary under the provisions of any statute rule order regulation or bye-law applicable thereto and also permission from PIDEMCO LAND PTE LTD and shall carry out such works in accordance with the conditions thereof:
>
> ……
>
> (d) provision of carpets tiles (vinyl or otherwise) or other floor covering or finishes of whatever kind; "

53. There is also Mr. Prince's evidence that by the October 1996 lease, Delifrance acquired the corridor space and his recollection was that Delifrance "definitely had [the] right to tile and use it as our own space." See NE 242.

54. Another argument put forward by Mr. Tan is that despite the formal tenancy agreement in October 1996 between the Defendants and Delifrance, Delifrance was not a tenant, as it never had exclusive possession of the Adjacent Premises. He relied on the Plaintiffs' control of the key to the roller shutter door they had installed at the inter-tenant boundary line. Delifrance, on the other hand,

held no key at all.

55. Possession is a legal concept, which depended upon the facts. Whilst the usual method to establish exclusive possession may, for example, be enclosure by fencing, it does not necessarily follow that absence of fencing invariably leads to an opposite conclusion. Each case turns on its facts. I disagree with Mr. Tan's contention that in this case just because Delifrance had no control of the key to the roller shutter door, it did not have a legal right of exclusive possession of the Adjacent Premises.

56. In addition to Mr. Prince's unequivocal testimony, I accept Mr. Ong's evidence (NE 503) that the doorway represented by the dotted line and highlighted in green on the plan attached to Delifrance's lease dated 21 October 1996 (1AB 147) had become an inter-tenant line. In this case, control of the roller shutter door by the Plaintiffs is irrelevant. As Mr. Lapper himself testified (NE 14), Delifrance and those authorised by it had no need to make use of the doorway to cut across the Plaintiffs' premises. There was no need for Delifrance to require control or bother with keys to the roller shutter door. Moreover, the layout and design of Delifrance was such that it did not require the dining area to be secured. As Mr. Lapper explained in his written testimony, Delifrance had only secured its counters with roller shutters that would be pulled down at closing time.

57. More importantly, Delifrance's indulgence as explained below is compatible with its right to quiet enjoyment in Clause 4(7) of the October 1996 and February 2000 lease.

58. On being questioned by Mr. Tan about the corridor, access and his involvement in the negotiations, Mr. Prince answered (NE 246, 249-251):

> "Q : Did you speak to anyone from Peranakan Place Complex after 1996 about this access?
> A : [The] way I work in 1996, I [would speak] to GM. I gave general directions. I spoke to K T Ong and wife before 1996 about electricity. Don't have discussion with K T Ong or wife about this corridor."
>
> …….
>
> "Q : In taking up corridor space, the opening that is dotted line "line for new" Delifrance flooring was not sealed?
> A : Yes. The door was left open and because important for us to have unity, someone put heavy ropes there. Don't know if it is Peranakan Place complex.
>
> Q : Opening between Delifrance and Esmirada [green] did you ask for it to be sealed?
> A : In negotiation with owner, [we] asked for maximum. Asked to close passage if possible.
>
> Q : What was reply?
> A : [It] was [an] overall reply [for the] shop. Frontage of shop. Decide[d] to take it.
>
> Q : Package offered …. [did] not include the sealing of access?
> A : Yes
>
> Q : Prepared to keep access free of tables and chairs?

A : Allowed to put tables and chairs. Did not mind people going through.

Q : Did not mind because that was package [you] got from landlord?
A : Yes

Q : Was [there] attempt to negotiate price at which [you] would take adjacent premises with access sealed?
A : No

Q : At any stage of [the] negotiation, was there negotiation between Delifrance with owners of Esmirada?
A : On negotiation, told you I did not negotiate myself. I can't tell you today whether there [were] negotiations."

59. I cannot agree with Mr. Tan's interpretation of Mr. Prince's evidence that Delifrance allowed the public to pass and repass through or over its premises because it was part of the package deal from the landlords. Mr. Tan's Closing Submission on this point is completely untenable. I disagree with his submission that Mr. Prince's evidence was that the package from the Defendants "required the doorway to be kept open and for people to go through". In other words, the public must be allowed to use the doorway and to walk through Delifrance's premises to the ground floor toilets.

60. Mr. Prince did not say that and he would not know what was exactly in the package. Mr. Prince had earlier testified that he was not familiar with the exact details of the negotiations as they were left to his general manager, Yvan Pham. Also Mr. Prince's evidence was that he did not have any discussions with Mr. Ong or his wife about the corridor and access.

61. Mr. Prince was only able to say that Delifrance had asked the Defendants about sealing of the doorway. From his evidence, I construe that there was no follow-up or discussion on the matter as Delifrance decided to accept the landlords' offer without pursing or following up on the point.

62. It is not possible to imply from his evidence a term in the package deal that the doorway must be kept opened and that the public must also be allowed right of access through the premises to be leased to Delifrance. It was Mr Ong and his wife who had negotiated with Mr Pham and I note and accept Mr. Ong's answer (NE 562) in re-examination:

"the package did not include the opening of the doorway."

That testimony is consistent with the terms of the October lease. The October tenancy was renewed in February 2000 for another two years. Again, there was no reservation of right.

63. Mr. Lapper had not spoken with Delifrance about the rights claimed. He admitted that he had simply assumed that the Defendants had told Delifrance to permit patrons of Esmirada to walk through Delifrance to access the ground floor toilets (see NE 124).

64. The Defendants' stance is that they did not require Delifrance to allow patrons of Esmirada to walk through the Adjacent Premises. I agree with Mr. Quahe's submission that the Defendants would not have insisted on that. Delifrance was paying substantial rent to the Defendants. It would make no commercial sense for the Defendants to scuttle $60,000 monthly rental for the $2,000 per month the Defendants were asking from the Plaintiffs.

65. As Mr. Prince testified in clear terms, it was Delifrance who "did not mind" and had allowed the

public to walk through its premises to and from Esmirada to the ground floor toilets. It was made possible by the design and layout of the demised premises at that time.

66. Lee Han Tze said he saw the layout of Delifrance and agreed with S.G. Leong's description of an "open concept". Mr Ong in his written testimony deposed that Delifrance had arranged its tables and chairs in a "dispersed manner" over part of Adjacent Premises and that had enabled patrons from Esmirada to pass through the doorway and cut across Delifrance. Mr Lapper's oral testimony is that on the Delifrance side of the doorway, chairs were placed away from the access.

67. In my judgment, I find that the Plaintiffs and those authorised by them were able to traverse the Adjacent Premises for some five years because of the goodwill or indulgence granted by Delifrance. That goodwill or indulgence amounted to simply a gratuitous licence to pass and repass along or through Delifrance's premises to and from Esmirada. That gratuitous licence came to an end when Delifrance gave up the premises. Delifrance gave notice of its decision not to renew the tenancy on or about 25 July 2001.

68. Mr. Lapper was well aware of Delifrance's goodwill or indulgence. Most telling was his admission that if he had known that Delifrance's lease was for two years [i.e. up to 15 September 2001], he would not have renewed the Plaintiffs' lease for three years but would have taken the two years offered by the landlords (NE 14).

69. My conclusions on Clause 1(b) of the December 1999 lease and findings concerning the Adjacent Premises demised to Delifrance are sufficient to dismiss the Plaintiffs' action. I shall, nevertheless, now turn to consider the alternative claims put forward by the Plaintiffs.

The Evidence

70. A consideration of the alternative claims such as collateral contract and proprietary estoppel would involve a determination of the credibility of witnesses and a necessity to find as a fact what it was exactly the parties said.

(i) What was allegedly said

71. Wolfgang Lapper's written testimony on what was allegedly said is as follows:

> "24. Sometime in 1996, Mr. Ong approached me. He suggested that I take up part of the corridor fronting the restaurant. A queue would normally form in the evenings along the internal corridor outside Esmirada. Further, since Esmirada's bar was small, sometimes the guests were standing in the internal corridor, which was also air-conditioned. Mr. Ong told me that I could have the space for free. I was agreeable but I recalled nothing happened for a while.
>
> 25. Sometime in July or August 1996, I recalled meeting Mr. Ong again. I was asked to make a decision whether I wanted the additional space comprising that part of the internal fronting the restaurant. This time I was told that rent of $2,000.00 would have to be paid. Mr. Ong also told me that the access through the internal corridor must be retained. It was agreed that the restaurant would set up a bar on one side with some tables and chairs for bar use only on the other side. In this way, a passageway is kept for people to walk through.

> 26. I accepted the Defendants' offer through Mr. Ong and arranged for that part of the internal corridor fronting the restaurant to be renovated. In the renovation, provision was made for continued access through the space that was the internal corridor to the toilets. Consequently, the additional space offered to the Plaintiff could not be optimised. In any event, it was only to be used as a bar."

72. To a suggestion put during cross-examination as to what Mr. Ong said, Mr. Lapper replied (NE 11)

> "Put: Access you seek includes areas of Peranakan Place demised to Bread Talk?
>
> A : When rented premises, there is corridor which leads to toilets. [In] 1996 – premises rented to Delifrance. Delifrance later wanted extra space at the front of Orchard Road – August/December of 1996. At [the] same time Ong asked if I wanted to take up additional space on my side of [the] corridor. Business [was] doing well. People [were] standing at corridor space waiting. I told Ong that I would discuss with [my] partners. Ong told me [the] space had to remain as [a] corridor. Same for Delifrance. Ong told me [I] could beautify the space. To maximise expenditure [bar] placed on [the] left, seating area on [the] right with "corridor space" in between. Delifrance also kept corridor free of chairs but ..both premises look[ed] like part of premises [with] enhanced overall outlook."

73. Mr. Lapper's oral evidence that Delifrance was also to retain the corridor at its end is not in his written testimony.

74. The Defendants' case is that this was not at all the situation. The Defendants denied making the alleged statements.

75. Contrary to Mr. Lapper's allegation, Mr. Ong said that it was Mr. Lapper who had approached him about taking over the corridor space.

76. In his affidavit evidence, Mr. Ong deposed that management of Delifrance had proposed taking other units as well as the corridor space outside Delifrance. The proposal was attractive to Mr. Ong as it was "an opportunity to reconfigure the layout of the Peranakan Place in order to maximise functionality and to enhance rental yield." Delifrance also wanted exclusive use of the corridor space and this was agreed.

77. Mr. Ong 's written evidence on this subject is as follows:

> "30. At no time did I tell Wolfgang that the Additional Space and the access to the toilets would be retained when the Plaintiffs took up the lease for the Additional Space. It would not have made commercial sense for the Defendants to jeopardize the $60,000 per month rental (S$37.66 per square foot) that Delifrance was paying in respect of the 1593 square foot area of the Adjacent Premises for the monthly sum of S$2,000 (S$3.06 per square foot) that the Plaintiffs were paying for the Additional Space. As the Adjacent Premises had been demised to Delifrance, the Defendants would have been in breach of their contractual obligations to Delifrance if an agreement had been entered into with the Plaintiffs to the effect that Delifrance would be required to allow the Plaintiffs' patrons to cut across the Adjacent premises. For both ethical and commercial reasons, such a course of action is unthinkable.

37. After the lease of the Additional Space to the Plaintiffs and the Adjacent Premises to Delifrance, the internal corridor no longer existed.…

41. ……..At no time did the Defendants seek to interfere with the express contractual rights of their tenants to the quiet enjoyment of the premises demised to them.

67. ..At no time did I represent to the Plaintiffs that the Defendants would keep the Doorway open to allow access to the toilets through the Additional Space and across the Adjacent Premises or that the Defendants would do so for the Plaintiffs' benefit."

(ii) Principal point in dispute

78. As to what was said, the evidence of Mr. Lapper and Mr. Ong is in direct contradiction. This is the principal point on which the parties divide. There is little agreement between the parties as to what occurred.

79. Mr. Lapper and Mr. Ong met three or four times before 26 August 1996. The meetings were to discuss business common to both men and on those occasions the taking over of the corridor space outside Esmirada was raised. No one took any notes of those conversations. Before 26 August 1996, neither side wrote to the other afterwards referring to what had been discussed. Except for the letter of 26 August 1996, there are no other documents generated during this period that will help shed light on the events and conversations relating to the letting of the corridor space to the Plaintiffs.

80. The Plaintiffs were unable to furnish particulars of the duration and details of the alleged discussions. The Plaintiffs simply pleaded that they are "not able to recall the duration save that the discussions took place over the course of 3 to 4 days." See 2(iii) Further and Better Particulars dated 18 January 2002. Mr. Lapper's recollection of the conversations and events are not necessarily more reliable than Mr. Ong's. Both were speaking long after the event and with recollections inevitably coloured by hindsight.

81. In a case like this where there is a conflict of evidence, in ascertaining the truth it is necessary to consider the objective facts, documents and the overall probabilities.

82. In the end, I favour Mr. Ong's version, which is consistent with commercial reality and the independent testimony of Mr. Prince. I therefore find as a fact that Mr. Ong as director of the Defendants did not make the representations alleged. I reached this view assisted by several factors such as:

(i) The Plaintiffs' pleaded case is that in August 1996, Mr. Ong approached Mr. Lapper about taking over the Additional Space. By then, Mr. Ong had already reached an in principle agreement with Delifrance to lease the Adjacent Premises. As Mr. Ong in re-examination replied (NE 571, 565):

"Q : Why did you say your discussion with Esmirada never include[d] any discussion for the need of access using the internal corridor as a passageway to the toilets?

A : It could not be because by that point in time I had already agreed and

decided that Delifrance will occupy the adjacent space such that there would not be a corridor anymore."

…….

"A : ..I did not agree to the maintaining of the passageway and the doorway. It would not be possible for me to lease the adjacent space to Delifrance and to agree the passageway and doorway."

Further, in the course of being questioned by Mr. Tan about how the $2,000 rental was fixed, Mr. Ong said he could not recall whether $2,000 was his or Mr. Lapper's figure but he remembered "mentioning the rental that was being agreed upon with Delifrance for the adjacent premises." (see NE 443). Again, that unchallenged testimony is consistent with Mr. Ong's evidence that his conversations with Mr. Lapper were after he had reached an agreement with Delifrance.

(ii) It is most unlikely that Mr. Ong would have promised uninterrupted right of access and right of way for as long as Plaintiffs remained a tenant. If that were to happen, Mr. Ong would have had to reserve for the Defendants a right of way in the lease with the tenant of adjoining premises. I have already found that there was no such reservation in the Delifrance lease.

(iii) Where two sets of tenants are involved, as was the case here, each tenancy with a different commencement and termination period, it would offend commercial reality to provide for the right of way as claimed. Given the very nature of the right of way claimed by the Plaintiffs, no reasonable businessman and landlord of commercial property with Mr. Ong's experience would think and behave in the way alleged. It is unreasonable to conclude that the Defendants would have contemplated "tying up" indefinitely their ability to use and deal with their property as head lessees. Thus, the inference to be drawn is that the alleged representations could not have been made.

(iv) It is inconceivable that a matter of such importance to the Plaintiffs would not have been reduced to writing. It is significant that no reason whatsoever was proffered by the Plaintiffs at the trial as to why the alleged requirement should not have been recorded in the August 1996 letter. I can only conclude that the representations were not made and parties accepted that the terms contained in the letter were indeed complete.

(v) There is Hugues Prince's evidence that it was Delifrance who did not mind the public traversing its premises. The evidence of the Plaintiffs' own witness, Mr. Prince, collaborates Mr. Ong's written testimony. In 40 of his affidavit evidence-in-chief, Mr. Ong deposed that Delifrance had no objections to Esmirada's customers making use of this [walking through its premises] as a route to the ground floor toilets.

(vi) The Defendants over a period of five years were aware that the public would gain access to the ground floor toilets via Esmirada and Delifrance. That awareness cannot conceptually be equated to representations, acquiescence or encouragement when it was the type of activity Delifrance had unilaterally

permitted.

(vii) There is Mr. Lapper's evidence that if he had known that Delifrance had only taken a two-year lease, he would have similarly taken a two-year lease offered by the Defendants instead of signing on for three years as they had done with the result that Delifrance's lease ended a year earlier than the Plaintiffs'.

83. Mr. Tan relied on three documents to demonstrate that Mr. Ong had made the representations. The first document is a fax dated 4 January 1998 to Mr. Ong from GGW. At 1PBD page 139, GGW wrote:

> " Deli France is now blocking the walk way (sic) every day so our customers have difficulties to go to the toilet."

84. Mr. Ong's handwritten remark reads:

> "We will write to them."

85. I am not persuaded that Mr. Ong's handwritten reply assists the Plaintiffs. Reference to "walkway" in the letter does not necessarily relate to the alleged rights. It would not make sense for Delifrance to clutter or block its premises, as that must surely affect its own restaurant business. Reference to "walkway" could probably mean the stretch of common area outside Delifrance leading to the flight of steps to the ground floor toilets.

86. On that document, Mr. Tan cross-examined Mr. Ong about access through the Adjacent Premises and Mr. Ong said that he had not intervened on that matter [NE 516].

" Q : How many times [have you] intervened as Plaintiffs to enforce [the] right of [the] Plaintiffs' access over adjacent premises?
A : No

> Q : At 1PB139 you say "we will write to them"?
> A : Yes
>
> Q : So you didn't write to them?
> A : No"

The fact of the matter is that no letter was ever written nor did Mr. Ong contact Delifrance.

87. Mr. Ong said he wrote the note in his capacity as director of the Plaintiffs. That evidence is not far-fetched since Mustard Seed was in charge of the administrative matters of Lemon Grass.

88. The other documents Mr. Tan relied on are two letters from Harry Elias Partnership dated 6 August and 5 September 2001 respectively. There, the Defendants' solicitors wrote that their clients had granted a concession to the Plaintiffs which they are now withdrawing. The inference he wanted to draw is that the conversations with Mr. Ong on access through the doorway did take place and given effect to.

89. In my view, the two letters also do not assist the Plaintiffs. I am unable to read the letters in the same way. The September letter is quite categorical in pointing out that no right of access and right of way had been granted to the Plaintiffs under the 26 August 1996 letter including the tenancy

agreement dated 29 December 1999. That letter clarified the earlier letter of 6 August 2001.

90. In addition, it went on to allude to the doorway being left unsealed in 1996 as a concession to the Plaintiffs but the Defendants now wish to exercise their right under Clause 5(14) of the December 1999 lease.

91. Mr. Quahe's submission is that reading the letters in context, the word "concession" is synonymous with "forbearance". He argued that it was due to the Defendants' "forbearance" in 1996 that the doorway was not sealed. That interpretation accords with my understanding of the two letters.

92. In any case, I do not place much weight on the letters written by Harry Elias Partnership. They were written at an early stage when the rights and defences of the parties were not fully understood and formulated by those representing the respective parties. How much the Plaintiffs understood their own case is best gleaned from the various amendments to their pleadings; the last amendment to include a claim in proprietary estoppel was made on the first day of the trial. When the Defendants first raised the sealing of the doorway on 30 July 2001, the Plaintiffs in fax dated 31 July 2001 did not agree to it. Nothing was said then about rights promised to the Plaintiffs. Neither was it raised as a ground of objection on 8 and 22 August 2001 by the Plaintiffs' then solicitors, Infinitus Law Corporation. In their August reply, Infinitus Law Corporation objected to the sealing of the doorway and argued the Defendants' breach of Clause 1(b) of the December 1999 lease. One would have expected the Plaintiffs to protest that the Defendants could not board up the doorway as the Plaintiffs were on a promise to be allowed internal access to the ground floor toilets until the end of the Plaintiffs' lease.

93. Mr. Tan argued that the absence of an application to change the corridor to lettable space supports his contention that the representations were made. I agree with Mr. Quahe's submission that there is want of evidence to indicate that approval for such a change was required. In any case, under Clause 3(4) of the lease, it is for the tenant to make the necessary application.

94. The bar-cum-waiting area did not have the physical appearance or distinctive characteristics of a corridor or passageway. There was no signage indicating that it was a route to the ground floor toilets within Peranakan Place. There was no 'EXIT' sign above or near the rope curtain to indicate that it was another way out of the restaurant; an entrance as argued by the Plaintiffs.

95. The Plaintiffs called Tan Koon Siang the contractor involved in the renovations to the bar-cum-waiting area. He testified that Mr. Lapper had told him that the Additional Space was to accommodate a passageway and that he was to ensure that the layout did not impede the passageway. For privacy Mr. Lapper had suggested installing a rope curtain.

96. I place little reliance on Tan Koon Siang's evidence. Work orders for the renovation were not produced. The quotation and invoice were of no assistance. Contrary to Tan Koon Siang's claim that he could still remember the works done by his company some five years ago, his recollection is demonstrably inaccurate. For example in 5 of his affidavit of evidence-in-chief, he deposed that his workmen installed the rope curtain. On being questioned about this by Mr. Quahe, the witness replied (NE 142):

> "Q : Rope curtain[s], installed by you?
> A : I installed the roller shutter..."

97. On checking the quotation and invoice produced by the Plaintiffs for the renovation, I cannot find

any item billed by Tan Koon Siang's company for either the rope curtain or the roller shutter door. Curiously, the quotation and invoice submitted by the Plaintiffs were addressed to Papa Joe's and not to the Plaintiffs.

98. Having concluded that Mr. Ong did not agree to allow internal access to the ground floor toilets to the Plaintiffs, the claims based on collateral contract and proprietary estoppel must necessarily fail. Even if I had held the other way in favour of Mr. Lapper, that would not be enough to further the Plaintiffs' cause. There are obstacles in the way of both these alternative claims, which I shall now deal with.

The Collateral Contract

99. This issue would involve a consideration of the burden of proof upon the party alleging the oral collateral contract and the application of the parol evidence rule.

100. In my view, the Plaintiffs face insuperable difficulties with this cause of action. Three difficulties are considered below.

101. That said, I noticed that the Plaintiffs in Closing Submissions had hardly argued their case on an enforceable oral collateral contract. They chose to concentrate in the main on a claim founded on proprietary estoppel.

(i) The pleadings

102. By 9 of the Re-Amended Statement of Claim, the Plaintiffs pleaded that there was an agreement (collateral to or expressly provided for in Clause 1(b) of the leases executed), which allows for ready and easy access to toilet/washroom facility by a corridor.

103. In Further and Better Particulars filed on 18 January 2002, the Plaintiffs referred to 2 to 8 of the Statement of Claim [same as Re-Amended Statement of Claim] as the facts and matters in support of the alleged collateral agreement allowing for ready and easy access to the toilet/washroom facility by a corridor.

104. The Plaintiffs' pleaded case is that in August 1996, Mr. Ong approached Mr. Lapper about renting the Additional Space. Against the Defendants, the Plaintiffs pleaded an agreement between the parties that the internal layout of the Additional Space would be planned in such a way that the "Corridor would continue to be the Access".

105. The words "Access" and "Corridor" are respectively defined in 2 of the Re-Amended Statement of Claim as:

> "Access" and "Corridor" mean " ..ready and easy access("the Access") to the toilet/washroom facility by a corridor ("the Corridor") located at very close proximity to Esmirada."

106. Rather than plead the consideration for the alleged collateral agreement that is essential, the Plaintiffs confusingly pleaded in 5 of the Re-Amended Statement of Claim the following:

> " On the basis of the **Agreement** reached with the Defendants (through Ong),

> the Plaintiffs took up the lease of the Additional Space and proceeded with the renovations to the same following the agreed layout with the Access. **The Agreement was evidenced by a letter dated 26th August 1996.**" [emphasis added]

107. In addition, the Plaintiffs' pleaded case is that the August letter did not contain all the terms. The other oral term is set out in 5(i) of the Further and Better Particulars, which reads:

> "5i) The discussions entered into with Ong, in particular regarding the property layout of the additional space wherein the Plaintiffs were required to retain the Corridor of which the Plaintiffs would have same, leading the Plaintiff to believe and understand the matters stated in paragraph 4."

108. Reading 3 to 8 of the Re-Amended Statement of Claim with the particulars provided, the retention of the corridor as access is not a term of the alleged collateral contract but an oral term of the "Agreement" evidenced by the 26 August 1996 letter. Such a plea falls foul of the legal requirements of a collateral contract which consists of the promisee [the Plaintiffs] entering or promising to enter into a principal contract with the promisor [the Defendants], after a statement which takes effect as a term in a second contract between the promisee and the promisor collateral to the principal contract: ***Heilbut Symons & Co v Buckleton*** [1913] AC 30.

109. On pleadings alone, the Plaintiffs' claim insofar as it is based on the alleged collateral contract fails. Nonetheless, I shall say something about the alleged oral term.

110. In their letter of 26 August 1996 [1AB 130], the Defendants wrote:

> "
> 26 August 1996
>
> Lemon Grass Pte Ltd
> 180 Orchard Road
> #01-01/02 Peranakan Place
> Singapore 238846
>
> Dear Sirs
>
> LEASE OF ADDITIONAL SPACE AT PERANAKAN PLACE COMPLEX
>
> We refer to (1) the Tenancy Agreement dated 13 December 1993 made between Peranakan Place Complex Pte Ltd as Landlord and GGW Gastrofun Pte Ltd as Tenant, and (2) the Novation Agreement dated 19 March 1996 between Peranakan Place Complex Pte Ltd as Landlord, GGW Gastrofun Pte Ltd as Tenant and Lemon Grass Pte Ltd as New Tenant (both Agreements hereinafter collectively referred to as the "Agreements").
>
> We are pleased to confirm our agreement to lease to you the additional space which is shown outlined in red on the plan annexed to this letter at the rent of Singapore Dollars Two Thousand (S$2,000.00) per month with effect from the 1st day of October 1996, which will be payable at the same times and in the same manner as the total monthly rent payable under the Agreements. All the terms and conditions of the Agreements will apply to the lease of the additional space.

Please signify your acceptance by signing below on the Acceptance Copy and return it to us not later than 30 August 1996 together with a cheque for the sum of S$6,000.00 drawn in favour of "Peranakan Place Complex Pte Ltd" for the additional security deposit required.

Thank you,

Yours sincerely
For & On Behalf of
PERANAKAN PLACE COMPLEX PTE LTD

Sgd.
MRS SHERIE ONG
Director

ACCEPTANCE COPY

We, LEMON GRASS PTE LTD hereby accept and confirm the abovementioned terms.

Sgd. Wolfgang Lapper

_____
Signature of Authorised Representative
& Company's Chop stamped: LEMON GRASS PTE LTD

27 Aug '96

_____
Date **"**

111. The other terms of the 1993 lease were incorporated by reference in that letter. Mr. Lapper unconditionally signed the confirmation letter the next day on 27 August 1996 [1AB131] even though the letter dated 26 August was silent as far as the alleged requirement to maintain as a condition of the lease the passageway leading to the ground floor toilets.

112. There is no evidence to support the pleadings that the August 1996 letter was intended to contain part of a fuller agreement, the other part was orally made. Once an agreement is reduced and made in writing it is treated as such unless the parties are shown otherwise to intend.

113. If the intention was for the requirement to have been a term of the August contract, it would have been a simple matter to add it to the written letter.

114. As the agreement to lease the Additional Space was reduced to writing, verbal evidence of the alleged oral term is not allowed to add to or in any manner vary or qualify the written contract: Ss 93 and 94 ***Evidence Act*** (cap 97).

115. I would in passing mention that all relevant terms of the December 1999 lease are the same as previous leases. None of those previous leases contain a right of access and right of way claimed by the Plaintiffs. There was no explanation at all as to why the rights claimed were not recorded in the

lease at each renewal given its alleged importance to the Plaintiffs' business as a fine dining establishment. It is not disputed that the parties were legally represented at the time of each renewal.

(ii) Plaintiffs' failure to establish requirements of a collateral contract.

116. A collateral contract is an agreement distinct from the main contract. A court must therefore find all the usual legal requirements of a contract having been fulfilled with respect to the collateral agreement before it can be enforced.

117. What this means is that the statement purporting to be the contractual promise in such a collateral contract must be promissory in nature or effect rather than representational: ***De Lassalle v Guildford*** [1901] 2 KB 215: ***Wells (Merstham) v Buckland Sand & Silica Ltd*** [1965] 2 QB 170; ***Esso Petroleum v Marden*** [1976] 1QB 801 at 826. The Plaintiffs must establish the agreement of the parties to its terms. Thus, to succeed in a claim founded on a collateral contract, the Plaintiffs have to prove certainty of the terms.

118. It is for the party seeking to rely upon the collateral contract who has to bear the burden of establishing that both parties intended to create a legally binding contract: Ralph Gibson LJ in ***Kleinworth Benson Ltd v Malaysia Mining Corporation Berhad*** [1989] 1 All E.R. 785 at 796.

119. They must also establish consideration, which in the case of a collateral contract is easy to prove. All that is required is the promisee [the Plaintiffs] entering or promising to enter into a principal contract with the promisor [the Defendants]. As stated, this consideration was not pleaded.

120. The Plaintiffs did not address in Closing Submissions a key issue, which is, even if Mr. Ong said what he did (and I found that he did not), what was the effect in law of those statements? Did they amount to a collateral contract regarding access to the ground floor toilets through the Adjacent Premises leased to Delifrance?

121. Nowhere in Closing Submissions was it put forward that what Mr. Ong allegedly said were contractual in character or effect, an essential requirement to establishing the existence of a collateral contract. In fact, the Plaintiffs had essentially argued that the alleged statements were representations and nothing more.

122. Other than a passing reference to the collateral agreement being admissible besides s 94 ***Evidence Act*** in the context of the doctrine of estoppel, nothing else was said in the Closing Submissions about this cause of action.

123. In any event, it would have been difficult in my view for the Plaintiffs to establish the existence of a collateral contract even on the assumption that the alleged statements as to right of access and right of way were uttered. A tenancy like all contracts requires certainty of terms. A factor, which does suggest that the agreement cannot be properly construed as having intended to create a collateral agreement, is the vagueness as to the duration of the alleged right of way. The duration was not from a statement made by Mr. Ong but came about from Mr. Lapper's understanding of the conversations.

124. This is a landlord-tenant relationship. In this context, the alleged collateral contract would be a business contract. Such a contract must be viewed commercially, and it would be a palpable absurdity to consider such a contract granting a personal right of use for as long as the Plaintiffs are

tenants. In terms of duration, this is difficult to accept as the right involves passing and repassing over property leased to another tenant whose interest in terms of period of occupation did not coincide, as was the case here.

125. Overall, considering the various points against the existence of a collateral agreement in the circumstances of this case, and particularly reflecting on the implication of the language used in the documents, I conclude that the Plaintiffs have not established the existence of a collateral contract.

(iii) Inadmissibility of collateral contract

126. Even if a different view is taken on the question of the existence of a collateral contract, the collateral agreement (again on the assumption that the alleged statements were made), could not stand consistently with the main written agreement and for that reason, could not be enforced: S 94(b) ***Evidence Act*** (Cap.97).

127. CJ Yong, delivering the judgment of the Court of Appeal in ***Latham v Credit Suisse First Boston*** [2000] 2SLR 693 at p 701 said:

> "In our judgment, it [s 94(b)] could not operate to admit evidence of the verbal agreement either as a collateral contract or as forming part of the terms of a part oral or part written contract. Section 94(b) only allows the admission of evidence of a collateral contract on matters, which are not inconsistent with the written agreement. Where the alleged terms of the oral agreement are in addition to and therefore inconsistent with the written contract, that evidence is inadmissible: *Ng Lay Choo Marion v Lok Lai Oi* [1995] 3 SLR 221."

128. Apart from the two rights [Clause 1(a) and (b)] expressly reserved to the Plaintiffs in the December 1999 lease, all other liberties, rights, easements or advantages are expressly excluded by Clause 1. To that extent, the rights claimed by the Plaintiffs in the collateral contract contradict or are in conflict with the terms of the lease. The collateral agreement is thus not admissible in evidence.

129. There is also Clause 5(17) of the December 1999 lease. It prohibits the Plaintiffs from claiming any right to traverse the Adjacent Premises. This clause is plainly at variance to the alleged collateral contract.

130. There is also Clause 4(7), which is the covenant for quiet enjoyment in the December 1999 lease. The alleged rights, which required the Plaintiffs to retain the corridor and to allow public to walk through the bar-cum-waiting area of the restaurant, is incompatible with this covenant.

131. In the result, the Plaintiffs' claim insofar as it is based on a breach of the alleged collateral contract is dismissed.

Proprietory Estoppel

132. This cause of action is pleaded in 12 of the Re-Amended Statement of Claim. In the Further and Better Particulars to 12 of the Re-Amended Statement of Claim filed on 29 January 2002, the Plaintiffs pleaded the nature of the interest in the land as:

"1(h). Right to use the Corridor as the Access to and from the toilet/washroom facilities."

133. Further, the detriment claimed by them is as follows:

"1(i). The Plaintiffs have incurred expense to renovate, and the layout had to accommodate the Access by providing for its continued availability."

134. Generally, if the owner of land requests or allows another to incur expenditure or otherwise prejudice himself under an expectation created or encouraged by the owner that he will obtain an interest in the land, that raises an equity in the other which is satisfied in whatever is the most appropriate way: ***Dillwyn v Llewelyn*** (1862) 4 De GF & J 517 and ***Ramsden v Dyson*** (1866) LR 1 HL 129. To establish a claim in proprietory estoppel, three elements must be shown: (a) an assurance, (b) a reliance, and (3) a detriment. Once established, the question ultimately is whether or not the assertion of strict legal rights would be unconscionable: see ***Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd*** [1982] QB 133.

135. Since I have concluded that the alleged representations were not made, any belief that Mr. Lapper may have had was not encouraged by Mr. Ong. In any event, nothing in the circumstances of the case supports the creation of an interest in the land. The Plaintiffs claimed that they had incurred substantial renovation expenses as a result of the alleged representations.

136. The alleged expenditure of S$60,000 was not proven. The invoice produced by the Plaintiffs was unhelpful. Mr. Ong in 36 of his written testimony said that only $13,831.00 was spent on renovations. The renovations or redecorations in any case carried little weight in that they did not represent much more than fitting out the Additional Space while it was being occupied. There is want of evidence that the expenditure pleaded by the Plaintiffs is referable to a genuine belief in the Plaintiffs' entitlement to the rights claimed.

137. I cannot see any equity arising out of the alleged expenditure. The Plaintiffs renovated the Additional Space once after confirming the tenancy in August 1996. Mr. Lapper testified that renovations were completed in early 1997. Mr. Lapper admitted during cross-examination that the Plaintiffs had benefited from taking up the Additional Space. The Plaintiffs' business was doing extremely well in 1996. The Additional Space would ease the congestion in the corridor, offer a comfortable holding area for patrons to wait and at the same time generate income through the sale of drinks. There was no evidence that Mr. Lapper had an alternative plan to the Defendants' offer or that he had other opportunities. The inference is that Mr Lapper would have proceeded exactly as he did.

138. In all the circumstances here, the claim based on proprietory estoppel fails.

<u>Derogation from grant</u>

139. Insofar as this plea is concerned, the Plaintiffs' case is that the grant comes with convenient and readily accessible toilet facilities. Having concluded that there was no such express grant in the lease or otherwise promised, the Plaintiffs' claim under this cause of action must necessarily fail.

<u>Counterclaim.</u>

140. The Defendants are no longer pursuing their claim for breach of Clause 3(13) of the December 1993 lease. The Counterclaim is thus limited to a claim for unpaid invoices in a total sum of $18,703.90 in respect of electricity and water charges consumed by the Plaintiffs and for which the Defendants are under Clause 3(3) entitled to claim reimbursement.

141. I agree with Mr. Tan's submission that the Defendants have not proven their claim for reimbursement. No evidence was led to show that tapping of electricity was discovered in or around August 2001 during the upgrading of Peranakan Place. Other than what has been stated in the invoices, no evidence was adduced to explain how the Defendants' apportionment was arrived at. No bills from Power Supply were introduced in evidence.

142. I accept Mr. Lapper's evidence that the Plaintiffs were billed for electricity every month. The Defendants have not proven that there is no double billing, bearing in mind that the invoices (DB 622, 664 and 693) are for electrical consumption dating back to 1996 until 2001.

143. As for invoice 1253 from the Defendants for water supplied to Esmirada for October 2001, the Plaintiffs' defence is that they have not received it. The Defendants under Clause 3(3) is to notify the Plaintiffs in writing of the amount apportioned by the landlords and payable by the Plaintiffs.

144. I agree with Mr. Tan that the Defendants led no evidence as to when and how written notification was given to the Plaintiffs. The Defendants rely on 2 letters dated 18 and 28 December 2001 from their solicitors as proof of notice. A copy of invoice 1253 was forwarded under cover of both letters to M/s Lim & Lim, the Plaintiffs' former solicitors. These letters do not help much as they were written after the Counterclaim was filed on 8 November 2001. They do not constitute proper written notification envisaged by Clause 3(3).

Result

145. For the reasons set out above, I accordingly dismiss the Plaintiffs' action with costs to the Defendants. I also dismiss the Defendants' Counterclaim with costs to the Plaintiffs. I shall hear parties on costs of interlocutory applications, which had been reserved.

Sgd:

BELINDA ANG SAW EAN
JUDICIAL COMMISSIONER