Oriental Investments (SH) Pte Ltd *v* Catalla Investments Pte Ltd [2012] SGHC 245

Case Number	: Suit No 276 of 2010/J
Decision Date	: 10 December 2012
Tribunal/Court	: High Court
Coram	: Philip Pillai J
Counsel Name(s)	: Wang Tsing I Arthur (Tan Kim Seng & Partners) for the plaintiff; Phua Cheng Sye Charles and Stephen Cheong (Tan Kok Quan Partnership) for the defendant.
Parties	: Oriental Investments (SH) Pte Ltd — Catalla Investments Pte Ltd

Contract – misrepresentation

Equity – estoppel – promissory estoppel

Equity – relief – against forfeiture

Landlord and tenant – termination of leases – forfeiture

10 December 2012 Judgment reserved.

Philip Pillai J:

1 This is a dispute between a landlord and its tenant. The plaintiff tenant, Oriental Investments (SH) Pte Ltd ("the Plaintiff"), was at all material times acting through and represented by its director Kevin Guay Kim Hua ("Kevin"); and the defendant landlord, Catalla Investments Pte Ltd ("the Defendant"), was at all material times acting through and represented by its General Manager, James Lim Keow Leng ("James").

The facts

Background

2 Kevin is in the food business. Sometime in early 2005, Kevin started negotiating with James to rent an outdoor refreshment area ("the Premises") from the Defendant. Kevin alleges that, pursuant to certain representations made by James, he spent over $300,000 on renovations before a tenancy agreement was entered into and before regulatory approval was obtained for his planned renovations. The planned renovations included erecting a canopy and a fifth drink stall (for which regulatory approval had not been obtained) on the Premises in addition to four existing stalls (for which regulatory approval had already been obtained). These facts were not in dispute. For convenience, I shall refer to the canopy and the fifth drink stall collectively as "the Structures".

3 Kevin alleges that during the negotiations James represented that (a) regulatory approval from the Urban Redevelopment Authority ("URA") for the Structures could be obtained; (b) the Defendant did not object to the erection of the Structures; and (c) James would help the Plaintiff apply for the necessary approvals. Unsurprisingly, James denies ever making these representations to Kevin.

4 On 19 July 2005, the Plaintiff entered into a tenancy agreement ("the First Tenancy") with the

Defendant for three years, backdated to start from 1 June 2005 and ending on 31 May 2008. The agreed rental for the First Tenancy was $32,000 a month for the first year and $38,000 a month for the second and third years. These facts were not in dispute.

5 After entering into the First Tenancy, James made various submissions to URA through another firm known as SA Lim Architects ("SA Lim"). However, James could not obtain approval for the Structures. URA had insisted in its letters to SA Lim that the Structures on the Premises must be removed. These facts were not in dispute. Kevin avers that James did not tell him about the problems, and that he only discovered the problems when he personally approached SA Lim in April 2008, less than two months before the termination of the First Tenancy.

6 On 1 October 2007, the Defendant offered the Plaintiff a renewal of the existing tenancy agreement for another two years ("the Second Tenancy") from 1 June 2008 to 31 May 2010 at an increased rental of $52,000 per month. The Second Tenancy, which was signed by both parties on 10 October 2007, contained certain condition precedents. Whether or not there was valid and unconditional acceptance of the Second Tenancy by the Plaintiff and whether certain condition precedents were fulfilled were two issues disputed by both parties. Much of the present case turns on the findings of fact relating to the letter of offer dated 1 October 2007 concerning the Second Tenancy, which I will consider later.

7 Shortly after signing the letter of offer dated 1 October 2007, parties started disputing whether or not the Plaintiff's purported acceptance of the Second Tenancy was valid. The relationship between the parties deteriorated so badly that by April 2008, the Plaintiff and the Defendant would only communicate with each other through their lawyers. From April to May 2008, the Plaintiff asserted that the offer for the Second Tenancy was validly accepted and hence there was a binding tenancy for another two years, whereas the Defendant denied the validity of the Second Tenancy because certain condition precedents stated therein were not fulfilled.

8 On the morning of 1 June 2008, the day immediately following the expiration of the First Tenancy, the Defendant re-entered the Premises at about 7.15 am and took vacant possession by removing the Plaintiff's fixtures including the Structures. The Plaintiff then brought the present action.

Plaintiff's case

The representations

9 Kevin avers in his Affidavit of Evidence-in-Chief ("AEIC") that sometime before February 2005, one Alex Ng ("Ng") informed him that the Defendant was looking for a new operator for the Premises. Kevin went with Ng to view the Premises, and found the Premises to be suitable for use as an outdoor refreshment area ("ORA"). While they were at the Premises, Kevin and Ng met James ("the February 2005 meeting") who introduced himself as the General Manager of the Defendant. Kevin and Ng both aver in their respective AEICs that, at the February 2005 meeting, Kevin informed James that he had previously operated stalls only in foodcourts, and that he had no prior experience or expertise in operating an ORA business. Kevin further avers that at this meeting, James offered to guide and help him sort out the paperwork, and to help him appoint an architect to submit plans to obtain the necessary approval from URA for any alteration or addition that had to be made to the Premises. [note: 1]

10 Kevin's case is that at the February 2005 meeting, he told James that he intended to construct a canopy structure over the ORA so that his patrons could be sheltered from poor weather. Kevin avers that James assured him that the construction of the canopy did not pose any problems as it

"only involved submission of plans to the relevant authorities for approval" and that James further suggested that Kevin could construct an additional fifth kiosk at the side of the Premises to sell drinks. As a result, Kevin incorporated the Plaintiff company in March 2005 to contract the First Tenancy with the Defendant.

Engaging Kingsville

11 After some negotiation, the parties agreed that the rental payable for the First Tenancy was $32,000 a month for the first year and $38,000 a month for the second and third years. This fact is not in dispute. Kevin's avers that after the February 2005 meeting, he arranged for his own contractor to view the Premises for a price quotation to build the Structures. When James heard about this, he recommended Kingsville Pacific Pte Ltd ("Kingsville") to Kevin, because Kingsville had prior experience and would be able to secure the necessary approval from the authorities expeditiously.

12 In late March 2005, Kingsville quoted Kevin $320,000 to construct the Structures. Kevin avers that he engaged Kingsville even though he had received lower quotations for the same work from other contractors, and even though he had not yet entered into the First Tenancy. Kevin alleged that Kingsville provided both himself and James with the proposed plans of the Structures. Although James knew that works were ongoing, the Defendant did not raise objections whilst Kingsville constructed the Structures. Kevin's case is that he was under the impression that James would proceed to apply for approval from URA on the Plaintiff's behalf after the construction of the Structures was complete because James promised to do so. James denies making such a promise.

13 In late May 2005, the Plaintiff took possession of the Premises and commenced business. Soon after, the Plaintiff received a letter from the Building and Construction Authority ("BCA") dated 2 June 2005 informing it that the Structures did not conform to the plans which were earlier approved by the URA and confined to four kiosks only. Kevin avers that he was shocked to receive the letter, and that he wanted to seek clarification directly from the URA. However, he avers that James told him that the authorities would not entertain him because he was neither the landlord nor the owner of the Premises. Kevin further avers that James told him not to worry because the proposed plans had already been submitted to URA for approval and that he should concentrate on running his business. Trusting James, Kevin stopped asking him questions.

The First Tenancy

14 The First Tenancy agreement, which was to last for three years, was executed in July 2005; and was backdated to begin on 1 June 2005 and end on 31 May 2008. Kevin avers that, because of his limited command of the English language, of which James was aware, James had to explain the terms of the First Tenancy to him. Kevin further avers that James assured him repeatedly not to worry about the details of the contract as long as he paid the rent on time each month. James denies making such assurances.

15 Subsequently, Kevin claimed that whenever he met James at the Premises, he would ask James about the status of the URA approval and James would tell him that the plans had already been submitted and that he should wait patiently. Kevin avers that he never received copies of the submission of plans to URA or any details from James or from Kingsville.

The 20 November 2006 letter

16 Sometime in March 2006, Kevin avers that James mentioned that there were problems with

obtaining the approval although he did not give any further details or explanation. To Kevin's surprise, he received a letter from the Defendant dated 20 November 2006 ("the 20 November 2006 letter"), stating that the Plaintiff had breached cl 3.7 in the First Tenancy:

> We have advised you on several occasions, that the Management do not allow and will not be held liable for any unauthorized works but we noted that the premises has been altered and below are the findings:
>
> 1. As stated on the tenancy agreement, the demised premises is inclusive of Kiosks 1 to 4 of area 6,000 sq ft, and including an office space at unit 01-08 but *an additional kiosk has been erected* and tables and chairs are being displayed at the excess open area, which exceeds the leased area of 6,000 sq ft.
>
> Under Clause 3.7 …, *no alternations* [*sic*] *and additions are allowed, with* [*sic*] *the prior consent from the landlord* and under Clause 3.7.2 — if any A & A is being done, the tenant should submit proper documentations to the Landlord.
>
> …
>
> *You have failed to effect all of the terms stated above.* Under this circumstances, the Landlord may pursue to this matter further, upon giving you a grace period of fourteen (14) days to make good all the additions and alternations [*sic*] but, in view of our good working relationship, *we are willing to settle this matter amicably by giving you an extended grace period of twenty-one (21) working days to make good all of the above.*
>
> No further notice shall be given after the grace period, expiring on December 18, 2006. We reserve all rights to terminate this lease, reinstate the demised premises to its original condition at the Tenant's cost and legally pursue this matter if you fail to act on the above stated.
>
> [emphasis added]

17 Kevin avers that when he approached James about this letter, James told him that the purpose of the letter was just "to serve as a record" and had "no real consequence". Kevin further avers that the Defendant did not at any time during the First Tenancy act upon its reserved rights under the 20 November 2006 letter. Thereafter, nothing significant happened until August 2007, when Kevin avers that James handed him a letter to pay the following sums, which he duly paid to James in cash:

Item	**Cost**
Resubmission of plans to URA	$2,500
Professional fees for architect	$15,000

The 1 October 2007 letter and the Second Tenancy

18 On 1 October 2007, James sent the Plaintiff a two-paged letter ("the original 1 October 2007 letter"), offering to renew the First Tenancy for a further period of two years at an increased rent of $52,000 per month. The content of the original 1 October 2007 letter is not in dispute, and it states:

> Date: October 1, 2007 Our Ref: CI/048905-01/07

…

Dear Mr Kevin

Re: Letter Of Offer – Leasing Of Outdoor Area (Kiosks 1 to 4) At 100 Orchard Road Hotel Meridien & Shopping Centre Singapore 238840

We refer to the above and are pleased to offer you renewal of the lease as follows:

…

Term — [**init'ld by James**] [**2**] ~~3~~ years commencing June 1, 2008

Rental — [**init'ld by James**] [**S$50,000**] ~~S$ 52,000.00~~

…

Important Note: All of the above are subjected to the following terms and conditions

…

5 This offer is only valid, for outdoor kiosks of 1 to 4. *Additional drink kiosk erected by the tenant during the existing tenancy period must be removed, prior to renewal of lease.*

6 Approval of additional sitting area are required to be submitted to URA/SLA for approval. *The Landlord will charge you accordingly for any submission/approval fees, upon approval permission.*

…

Thank you.

Yours faithfully, *I have read and accept the above.*

[Signature J1] **"X"** [Signature K1]

James Lim Oriental Investments

General Manager (SH) Pte Ltd

Catalla Investments Pte Ltd [dated 10/10/2007]

[emphasis added]

19 Kevin avers that the original 1 October 2007 letter he received was already signed by James in ink both at the bottom of the first page and at "Signature J1". After receiving the original 1 October 2007 letter, Kevin negotiated with James, with the result that Kevin agreed to dismantle the fifth drinks stall and James agreed to reduce the rent from $52,000 per month to $50,000 per month. On the other unresolved issue of URA approval for the canopy, Kevin avers that James assured him that the canopy merely required a resubmission of plans for approval. James then amended in his own handwriting the relevant terms on the first page of the original 1 October 2007 letter to reflect the

agreed shorter term and reduction in rent. James also initialled to the left of each handwritten amendment and signed the bottom of the first page.

20 Kevin avers that he then went back to his own office, where he signed the original 1 October 2007 letter by affixing "Signature K1" and his company stamp on each page. Kevin then made a photocopy of this original 1 October 2007 letter now duly stamped and signed by both parties on both pages. Kevin avers that he had intended to keep the original 1 October 2007 letter himself and to hand James the photocopy that he made.

21 I pause to note that Kevin did not produce in evidence the original 1 October 2007 letter which he had retained. Instead, Kevin produced a photocopy of the original 1 October 2007 letter signed by James and himself ("Kevin's copy"). James produced the photocopy of the original 1 October 2007 letter that Kevin had given to him ("James' copy").

22 It is absolutely crucial to distinguish between Kevin's copy and James' copy of the same letter in evidence, Essentially, James' copy is identical to Kevin's copy save in one material aspect. At the spot marked "X" (see [18] above) to the left of "Signature K1", James' copy contains a further handwritten inscription written in blue ink ("the Inscription") which reads:

NOTE: Pending — ON HOLD for confirmation [**Signature K2**]

[**Signature J2**]

[emphasis added]

23 Below the Inscription, there is on both pages a second signature of James ("Signature J2") in the same blue ink. To the right of the Inscription on both pages, there is a second signature of Kevin ("Signature K2") in a markedly darker shade of blue ink. Much of the present case turns on the explanation for the Inscription, "Signature J2" and "Signature K2" which were found on both pages of James' copy but absent on Kevin's copy.

24 Kevin's case is that he accepted the offer contained in the original 1 October 2007 letter which had already been signed on both pages by James and he put his signature, "Signature K1", on it. He then made a photocopy of the original 1 October 2007 letter now signed by both parties, with the intention of giving the photocopied fully signed letter to James. Kevin said during cross-examination that [note: 2] :

> [Signature K2] was mine as well, but because when I gave [James] this letter of offer, it was a photocopy. *I kept the original. I'm afraid it will not be valid, that is why I signed one more signature.*
>
> [emphasis added]

25 Kevin's case was that he was afraid that his photocopied "Signature K1" would not be valid, and so he voluntarily affixed a second "Signature K2" in blue ink on both pages of the photocopied letter in order to authenticate the photocopy. Kevin's case was that when he affixed "Signature K2" on the photocopy and gave it to James, neither the Inscription nor James' second signature, "Signature J2", was found on the photocopy. Kevin avers that James had subsequently inserted the Inscription and "Signature J2" onto the photocopy without his knowledge or consent.

26 James denies all the above allegations regarding the sequence of events and avers in his AEIC that the Inscription was added by Kevin himself when he signed the Second Tenancy.

Subsequent correspondence and falling out

27 Kevin avers that, after signing and returning to James the photocopied 1 October 2007 letter, he assumed that the Plaintiff had validly entered into the Second Tenancy for two years beginning 1 June 2008. Nothing significant happened until Kevin received another letter from the Defendant dated 22 January 2008, where James stated that there was no renewal of the First Tenancy because Kevin had breached certain terms of the First Tenancy. James also demanded that the Plaintiff vacate the Premises when the First Tenancy expired on 31 May 2008. When Kevin approached James about the letter, James refused to discuss the matter any further, although he allegedly stated that the Defendant had no agreement to let the Premises to another ORA operator.

28 Subsequently, James sent Kevin another letter dated 28 March 2008 ("the 28 March 2008 letter") stating that there was no valid renewal of the First Tenancy and reminding the Plaintiff to hand over the Premises in its original condition by 31 May 2008. Thereafter, the parties' relationship broke down so badly that they only communicated through their respective legal counsel. Kevin's counsel alleged that the Defendant through James had made some representations which the Plaintiff was entitled to rely on and in fact relied on, and insisted that the Second Tenancy was valid. The Defendant's counsel, on the other hand, denied all the Plaintiff's allegations, and insisted that the Plaintiff vacate the Premises by 31 May 2008.

Re-entry on 1 June 2008

29 On 1 June 2008, at about 7.15 am, the Defendant as the landlord forcibly re-entered the Premises in order to take vacant possession. The Defendant erected hoardings around the Premises in order to prevent representatives of the Plaintiff from entering while its agents dismantled (a) the canopy and its surrounding awning structures; (b) the fifth kiosk; and (c) all of the Plaintiff's tables and structures within the Premises. Subsequently, the Defendant sent the Plaintiff a cheque for the sum of $1,410.96, being the remainder of the Plaintiff's security deposit of $114,000, which the Plaintiff refused to accept.

30 On 20 April 2010, the Plaintiff commenced an action against the Defendant on four causes of action: (a) misrepresentation; (b) breach of contract; (c breach of collateral contract; and (d) wrongful repudiation of the Second Tenancy through reliance on the equitable doctrine of promissory estoppel.

Defendant's case

31 While the Defendant disputed and denied many of the allegations made by the Plaintiff, only the following disputes of fact would, depending on my findings, have a material bearing on the outcome of the present case:

(a) that prior to entering into the First Tenancy, James represented to Kevin at the February 2005 meeting that

(i) Kevin could construct the Structures on the Premises;

(ii) the Defendant had no objection to the Structures; and

(iii) James would help Kevin obtain the necessary approval from URA and the National Environment Agency ("NEA") for the Structures (collectively referred to as "the Alleged Representations");

(b) that James told Kevin that the 20 November 2006 letter was "just to serve as a record" and "had no real consequence"; and

(c) that James added the inscription and "Signature J2" to the 1 October Letter only after Kevin had affixed "Signature K1" allegedly to authenticate the photocopy of the 1 October 2007 letter and not to signify his agreement to put the Second Tenancy on hold.

32 The events that Kevin avers occurred after he signed and returned to James the photocopied 1 October 2007 letter were all based on documentary and contemporaneous evidence and were not disputed by the Defendant.

The witnesses

33 During the trial that lasted 5 days, the Plaintiff called the following witnesses:

(a) Kevin;

(b) Yeo Pei Lin, Thyline ("Yeo"), a representative from the URA; and

(c) Teo Kim Swa ("Teo"), an architect from SA Lim.

34 The Defendant called the following witnesses:

(a) James; and

(b) Richard Yong Yuen Sen ("Yong"), a director of Kingsville.

My findings of fact

Evaluation of parties

35 After hearing the evidence and observing the demeanour of each witness, I find every witness, except for James, to be coherent and consistent and I accept their evidence. In contrast, I find James to be an evasive witness. The version of events that James recounted in his AEIC was significantly different from the evidence that he gave during trial. I was not impressed by the fact that James often changed his story, albeit sometimes only slightly, when pressed for details. Therefore, I do not find James' evidence to be reliable.

Whether James made the Alleged Representations

36 On the issue of whether James made the Alleged Representations, I observe that Kevin's capital investment of over $300,000 in constructing the Structures even before he entered into the First Tenancy is certainly unusual given Kevin's lack of experience in running an ORA business. Kevin was making an upfront capital investment of over $300,000 against a three year lease at a total rental of $1,296,000. I accept Kevin's evidence that the Defendant was much more experienced than the Plaintiff in this business. I find on a balance of probabilities that James must have made some representations to Kevin as to what he would do to help Kevin even before Kevin entered into the

First Tenancy. I shall now proceed to determine, from the evidence, the content of these representations.

James knew about the Structures in March 2005

37 The parties did not dispute that the construction of the Structures was completed before an application for URA approval had been made or before they formally entered into the First Tenancy. Kevin alleged that James knew about his plans to construct the Structures in as early as March 2005, whereas James claimed that he only found out about the Structures in May 2005 when he was walking by the Premises. Under cross-examination, James initially took the position that he did not know about or notice the construction of the canopy until May 2005, which according to him was the earliest time that he could have found out about the works [note: 3] :

Q: … [You said] that a tenant cannot make changes to your premises, so my question to you was that if they constructed a fifth kiosk and a canopy and when you noticed it, would you not tell them to either stop the construction or, if they have completed it, to tear it down? Is that not correct, would you not do that?

A: Yes.

Ct: Where is your office in relation to the five kiosks?

A: #01-02 of the food court.

Ct: If construction is going on, would you notice it and how soon would you notice it?

A: I would not have noticed because there would be partition board.

…

Ct: *Putting up a canopy across the four kiosks and to a fifth, and building a fifth kiosk is not exactly minor alterations to the four kiosks.*

A: *Yes.*

Ct: So when they started working on this sometime in March or April, right through May, are you telling me you never noticed it until it was up in May, 16 May?

A: *Not in March or April. Only in May.*

[emphasis added]

38 However, after some questioning, James changed his position on this issue and admitted that he knew about the construction of the canopy and the fifth kiosk earlier, in March 2005 instead of May 2005: [note: 4]

Ct: Yes, that is what I tried to establish. So that basically, March, you already knew of what he was planning to do and it was not on 16 May that you finally discovered what he did.

A. Yes.

39 This is just one of the examples where James' evidence in his AEIC did not stand up to scrutiny when probed. Accordingly, I shall approach his testimony with some caution. On the other hand, I find that Kevin's evidence is coherent because the evidence that Kevin gave throughout the trial were relatively consistent with his AEIC. I therefore accept Kevin's evidence and find that James knew about the construction of the Structures in as early as March 2005 and did not object to them. I infer from this fact that the Defendant through James had impliedly consented to the construction of the Structures right from the start, when James recommended Kingsville to the Plaintiff.

James represented that he would help apply for URA approval

40 I next find that, in the absence of any credible explanation to the contrary, which the Defendant has been unable to furnish, James' voluntary and exclusive engagement of SA Lim to submit plans to the URA on the Plaintiff's behalf for the entire period of August 2006 to April 2008 suggests that, on a balance of probabilities, James must have represented to Kevin before the First Tenancy that he would help him do so, and he was later performing his representations.

41 The fact that James exclusively conducted all correspondence with SA Lim regarding submission of plans to the URA was borne out during the cross-examination of SA Lim's representative, Teo, whose evidence I accept: [note: 5]

> Q. … Can you confirm who of Catalla Investments instructed you for these works?
>
> A. Throughout this whole period of involvement, I've been dealing with James Lim.

42 Under cross-examination, Teo testified that right until April 2008 when he was approached by Kevin, he was under the impression that his firm's services were hired by the Defendant and that nobody at his firm was aware of the Plaintiff's existence. Even after URA rejected the first submission, James continued to instruct SA Lim exclusively. Teo's evidence was that James was the one who gave him instructions to submit a second set of plans to URA in August 2006: [note: 6]

> Q. … [W]ould it be correct that this second set of plans were submitted with the knowledge of James Lim of Catalla Investments?
>
> A. Yes, certainly.
>
> ...
>
> Q. [B]esides James Lim, did you speak to my clients about the second set of plans before it was submitted?
>
> A. No.

43 There was no reason for Teo to lie. In fact, Teo had to be subpoenaed by the Plaintiff to give evidence in court. Teo gave evidence that after looking at the Structures, he was already aware that it would be difficult to obtain URA approval because it would involve "pushing the limits" of what URA would usually permit and he had communicated the difficulty that he had anticipated to James back in 2006: [note: 7]

> A: Of course before we go in with a submission, we actually talk to URA. We actually discuss with them. And as in all authorities, when certain areas are grey, they will say: please submit

plans and we will evaluate. And that's what we did.

Ct: This is something that happened in 2006, so it is already done, it is there. The canopy is there, the fifth kiosk is there, the tables are all there. So you have seen something on the ground.

A: Yes.

Ct: And your brief is to seek approval.

...

A: *Actually when we came in with these plans, certainly we know a lot of things would not be allowed, but in trying to push the limits, we were trying very hard …*

Q: By looking at the contents, can you give us a brief summary of what was the response from URA as far as you can understand?

A: *I think what this letter means is that our attempt to push the limit has failed now. URA did not agree, despite all the supporting reasons we have given. …*

Q: Now, when you received this letter from URA, was it communicated by you to James Lim of Catalla Investments?

A: Well, I don't have the records, it is so long ago, but *I'm quite certain that by e-mail or some means we would have communicated, me and the client.*

Ct: Communicated to whom?

A: *To James Lim, that is.*

[emphasis added]

44 I accept Teo's evidence that he conveyed such a concern to James. However, despite knowing that the submissions had been rejected by URA twice, James did not convey these problems to Kevin. I accept Kevin's evidence that he only found out about these problems when he approached Teo personally in April 2008, as Kevin's evidence was corroborated by Teo's evidence given under cross-examination: [note: 8]

Q: Can I confirm that even from the time you were instructed in August 2006 to the date of 13 December 2010, when you received the last letter from URA, you were not introduced to my clients?

A: *No, I was not introduced to the client. To, I mean, Oriental … Investments.*

Q: And that would it be correct to say that the first time you met them would be in April 2008, when they came to your office?

A: *I can't remember the exact date, but it appears from the transcript given to me that* — I remember I did meet them in my office and we had a discussion, but I can't remember the exact date. *That is the first time that I met them, in 2008.*

[emphasis added]

45 Based on the evidence above, James must have represented to Kevin that the Plaintiff could construct the Structures first and obtain the necessary regulatory approval later, and that James would help the Plaintiff apply for the approval. This explained why James dealt exclusively with SA Lim although it was not necessary for him to do so. This also explained Kevin's surprise when he found out in April 2008, barely two months before the determination of the First Tenancy, that regulatory approval from the URA was not forthcoming. I find on a balance of probabilities that James made the Alleged Representations to Kevin.

James represented that he would help apply for NEA approval

46 I am fortified in my finding that James made the Alleged Representations by looking at James' unusual conduct in obtaining an NEA licence for the Plaintiff to operate a drink stall from the fifth kiosk. It was undisputed that after Kevin signed the First Tenancy, James was able to apply for and obtain a licence through Great Treat Pte Ltd ("Great Treat"), a subsidiary of the Defendant of which James was a director. It was also undisputed that the licence was used by the Plaintiff for his business. Under cross-examination, when asked to explain his actions, James could not furnish any convincing reasons as to why he had taken the trouble to apply to the NEA for a licence on the Plaintiff's behalf. The following transpired during a lengthy cross-examination of James: [note: 9]

Ct: No, the question is very simple. Why did you use Great Treat to apply for an NEA licence for a fifth kiosk whilst the plaintiff applied for an NEA licence himself for the four kiosks? …

A: I already said earlier that kiosk one to kiosk four, the plaintiffs leased from us and he could obtain licences. The fifth kiosk he did not lease from us and there was no tenancy agreement. How could he get the licence?

…

Ct: You still haven't fully explained why in the case of the fifth kiosk you took the trouble of applying for the licence when he could have done it himself, as well as the other four, which he did.

A: He did not get permission. He did not get the architect to do the submission, and in NEA there was no record of the fifth kiosk.

…

Ct: So how does the fact that you applied for the NEA licence under your own name enable you to get the NEA licence regardless of the unauthorised structure? *How come you can get it and he can't?*

A: … As for the kiosk, the NEA asked me what they were for. I told NEA that I took the drinks from my food court to bring out to the stall for sale, and there was no cooking and there was no drink there and then prepared. I told NEA that I was informed that the application was in the process, and I asked them to give me a temporary licence for them to operate in the meantime.

When [Kevin] approached me for assistance to apply for the licence I went down to NEA and gave a letter of undertaking, to undertake that in case of any food poisonings our company

would be responsible. Therefore I requested [Kevin] to sign an undertaking with me to cover back-to-back.

…

Ct: [S]o that is where I started my point ten minutes ago, which was, very simply, you could do it for whatever reason and he could not do it. Right? So you help him. Right? *Then the question becomes why.*

…

A: The kiosk has no address and he couldn't put kiosk five, and I used my licence to undertake this licence. The kiosk has no address and I used my licence to undertake this kiosk licence. So he is doing something that is an offence which I have to bear the responsibility for.

[emphasis added]

47 I find that James could not explain why he had bothered to apply for an NEA licence through Great Treat and on the Plaintiff's behalf. Even if I were to accept James' evidence that he had objected to the unapproved fifth kiosk right from the outset and that he had made the Defendant's position known to the Plaintiff, such evidence would be contradicted by his later application to NEA for a licence to operate a drink stall from the unapproved fifth kiosk using Great Treat, a subsidiary of the Defendant. If it was clear that the NEA would not issue a permit to the Plaintiff, I do not find it probable that the Defendant, who was much more experienced than the Plaintiff in these matters, would voluntarily undertake to incur additional legal liability.

48 The irresistible inference which I draw from James' application to NEA is that he made the Alleged Representations to Kevin to the effect that he would help the Plaintiff obtain all the necessary regulatory approvals if it were to enter into the First Tenancy. James' subsequent application to NEA for a drink licence for the fifth kiosk through Great Treat is evidence that he was performing certain promises that he had made to Kevin. Otherwise, in the absence of such a representation or undertaking, I find it difficult to accept that James would go to such great lengths to assist Kevin in obtaining a licence for an unapproved structure that the Defendant had allegedly objected to. I therefore find that the Plaintiff has proven on a balance of probabilities that the Defendant through James had made the Alleged Representations at the February 2005 Meeting.

Whether Defendant intended 20 November 2006 letter to have legal effect

49 I turn next to whether the Defendant intended the 20 November 2006 letter to have legal effect, and if so, what legal effect. The Plaintiff's case is that James had assured Kevin repeatedly that the 20 November 2006 letter was "for reference only" and was not intended to have any legal effect. On the other hand, the Defendant's case is that the 20 November 2006 letter gave the Plaintiff the requisite notice that it intended to rely on cl 3.7 to terminate the First Tenancy or any subsequent renewals based on the First Tenancy.

50 On the totality of the evidence, I accept the Plaintiff's case. I find that the 20 November 2006 letter did little to inform Kevin about what was transpiring between James and SA Lim as was suggested by James in his AEIC. Under cross-examination, Kevin painted a different picture from the version of events that James suggested: [note: 10]

Q: Okay. You said, you told the court that James said that the defendants would be responsible

for the submission of approvals for the drink kiosk and canopy, but these three letters that I referred to you, signed by Mr James Lim, say totally the opposite.

A: These three were written by him. I knew it. May I speak?

Ct: Sure.

A: *Each time after I received this letter, I would look for him. I would ask why had I breached the contract, but what he answered was that this was just for reference. For these three times I get the same answer from him.*

Q: So, witness, you did not reply to the three letters to set the record straight?

A: No, I went straight to him.

[emphasis added]

51 I believe Kevin's evidence and I find that it is more likely than not that James orally assured Kevin that the 20 November 2006 letter was a mere formality and the Defendant did not intend for it to have any effect. Even though Kevin's command of the English language was not good enough for him to understand the content of the entire letter, his receipt of the letter was sufficient for him to speak to James about it. I believe Kevin's evidence in court that the 20 November 2006 letter made him so worried about "breaching the contract" that he approached James three times on the same issue, each time to be told by James that the 20 November 2006 letter was written "for reference" only.

52 I therefore do not accept the Defendant's submission that the 20 November 2006 letter gave the Plaintiff sufficient notice that it had breached cl 3.7 in the First Tenancy agreement. From their dealings, James must have been fully aware of Kevin's limited command of the English language. If the Defendant had intended the 20 November 2006 letter to have any legal effect, James should have made it clear and should not have told Kevin that it was "for reference only" when Kevin approached him repeatedly to clarify the effect of the 20 November 2006 letter. Although the Defendant in the 20 November 2006 letter reserved its right to terminate the First Tenancy if the Plaintiff did not remedy the breach of cl 3.7 within 21 working days, I note that this course of action was not in fact pursued by the Defendant. There was also no evidence to suggest that such a course of action was contemplated by the Defendant at that point in time.

53 I therefore find that Kevin's evidence and the parties' actual conduct are consistent with the mutual understanding that the 20 November 2006 letter was not intended to have legal effect. Kevin was not aware of the problems with obtaining URA approval until he approached SA Lim in April 2008, which was very late in the day considering that the First Tenancy would terminate on 31 May 2008. I therefore reject the Defendant's reliance on the 20 November 2006 letter to show that the Plaintiff had notice in as early as 2006 that regulatory approval from URA was not forthcoming. I accordingly accept Kevin's evidence as stated at [49] to [52] of his AEIC:

49. I was shocked to receive these letters as I had thought that James had done the submission of plans and drawings and obtained approval from the authorities for the alterations and additions at the demised premises. *I had not at any time before the letter from BCA heard from James that the authorities did not approve the alterations and additions at the demised premises or that there was no approval from the authorities for the alterations and additions at the demised premises.*

50. I approached James on the matter and in my conversation with James, I told him that he knew exactly how much I had spent in doing up the alterations and additions …

51. *I even suggested to go down to the authorities to seek clarification on why the alterations and additions could not be approved but James told me not to waste my time as the authorities would not entertain me* as I was not the landlord or owner of the demised premises.

52. James then told me not to worry as plans and drawings for the alterations and additions had been submitted by the Defendants to the authorities for approval and asked me to concentrate on running my business … as he and his architect would sort out the issue of approval for me. *Trusting him, I did not question James any further as I did not want to jeopardise my relationship with James.*

[emphasis added]

Whether the agreement in 1 October 2007 letter was valid

54 I turn next to the last factual issue relating to the nature and effect of the Inscription, "Signature K2" and "Signature J2" on James' copy of the 1 October 2007 letter which was absent on Kevin's copy. The Plaintiff's case was simply that "Signature K2" served the purpose of authenticating the photocopied "Signature K1" and not to signify agreement to the Inscription which was not there when Kevin inscribed his Signature K2. On the other hand, the Defendant's case was that Kevin added "Signature K2" and the Inscription because he wanted to put the Second Tenancy on hold until further notice. In James' AEIC filed on 23 March 2011, he stated at [37]:

37. A second option to renew was sent on 1 October 2007 which similarly provided for an extension of the lease for a further 2 years commencing 1 June 2008 for 4 kiosks only (the "Second Option"). It was, as with the First Option, an expressed term and condition precedent for the extension of the lease that the Unauthorised Additions had to be removed prior to the renewal of the lease unless approval was obtained by the SLA/URA. This letter was executed by the Plaintiffs on 10 October 2007 *with a handwritten note by the* [*Kevin*] stating "Pending—On Hold for Confirmation" *on both pages of the Second Option*. According to [Kevin], this was because he was undergoing some marital problems at the material time and needed to sort them out before he could commit fully to the Second Option. However, [Kevin] never reverted to the Defendants as to whether the Plaintiffs would be confirming the Second Option. The Second Option therefore was deemed to have lapsed on 22 October 2007 as stated on the second page of the Second Option.

[emphasis added]

55 However, during cross-examination in court, James changed his mind on who wrote the Inscription and readily agreed with the Plaintiff's counsel that it was he who wrote the inscription on Kevin's behalf and not Kevin as he had affirmed in his AEIC. This was yet another instance where James' evidence in his AEIC was inconsistent with his evidence in court:

Q: Now, can you confirm that [the inscription was] written by you?

A: Yes.

Q: Then can I ask you to look at your affidavit, if you turn to page 19 at para 37? … Do you

confirm that that is incorrect?

A: That is so. *He said it and I write it on his behalf and I asked him to countersign.*

Q: So you are changing what [you] have said in paragraph 37?

A: He couldn't write in English and we were not allowed him to write in the Chinese, *that is why I wrote on his behalf and asked him to countersign.*

Q: Okay. But that's not what you said in paragraph 37, yes.

A: Yes.

[emphasis added]

56 After admitting that the Inscription was written by him, James had initially said during cross-examination that he wrote it "on Kevin's behalf" and on Kevin's instructions, and he asked Kevin to countersign next to the inscription with "Signature K2" because Kevin could not write in English. James initially said that the Inscription "Pending—ON HOLD for confirmation" were Kevin's exact words:

Ct: So you kept a photocopy with the "Pending—ON HOLD for confirmation". So did he tell you what is the meaning of "Pending—ON HOLD for confirmation"? *These are these your words or his words?*

A: *Written by me.*

Ct: Yes, written by [you]. You say he … doesn't speak English so he told you something and then you write or what?

A: I write; I write on the photocopy.

Ct: *What did you write? You write in your own words or did he tell you in Mandarin then you translate?*

A: Oh, he tell me in the English say that "Pending—ON HOLD" first, yah.

Ct: *He can tell you in English but he doesn't know how to write?*

A: *Yah, that's right.*

…

Ct: *Did he tell you anything? … He actually told you "Pending—ON HOLD for confirmation"?*

A: *For confirmation.*

Ct: Right, he just say that?

A: That's right.

Ct: *But did he tell you what does that mean?*

A: *He never* [*told*] *me the* [*meaning*].

Ct: … *He signed the document first and then you write this in or you write this in then he signed?*

A: *He said it first and I wrote it down, he then signed.*

[emphasis added]

57 However, upon further questioning, James changed his story again slightly and said that he wrote the Inscription on his own accord, which suggests that the inscription was not, as James had previously insisted, written on Kevin's instructions: [note: 11]

A: The letter of offer I type it and I signed the letter of offer and gave it to him. [Kevin] took the letter of offer and signed and gave it to me on the 10th of October. *I kept the photocopy. He took the original copy. There was no such wording on the original copy.* Between 10th and 22nd October, he said he has some family problems and he said that the offer that he signed, he asked me to keep it pending, on hold. *I was worried that he would change his mind again, so I took out my photocopy and I wrote it on the photocopy and asked him to sign.* …

[emphasis added]

58 Shortly after, and upon further questioning, James changed his story yet again, this time stating that the Inscription was not written in Kevin's presence when he signed the 1 October 2007 letter at James' office on 10 October 2007, but was added later by him: [note: 12]

Q: Now, witness, you just told the Court that it was sometime between the 10th and the 21st that you spoke to [Kevin] and it was after that conversation that you wrote "Pending—ON HOLD for confirmation". Is that correct?

A: Yes, it [was] mentioned by him. That is why I took out my photocopy and wrote those words and asked him to [countersign].

Q: *So it was not on the day when he gave you the copy on the 10th of October?*

A: *No, it was not signed on 10th of October.*

Q: *So you're changing what you told the Court earlier because you told the Court earlier on the 10th of October you met with* [*Kevin*]*, he returned the document to you and you wrote those words down.* But now you're saying that after the 10th, you met him again sometime between the 10th and the 21st and it was then that you wrote those words down. Is that correct?

A: He took the original on the 10th of October. It could be on the same day that he … came to me again and I did not have the original with me. Otherwise, I would have written those words on the original.

Q: So now you're saying that it may have been on the 10th of October or it may be sometime between the 10th and the 21st when those words were written down. Is that correct?

A: Yes. But it was written after he had signed the original on the 10th of October. That is why … his copy didn't have the second signature.

Ct: How do you know? All you said so far is this is the only document you had. He didn't have the original with him because had he had the original with him, he would have written the same thing on that document.

A: *Yes. I had only the copy, so I wrote on the copy I had. I went to my office. I went to my office to get the copy and wrote those words on the copy.*

Q: *So it cannot be at the same time when he gave you the copy because you just said that you had to go back to the office to take it.* So it must have been a different time from the time when he handed you the document.

A: *Could be on the same day, perhaps a different time.*

[emphasis added]

59 I am not at all impressed by James' credibility as a witness. Besides not being able to furnish any credible explanation as to why he wrote the Inscription, he changed his evidence in court three times within a short span of 15 minutes. James started by saying that Kevin had asked him face-to-face to add the Inscription in its exact words. Within several minutes, James told the court a completely different story, saying that he had written the Inscription when he went back to his office after his meeting with Kevin.

60 I find James' explanation of the Inscription to be contrived. If Kevin had wished to put the accepted offer in the 1 October 2007 letter on hold, he did not need to return his duly signed copy to James. In October 2007, the Plaintiff still had more than 6 months to the end of the First Tenancy to decide whether to proceed or to renegotiate. In my view, it is most unusual for a landlord with the commercial experience of the Defendant to enter into a valid and binding lease renewal signed by the tenant and at the same time put the renewal "on hold" at the request of the tenant without any indication of how long it was to be on hold. When asked in court why the Defendant had acted in such an unusual manner, James gave the following reasons, which I find unconvincing: [note: 13]

Ct: By you're a businessman, okay. When you sign a document and say, "I accept, okay", if you don't come back to me by the 21st of October and you don't pay me the 3 months' rental, I walk away. I have you on the hook.

A: Yes, I agree.

...

Ct: So you can say "I give you another week. I can change the"—I'm trying to understand … why did you do what you did or why would he do what he did. What are you … trying to gain [by saying] "I can extend the time"?

A: It was a request made by him. *If I did not follow what he told me to do, then perhaps he would think that I was not going to renew his lease and I would change my mind.*

Ct: No, no. But he's already signed the document and given it to you. So once he signs, he's on the hook.

A: Well, he might change his mind and that is why he asked me—

Ct: No, but once he has signed, I don't care whether he changes his mind, he's on the hook. You are all businessmen. You sign document knowing what you sign.

A: Yes, I agree.

[emphasis added]

61 When contrasted with James' version of events, Kevin's case was much more convincing. Kevin's case was simply that the inscription was not on the 1 October 2007 letter when he signed it on 10 October 2007. After considering the totality of the evidence, I believe Kevin and I find that the Inscription and "Signature J2" were not on the 1 October 2007 letter when he signed it. Therefore, it follows that Kevin did not agree to have the Second Tenancy put on hold or subject to confirmation.

The legal issues

Misrepresentation in relation to the First Tenancy

62 On the issue of misrepresentation, I have found that the Defendant through James had made the Alleged Representations to the Plaintiff's representative Kevin:

(a) that the construction of the Structures on the Premises did not pose any problems because it "only involved submission of plans to the relevant authorities for approval";

(b) that the Defendant would have no objections to the Plaintiff erecting the Structures; and

(c) that James would help the Plaintiff apply for the necessary regulatory approval for the Structures.

63 There are three types of misrepresentation: fraudulent, negligent and innocent misrepresentation. Each attracts different remedies. All three were pleaded by the Plaintiff. The authors of *The Law of Contract in Singapore* (Andrew Phang Boon Leong *gen ed*) (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") explain the difference between the three types of misrepresentation at 663:

A representee's right to relief may be grounded in the law of torts (for fraudulent and negligent misrepresentations), in equity (for purely innocent misrepresentations) and in statute (for non-fraudulent misrepresentations). As we shall see, there are differences in the elements that must be established for each. The term "misrepresentation" therefore, is really [a] convenient shorthand for all of these disparate causes of action, all of which are based on a false pre-contractual statement.

64 Turning first to the claim in fraudulent misrepresentation, the Plaintiff has the burden of proving the five elements of the tort of deceit set out by the Court of Appeal in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14]:

14 The essentials of this tort have been set out by Lord Maugham in *Bradford Building Society v Borders* [1941] 2 All ER 205. Basically there are the following essential elements. First, there must be a representation of fact made by words or conduct. Second, the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons

which includes the plaintiff. Third, it must be proved that the plaintiff had acted upon the false statement. *Fourth, it must be proved that the plaintiff suffered damage by so doing. Fifth, the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true.*

[emphasis added]

65 The most significant obstacles for the Plaintiff are the fourth and fifth elements. The fact of damage is an essential element of a claim based on the tort of deceit. This can be contrasted with a claim for breach of contract where the fact of damage is not an element of the claim, and nominal damages can be recovered in the absence of damage or where damages cannot be proved on a balance of probabilities. In the Plaintiff's Statement of Claim at [67], the Plaintiff particularized the damage that he had suffered as a result of the misrepresentations as follows:

The damage suffered by the Plaintiff included the monies invested by them in the form of rental over the three years, sums over $300,000 paid to Kingsville for the Works carried out, monies paid to the architect for the submissions of application for planning permission, loss of profit etc.

66 I shall next evaluate each of the Plaintiff's pleaded "damage". On the issue of wasted rent and loss of business profits, by the time the Defendant took vacant possession on 1 June 2008, the Plaintiff had already obtained the full benefit of the First Tenancy. The Plaintiff ran a profitable business on the Premises for the entire duration of the First Tenancy. Since no evidence was adduced by the Plaintiff to show that their present dispute with the Defendant had affected its business during the term of the First Tenancy in any way, I find that the rent paid by the Plaintiff was not wasted and the Plaintiff did not suffer "damage" in the form of loss of business profits during the period of the First Tenancy.

67 On the issue of the cost of erecting the Structures, engaging the architect, and applying to URA, I find that those costs would have been incurred regardless of whether James made the misrepresentations. Although Kevin alleged that he received lower quotations from other contractors apart from Kingsville, he did not adduce evidence of the lower quotations. In any event, regardless of which contractor Kevin engaged, he would also have had to incur the cost of engaging an architect and applying to URA for approval. These expenditures therefore cannot be considered "damage" suffered by the Plaintiff as a result of James' misrepresentations.

68 On the issue of the cost of removing the Structures, I note that it was Kevin and not James who suggested building the Structures in the Premises. Importantly, Kevin did not enter into the First Tenancy with any option to renew the tenancy for a second term. Given that the Defendant was not obliged to renew the tenancy, the First Tenancy would have expired on 1 June 2008 and the Plaintiff would have been obliged to remove the Structures. Therefore, it is in my view improper to take into account the cost of removing the Structures at the end of the tenancy.

69 From my analysis, I find the Plaintiff's characterisation of the damage it had suffered to be misconceived. Looking at the facts, it is difficult for me to see how the Plaintiff has suffered any damage by entering into the First Tenancy, and the Plaintiff's claim for fraudulent misrepresentation fails for this reason.

70 However, for the sake of completeness, I shall also make findings on the fifth element of the tort of deceit concerning the Defendant's knowledge. On the evidence, I find that the Plaintiff has not shown on a balance of probabilities that James made the representations with knowledge that the representations were false, or in the absence of any genuine belief that they were true. If that were

the case, it would have been quite inexplicable for James to apply for URA approval three times on the Plaintiff's behalf. I note that the threshold for proving fraud is always an extremely high one for a plaintiff to cross, and I find that the Plaintiff in the present case has not come anywhere close to meeting this threshold.

71 In short, the First Tenancy was for a period of three years with no option to renew. I find that even though James did not obtain regulatory approval on the Plaintiff's behalf as he represented that he would, the Plaintiff has not proven that it suffered damage during the First Tenancy as a result of the misrepresentations made by James. Additionally, the Plaintiff has not proven that the Defendant made the representations knowing that they were false or without any genuine belief that they were true. Therefore, the Plaintiff's claim in fraudulent misrepresentation must fail.

72 I next turn to evaluate the Plaintiff's alternative claim in non-fraudulent misrepresentation, relying on section 2(1) of the Misrepresentation Act (Cap 390, 1994 Rev Ed) ("the Misrepresentation Act"). Section 2(1) of the Misrepresentation Act, which deals with non-fraudulent misrepresentation, states:

> **Damages for misrepresentation**
>
> **2.**—(1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto *and as a result thereof he has suffered loss*, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.
>
> [emphasis added]

73 The rationale of section 2(1) of the Misrepresentation Act is explained by the authors of *The Law of Contract in Singapore* at 755 as follows:

> Prior to the enactment of the Misrepresentation Act, a non-fraudulent misrepresentation which induced a representee to enter into a transaction, gave, in general, the representee no right to damages unless the misrepresentation was a term of the contract. … Rescission, unless that right was lost, was the only remedy. With the passing of the Act, the representee is now able to claim for damages for any non-fraudulent misrepresentation in respect of which he could have recovered damages had the misrepresentation been fraudulent.

74 Section 2(1) of the Misrepresentation Act gives the representee a statutory right to damages in cases of non-fraudulent misrepresentation. The only remedy available at common law to the representee is the remedy of rescission. However, whether the misrepresentation was fraudulent or non-fraudulent, the plaintiff is required to prove that he suffered loss as a result of the misrepresentation. I have found at [69] above that the Plaintiff has been unable to establish any loss or damage. Therefore, any claim based on section 2(1) of the Misrepresentation Act necessarily fails as well.

75 I note in passing that in the Plaintiff's Closing Submissions dated 6 January 2012, the Plaintiff's counsel asked the court at [81] to award the remedy of rescission with respect to the First Tenancy. The term of the First Tenancy has already determined through the effluxion of time. The remedy of rescission is not available for the determined First Tenancy, and I can do no better than to quote

John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (3rd Ed, 2012) at 4–52:

> **[4–52] Restitution must be possible.** Rescission of the contract for misrepresentation involves the contract being retrospectively avoided, and any performance already made under the terms of the contract being reversed, so that the parties are placed in the position in which they would have been had there been no contract. In principle, therefore, a necessary precondition to rescission being available is that performance of the contract can in fact be reversed: and so, for example, the representee must be able to give back to the representor whatever he received under the contract. As Crompton J said in *Clarke v Dickson*:
>
> > When you enunciate the proposition that a party has a right to rescind, you involve in it the qualification, if the state of things is such that he can rescind. If you are fraudulently induced to buy a cake you may return it and get back the price; but you cannot both eat your cake and return your cake.
>
> [emphasis added]

76 The outcome, while surprising, is not unfair once one recognises that the Plaintiff's cause of action against the Defendant lies not in the Defendant's misrepresentation with respect to the First Tenancy, but in the Defendant's repudiatory breach of the Second Tenancy, which I shall turn to next.

Repudiatory breach of the Second Tenancy

77 In the light of my finding that the 1 October 2007 letter, duly signed by Kevin, constituted a valid acceptance of the offer contained therein, I shall now deal with the issue of whether the Defendant's effecting of vacant possession amounted to a repudiatory breach of the agreement to grant the Second Tenancy.

Condition precedent

78 The Defendant's counsel submitted that the agreement to grant the Second Tenancy was not valid because the Plaintiff did not fulfil the condition precedent at paragraph 5 of the 1 October 2007 letter, which states:

> This offer is only valid, for outdoor kiosks of 1 to 4. Additional drink kiosk erected by the tenant during the existing tenancy period must be removed, prior to renewal of lease.

79 Whether a clause is a condition precedent is a matter of construction. In the English High Court (Technology and Construction Court) decision of *Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd* [2008] EWHC 2379 (TCC), Coulson J held at [298] that:

> It is trite law that, if one party's obligation to do something under a contract is contingent upon the happening of a particular event, the circumstances of that event must be identified unambiguously in the contract. It must be clear beyond doubt how and in what circumstances the relevant obligation has been triggered.

80 In my view, paragraph 5 of the 1 October 2007 letter should be construed as a condition precedent. If the Defendant is entitled to rely on paragraph 5, the agreement to renew the lease is not valid until the Plaintiff satisfies the condition precedent.

81 However, the Plaintiff argues that the Defendant is not entitled to rely on the condition precedent stated in paragraph 5 because by its consistent conduct and representations to the Plaintiff, the Defendant is estopped from such reliance under the doctrine of promissory estoppel. Having found that paragraph 5 is a condition precedent, I shall turn next to the issue of whether the Defendant is estopped from relying on paragraph 5.

Promissory estoppel

82 The doctrine of promissory estoppel protects a party's reliance on promises not supported by consideration, on the basis that the party has acted on the promise to his detriment and it is now inequitable for the promisor to go back on his promise. The doctrine is often described as a shield in order to prevent a promisor from insisting on his strict legal rights, and (at least on a conventional view) promissory estoppel cannot be used as a sword by the promisee to found an independent cause of action.

83 It is trite that the three elements that a promisee must prove in order to successfully raise a promissory estoppel are: (i) the promisor made a clear and unequivocal promise; (ii) the promisee acted in reliance on the promise; and (iii) as a result of the reliance the promisee suffered detriment: see generally *The Law of Contract in Singapore* at 229–237. Additionally, the promisee must show that it is inequitable for the promisor to resile from his promise. The effect of the Plaintiff raising a promissory estoppel successfully in the present case is that the Defendant would be estopped from relying on the condition precedent in paragraph 5, without first giving the Plaintiff an opportunity to remedy the breach in order to satisfy the condition precedent.

(1) The first element

84 On the first element of "a clear and unequivocal promise", the relevant promise is the Defendant's promise not to rely on paragraph 5. I have earlier found that the Defendant through James had since the start of the First Tenancy consistently represented to and promised the Plaintiff that the Defendant did not object to the construction of the unapproved Structures. In fact, the Defendant went further to offer to help the Plaintiff apply for planning permission from URA, as evinced by the Defendant's dealings with the architecture firm SA Lim even to the exclusion of the Plaintiff. Although the Defendant vehemently denied making such a promise, it is in my view extremely telling that immediately following paragraph 5 of the 1 October 2007 letter, paragraph 6 states:

> 6. Approval of additional sitting area are required to be submitted to URA/SLA for approval. *The Landlord will charge you accordingly for any submission/approval fees, upon approval permission.*
>
> [emphasis added]

85 I find that the presence of paragraph 6, which was drafted by the Defendant, directly contradicts the Defendant's case. If it were true, as the Defendant maintained it was, that the onus was always with the Plaintiff to apply for the relevant approval, the Defendant would not have bothered to insert paragraph 6 into the 1 October 2007 letter. The landlord is usually not involved in the submission of the tenant's plans or the payment of approval fees. In my view, the existence of paragraph 6 strongly suggests that, even as late as on 1 October 2007, the parties' understanding was that the Defendant was still responsible for applying for regulatory approval from URA on the Plaintiff's behalf.

86 Although the Defendant had through the 20 November 2006 letter put on record that it had objected to the Plaintiff's alterations very early on, I believe Kevin when he said that when he

approached James on the matter, James had assured him that the 20 November 2006 letter was just "to serve as a record" and had "no real consequence". The 20 November 2006 letter, therefore, was insufficient notice to the Plaintiff that the Defendant intended to resile from its promise that it would not object to the unapproved Structures.

87 In addition, the very fact that the Defendant did not take any steps during the First Tenancy to enforce cl 3.7 was consistent with the Plaintiff's case that the Defendant had intended the 20 November 2006 letter to be only a formality. While silence or mere inaction would ordinarily not amount to a clear and unequivocal promise, I infer the element of a clear and unequivocal promise from the Defendant's inaction following the strongly worded 20 November 2006 letter, viewed in the light of (a) the Defendant's generally nonchalant attitude towards the unapproved Structures; (b) James' active recommendation of a contractor, Kingsville; and also (c) the extent of James' involvement in assisting the Plaintiff to apply for approvals for the Structures.

(2) The second element

88 I next turn to the second element of reliance on the promise. The authors of *The Law of Contract in Singapore* explain at [231] the element of reliance as follows:

> The second requirement that needs to be satisfied is that the promisee must have acted in reliance on the promise. *Generally, such reliance is evidenced by the promisee's change of position on the faith of the promise, that is, by doing or omitting to do something which he would otherwise not have done or omitted to do.*
>
> [emphasis added]

89 This second element raises little difficulty in the present case. I find that the Plaintiff had relied on the Defendant's promise by leaving the task of applying for regulatory approval in his hands and not actively exploring ways to modify the Structures in order to obtain approval. I accept Teo's evidence that the additional cost to modify the canopy so that the relevant approvals could be obtained was substantial: [note: 14]

> A: But I think the scope of work can be quite a fair bit, because they have to now make sure that that whole canopy is not blocking. They have to segment it, you know, and then the height has to be changed. So there is quite a bit of structural work. They probably had to dismantle it, cut it down, weld it, you know, to bring it to the controlled height. So some of these works are quite extensive, and perhaps that is the reason why it didn't proceed, you know. Because that is the only way that URA will approve it, and we had to pursue that along that line. But whether the client towards the end will do it, you know, that is beyond me …

90 I also find that, had Kevin known the problems faced by SA Lim in obtaining approval, he would have been willing to, and would have incurred at least part of the modification cost in order to continue carrying on business on the Premises. Kevin did not do so earlier because he had relied on James' promise. Under cross-examination, Kevin evinced an intention to regularise the set-up of his ORA and an intention to explore methods of apportioning the losses resulting from James' misrepresentation that he would obtain approval for the fifth kiosk and the canopy after installing them:

> A. I discussed with [James] that I agree to remove the drinks kiosk, but subsequently he told me to remove the entire canopy, so I asked him, "Who is going to pay for the charges?" I

already spent more than $300,000 to erect this. Do you think it is reasonable for me to —it was you who told me that I could obtain the approval. After three years you told me otherwise. About two years plus. He told me that it cannot be approved. Do you think I can accept it?

(3) The third element

91 I now turn to the third element of detriment. The current position of the law in Singapore on what constitutes detriment for the purposes of promissory estoppel is summarised by the authors of *The Law of Contract in Singapore* at 234 as follows:

> More recently, in *Lam Chi Kin David v Deutsche Bank AG* [2010] SGHC 50, Steven Chong JC (as he then was) explained that the term "detriment" may be understood to include: (a) the incurrence of time and expense; (b) incurring a liability; (c) a change of position; and (d) the deprivation of a benefit. The former two categories conform to the general understanding of detriment in a "narrow" sense because they involve the actual incurrence of time, money or liability. On the other hand, the latter two categories constitute "detriment" in the broad sense since such detriment would only arise if the promisor were permitted to resile from its promise. In Chong JC's view, either form of detriment is sufficient because "the doctrine has consistently been held to apply in circumstances when it was inequitable either in the narrow or broader sense of 'detriment' for the promisor to resile from his promise and to enforce his strict legal rights". *On appeal, the Court of Appeal disagreed with Chong JC's application of these principles to the facts but did not disagree with the learned judge's exposition of the law.*
>
> [emphasis added]

92 The present case falls squarely within the situation described in *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 ("*Hughes*"), which was summarised in *Spencer Bower, Turner and Handley: Actionable Misrepresentation* (Butterworths, 4th Ed, 2000) ("Actionable Misrepresentation") at 481 as follows:

> The *locus classicus* of this species of detriment is none other than *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 ("*Hughes*"). In that case, the owner of the freehold gave six months notice to the lessee to repair the premises. The lessee, however, made an offer to purchase the owner's leasehold interest. Unfortunately, the negotiations which went on for some time did not result in the sale whereupon the owner gave the lessee notice of ejectment for failing to complete the repairs on time. The court found that the owner was estopped from enforcing its strict legal rights because the lessee had changed his position by relying on the owner's implied promise that he would not be required to repair the premises while the negotiations were underway.

93 I agree with the Plaintiff that the estoppel raised in *Hughes* would apply and the Defendant is estopped from relying on the Plaintiff's non-fulfilment of the condition precedent in paragraph 5 unless the Defendant gives the Plaintiff a reasonable amount of time to rectify the breach.

(4) Conclusion

94 From the foregoing analysis, I find that the Plaintiff in the present case has successfully raised the shield of promissory estoppel by proving the three elements of representation, reliance and detriment. It is clear from all my findings that the Defendant's course of conduct throughout the First Tenancy gave the Plaintiff the impression, and rightfully so, that the Defendant would not enforce

cl 3.7 in the First Tenancy. The Defendant had even represented that it would help the Plaintiff apply for regulatory approval.

95 In my view, this is exactly the sort of situation where equity would intervene to prevent the Defendant from going back on its word. I find that the Defendant is estopped from relying on the condition precedent in paragraph 5 of the 1 October 2007 letter. As a result, the agreement to enter into the Second Tenancy on 1 June 2008 was valid and the Second Tenancy came into existence on the specified date. By entering the Premises and taking vacant possession, I find the Defendant to be in repudiatory breach of the Second Tenancy.

The Plaintiff's remaining claims

96 I turn next to the Plaintiff's remaining claim in breach of collateral contract. I find that on the face of the Plaintiff's Statement of Claim at [14] to [17], the Plaintiff has not pleaded with sufficient particularity the content of the alleged collateral contract, how the alleged collateral contract was breached, and what damage the Plaintiff suffered as a result. The claim in breach of collateral contract is therefore bound to fail.

Observations

97 This case has brought into focus the consequences of a landlord's exercise of its right to re-enter premises in order to forfeit a lease which is subsequently found to have been unlawful. In this regard, Kevin Gray and Susan Francis Gray in *Elements of Land Law* (5th Ed, Oxford University Press, 2009) ("*Gray & Gray*") observe at 470:

> The right to re-enter the demised premises and forfeit the lease or tenancy is the most draconian weapon in the armoury of the landlord whose tenant has committed a breach of covenant. Most written leases contain [a] forfeiture clause … As will appear later, the exercise of the landlord's right of re-entry is heavily qualified by the court's discretion to grant relief against forfeiture.

98 Before a landlord decides to exercise its forfeiture rights the following are germane considerations. First, where a tenant wrongfully holds over, the landlord is statutorily entitled to double rent or double value at its option for the entire period of the wrongful holding over under section 28(4) of the Civil Law Act (Cap 43, 1999 Rev Ed):

> **Double rent or double value on holding over by tenant**
>
> (4) Every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not.

99 Second, a landlord may apply for a writ of possession, first having obtained a judgment or declaration of its right to possession through Order 45 rule 3 of the Rules of Court (Cap 332, R 5, 2006 Rev Ed):

> **3. Enforcement of judgment for possession of immovable property (O. 45, r. 3)**
>
> …
>
> (2) A writ of possession to enforce a judgment or order for the giving of possession of any

immovable property shall not be issued without the leave of the Court except where the judgment or order was given or made in a mortgage action to which Order 83 applies.

(3) Such leave shall not be granted unless it is shown that every person in actual possession of the whole or any part of the immovable property has received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled.

[emphasis added]

100 It is evident that several protective mechanisms are in place within Order 45 rule 3. The issuance of a writ of possession requires leave of court (Order 45 rule 3(2)) which will only be granted the court is satisfied that every person in actual possession of the immovable property has received notice sufficient to enable him to apply to court for relief (Order 45 rule 3(3)).

101 Sections 18 and 18A of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) prescribe stringent conditions that a landlord must satisfy before a tenant loses the right to relief against forfeiture. The authors of *Tan Sook Yee's Principles of Land Law* (3rd Ed, LexisNexis, 2009) explain these conditions at 498:

In order to forfeit the lease, the landlord would have to satisfy the following requirements: (a) the landlord must demonstrate that the tenant's breach of covenant entitles the landlord to re-enter and forfeit the lease; (b) there has not been waiver of the breach by the landlord; (c) the landlord must satisfy all the statutory requirements governing forfeiture including the relevant notice provisions before re-entry; and (d) exercise the power of re-entry by either physically re-entering the premises or serving the tenant with a writ of possession. The tenant can still apply to the Court to ask for relief against forfeiture.

[emphasis added]

102 A prudent landlord having an independent common law self-help right of forfeiture would need to weigh the advantages of exercising this self-help right of forfeiture against its entitlement to double rent for wrongful holdovers, and the availability of court processes to mitigate the risk of unlawful repossession and termination which may subsequently expose it, as here, to liability for wrongful termination of the lease.

Conclusion

103 In the light of the above analysis, I find that the Plaintiff succeeds on its cause of action based on the Defendant's wrongful repudiation of the Second Tenancy, as set out in [26] and [28] of the Plaintiff's Statement of Claim:

Wrongful repudiation of Lease as renewed by the Defendants

26. However, wrongfully and in breach of the terms of the Lease as renewed, the Defendants have, by their solicitors' letter dated 30 May 2008 to the Plaintiff's solicitors and the Defendant's wrongful actions as referred to in paragraph 13 [t]hereof, evinced an intention not to be bound by the terms of the Lease as renewed and they have repudiated the same.

…

28. By reason of the matters as set out in the preceding paragraphs, the Plaintiffs have lost the benefit of the Lease as renewed and lost the revenue/profits they would otherwise have received under it and have thereby suffered loss and damage.

104 The Plaintiff is therefore entitled to damages for such wrongful repudiation, to be assessed by the Registrar on a loss of profit basis for the period of 1 June 2008 to 31 May 2010, taking into account the Plaintiff's liability to pay rent during the same period as well as its duty to mitigate its loss. I would award simple interest of 5.33% per annum on the Registrar's award of damages starting from 1 June 2008, the day on which the Plaintiff's cause of action arose. The Defendant is to return the security deposit of $114,000 less costs actually incurred to remove the Structures.

105 I further award the Plaintiff costs of the proceedings before me, to be agreed or taxed.

[note: 1] See Kevin's AEIC at [24].

[note: 2] See certified transcript of 25 May 2011, at p 20.

[note: 3] See certified transcript of 27 May 2011, at pp 12 and 13.

[note: 4] See certified transcript of 27 May 2011, at p 19.

[note: 5] See certified transcript of 26 May 2011, at p 75.

[note: 6] See certified transcript of 26 May 2011, at pp 91 and 92.

[note: 7] See certified transcript of 26 May 2011, at pp 83 to 88.

[note: 8] See certified transcript of 26 May 2011, at pp 104 and 105.

[note: 9] See certified transcript of 27 May 2011, at pp 124 and 139.

[note: 10] See certified transcript of 24 May 2011, at pp 71 and 72.

[note: 11] See certified transcript of 11 October 2011, at p 45.

[note: 12] See certified transcript of 11 October 2011, at p 47.

[note: 13] See certified transcript of 27 May 2011, at pp 52 and 53.

[note: 14] 26 May at p 101.