Fico Sports Inc Pte Ltd *v* Thong Hup Gardens Pte Ltd
[2010] SGHC 237

Case Number : Suit No 151 of 2009

Decision Date : 17 August 2010

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Jude P Benny and Kang Kim Yang (Joseph Tan Jude Benny LLP) for the plaintiff; Tan Teng Muan and Loh Li Qin (Mallal & Namazie) for the defendant.

Parties : Fico Sports Inc Pte Ltd — Thong Hup Gardens Pte Ltd

CONTRACT

LANDLORD AND TENANT

17 August 2010 Judgment reserved.

Judith Prakash J:

Introduction

1 This is a tenancy dispute. The defendant, Thong Hup Gardens Pte Ltd ("THG"), is the head tenant of a plot of land situated at Jurong West Street 25 with an estimated area of 116, 600 square metres ("Plot 2") which it rented from The Government of the Republic of Singapore represented by The Housing and Development Board ("HDB") pursuant to a tenancy agreement made on 21 July 2005 ("the Head Lease").

2 The plaintiff, Fico Sports Inc Pte. Ltd. ("Fico") is THG's sub-tenant in respect of a portion of Plot 2 having an area of 40,000 square metres ("the Premises") as described in the lease dated 6 February 2006 ("the Sub-Lease") between THG and Fico. Following disputes that arose in the course of the Sub-Lease, the parties entered into a settlement agreement dated 11 March 2008 ("the Settlement Agreement").

3 This action was started by Fico in February 2009. The main reliefs that it seeks are as follows:

(a) A mandatory injunction or an order for specific performance of the Sub-Lease read with the Settlement Agreement such that THG by its directors or authorised signatories are to endorse on to the plans and other documents relating to sub-lettings, change of use applications and additions and alterations works ("A&A works") by Fico in respect of the Premises and either return the said plans and documents to Fico or forward them to the relevant HDB department for approval within 3 days of this order or, in respect of future applications to HDB, within 7 days after receiving them from Fico;

(b) A declaration that Fico shall be entitled to its rights under clause 4 of the Sub-Lease and that THG shall, upon the grant of the extension of the Head Lease, execute a further lease with Fico according to the said clause 4;

(c) Damages; and

(d) Further or alternatively, damages for misrepresentation pursuant to s 2 of the Misrepresentation Act (Cap 390, 1994 Rev Ed).

4 THG resisted Fico's suit on the basis that it was Fico and not itself that was in breach of contract. THG mounted a counterclaim and seeks the following reliefs:

(a) A declaration that Fico has committed a fundamental breach of the Sub-Lease entitling THG to terminate the Sub-Lease forthwith or, alternatively, a declaration that Fico committed a repudiatory breach of the Sub-Lease entitling THG to terminate it, forthwith;

(b) Further or alternatively, a declaration that the Sub-Lease has been terminated;

(c) An order that Fico deliver up vacant possession of the Premises forthwith; and

(d) Further or alternatively, damages to be assessed for the breaches committed by Fico.

Background

5 THG is in the business of horticulture. At all material times, it was run by Mr Toh Thong Hup ("Mr Toh") and his daughter Toh Gek Hoon ("Joey Toh"). Fico was incorporated in December 2005 to carry on the business of acquiring, developing, and leasing sports facilities. It has several directors but the persons who represented the company in its dealings with THG were Mr Lau Nam Foong Gary ("Mr Lau") and his wife, Mdm Fiona Loy ("Fiona Loy").

6 In April 2005 THG learnt that the Government of Singapore, through the HDB, was offering by way of public tender to let out two parcels of land at Jurong West Street 25 for short term or interim uses. The tender papers specified that the uses to which a successful tenderer could put the parcels of land were:

(a) Turf production;

(b) Nursery (including tree/plant storage);

(c) Sports ground; and

(d) Adventure training ground.

However, at least half of each parcel of land had to be put to a non-agricultural use.

7 THG put in a bid for the second plot of land, Plot 2, which had an area of 116,600 square metres, and offered to pay rent of $12,826.00 a month or 11 cents per square metre. By letter dated 8 July 2005, HDB notified its acceptance of THG's bid. THG's intention at that stage was to use half of Plot 2 for the purposes of a nursery and to construct football pitches and badminton courts on the other portion.

8 At about this time, Mr Lau made contact with THG. At a meeting with Mr Toh and Joey Toh in July 2005, Mr Lau informed them that he wanted to take a sub-lease of part of Plot 2 in order to carry on sporting activities, particularly tennis. There were several meetings between the parties thereafter and the accounts of what were discussed at these meetings vary somewhat. It is Fico's position that from the outset Mr Lau had made it clear to THG that it was absolutely crucial for Fico's business to succeed that it be able to have food and beverage facilities (which Fico referred to as "F&B") with cooking and eating-in at its business premises.

9 Mr Lau testified that, on or about 11 October 2005 he had given Mr Toh a presentation regarding the business that Fico would carry on at Plot 2 and had given examples of the projected use of retail shops on the Premises. These included fast food outlets and seafood restaurants. Mr Lau said that he had had a discussion with Mr Toh after the presentation during which Mr Toh had told him that there would be no problem for part of the Premises being used for F&B with cooking and eating-in.

10 Mr Toh denied this allegation. He stated that at no time during his meeting with Mr Lau was there any conversation about F&B outlets being set up in the Premises. He did recall a meeting at HDB's office attended by Mr Lau, Joey Toh and Mr Toh himself in October 2005. At that meeting, Mr Lau had asked HDB about the provision of F&B facilities on the Premises. The HDB officer, one Mr Goh Choon Ngwen, informed Mr Lau that only drinks and snacks could be served at the Premises. Mr Toh categorically stated in his affidavit that he had never told Mr Lau that any part of Plot 2 could be used for food & beverage with cooking and eating-in. The allegation that he had induced Mr Lau to enter into a tenancy agreement by representing that the Premises could be used for F&B with cooking and eating-in at the Premises was a blatant lie.

11 Shortly after THG's first meeting with Mr Lau, the tenancy agreement in respect of Plot 2 was signed and dated 21 July 2005. Clause 1.1 of the Head Lease provided that the term of the lease would be "three + three + three years" from 1st August 2005. It was later clarified by the parties that this provision meant that the original term of the lease was a period of three years only but that the HDB could renew the grant of the lease for up to two further periods of three years each. Clause 4.1.1 of the Head Lease set out the approved use of Plot 2 in the same terms as stated in the tender. The Head Lease also contained the following material terms:

(a) Clause 4.2.5 – THG was not permitted to erect or put up any structure on Plot 2 without the prior written consent of HDB;

(b) Clause 4.2.6 – THG was not to undertake any addition or alteration works without the prior written approval of HDB and the relevant authorities and also had to engage competent professionals to submit plans, drawings and calculations to the relevant authorities in the event that HDB gave their consent and before the works could be proceeded with; and

(c) Clause 7.1 – at the written request of the tenant made three months before the expiration of the term, HDB could grant the tenant a further tenancy of Plot 2 for a further term of up to three years subject to new terms and conditions and the market rent prevailing at time of renewal to be decided by HDB provided that at the time of the request there had been no breach of any of the terms and conditions by the tenant.

12 On 11 October 2005, a letter of intent was signed by THG and Mr Lau. By this letter, THG agreed to sub-lease about 25,000 square metres of Plot 2 to Mr Gary Lau to develop a sports complex with his business partners. The letter stated that the land would be used for "Football field & tennis only (All other sport facilities are subjected to approval by HDB)". The rental to be paid was 18 cents per square metre per month and the duration of the lease was stated to be three years plus three years plus three years "according to our master lease date and period". I note in passing that the terms of the letter on the use of the land were consistent with Mr Toh's evidence that Mr Lau wanted the land to develop his sports business - particularly in relation to tennis.

13 The letter of intent was initially drafted by Mr Lau and sent to THG for the latter's approval. It is THG's position that Mr Lau had a copy of the Head Lease at the time he prepared the letter of intent. Fico, however, denies this.

14 In November 2005, THG entered into a contract with a firm of professional engineers and consultants called HSK & Associates ("HSK") and subsequently submitted to HDB a set of plans that HSK had drawn up in respect of THG's intended use of Plot 2. HSK, pursuant to a separate appointment by Mr Lau, additionally drew up plans for the use of the Premises which were also submitted to the HDB by THG. Fico's plans included a structure bearing the description "Single-Storey Shop with Ancillary Office and Changing Room (Blk 3)" (hereinafter called "Block 3") which contained 19 units some of which were marked "Shop (F&B)". Whilst Fico's allegation was that its requirements and plans were incorporated by THG in its master plan which were then submitted to the HDB, THG took the position that Fico had instructed HSK in respect of the drawings needed for the structures to be put up on the Premises and that THG was never involved in instructing HSK regarding Fico's drawings. Eventually, because THG was the head lessee, HSK put the respective parties' submissions together and forwarded them to the competent authorities for approval.

15 Fico was incorporated in December 2005. In February 2006, the Sub-Lease was entered into by the parties. The document was drafted by Mr Lau and vetted by Joey Toh. The material terms of the Sub-Lease are as follows:

(a) The term of the Sub-Lease was stated to be a term of "three + three + three years commencing from the 1st day of August 2005" at a monthly rent of $4,500 with GST of $225 and, from 1st July 2006, at a monthly rent of $7,200 with GST of $360;

(b) Clause 4 provides:

"Upon completion of the term, the Sub Tenant has the option to extend the lease in accordance with the period of new extension granted to the Tenant by the HDB. The new rental will be as per existing proportion of rental paid by the Sub Tenant to the amount paid by the landlord to HDB";

(c) Clause 6 provides:

"The Sub Tenant hereby covenants with the Tenant as follows:

...

(3) To use the Demised Premises for the purpose of sports/games/recreational activities and or other uses as approved by the HDB

...";

(d) Clause 7 provides:

"The Tenant hereby covenants with the Sub Tenant as follows:-

(1) That the Sub Tenant duly paying the rent hereby reserved and observing and performing the several covenants and stipulations herein on its part contained shall peaceably hold and enjoy the Demised Premises during the said term without any interruption or disturbance by the Tenant or any person lawfully claiming under or in trust for the Tenant.

...

(3) Not to construct or allow any third party to construct any sporting and food & beverage facilities, and or carry out any sporting activities (other than badminton) in or around the land situated at Jurong West Street 25.

..."

16 The Sub-Lease does not contain any clause dealing with sub-letting of the Premises. The first draft of this document which Mr Lau forwarded to THG contained a clause 5 which read: "The Tenant may sub-let the premise in whole or in part provided the HDB requirement for sub-letting is met". THG asked for this clause to be deleted and Mr Lau agreed. Mr Toh explained he had made this request because he did not want to give Fico the right to sub-let. He did not know then that this was the wrong way to achieve his aim.

17 Two further matters need to be mentioned in this account of the background. First, by an option dated 17 July 2006, THG granted Fico an option to rent an additional 18,300 square metres from it at an additional rental of $1,800.00 per month. This option was exercised by Fico on 22 March 2007. Secondly in January 2008, Fico started an action in the District Court against THG alleging that THG had encroached on the Premises. This dispute was later resolved by mediation and parties entered into the Settlement Agreement to record the agreed terms. Clause 9 of the Settlement Agreement read as follows:

> "FSIPL may sub-let the demised land provided that HDB has no objection to the sub-letting. FSIPL shall copy the appropriate correspondence to THGPL."

18 The parties did not have an easy relationship. On 25 March 2009, HDB issued THG with a notice to quit. In turn, THG issued and served a notice to quit on Fico on 26 March 2009. In any case, the original term of the Head Lease expired on 31 July 2008 and, to date, no renewal of the tenancy has been granted by the HDB to THG. THG wrote to HDB on 4 August 2008 purporting to exercise its option to obtain an extension of the Head Lease but in its reply of 11 August 2008, HDB stated that it would only consider an extension after the infringements of the Head Lease which had occurred by reason of unauthorised sub-letting of parts of the Premises and unauthorised A&A works thereon had been rectified/or regularised. Such regularisation has not yet taken place. Both parties however,

continue in occupation of their respective portions of Plot 2.

The Parties' Complaints

Fico's side of the story

19 Fico's first complaint relates to its inability to use the Premises for cooking and eating-in. It states that such facilities are critical to its business success and that THG knew this right from the outset. In order to induce Fico to enter into the Sub-Lease, THG made various representations regarding the use of the Premises for Fico's F&B requirements. Fico relied on such representations but they turned out to be false as under the terms of the Head Lease the Premises cannot be used for F&B with cooking and eating-in.

20 Fico states that it discovered the false representations when THG's solicitors sent a letter dated 17 September 2008 to Fico's solicitors enclosing HDB's letters stating that the Premises could not be used for food operators with cooking and eating-in and requiring Fico to make applications for "change of use" for parts of the Premises which Fico had sub-let to fast food and cooked food operators.

21 Fico further complains that THG refused to assist it in mitigating the loss that it had sustained by reason of the falsity of the representations. By its letter of 10 October 2008, Fico sought to have THG's endorsement on the required plans/drawings before the same were submitted to HDB in support of Fico's application for a change of use. THG had however failed or refused to endorse these plans/drawings.

22 The second category of Fico's complaints relate to allegations of breach of contract. The terms of the Sub-Lease, it says, clearly entitle Fico to sub-let parts of the Premises, to use the same for any uses approved by the HDB and to a renewal of the Sub-Lease for a second term of three years subject only to a change in rent. However, THG had acted in breach of the Sub-Lease in refusing to endorse or in persistently delaying its endorsement of various applications made by Fico. The details of this allegation are as follows:

(a) From 14 April 2008 to the end of the first week of July 2008, Fico wanted to apply to HDB for authorisation to sub-let certain parts of the Premises to Pizza Hut (S) Pte Ltd ("Pizza Hut"), Shan Da Want Chicken Pte Ltd ("SDW Chicken"), Yummy Yum Yum Pte Ltd ("Yummy PL") and Love Skateboarding Pte Ltd ("LSPL"). Fico repeatedly requested THG to assist in the applications by endorsing on the plans and related documents. In breach of clause 6(3) of the Sub-Lease and/or clause 9 of the Settlement Agreement and/or an implied term thereof to assist Fico to obtain the approval of the HDB on A&A works and sub-lettings, THG refused to make such endorsements;

(b) THG had in breach of clause 6 of the Sub-Lease refused to endorse and/or had unreasonably delayed in endorsing Fico's application for permission to erect an indoor skateboard park even though the said clause 6 entitled Fico "to use the Demised Premises for the purpose of sports/games/recreational activities and/or other uses as approved by the HDB";

(c) In June 2008 the Plaintiff and its solicitors had tried to resolve the impasse by making the applications relating to sub-letting and A&A works directly to the HDB and informing THG by sending them copies of their correspondence. On 8 and 24 July 2008, HDB made clear its position that all Fico's plans and related documents on sub-letting and A&A works had to be

submitted through THG for endorsement or the same would not be entertained by HDB. Despite this clear requirement from HDB, THG continued to refuse to endorse Fico's documents;

(d) By its letter of 11 August 2008, HDB had indicated it would consider renewing the Head Lease after receiving the applications and documents necessary to regularise the unauthorised A&A works and unauthorised sub-letting in respect of the Premises. By 29 August 2008, all the data and plans required for regularisation had been handed by Fico to THG's solicitors. Instead of endorsing on and submitting these documents to the HDB, THG sought on 28 August 2008 to unilaterally impose onerous new terms on Fico. This was in breach of clause 4 read with clause 6(3) of the Sub-Lease. It was also in breach of an implied term in the Sub-Lease that THG would assist Fico to do what was reasonable to apply for a change in use of the Premises; and

(e) To date, THG continues to be in breach of the terms of the Sub-Lease and the Settlement Agreement as it had continued to refuse to assist Fico by making the necessary endorsements on the documents for change of use, approval of sub-letting and approval of the A&A works despite Fico's repeated requests and even after Fico had agreed to bear any increase in rent relating to a change in use if such an increase was imposed by the HDB.

23 Fico also alleges that by reason of these matters and of the fact that it continues to receive rents from Fico, THG was and is in breach of clause 7(1) of the Sub-Lease which contains an implied covenant preserving Fico's quiet enjoyment of the Premises, and thus is in derogation of the rights which THG granted Fico under the Sub-Lease. THG is also in breach of clause 4 of the Sub-Lease in so far as it had neglected and failed to execute a second lease agreement in favour of Fico granting it a further lease of three years.

THG's side of the story

24 THG's main complaint is that after the conclusion of the Sub-Lease, Fico conducted itself (or its actions were so conducted by Mr Lau) as if it had an unrestrained right to do exactly what it pleased. In particular, Fico sub-let various parts of the Premises to tenants without seeking HDB's prior approval, refused to disclose the rent it was receiving from such tenants and also attempted to mislead everyone as to the protocol it claimed HDB had agreed to in the conduct of affairs in respect of its tenants.

25 In relation to the question of sub-letting, THG maintains that Mr Lau and Fico knew that any sub-letting of the Premises would be subject to HDB's approval. Despite this Fico signed written agreements with the following tenants to set up restaurants and a food court without first seeking consent or informing anyone of the change of use the Premises were being put to:

(a) Pizza Hut (for a 36-month tenancy commencing on 15 December 2007);

(b) SDW Chicken (for a two-year term commencing on 25 April 2008); and

(c) Yummy PL (for a three-year term commencing on 26 April 2008).

The tenants were let into possession and started renovation and construction works in respect of their respective units without notifying HDB or THG. When the hearing started, Pizza Hut and SDW Chicken were in occupation and operating out of their respective units while Yummy PL had halted its renovation works and had not started operations.

26 On 8 April 2008, HDB asked for details of the rent that Fico was collecting from Pizza Hut. Fico did not furnish this information despite being asked for the same repeatedly between 28 April 2008 and 5 August 2008. On 8 July 2008, HDB asked for information regarding the rent that Fico would receive from LSPL. Fico then announced that it would operate the skateboard park itself. THG alleges that Fico knew the consequences of disclosing the rent it was receiving from its tenants and that it wanted to avoid disclosing such information to either THG or HDB despite the fact that such conduct would result in a serious breach of the Head Lease.

27 THG complained that in order that Fico could have a free hand in achieving its own agenda, Mr Lau would communicate directly with HDB and leave THG out of the loop. To justify its approach, Fico drew up a protocol on 29 May 2008 and sent it to HDB and THG. It claimed this protocol had been discussed with HDB and was to be applied henceforth. The protocol gave THG no role in Fico's sub-lettings and use of the Premises. On 1 July 2008, THG's solicitors asked Fico to furnish them with HDB's confirmation that the protocol was applicable to the chain of communication between the parties. No response was received from Fico but on 24 July 2008, HDB wrote to the parties and corrected the protocol given by Fico. It was clear from this letter that HDB had never approved Fico's protocol. Instead, HDB required all applications and submissions - whether for sub-letting or change of use - to be made through THG with the latter's consent and approval. The HDB also required the plans being submitted to have been prepared by a qualified person.

28 Other alleged instances of breaches on the part of Fico which THG complained of were:

(a) The sub-letting of a portion of the Premises to one Tan Beng Kiat for use as a soccer field without the prior approval of HDB having been obtained;

(b) The opening of a lounge to members of the public;

(c) The commencement of renovation work without prior approval;

(d) The direct application to HDB to set up a clubhouse without THG's approval or knowledge; and

(e) The sub-letting of a unit in Block 3 to a construction company to use as an office which use is not an approved one.

29 THG also complains that the Head Lease was not renewed due to breaches on the part of Fico. It relies on various correspondence from HDB addressed to THG and copied to Fico including the following:

(a) HDB's letter of 9 May 2008 which noted that its site inspection had revealed extensive A&A works creating individual food stall structures carried out at Block 3 and stated that such works should not have been started without its approval;

(b) HDB's letter of 29 May 2008 which stated that a further site inspection had revealed that a new food establishment had commenced operation in Block 3 although no formal application for approval had been received and urged adherence to the terms of the Head Lease in order to avoid risking non-renewal of the Head Lease;

(c) HDB's letter of 30 May 2008 which stated that part of the A&A works at the Premises was for construction of a food court and since no approval had been granted for such use, the operations of the food court could not be commenced; and

(d) HDB's letter of 24 June 2008 noting that part of the Premises had been converted into a lounge which appeared to be open to the public and demanding the removal of the sign advertising the lounge which had been placed at the entrance of the Premises.

30 THG avers that, in the circumstances, it saw a need for clear provisions to be drawn up to spell out what Fico could and could not do in the areas of sub-letting and change of use. It considered that there were serious implications for THG as head lessee if the change of use requests were met. This was because the rent for Plot 2 would probably be revised upwards and additional terms might be added to the Head Lease which would adversely affect THG's interests. Therefore attempts were made to try and agree terms for these matters. Fico, however, did not accept the terms proposed and refused to agree to a proper and transparent procedure to deal with matters which the Sub-Lease does not cover.

The Issues

31 The parties have characterised the issues somewhat differently. THG submits that the principal issues are as follows:

(a) Is THG obliged under the Sub-Lease to unconditionally sign the drawings and submission for change of use which Fico may seek in respect of the Premises?

(b) Was there any misrepresentation by THG to Mr Lau prior to the entry of the Sub-Lease?

(c) Was Fico in repudiatory breach of contract at the time THG issued its notice to quit, *i.e.* on 26 March 2009?

32 In Fico's view, the issues to be decided are:

(a) In relation to the allegation that Fico is in breach of the Sub-Lease:

(i) Whether a logical reading of clauses 6(3) and 7(3) of the Sub-Lease allows Fico to use the Premises for F&B as well as for sports/games/recreational activities;

(ii) Whether as a result there is an implied obligation on THG to assist Fico in applying for HDB approval in respect of use of the Premises by consenting to endorse on Fico's plans and documents; and

(iii) Whether THG has breached its obligation under the Sub-Lease by withholding its consent for reasons that are, *inter alia*, wholly unconnected with the Sub-Lease and/or extraneous to the intentions of the parties, thereby rendering its refusal to consent unreasonable.

(b) In respect of Fico's claim that THG had made misrepresentations:

(i) Whether THG had knowledge of Fico's specific requirements for F&B;

(ii) Whether THG had either negligently or innocently misrepresented to Fico (through Mr Lau) that F&B with cooking and eating-in was allowed on the Premises;

(iii) Whether Fico was induced to enter into the Sub-Lease because of these misrepresentations;

(iv) If THG knew that F&B uses were restricted, whether its silence in the face of Fico's misapprehension amounted to misrepresentation; and

(v) Whether Fico's right to rescind the Sub-Lease has been extinguished by affirmation.

(c) In relation to Fico's claim for specific performance of the terms of the Sub-Lease:

(i) Whether the parties are still governed by the terms of the Sub-Lease;

(ii) Whether damages will be an adequate remedy;

(iii) Whether Fico comes with "clean hands" and whether its alleged breaches are a barrier to specific performance; and

(iv) Whether the grant of specific performance as a relief is possible in view of the position taken by HDB.

(d) Finally, in relation to THG's counterclaim:

(i) Whether Fico's actions, omissions, and course of conduct amounted to breaches of the Sub-Lease;

(ii) Whether Fico's conduct evinced an intention to repudiate the Sub-Lease and whether such repudiation was accepted by THG;

(iii) Whether the alleged breaches went to the root of the contract or made the essential object or the substantial benefit of the Sub-Lease impossible to be attained; and

(iv) Whether the option to renew the Sub-Lease can still be exercised.

33 It can be seen that Fico's list of issues is comprehensive and covers the issues raised by THG. I will therefore structure the analysis largely in accordance with the issues as posed by Fico. I will start with the issue of misrepresentation and then go on to the issue of the terms and alleged breach of the Sub-Lease before considering the remedies available to the parties.

Misrepresentation

34 To succeed in its claim for misrepresentation, Fico, citing *Eng Hui Cheh David v Opera Gallery Pte Ltd* [2009] SGHC 121 at [97] asserted that it is necessary for it to prove that:

(a) A representation of fact was made to it by THG which was untrue;

(b) It was induced to act on the representation; and

(c) It suffered a loss as a result.

I accept that these are the ingredients of actionable misrepresentation.

35 The first matter to consider therefore is whether the representation was made. In its submissions, Fico repeated its pleaded position that THG "expressly and/or implicitly" represented that the Premises could be used for F&B operations that included cooking and eating-in. From these representations, Fico understood that, subject to any necessary technical clearances from authorities

such as the National Environment Agency, it would be able to carry out such operations.

36 Fico said that THG knew about the proposed F&B operations because at the outset Fico had communicated its intention to carry out F&B operations that would necessarily include "by virtue of a common understanding of the term F&B", cooking and eating-in at the Premises. Fico (or rather Mr Lau) had made it clear by certain emails sent to THG in October 2005 that Fico intended to have F&B at its premises. The emails themselves did not mention the proposed F&B outlets but attached to them were several "Proposed Layout Plans" and each of these depicted designated and distinct areas for F&B use. Under cross examination Joey Toh had acknowledged that she had seen the Proposed Layout Plans and was aware that F&B was clearly denoted in those plans. Fico pointed out that the Proposed Layout Plans had shown more than one F&B outlet, covering a gross floor area of 720.98 square metres or approximately 7,700 square feet. Thus, THG had to be aware that Fico intended to carry out extensive F&B operations on the premises.

37 Apart from the above, Fico said there had been specific discussions on the F&B issue. On or about 11 October 2005, during negotiations prior to the signing of the Sub-Lease, Mr Lau had discussed with THG and submitted to THG documents (referred to as the "Marketing Kit") showing Fico's proposed business model for the Premises. This included artist's impressions of F&B outlets like McDonald's, Kentucky Fried Chicken, Jumbo Seafood – outlets which would obviously include cooking and eating-in at the Premises.

38 Fico emphasised that during the said discussion, Mr Toh had told Mr Lau in so many words that there would be no problem in cooking and eating-in at the Premises. Mr Lau also stated that Mr Toh had said that Fico could do anything as long as the HDB approved.

39 It was also Fico's pleaded position that it was clear from the inclusion of Clause 7(3) of the Sub-Lease that Fico's proposed F&B operations were already within the contemplation of the parties at the time of drafting and signing the Sub-Lease. Clause 7(3) reads:

> 7. The Tenant hereby covenants with the Sub Tenant as follows:-
>
> ...
>
> (3) Not to construct or allow any third party to construct any sporting and food and beverage facilities, and or carry out any sporting activities (other than badminton) in or around the land situated at Jurong West Street 25

Fico submitted that under cross examination Mr Toh had conceded that THG was specifically restrained from carrying out F&B activities by Clause 7(3) because Fico was to be the designated F&B operator. In this respect the cross examination passage read:

> Court: No. The question is: Why did you agree not to do F&B?
>
> Witness: It's actually already in this agreement and I did very little amendment to this tenancy.
>
> Court: Yes. Why didn't you take it out? You could have cancelled the F&B.
>
> Witness: Because we don't have intention of doing it, so we just leave it.
>
> Court: Yes.
>
> Q Now, would you agree with me, it was also left in because Fico was going to do the F&B and they told you that was in the drawings? Correct?

A Yes.

40 Fico submitted that if HDB had indeed clarified, at the outset, that F&B was to be limited to a single outlet serving snacks and drinks, there would have been no reason to include Clause 7(3). Further, the approved drawings showed F&B in a few different areas on the Premises and covered an enormous gross floor area of 720.98 square metres. That could only mean that the parties had come to an understanding, based on THG's representations, that Fico would be able to operate F&B facilities with cooking and eating-in.

41 Fico's final submission on this point was that if THG had not intended for Clause 7(3) to operate in such a manner, then the failure to remove Clause 7(3) was an implied misrepresentation on the part of THG on the type or extent of F&B facilities that Fico could operate. This last submission, in my view, carries no weight and, indeed, smacks of desperation. I cannot accept that THG's agreement to not provide F&B facilities itself meant that it was representing to Fico that Fico could have F&B facilities which involved cooking and eating-in. That would be stretching the wording of the covenant. In fact, all the arguments on the existence and wording of Clause 7(3) are tenuous and I have no hesitation in rejecting them.

42 I now deal with the other points made in relation to misrepresentation. First, I should say that Fico has not been able to establish that the misrepresentation complained of was indeed made. Mr Toh denied telling Mr Lau that there would be no problem with cooking and eating-in on the Premises. I accept his denial in preference to Mr Lau's assertion that such a statement was made. Mr Lau was not a very credible witness – he was glib and often evasive and when it came to this allegation, I think that he made up the evidence. In this connection, I also accept THG's evidence that at the meeting with HDB on or about 11 October 2005 Mr Lau brought up the issue of F&B at the Premises and was told very clearly by Mr Goh Choon Ngwen of HDB that only drinks and snacks were allowed and cooking was not permitted on the premises.

43 It is important to remember that it was Mr Lau who first approached THG and asked them to sub-let a portion of Plot 2 to Fico. It was clear from the evidence that from the very beginning Mr Lau was keen to take a sub-lease for his proposed sporting activities and that he did not have to be induced into anything. It was Mr Lau who drew up the first version of the letter of intent. This had no mention of food and beverage of any kind. Whilst this was amended several times, no reference to food and beverage was inserted and the signed version was equally devoid of any such reference. It is also material that in August 2005 when the HDB wanted to know what the proposed use of the premises by Fico would be, Fiona Loy's reply to THG for onward transmission was "All kinds of sports except those not approved by HDB". If F&B facilities had been such a vital part of Fico's plans, either Mr Lau or his wife would surely have mentioned it in writing to HDB from the beginning. The alternative inference, and one which is equally unhelpful to Fico, is that the plans for F&B facilities were deliberately suppressed as Mr Lau did not want to risk an immediate rejection of the proposed Sub-Lease from HDB. After all, HDB had made it plain in the Head Lease what the approved uses were. F&B was not one of these.

44 Further, the sequence of events contradicts Fico's case that in order to induce it to enter the Sub-Lease, Mr Toh had represented to Mr Lau on 11 October 2005 that the Premises could be used for cooking and dining-in. This is because by 19 August 2005 Mr Lau already knew that HDB had approved THG's application to sub-let four hectares to him at 18 cents per square metre to be used for tennis and football. The parties had by then agreed on the principal terms of the sub-tenancy and that is why HDB's approval for the same had been sought by THG.

45 The complaint about misrepresentation was an afterthought. In October 2008 when Fico was complaining to THG in respect of its refusal to apply for change of use of the Premises so as to permit cooking and dining-in, Fico wrote (on 15 October):

> I have shared with Mr Toh Thong Hup on our operations, needs and requirements before LOI was signed and subsequently signing of the lease.
>
> Mr Toh was aware and is supportive. He has also included our plans into the Master Plan E3300-00004-2006 with him as the main applicant.
>
> It has been made known to Mr Toh that the 19 units at Blk 3 are meant for subletting and the various uses have been communicated & provided for such as F&B, Gym, and Retail...etc.
>
> The change of use is meant to apply by you on our behalf to the authority. Are you trying to misled (shed your responsibility) by applying for shop when our intention was made known very clearly it is F&B including cooking?

46 It can be seen from this wording that Fico was not complaining that Mr Toh had misled Mr Lau into believing that the Premises could be used for cooking and dining-in. Instead the language of the letter indicates that the party who had mentioned "cooking" (if it was mentioned at all) was Mr Lau. It was Mr Lau who was doing the talking and communicating with THG on Fico's plans. The strongest allegation that Fico made in this letter of 15 October 2008 was that "Mr Toh was aware and is *(sic)* supportive" of Fico's plans. Being supportive of Fico's plans cannot be construed as making a misrepresentation, as Fico pleaded in the Statement of Claim.

47 Next, as THG reminded me in submissions, counsel for Fico in Fico's opening submissions at the trial had taken the position that THG had made a misrepresentation to Fico by keeping silent on what could be done at the Premises and this silence had deceived Fico into believing that it could set up F&B outlets with cooking and dining-in at the Premises. This was a departure from Fico's pleaded case because in para 12(a) of the Statement of Claim, Fico averred that THG's misrepresentation had arisen from a conversation between Mr Lau and Mr Toh where Mr Toh had said that the Premises "could be used for food and beverage with cooking and eating-in at the premises". During cross-examination Mr Lau had denied that THG's alleged misrepresentation was by silence. He was then asked to identify the misrepresentation that THG had made. After much evasive rambling, Mr Lau answered that he was relying on Mr Toh's promise to him that "[he(Mr Lau)] could do anything as long as HDB approves" for Fico's case of misrepresentation. This, as Mr Lau agreed in court, is not to be found anywhere in his affidavit of evidence-in-chief.

48 Fico, therefore, twice changed its story about the alleged misrepresentation. The final version put forward by Mr Lau was that the alleged misrepresentation on THG's part was Mr Toh's statement that Mr Lau could do anything as long as HDB approved. THG submitted, and I agree, that this statement could not be a misrepresentation as it was the truth.

49 In addition to relying on an alleged express assurance from Mr Toh, as I have indicated above, Fico also relied on the fact that its Proposed Layout Plans contained clear statements that certain units in its premises were for "F&B". The way in which this was pleaded was not quite proper, in my view. What Fico said in para 12 of its Statement of Claim was:

> During their negotiations, in order to induce the Plaintiffs to enter into the Lease dated 6th February 2006, the Defendants made the following representations to the Plaintiffs:

...

(a) in a document entitled "Proposed Layout Plan" dated October 2005 sent to the HDB with a cover letter dated 16 November 2005, and copied to the Plaintiffs, the premises to be sub-let to the Plaintiffs could be used for food and beverage (or "F&B");

(b) in a document entitled "Proposed Layout Plan" dated December 2005 given to the Plaintiffs, the premises to be sub-let to the Plaintiffs could be used for food and beverage ...

This implied that it was THG who prepared the Proposed Layout Plan and sent the same to Fico. As Fico knew, that implication was not true because from the beginning it had been Fico (or, more precisely, HSK on Fico's instructions) who prepared the Proposed Layout Plan and wrote the word F&B thereon and sent them to THG for submission to HDB. HSK was directly appointed by Fico and instructed to prepare the various drawings and submissions required in respect of the uses of the structures to be erected at the Premises. It was HSK who designated some units in Block 3 as "Shop (F&B)". There was, however, no description indicating a restaurant or a food court in any of the drawings prepared by HSK.

50 Fico did not call anyone from HSK to explain the drawings the latter had produced. THG, however, adduced evidence from Mr Foo Koong Kit Richard, a registered and practicing architect. His testimony was that HSK's submission for Fico was a simple layout submission without details. For example, there were no details of any kitchen or stove with open fire depicted for the shop (F&B) units. Mr Foo stated that such a simple layout submission would have been for approval of units selling snacks and light meals only. He also stated there were different classes of establishments under the Urban Redevelopment Authority's ("URA") classifications regarding food establishments. Some establishments could only retail and serve food for consumption elsewhere that did not require cooking and preparation on site. Such retail of snacks and light meals fell under Class I being "shop" use. Another class (i.e. restaurant) envisaged the cooking and preparation of food for consumption on site. If the intended use of the "shop" was as a "restaurant" falling under Class III of URA's classification, approval for such use had to be obtained from URA. I accept this testimony from Mr Foo.

51 I also accept the evidence of THG that neither it nor its representatives played any part in giving instructions to HSK regarding the structures that Fico wanted to erect on the Premises or concerning the uses it wished to put such structures to. In cross-examination Mr Lau claimed that he had told HSK specifically that he wanted to use the Premises for restaurants and fast food. He accepted that the approved drawings which depicted the shop units at Block 3 were based on the instructions which he had given to HSK. THG argued that if Mr Lau had specifically instructed HSK that some units were to be used as restaurants and fast food outlets, HSK would not have depicted these in Block 3 as "Shop (F&B)" when the word "shop" denoted a class of use which fell under Class I of URA's classification. THG further submitted that HSK, as professional engineers, would have known what they were doing. Consequently, their description of the units and shops must have accorded with Fico's actual instructions that the units were to be used for uses falling within Class I. I agree because HSK would have known that only Class 3 outlets could be used as restaurants. It is significant that Fico did not adduce evidence from HSK as to why it had depicted the units in that way when Fico ostensibly wanted to use them as restaurants and fast food outlets. It is also significant that Fico does not appear to have made any complaint to HSK in respect of the way in which the drawings were produced if indeed it instructed HSK that the units were to be used for restaurants and fast food outlets. Fico is now well aware that a Class I shop will not enable it to operate such businesses. If HSK gave Mr Lau the impression that Fico would be able to do so and the drawings were sufficient to obtain approval for the same, then Fico would have grounds for complaint.

52 I have come to the conclusion, on a balance of probabilities, that no instructions were given to HSK that the Premises were going to be used for cooking and eating-in. Mr Lau was aware at all material times that as far as food was concerned he could only serve snacks, light meals and drinks. This is what he was told by HDB at the meeting in October 2005. HDB was consistent on this point. In December 2007, it informed Fico that the proposed Members' Lounge could only serve light meals which did not involve cooking.

53 As the head tenant in respect of Plot 2, THG had the responsibility of endorsing and submitting all plans for structures to be built on the Premises. I accept its evidence that it simply incorporated Fico's plans without any change. Since the plans emanated from Fico and there was no input on the same from THG, I find difficulty in seeing how THG's conduct in relation to the acceptance and submission of the plans constituted any representation as to the use of the premises for cooking and eating-in. In any event, the plans proposed an F&B usage that fell within "Shop (F&B)" which was a Class 1 usage and did not propose a Class 3 unit so it is impossible to construe any such representation from the plans.

54 For the reasons given above, in my judgment, Fico has no claim for damages for misrepresentation.

Alleged breach of the Sub-Lease by THG

Interpretation of the contracts

55 This part of the judgment deals with the issues referred to in [31(a)] and [32(a)] above. My first task is to decide what the true meaning of Cl 6(3) of the Sub-Lease is.

56 Clause 6(3) of the Sub-Lease is a covenant. By it, Fico covenants with THG:

> To use the Demised Premise for the purpose of sports/games/recreational activities *and or other uses as approved by the HDB*.
>
> (emphasis added)

As Fico points out, this clause contains two parts. The first part is the description of the explicitly approved uses, *i.e*. "sports/games/recreational activities"; the second refers to other uses as approved by the HDB".

57 Fico's interpretation is that a common sense reading of the covenant would lead to the view that it was already in the contemplation of both parties that Fico would primarily use the Premises for sports, games and recreational activities. However, other uses, as maybe approved by the HDB in the future, were also within their reasonable contemplation. Fico pointed out that while Joey Toh took the position that the phrase "and or other uses by HDB" was strictly a reference to the four uses enumerated in Cl 4.1.1 of the Head Lease, Mr Toh had agreed that other uses outside of sports/games/recreational activities could be included under Cl 6.3. Mr Toh further agreed that Fico was not precluded from putting the Premises to other uses including retail shops and F&B outlets restricted to snacks and light meals provided that such uses had received HDB's approval. He stated that if HDB was able to accept the sale of snacks and light meals, he would also be able to accept this use. Fico further submitted that the fact that other uses outside those stated in Cl 4.1.1 of the Head Lease were contemplated by it and THG is supported by the presence of Cl 7(3) of the Sub-Lease which prevents THG from constructing or allowing any third party to construct any F&B facilities.

58 Fico submitted that in these circumstances the approval of HDB would operate progressively - *i.e*. it was open to Fico to seek HDB's approval for the relevant uses as and when the need for the same arose.

59 In its argument on interpretation, Fico took pains to rebut THG's allegation that Mr Lau had had a copy of the Head Lease from the beginning and was familiar with its terms when he drafted the letter of intent and Sub-Lease. Joey Toh had given evidence to the effect that it was Mr Lau who had pointed out to her that Cl 6.1 in the Head Lease was inconsistent with the parties' intention that THG would have a secure term of three years from the start of the Head Lease. He advised her to have this clause deleted and Joey Toh then approached HDB and verbally arranged for the clause to be struck out. She and her father had attended at the HDB thereafter to initial against the deletion. Fico submitted that there was not a scrap of evidence other than THG's say-so that this episode ever took place. It was illogical, if not impossible, to be able to arbitrarily amend a government contract without formal correspondence. The alleged amendment was not dated and there was no evidence to prove that the deletion took place at the suggestion of Mr Lau. On the contrary, the Defendant's letter of 4 August 2008 to HDB indicated that the request for the deletion of Cl 6.1 had been made at the time of tender.

60 It is well established that the task of the court in interpreting a contractual document is to give effect to the parties' intentions objectively "in the face of conflicting subjective interpretations advanced by ingenious counsel": *per* V K Rajah JA in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029, at [1]("*Zurich Insurance*"). The same case also confirmed that extrinsic evidence of the external context of the contract can be used to assist interpretation as long as such evidence is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context. However, the principle of objectively ascertaining contractual intention remains paramount. In this exercise, the court must have regard to, *inter alia*, the plain or ordinary meaning of the words the parties used. The extrinsic evidence that is admissible includes prior negotiations and subsequent conduct.

61 The first thing that the court has to do according to *Zurich Insurance* is to take into account the essence and attributes of the document being examined. In this case, the document to be interpreted is a tenancy agreement which is a formal contract involving land and which normally contains the demise of the land concerned and the conditions on which the tenant is to hold it as well as the matters to be observed by the landlord. In this connection, I have to bear in mind that Cl 6.3 is a tenant's covenant. In form, therefore, it expresses an obligation to be observed by the tenant alone; it does not impose any obligation on the landlord. It is also apparent from the wording of Cl 6.3 that the obligation concerns a third party, HDB, and is not an obligation that can be waived by the landlord acting on its own. The clause also has to be looked at in the context of a sub-tenancy which is carved out from a Head Tenancy. It is apparent from Cll 4 and 5 of the Sub-Lease that HDB has a part to play in relation to the Sub-Lease since the Sub-Lease is subject to its approval (Cl 5) and any option to extend the Sub-Lease under Cl 4 depends on an extension of the Head Lease granted to THG by HDB.

62 The question here is as to the true meaning of the words "and other uses as approved by the HDB". Whilst Fico's position as stated above is that these words refer to uses that may be approved by HDB from time to time, THG's interpretation is that they refer to the uses that had already been approved by HDB at the time of signing of the Sub-Lease, *i.e*. those uses enumerated in Cl 4.1.1 of the Head Lease which I have set out in [6] above.

63 THG pointed out that long before the Sub-Lease was signed, Fico was aware that HDB's prior approval was required for the way in which the Premises were to be used. This was shown by the

correspondence in August 2005 when it had told Fiona Loy that HDB wanted to know the proposed uses of the Premises and she had replied that they would be used for "all kinds of sports except those not approved by HDB". This answer had been passed on to HDB. HDB's subsequent approval of use as "football field and tennis court only" given by way of letter dated 19 August 2005 had been forwarded to Fiona Loy. The correspondence also showed that although sport was one of the approved uses, not all kinds of sport would be permitted. Consequently, when Mr Lau drafted the Sub-Lease and used the phrase "other uses as approved by HDB", he meant those uses and sports that had already received HDB's approval.

64 THG also stressed that the word "approved" used in Cl 6(3) is in the past tense. It is not qualified or modified by any other words to suggest that the approval may be of matters to come in, which, for example would be indicated by the phrase "as approved *from time to time* by the HDB" or the phrase "as *may be* approved by the HDB" or, even more clearly, the phrase "as *shall be* approved by the HDB". In contrast Cl 6(4) states "... installation expense from sub station to our plot **will be** shared equally ...". THG submitted that the use here of the future tense made it clear that the clause refers to a payment to be made in the future. Mr Lau had admitted that he produced the Sub-Lease using a template and he also admitted that Cll 6(3) and 7(3) were what he wanted. The *contra proferentem* rule should apply against Fico if there was any ambiguity as to whether Cl 6(3) was meant to operate progressively.

65 Looking at the language of Cl 6(3) and having regard to the context, I am satisfied that its meaning is that the tenant has covenanted to use the demised premises for such sports, such recreation activities, such games and such other uses as had been "approved by the HDB" either at the time of entry into the Sub-Lease or at any time thereafter.

66 There are two parts to that interpretation. In relation to the first part of the interpretation, *i.e*. that the phrase "approved by the HDB" applies not only to the words "other uses" but also to the words "sports", "recreation activities" and "games", this is not only a natural reading of the words but is also supported by the context which both parties were aware of. This context was that HDB was not going to approve of all kinds of sports as Fico well knew (as shown by the way in which HDB gave its consent to Fico's proposed use of the Premises and the statement in the letter of intent that the usage of land was for a football field and tennis only, with other sports facilities subject to approval by HDB) and similarly, that HDB was not obliged to approve all kinds of recreational activities and games. In this connection, the Head Lease referred to four permitted uses, only two of which related to anything that Fico might want to do. Mr Lau was aware of the terms of the Head Lease at the time he drafted the Sub-Lease. I accept Joey Toh's evidence that she gave him a copy of the Head Lease at the very beginning. Her oral evidence was supported by the fact that the copy of this document that Fico produce in court was the original unamended document which contained Cl 6.1.1 in full without the lines which subsequently deleted it. With that knowledge, Mr Lau was careful, therefore, when drafting the Sub-Lease to indicate that any uses of the Premises would be in accordance with HDB's approval.

67 As for the second part of the interpretation: whilst the word "approved" may in itself be in the past tense, when used in the phrase "as approved by HDB" it does not, in my opinion, limit the approval to one that had already been issued before the conclusion of the Sub-Lease. Instead, it is also capable of referring to approvals that might be given by HDB thereafter. The phrase is capable of being interpreted, without straining the language, as referring to approvals that were current at the time, *i.e*. both those that had been issued prior to the execution of the Sub-Lease and those that might have been given later. Mr Toh of THG was quite frank in his evidence when he said that it was HDB's approval that mattered and generally THG would not have an objection if such approval was given. The interpretation I have given the clause is not inconsistent with THG's attitude and it is

probable that if THG had been asked to consider the meaning of the clause before all the disputes with Fico arose, it would have accepted quite easily that the clause encompasses approvals given after execution of the document.

68 Although I agree with Fico that its covenant allows it to use its premises for such uses that had been approved by HDB before or after the conclusion of the Sub-Lease, this is not the end of the matter. To succeed, Fico has to show further that as and when it wanted to implement a new use which had not already been approved THG was obliged to assist it in obtaining such approval. I have already said that Cl 6(3), as a tenant's covenant imposes an obligation only on Fico itself. It does not impose any obligation on THG (the landlord). Fico resisted such a conclusion: it argued that a correlative landlord's obligation may be implied from a tenant's covenant. I turn to consider this argument.

Can any obligation on THG be implied from Fico's covenant?

69 Fico relied on various authorities to support the proposition that a correlative obligation that operates on one party can be implied from a given term in a contract, notwithstanding the fact that the term purports to bind the other party instead. Fico's submissions were not, however, directed only to showing the existence of a correlative obligation. Fico also sought to imply a term in the Sub-Lease, on the basis of the usual principles applied in the implication of contractual terms.

70 It first cited *The Interpretation of Contracts* by Sir Kim Lewison (London Sweet & Maxwell, 4th Ed, 2007) ("*Lewison*"), which states at p 222 that where a contract imposes an express obligation on one party to the contract but is silent as to the obligations of the other party the court may, in appropriate circumstances, imply an obligation on that other party correlative to the express obligation. *Lewison* emphasises that before such an implication is made, the test of necessity must be satisfied. He cites the following dictum of Cockburn C.J. in *Churchward v R*. (1865) LR 1 QB 173 which Fico also relies on:

> "I entirely concur that although a contract may appear on the face of it to bind and be obligatory on one party, yet there are occasions on which you must imply-although the contract may be silent – corresponding and correlative obligations on the part of the other party in whose favour alone the contract may appear to be drawn up. *Where the act done by the party binding himself can only be done upon something of a corresponding character being done by the opposite party*, you would there imply a corresponding obligation to do the things necessary for the completion of the contract."
>
> (emphasis added)

71 Fico cited some examples of cases involving landlords and tenants where this principle had been applied. In *Barnes v City of London Real Property Co* [1918] 2 Ch 18 ("*Barnes*"), a reservation of rent for the provision of a housekeeper to clean the demised premises was held to have given rise to a correlative obligation on the part of the landlord to provide a housekeeper to clean the property. In *Edmonton Corp. v WM Knowles & Son* (1961) 60 L.G.R. 124 *("Edmonton")*, it was held that the presence in a lease of a covenant on the part of the tenant to pay the cost of periodical repairs of the premises gave rise to an implied licence on the part of the landlord to enter the premises for the purpose of painting even though a right of entry for the landlord had not been reserved. The tenant was not entitled to claim damages for trespass on the part of the landlord's employee who had carried out the painting. And, in *Barrett v Lounova (1982) Ltd* [1990] 1 QB 348 ("*Barrett"*). The tenant had covenanted to do all internal repairs needed in respect of the demised premises. The tenancy agreement was silent about external and structural repairs. The premises fell into serious disrepair and

the tenant sued the landlord claiming the landlord was in breach of an implied covenant to carry out external and structural repairs. The action was successful and on the landlord's appeal, it was held that:

(a) There was no rule of law against the implication in a lease of a repairing covenant against the landlord if the terms of the agreement and the circumstances justify it, and the ordinary principles of contractual construction concerning implication of terms applied to leases;

(b) Since the tenant's covenant to keep the interior in good repair would eventually be impossible to perform in the absence of a correlative obligation to repair the exterior;

(c) Since the tenant's covenant was intended to be enforceable through the tenancy, it was necessary, in order to give business efficacy to the tenancy agreement, to impose an obligation to carry out exterior repairs on someone; and

(d) Accordingly, in the circumstances, it was appropriate to impose such an obligation on the landlord.

I note that *Barrett* has been criticised by *Lewison* who considers the reasoning manifestly unsound particularly when it is compared to the obligation implied in *Liverpool City Council v. Irwin* [1977] AC 239 to take reasonable care and which was not an absolute obligation. *Barrett* was distinguished in subsequent cases and in one was said to be confined to its own special facts.

72 It is worth emphasising that a term cannot be implied into any contract, including a tenancy agreement, unless it is essential for the proper working of that contract that the term should exist. The cases indicate, equally, that necessity is the touchstone for implying a correlative obligation and *Barrett* emphasises that the usual test as to whether a term should be implied – namely, the "officious bystander" or "business efficacy" test - must also be considered so that one must be able to say with reasonable confidence that had the term sought to be implied been suggested to the parties during negotiations, they would both have accepted it as being obvious.

73 Fico also argued that a correlative obligation has been imposed on THG by the terms of Cl 7(3) as well. The relevance of Cl 7(3) is that it prohibits THG from constructing or allowing any third party to construct F&B facilities. Fico argues that by covenanting to refrain from competing with any F&B operations carried out by it, THG put itself under a corresponding obligation to facilitate Fico's applications to HDB in respect of F&B uses of the Premises.

74 On the issue of necessity, Fico relied on the evidence that HDB would not receive any applications in respect of the Premises from Fico but would deal only with THG as the lessee under the Head Lease. In this situation, Fico submitted, it was impossible for Fico to seek HDB's approval as it had covenanted to do in Cl 6(3) unless THG facilitated the process by endorsing Fico's plans and forwarding them to HDB. Fico argued that in order for the Sub-Lease and Cl 6(3) in particular to be workable, it was necessary for the court to find that there was an implied obligation on THG to endorse Fico's documents for HDB's approval - regardless of whether such documents were for sub-letting, change of use or for the erection of an entirely new structure such as, for example, an indoor skateboard park. Fico's submissions on this point concluded (at [52] of Fico's Closing Submissions) as

follows:

> [Fico] submits that [THG] was under an implied obligation to assist [Fico] by consenting to endorse on [Fico's] Plans and documents, such consent not to be unreasonably withheld.

75 Before I discuss the submissions above, I should point out that Fico's pleaded case as stated in para 29 of the Statement of Claim, was that the implied term to be introduced into the tenancy agreement was:

> "[A]n implied term that [THG] shall do what is reasonably necessary to assist [Fico] to apply to HDB for approval on matters relating to sub-letting, and or applications for change of use or "A&A" works..."

This was an unqualified term and would impose an obligation on THG to assist by taking reasonable steps which would include, of course, endorsing its consent on Fico's applications if such was required by HDB.

76 In its closing submissions, however, Fico did not refer to the pleaded term and instead, as is shown by the quotation in [74] above, put forward a slightly different proposition. It has not formulated the precise wording of the implied term it is advocating. Rather, Fico has paraphrased what it submits THG ought to do under the Sub-Lease if such an implied term is introduced by the court. However, if such a term is formulated in accordance with the submissions, it is at once apparent that the term cannot reflect necessity. It would appear that Fico considers that the term should read:

> "The Tenant [*i.e.* THG] shall assist the Sub-Tenant [*i.e.* Fico] by consenting to endorse on the Sub-Tenant's plans and documents, and shall not unreasonably withhold such consent".

Such a term contains self-contradictory elements: on the one hand THG is said to be under an obligation to assist by consenting to endorse Fico's plans; yet on the other hand, the term contemplates that THG may have reasons to refuse to make such endorsement. In recognising that there may be justifiable reasons to withhold consent, Fico is also recognising that it cannot be an absolute necessity that all its plans and applications have to be approved. Fico has therefore watered down the term which it seeks to have implied. The most probable reason for this change in its position is its realisation that it cannot impose an absolute obligation on THG to support whatever it wants to do on the Premises without regard for the possible consequences to THG itself.

77 THG pointed out that Fico's need, after the conclusion of the trial, to restate the supposed implied term demonstrated that it was not able to give a clear expression to the implied term that it wanted the court to read into the Sub-Lease. It is established law that a term to be implied must be capable of clear expression so that one can assess whether such term is required to give the contract business efficacy. If the required term cannot be clearly expressed then, said THG, it is obviously not needed to give business efficacy to the Sub-Lease.

78 THG also stressed that Fico had not originally pleaded the implied term referred to in the closing submissions and this proposed term differed from the pleaded term in that it included the requirement of consent not being unreasonably withheld. This element of the implied term had not been brought up during cross examination of THG's witnesses. It was not put to them that Fico's case was that THG needed their consent to the endorsement of the "Plans and documents" but that such consent was not to be unreasonably withheld or had been unreasonably withheld. It was therefore not apparent during the trial that Fico had changed its position on the content of the alleged implied

term. In all these circumstances, THG submitted, Fico was not entitled to rely in its closing submissions on this completely new formulation of the implied term.

79 In my judgment, there is considerable merit in the points raised by THG. Parties are bound by their pleadings and cannot take the opposite party by surprise. For this reason, as well that of necessity which I mentioned earlier, I hold that a term cannot be implied into the contract to the effect that THG must endorse Fico's applications on the basis that its consent to do so may not be unreasonably withheld.

80 I should also consider whether quite apart from the phraseology suggested by Fico, there should be implied a correlative obligation on THG to support all Fico's applications for approval of its intended uses of the Premises. As mentioned earlier, the basis of the principle of "correlative obligations" is that the court finds that it is essential to interpret a particular contract as imposing reciprocal or mutual obligations on the part of the parties to each other although the contract itself only mentions an obligation of one party to the other.

81 Fico had placed particular emphasis on *Edmonton* because that case involved a correlative obligation being placed on a landlord as a consequence of a tenant's covenant. The covenant in that case was that the tenant would "pay to the [landlord] the cost... of painting with two coats at least of good oil paint in workmanlike manner every third year of the term all the outside wood and metal work and other external parts of the demised premises and any addition thereto heretofore or usually painted". The court held that since the tenant had covenanted to pay for the painting the landlord had an obligation to do the painting and the tenant could not complain of trespass when the landlord carried out his obligation. McNair J explained his decision, at 127 - 128 in the following terms:

> It is true that one cannot find in that [*i.e*. the tenant company's covenant] an express obligation assumed by the corporation that they would carry out that painting. On the other hand, there is an express obligation by the company to pay the corporation the cost of the painting. *Unless that obligation is to be entirely emasculated or given no effect at all*, it seems to me that at least one must imply into that covenant a right to the corporation to do the painting. And, if one implies a right to them to do the painting, one also necessarily implies a licence to go into the premises to do it. I think there must be certainly a right given to the corporation. But I go further, and I say that I think that, on the proper construction of this clause, there is an obligation on the corporation. (emphasis added)

The passage quoted shows that the basis of the correlative obligation imposed on the landlord was to give effect to the obligation of the tenant to pay for the cost of painting. The court was influenced by the need to give contractual promises a meaning instead of nullifying or ignoring them.

82 As THG submitted, the facts of the present case are different and do not give rise to a correlative obligation. Both in *Edmonton* and in *Barnes*, the relevant tenancy agreement imposed an obligation on the tenant. In this case, whilst it is true that Cl 6(3) imposes an obligation on Fico to use the premises only for approved uses, THG had already obtained approval for the uses that Fico itself had submitted by the time the Sub-Lease was executed; there was no obligation on Fico to seek approval for any other or additional uses. Under the covenant, Fico is obliged to use the Premises only for uses approved by HDB: it has no obligation to ask HDB to approve further uses. It may wish to ask HDB to approve a further use so that if it puts the Premises to such additional use it will not be in breach of the covenant but there is nothing in the Sub-Lease which compels it to add another use. The Sub-Lease was operable and effective on its terms as they stood and business efficacy did not require the inclusion of a term compelling THG to consent to what would be an additional use or a change of use. Further, if Fico is not compelled to use the Premises for anything

other than uses which HDB had already approved as at the date of execution of the Sub-Lease, there can be no correlative obligation on THG's part to assist Fico in its voluntary application for an additional use. Going back to the language of necessity, there is no necessity for such a correlative obligation to be implied to enable Fico to comply with its obligation to use the Premises only for approved uses. In the absence of such a necessity, a correlative obligation cannot arise.

83 Similarly, and even more strongly, it is hard to comprehend how a correlative obligation could, objectively, be said to arise from THG's covenant in Cl 7(3) that it would not, and it would not permit a third party to, construct food and beverage facilities on Plot 2. If it is THG's obligation not to carry out or permit such construction, what correlative obligation can be imposed on Fico? THG only has to refrain from doing something; its obligation is entirely negative. Any correlative obligation imposed on Fico as the other party would then have to be positive. But Fico has not argued that it is obliged under the Sub-Lease to construct food and beverage facilities. Its case is that THG is obliged to help it construct such facilities by assisting its applications to HDB for approval. In my judgment Cl 7(3) is of no assistance to Fico on this point.

84 I agree with THG that there is no correlation between what Fico undertook, *i.e*. to use the Premises for approved uses only, and an obligation on the part of THG to consent to endorsing Fico's applications for change of use.

85 I observe that when it came to the crunch, even Fico was not prepared to argue in favour of an unqualified obligation imposed on THG to consent to Fico's plans. It recognised that any such obligation had to be qualified by the words "such consent not to be unreasonably withheld". This must have been because Fico realised that any change of use of the Premises could have a direct impact on THG as Head Lessee. One such possible consequence could be an increase in the rental for Plot 2. In a letter dated 9 October 2008, HDB had pointed out that rental for the renewed term would be revised "based on the existing uses and market rate to be valued by SLA's valuer". Premises used as restaurants and food courts are usually subject to high rentals. Although Cl 4 of the Sub-Lease envisages a change in rental on renewal, there is no provision for increase of rental on change of use. Further, any application for a change of use may result in the introduction of new and stringent conditions to be observed by THG and Fico. There is nothing in the Sub-Lease to deal with a situation where such new conditions are imposed.

86 I conclude, therefore, that no obligation on the part of THG can be implied into the Sub-Lease in the terms submitted by Fico. If there is no obligation to endorse Fico's applications, there can be no breach of such obligation. I therefore do not have to make a finding on whether THG was unreasonable in its withholding of consent. Without going into detail, I would observe, however, that on the evidence my general view is that THG was not unreasonable.

87 Having come to the conclusion that THG is not in breach of the Sub-Lease, I do not have to deal with the various issues regarding what would be the proper remedy for such a breach. I can therefore turn my attention to THG's counterclaim.

Is THG entitled to recover possession of the Premises?

88 To reiterate, the term of the Sub-Lease was a period of "three + three + three years" and the parties accepted that this meant three terms of three years each and that at the expiry of each period of three years the tenancy ended unless renewed. Clause 4 of the Sub-Lease provides that upon the completion of the term, the tenant has the option of extending the lease in accordance with the period granted to the landlord by HDB. It therefore recognises that extension of the Sub-Lease is dependent on extension of the Head Lease. In point of fact, the Head Lease expired on 31 July 2008

and was not renewed for any period thereafter. HDB told THG in no uncertain terms that it would not be extending the Head Lease after that date. Since HDB did not extend the Head Lease, the Sub-Lease was also not extended. Thereafter, both THG and Fico would have been holding over on a periodic tenancy, most likely a monthly tenancy since the rental was paid on a monthly basis. A periodic tenancy can be terminated by notice to quit of the appropriate length. On 25 March 2009, HDB gave THG one month's notice to quit and, on 26 March 2009, THG gave a similar notice to quit to Fico. It is my opinion (albeit in the absence of argument) that that notice ended Fico's tenancy and Fico was obliged to surrender the Premises to THG on the expiry of the notice to quit. It has not done so yet. Equally, THG's Head Lease has been ended by the Notice to Quit served on it by HDB and it is no longer entitled to remain in possession of any part of Plot 2. THG, however, does not in this action rely on the notice to quit *simpliciter* in order to recover possession. Instead it regards its notice to quit as an acceptance of Fico's repudiation of the tenancy.

8 9 *Halsbury's Laws of Singapore* Vol 14(2) (LexisNexis, 2009 Reissue, 2009) ("*Halsbury's*") states at [170.0961] that a lease may be determined only in one of certain recognised ways. Of the nine ways listed in that paragraph, the ones relevant to this case are: notice to quit; forfeiture; and frustration, repudiation and acceptance. *Halsbury's* further confirms that the contractual doctrine of repudiation and acceptance applies to leases: at [170.0962].

90 One basis for the counterclaim is that Fico's conduct constituted a serious breach of the Sub-Lease and demonstrated its intention to not comply with the terms thereof but repudiate the Sub-Lease instead. THG pleaded that this repudiation had been accepted by its and its solicitors' letters giving notice to quit - both of which were dated 26 March 2009. As for forfeiture, the other main ground of the counterclaim is that Fico's breach of certain implied terms entitled THG to forfeit the lease and re-enter the Premises. The main implied terms relied on are that:

(a) Fico would not directly or indirectly by action or omission breach the terms of the Sub-Lease or put at risk the renewal of the term under the Head Lease; and

(b) that Fico would not use or suffer any part of the Premises to be used for any purpose other than an approved use.

THG did plead other implied terms but as it did not press these in submission, I will not deal with them here.

9 1 *Halsbury's* deals with the law on forfeiture and the right of re-entry at some length. To paraphrase [170.0963] and [170.0966], a lease may contain an express proviso for re-entry or forfeiture by the landlord on specified events, such as non-payment of rent or non-observance by the tenant of the covenants of the lease. Where the cause of forfeiture is complete, the landlord may bring an action to recover possession and the bringing of the action is equivalent to actual entry. If the writ contains a demand for possession, service of it operates as a final election to determine the term. In this case, the Sub-Lease did not contain any express proviso for re-entry or forfeiture. However, such a right may also be implied. Para [170.0965] of *Halsbury's* states:

> There is implied in every lease a condition that the tenant is not to do anything that may prejudice the landlord's title, and that, if this is done, the landlord may re-enter for breach of this implied condition.

92 Before I consider the issue of forfeiture further, I think it is worth reproducing two letters that

HDB wrote to THG. The first is dated 31 July 2008 and deals with the renewal of the Head Lease whilst the second is HDB's notice to quit.

93 The letter of 31 July 2008 reads as follows:

> 1 We refer to your letter dated 13 June 2008 and your tenant, Fico Sports Pte Ltd's (FICO)'s letters dated 27 June 2008 to HDB which were copied to you.
>
> 2 The first 3-year term of your Tenancy Agreement (TA) with HDB will expire on 31 Jul 08. Under Clause 7.1 of the Tenancy Agreement (TA), HDB may at your written request made 3 calendar months before the expiration of the tenancy of the subject site grant to you a further term of up to 3 years from the expiration of the current TA, subject to new terms and conditions and market rent prevailing at the time of the renewal provided, that there shall be no breach of the terms and conditions on your part. So far, we have not received any written request from you for a further 3-year term upon expiry of the existing TA.
>
> 3 We have highlighted to you in our letters dated 9 May 08, 29 May 08 and 30 May 08 that we did not give you any approval to carry out A/A works to convert your premises into a foodcourt. Under Clause 4.2.6 of the Tenancy Agreement, you are not to undertake any A/A works without the prior written approval of the Landlord and the relevant authorities. Therefore, the foodcourt is considered as unauthorised. We have also checked with URA which informed us that the unauthorised foodcourt area is approved for use as a shop and not for a foodcourt.
>
> 4 Our site inspections also revealed that Pizza Hut and a Taiwan Chicken Chop outlet have commenced business on site. Again, no approvals have been granted by HDB for the subletting. Recently, Fico has requested for HDB's approval to sublet various units at their premises vide their letters dated 27 Jun 08. It was stated in Fico's letter that you have agreed for HDB to revert directly to Fico on the subletting applications. This is not in accordance with the subletting application procedures. We have informed you on several occasions that Fico is your subtenant, any proposal from Fico must be submitted through you for HDB's consideration as Landlord.
>
> 5 In view of the above infringements, we will not grant a further 3-year term when your existing tenancy expires on 31 Jul 08.

THG noted that the earlier letters HDB referred to in para 3 of its letter had not only been brought to Fico's attention by THG itself but had also been copied to Fico by HDB. Fico had not responded in the way that HDB required but had consistently disregarded the terms of the Head Lease and failed to keep HDB informed, in the proper manner, as to what was happening on the Premises.

94 HDB's notice to quit dated 25 March 2009 reads:

> NURSERY AND SPORTS FACILITIES SITE
>
> AT 2 JURONG WEST STREET 25
>
> ...
>
> 2 We have given you more than ample opportunities to regularise the breaches of the tenancy agreement with your tenant, Fico Sports Inc Pte Ltd. The breaches are provision of the following without our consent:

a) Members' lounge with sale of alcoholic beverages

b) Snacks/finger food outlet

c) Pizza Hut with dine-in cum delivery

3 We regret that the breaches remain un-remedied. We now give you one (1) month's notice to quit the site. Please arrange to deliver vacant possession of the subject site to HDB on or before 24 Apr 2009 in accordance with the terms and conditions of the tenancy.

4 Please note that all monies received from or paid by you (including payment through GIRO) after 24 Apr 2009 is (sic) received towards account of double rent.

95 Fico argued that THG had merely submitted that it was "proper and valid" to imply the terms it had pleaded at para 36A of the defence and counterclaim without demonstrating the propriety or validity of the same. In the absence of concrete evidence or legal precedent to further THG's claim, Fico considered it sufficient to repeat its denial of any implied term in the Sub-Lease which could bind it in the manner asserted by THG.

96 It is true that there is no legal precedent for the assertion that there should be implied in the Sub-Lease a term that Fico would not breach the terms of the Head Lease. The situation with regard to the second term sought to be implied by para 36A(a) of the defence and counterclaim (see [90(a)] above) is different, however. As can be seen from [170.0965] of *Halsbury's* quoted above, it is established law that every lease includes an implied condition that the tenant will not do anything that may prejudice the landlord's title.

97 Turning to the facts, it is plain that Fico is in breach of this implied term. HDB's letter of 31 July 2008 showed that its principal reason for not renewing the Head Lease was Fico's conduct in carrying on activities which HDB had not approved. I have found that Fico was aware of the terms of the Head Lease and therefore knew what the approved uses for Plot 2 were. I have also found that Mr Lau was told by HDB that only snacks and light meals were permitted. He must also have been aware from HSK that the class "Shop (F&B)" did not permit cooking and dining-in. Yet Fico proceeded to sub-let portions of its premises to Pizza Hut and SDW Chicken without prior approval. Having seen Mr Lau in the witness box, I think he believed that if he presented THG and HDB with a *fait accompli* Fico would get what it wanted in that he would be able to persuade the other parties to see things Fico's way. HDB's notice to quit cited Fico's conduct and breaches as its reasons for terminating the Head Lease. THG's title has been prejudiced by Fico's conduct and it is entitled to re-enter on that basis.

98 The next term which THG sought to imply was stated in para 36(A)(b) of the defence and counterclaim. This was the term that Fico would not use or allow any part of the Premises to be used for any purpose other than an approved use. In my opinion, such a term would meet the test of business efficacy required for the implication of a term. Fico had expressly covenanted not to use the premises except for uses approved by HDB. Such a covenant must reflect the condition that such use would not be undertaken by Fico itself or by third parties who gained title or access to the Premises through Fico. This implied term has also been breached. However, since there is no express proviso for re-entry in relation to such a breach, it does not by itself allow forfeiture. It can only permit re-entry if the breach is considered to be a repudiatory breach which has been accepted by the landlord. I must, therefore, consider it in the context of THG's arguments on repudiation and acceptance.

99 The basis of this ground is the allegation that Fico had, by its actions and omissions and course

of conduct, breached the Sub-Lease and evinced an intention to repudiate the Sub-Lease and this repudiation had been accepted by THG. Further, Fico's conduct had resulted in the non-renewal of the Head Lease.

100 THG pleaded that Fico was at all material times aware of the terms of the Head Lease and that breach of the Head Lease may result in non-renewal of the Head Lease or termination of the same. Notwithstanding that, Fico had used portions of the Premises for unauthorised uses, in particular, it had rented out units to Pizza Hut and SDW Chicken. THG also complained about the following conduct on Fico's part:

(a) Fico's sub-letting of the Premises, without HDB's approval, to Tan Beng Kiat in December 2007 for use as two football fields;

(b) Fico's failure to respond to HDB's request of 8 April 2008 that Fico furnish the monthly rent, monthly service charge and area sub-let in respect of its sub-letting to Pizza Hut which was evidence of its reluctance to furnish financial information to HDB;

(c) Fico's attempted sub-letting to an unknown third party to put up a skateboard park which resulted in consultants for this project liaising with URA without previously informing HDB. When HDB came to know about this, it wrote (12 May 2008) to THG with copies to Fico, the consultants and URA, stating that it took a serious view of such matters. HDB specifically required the proposal to be submitted through THG for HDB's approval;

(d) Fico's claim that HDB had agreed to a particular protocol in relation to the approval of Fico's sub-tenants (a procedure which bypassed THG entirely and only required THG to rubberstamp Fico's applications) when in fact HDB had required a different procedure to be followed;

(e) Fico's decision on or about 23 July 2008 to manage the indoor skateboard park itself instead of sub-letting space to a third party operator which decision, THG believed, was due to Fico's reluctance to disclose to HDB the same details about the third party operator and the rent which it had earlier been asked to disclose in relation to the Pizza Hut tenancy; and

(f) Fico's opening of its lounge to the public and not to members only in disregard of HDB's letter of 7 December 2005 which gave approval only for a members' lounge. In this regard Fico had placed an advertisement at the entrance of Plot 2 which stated "Fico Lounge Now Open" and was clearly an invitation to all. HDB's response, on 24 June 2008, was to ask for all commercial advertisements along the boundary fencing to be removed.

I should state immediately that I do not consider that there is any merit in THG's complaint about the sub-letting of part of the Premises to be used as football fields as this was a use which HDB had previously approved.

101 The incidents listed in [100] had taken place before 31 July 2008. THG complained of further unacceptable conduct after the Head Lease had expired. First, Fico had sub-let the space next to its

office to a construction company as a site office. The HDB had discovered this from a site inspection but when the issue was brought up to Fico, it denied any sub-letting and asserted that the company concerned was handling maintenance work for Fico at its site. The difficulty here was basically with the use of the Premises as the same were not approved for use by third parties as offices.

102 Second, there was an incident which occurred on 10 January 2009. From 2 a.m. that morning, there was no power supply to THG's portion of Plot 2. The Premises, however, had power. The main switchboard on Plot 2 is housed in a structure on the Premises. THG complained that its personnel were not allowed to have access to the structure and it was only on Monday 12 January 2009, after a warning from the police, that access was obtained. It was then found that the supply to THG had been deliberately switched off. THG complained that for 10 hours on 10 January 2009 it had no power and had not been able to conduct its usual business. This was especially damaging as 10 January 2009 fell during the busy pre-Chinese New Year period. It submitted that Fico had deliberately caused this situation.

103 THG complained that from 31 July 2008 when HDB served notice that owing to Fico's persistent breaches it was not going to renew the Head Lease, Fico had made no effort to remedy its breaches. Instead, Fico had maintained it was entitled to continue sub-letting to Pizza Hut and SDW Chicken because THG had no choice but to sign the drawings and submissions for change of use to suit Fico's needs. Fico had also refused to consider the terms that THG had proposed for regulating the relationship. THG submitted that Fico's decision to continue with these sub-lets was inconsistent with the terms of the Sub-Lease and manifested an intention not to be bound by it. Consequently, THG was entitled to accept Fico's repudiatory breach and bring the Sub-Lease to an end by its notice to quit.

104 Dealing with the submissions on repudiation, Fico did not accept THG's assertion that it was due solely to Fico's actions that the Head Lease was not renewed. It stated that the unauthorised uses were commenced under its misapprehension that sub-letting was not restricted and that F&B included the type and scale of operations it was carrying out and that this arose due to THG's misrepresentations. When told by HDB that these were unauthorised uses, Fico had the option of either rectifying the breaches by ceasing operation or regularising the uses by applying to HDB for a change in use. Given Fico's "immense financial investments" in the Premises and the involvement of innocent third parties, it sought to regularise the unauthorised uses. HDB itself was supportive of this course of action. Fico had made repeated and concerted efforts to try to regularise the uses long before renewal of the Head Lease was in issue. THG had not mentioned those and had also carefully omitted its own part in hindering the start of the regularisation process by repeatedly delaying or refusing to endorse Fico's plans and documents over a significant period of time. The fact that THG did not actually write to HDB to formally request the renewal of the Head Lease at the end of the first three-year term was also highlighted by HDB in its letter of 31 July 2008.

105 I am not disposed to accept Fico's submissions on its lack of blameworthiness. As I have held above, it was Fico's actions that led to the non-renewal of the Head Lease. No doubt, under the terms of the Head Lease, THG should have applied for a renewal of the same but judging by the patience that HDB displayed in giving Fico and THG time to settle their problems even after 31 July 2008, I think it is safe to infer that THG's non-observance of the proper procedure would not have constituted an insurmountable bar to the renewal of the Head Lease. Secondly, Fico's actions were not induced by any misrepresentation on the part of THG. Thirdly, whilst Fico did seek to regularise the situation regarding the unauthorised uses, it did not adopt a reasonable position but acted in its own interests without regard for what was reasonable for THG and what was required by HDB. Fico's determined effort to try and impose its own protocol in relation to applications for change of use was just one example of its behaviour. On the other hand, THG made many efforts to try to resolve the

disputes and agree on a procedure for applications to HDB. Some of the correspondence has been referred to earlier.

106 From THG's viewpoint, its effort to resolve the difficulties culminated in its solicitors' letter of 26 February 2009. This letter contained the draft terms which THG hoped would form the basis of a written agreement between the parties to settle the change of use issue. To paraphrase THG's terms, these were as follows:

(a) Fico must not by any act or omission breach the terms of the Head Lease;

(b) Fico must not sub-let or part with possession of any part of the Premises unless it had sought and obtained prior written approval from HDB and other competent authorities for the same. Any condition imposed by such authorities would have to be complied with before the sub-letting commenced;

(c) The current approved uses of the Premises were for football and tennis, and Fico had also been given permission to use some units as shops. Before Fico used the Premises to prepare or cook food for consumption in the Premises or outside the Premises, it had to seek and obtain express written approval from HDB and other competent authorities for the same and would have to comply with any condition imposed by such authorities;

(d) Any application by Fico for a change of use should expressly identify Fico as the applicant and comply with such terms and conditions as HDB or other competent authority may impose;

(e) Fico must pay THG an administration fee of $300 for each application;

(f) If any follow-up was required by any application, Fico must pay THG's expenses and time cost at the rate of $150.00 per hour;

(g) Each of Fico's applications had to be submitted to THG first for it to consider and endorse before forwarding the same to HDB;

(h) Where the sub-letting proposed by Fico was for a use provided in Cl 4.1.4 of the Head Lease, THG would have seven days to consider and endorse the application. Where the sub-letting was for a use which was not within Cl 4.1.1 of the Head Lease, THG would not be obliged to endorse the application and it would have up to 14 days to inform Fico of its decision;

(i) In considering and deciding to endorse any application, THG would be entitled to ask Fico for assurances and indemnities in order to protect its rights and interests as Head Lessee;

(j) Fico would have to indemnify THG against any claim, loss or damage, etc that might be made against THG or sustained by it in connection with any sub-letting or change of use; and

(k) In the event that any sub-letting or change of use of the Premises resulted in any increase in rent or other charges payable by THG to HDB, Fico should be fully responsible for the same and should pay it (including any increase to the security deposit for the rent under the Head Lease).

107 Fico did not respond to that letter until a month later. It was only on receipt of the notice to quit on 25 March that Fico was moved to reply. On 27 March 2009, its solicitors wrote referring to proposals that Fico had made on 24 December 2008 asking THG to agree to endorse on Fico's plans and documents relating to sub-lettings and change of use upon Fico's agreement to: (i) pay the increase in rent by HDB if it specifically related to Fico's change in use; and (ii) pay an administration fee of $150 if the endorsed plans and documents were submitted by THG to HDB within two days of receipt and $50 if submission took place within seven days. The letter also stated that Fico's agreement to these two terms was not to be construed as an admission that THG was entitled to any other new terms in respect of the existing agreements between the parties. In effect, therefore, Fico was rejecting THG's proposal and putting forward its own terms.

108 In its closing submissions, Fico argued that the terms that THG had proposed were not reasonable because:

(a) THG wanted an uncurtailed right to be able to consider (and therefore, possibly refuse) any application from Fico regardless of whether it was for a currently approved use or would require a change of use;

(b) THG had demanded an exorbitant "administration fee" to be paid to it before it even received applications as well as expensive hourly charges for follow-ups. THG had unilaterally imposed the timeframes it saw fit for its response with no regard for Fico's commercial exigencies;

(c) There was an onerous requirement for Fico to nominate three international firms of valuers from which THG would choose one for the purpose of allocating any increase in rent due to change of use; and

(d) Fico was required to assure and indemnify THG for any complication arising from the applications regardless of whether it intended the outcome or was even at fault.

As far as Fico was concerned, THG was not attempting to mitigate its losses or to provide a framework for the parties to "move forward" as THG alleged. Instead, THG was trying to make it as difficult as possible for Fico to submit its applications to THG and was just trying to discourage Fico from doing so. This body of new, onerous, terms was an attempt to unilaterally modify the Sub-Lease to THG's advantage.

109 In my judgment, Fico's objections were misplaced. Some of THG's terms in relation to fee payment may have been excessive but Fico was prepared to pay some fees and so this was a

question of quantum rather than of principle. Fico also misunderstood part of the proposals. It appears to me that THG was prepared to agree to endorse plans that related to uses that had already been approved subject to conditions if necessary but wanted to be free to reject those that would embody a change of use or a new use. That was a reasonable stance bearing in mind the consequences that might result from the applications. Fico, on the other hand, wanted THG to agree to all its proposals but was not prepared to indemnify THG against the consequences thereof because it thought it should only be responsible for intended consequences or when it was at fault. That was a self-serving attitude to take. As far as the fees that THG sought to impose are concerned, these (and also the periods of time for the response) were matters which Fico could have negotiated. Instead, it made it clear by its lawyer's letter of 27 March 2009 that it wanted its terms accepted and would not accede to THG's. In general, THG's terms were reasonable since it had to protect itself against both the foreseeable and the unforeseeable consequences of agreeing to endorse on Fico's applications to HDB. It was also not reasonable for Fico to argue that its responsibility should be limited. It should have agreed to indemnify THG against all matters arising out of its applications to change the use of the Premises whether the same were foreseen or unforeseen, intended or unintended. Fault would be irrelevant; all that would be material would be whether the matter arose as a consequence of the change of use application or not.

110 One other point bears mention. THG had wanted Fico to be fully responsible for any increase in rent arising from any approved change of use. Fico's response was that it would only be responsible for rental increases "specifically related" to its change of use. This phraseology was vague. It had been used previously and because THG was not clear to what extent Fico was willing to bear the increase in rent, it had proposed through its solicitors' letters of 6 November 2008 and 26 February 2009 how the issue of apportionment could be determined. Fico had not dealt with that proposal in substance in its solicitors' response of 26 March 2009. It did not appear to be serious in its desire to settle the dispute out of court. It is significant that Fico's solicitors' letter of 27 March 2009 ended with the sentence "This is an open letter which will be shown to the Court, if necessary".

111 Coming to the incidents that took place after 31 July 2009, I do not think that THG can rely on anything to do with the incident of the power shutdown on 10 January 2009 to substantiate its argument that by conduct Fico was evincing an intention to repudiate the Sub-Lease. I do not need to make a finding on the rights and wrongs of this incident because in my view THG's case, if any, would be one for damages for mischief. There is nothing in the Sub-Lease relating to the power supply to THG's portion of Plot 2 and even if Fico did shut down the power intentionally such action does not relate to its observance of the terms of the Sub-Lease. It is also important that this was an isolated incident. I might have taken a different view of the matter if it had been part of a campaign to interfere with THG's enjoyment of Plot 2.

112 The alleged sub-letting of a unit to Hen Sheng Civil Engineering Pte Ltd ("Hen Sheng") to be used as a site office is a different matter since this, if proved, would amount to a breach of the covenant to use the Premises only for uses approved by HDB. It would also be evidence of continuing recalcitrance on the part of Fico. To substantiate this allegation, THG subpoenaed Mr Oh Kian Ann, a director of Hen Sheng.

113 Mr Oh testified that Hen Sheng was involved in a project for road repair and resurfacing at Jurong West Central 1 to 3, Streets 64 and 93. It was the contractor employed to resurface the roads concerned. The project started in August 2008 and was completed in December 2009. Mr Oh stated that Hen Sheng's site office for this project was at Canberra Road. As far as the unit rented from Fico was concerned, that was used only for storage of tools and as an office in relation to maintenance works which Hen Sheng had contracted to carry out for Fico.

114 In its submissions, THG emphasised the following evidence given by Mr Oh:

(a) That Hen Sheng itself did not do any maintenance work for Fico but arranged for such maintenance to be carried out by others;

(b) Although Hen Sheng charged Fico $1,000 a month for this maintenance service, Hen Sheng had never billed Fico and only intended to send out its bill for $17,000 after the 2010 Chinese New Year because this was a small amount;

(c) Hen Sheng provided the use of internet facilities in its office at the Premises to supervisors from a number of its nearby work sites;

(d) Although there was no telephone connection in the office in the Premises, Hen Sheng's supervisors who used the office had their own hand phones; and

(e) Although Mr Oh had said that the office was used mainly as a store, it turned out that it was used to store three small standard boxes of tools and a couple of ladders only.

THG submitted that this evidence supported the inference that in fact the unit was used as a site office. It also considered that Mr Oh's assertion that the site office for the project was in Canberra Road was incredible because that location was too far away from the project to suit the purpose of a site office.

115 Fico, on the other hand, submitted that the unit was clearly not a site office. It had no fax or telephone line and was therefore not equipped to act as such. It was a maintenance office and the fact that site supervisors from nearby projects would use the internet facility at the office was consistent with it not being a site office. Fico argued that site supervisors of major construction projects are not primarily coordinated through the internet and the usage of the internet facilities must have been primarily recreational.

116 Having considered the evidence, I am satisfied on balance that the office unit had been rented to Hen Sheng for use as a site office. The fact that for over a year not a single invoice had been sent out for the maintenance services allegedly provided by Hen Sheng to Fico was telling. I did not believe Mr Oh's assertions that the unit was merely a store cum maintenance office.

117 The evidence before me has satisfied me that Fico's conduct consistently evinced an intention not to be bound by the restrictions in the Sub-Lease. During the initial negotiations with THG, Mr Lau impressed upon the Tohs that he had a passion for sports and that he wanted to go into the sports business to express that passion notwithstanding his awareness that in Singapore the sports business was not profitable. Mr Lau was at all material times aware that Plot 2 had a restricted usage and that only certain sports would be approved by HDB. He was also aware that heavy duty food and beverage business was not permissible but that HDB would approve the provision of snacks and light meals as a complementary use to the primary usage of the Premises for sporting activities. In line with this knowledge and the terms of the Head Lease, the Sub-Lease had no provision allowing the establishment of fast food restaurants and food courts but contained a covenant that the tenant

would only use the premises for "sports/games/recreational activities and or other uses as approved by the HDB". Notwithstanding this, from the time Pizza Hut moved in in December 2007, Fico consistently acted as if it did not need HDB's approval for change of use. Even after it was forced to admit that this was required, it did not take reasonable steps to rectify the situation but instead continued to go its own way including by renting out premises for the purpose of a site office.

118 THG accepted Fico's repudiation by its notice to quit dated 26 March 2009. A similar notice was sent out the same day by its solicitors. Fico submitted that the notice to quit was not an effective acceptance of repudiation because in the very next paragraph after giving Fico notice, THG's solicitors had said "we opine it is still not too late for [Fico] to act responsibly and reasonably by accepting the terms we have set out in our letter to you of 26 February 2009 including the mechanism outlined in paragraph 26 thereof in order that our client may attempt to persuade the HDB to withdraw the notice to quit". I do not agree. In my judgment the notice to quit was an effective acceptance notwithstanding the suggestion that perhaps things could still be worked out with HDB.

119 Fico also contended that by accepting rent from Fico as well as demanding rent, THG had not accepted the breaches allegedly committed by Fico. Further, even though THG might have said that the acceptance of rent was without prejudice to its rights, the position in law was such that acceptance constituted a valid waiver of breach. For this proposition, Fico relied on *Leivest International Pte Ltd v Top Ten Entertainment Pte Ltd* [2006] SGHC 1 ("*Leivest*").

120 The proposition of law that *Leivest* embodied is well settled. Several English cases were cited in *Leivest* which held that the right of forfeiture is waived when rent is demanded and accepted by the landlord with knowledge of the tenant's breach. The question that has to be answered in each case is whether it was rent that was demanded and paid. If it was damages for trespass that was demanded and paid, then there would be no waiver. This principle is stated at [42] of *Leivest*, which reads:

> In *Windmill Investments (London) Ltd v Milano Restaurant Ltd* [1962] 2 QB 373, rent was paid and the landlord's receipt stated expressly that "This receipt is given without prejudice to the following breaches of covenant ..." with a breach spelt out. There was a dispute whether the receipt constituted a waiver of the breach. Megaw J found in favour of the tenant, and explained at 376:
>
> > [I]t is a question of fact whether the money tendered is tendered as, and accepted as, rent, as distinct, for example, from money tendered and accepted as damages for trespass. That is a question of fact. Once it is decided as a fact that the money was tendered and accepted as rent, the question of its consequences as a waiver is a matter of law.

121 Thus, if as a matter of fact the rental was only accepted as damages, then there would be no waiver. In the instant case on 26 March 2009, THG's solicitors advised Fico's solicitors that if Fico failed to vacate the Premises by the deadline given, Fico would be liable for double rent until vacant possession had been delivered. On 15 May 2009, THG advised Fico that it was holding over and was liable for double rent from 24 April 2009 and that any rent paid on or after 25 May 2009 was received without prejudice to THG's rights against Fico and to account of Fico's liability to double rent. THG made it quite clear, therefore, that payments made after issue of the notice to quit would only be accepted as part of the damages. As a matter of fact, therefore, I hold there was no waiver of THG's acceptance of Fico's repudiation.

122 For the reasons above, I find that THG's counterclaim must be allowed.

Conclusion

123 In the event, Fico's claim is dismissed with costs. THG is entitled to judgment on its counterclaim on the following basis:

(a) A declaration shall be issued that the Sub-Lease dated 6 February 2006 between THG as landlord and Fico as tenant was lawfully terminated by the notice to quit dated 26 March 2009;

(b) An order shall be issued ordering Fico to forthwith deliver up to THG vacant possession of that part of Plot 2 which was demised to Fico by THG;

(c) Fico shall pay THG damages to be assessed for breach of its covenant to use the Premises only for "sports/games/recreational activities and or other uses as approved by the HDB" and for holding over; and

(d) THG shall recover costs of the counterclaim to be taxed or agreed on the basis that costs of both the claim and counterclaim shall be regarded as one set of costs since the issues involved in both were largely similar.