Sheng Siong Supermarket Pte Ltd *v* Carilla Pte Ltd
[2011] SGHC 204

Case Number : Suit No 272 of 2010

Decision Date : 14 September 2011

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Willie Yeo and Lim Chee San (Yeo Marini & Partners) for the plaintiff; Marina Chin (Tan Kok Quan Partnership) for the defendant.

Parties : Sheng Siong Supermarket Pte Ltd — Carilla Pte Ltd

Contract

14 September 2011 Judgment reserved.

Andrew Ang J:

Introduction and facts

1 This case concerns the interpretation of a leasehold agreement and whether it is conditional upon the premises being capable of being used for a certain purpose.

2 The defendant, Carilla Pte Ltd ("Carilla"), purchased a three-storey leasehold property with a land area of about 1417.4 sq metres located at 535 Kallang Bahru, Singapore 339351 ("the Premises"), from Eng Wah Theatres Organization Pte Ltd in September 2008. The reversionary owner of the property is the Housing & Development Board ("the HDB").

3 The plaintiff, Sheng Siong Supermarket Pte Ltd ("Sheng Siong"), operates a well known chain of supermarkets, air-conditioned wet markets and food courts. The property was introduced to Sheng Siong by Gabriel Goh Seh Hui ("Gabriel Goh") of CJ Goh Partnership LLP, who had himself been introduced the property by Jeffrey Lau Chun Wei ("Jeffrey Lau") of Huttons Real Estate Group, an agent for Carilla.

How the dispute came about

4 The parties met on 13 October 2008 at Sheng Siong's office to discuss renting the Premises. They discussed, amongst other things, the following:

(a) The viability of setting up a supermarket and food court on the Premises;

(b) A potential rental rate of $2.50 per sq ft for three or more years to commence on the issue of the temporary occupation permit; and

(c) Necessary addition and alteration works ("A&A works").

It was agreed that Carilla was to take care of all the necessary A&A works and engage its own architects to draw up plans for submission to the HDB and the Urban Redevelopment Authority. Sheng Siong was to be responsible for the interior design and renovation works and daily maintenance of the

building.

5 In November 2008, various e-mails were exchanged between David Teo Kai Lip ("David Teo"), Sheng Siong's property manager, and Gabriel Goh regarding the rental of the Premises. In particular, an e-mail dated 10 November 2008 from Gabriel Goh to David Teo informed that Carilla was to build "two internal travellators, a sub-station [*sic*], central air-cons, and a cargo lift to suit the supermarket operations".

6 In January 2009, a Main Term Sheet ("MTS") was drafted by Carilla and translated into Chinese at Sheng Siong's request. On 12 January 2009, David Teo e-mailed Gabriel Goh stating that Sheng Siong had vetted the draft MTS and had some queries. In particular, with regard to cl 10(b) of the MTS, David Teo wrote:

> Please inform/advise the landlord that our co. business is operating supermarket, Air-conditioning wet market and Food Court. The Landlord will need to get approval from the relevant authorities for us to operate the said businesses. In the event, if either one of these business is being rejected or disapproved by authorities, we were [*sic*] not consider to rent the said premises.

He asked Gabriel Goh to check with "the Landlord" (*ie*, Carilla) regarding these queries and advise accordingly. Gabriel Goh forwarded this e-mail to Lawrence Leow and Jeffrey Lau of Carilla.

7 A final version of the MTS was signed by representatives from both Carilla and Sheng Siong on 14 January 2009. Clause 10, titled "Tenant's responsibilities" reads as follows:

> 40% of GFA is for retail and 60% GFA is for entertainment, offices, child care, etc. Tenant usage comprises supermarket, wet market, thematic F&B, offices and others.

The final paragraph also states:

> All the abovementioned terms shall be incorporated into the standard tenancy agreement (see attachment B) to form the Formal Tenancy Agreement. Both parties shall execute the Formal Tenancy Agreement within 30 days from the date of signing of this Main Term Sheet.

8 The first draft of the tenancy agreement was produced by Carilla on 8 January 2009 and a second draft was produced on 13 February 2009. A final version was prepared on 6 March 2009 ("the executed Tenancy Agreement"). All versions of the tenancy agreement omit various terms contained in the MTS. Most importantly, cl 10 of the MTS (reproduced at [7] above) which refers to "supermarket, wet market, thematic F&B" usage was omitted. Nevertheless, Annex 1 of the tenancy agreement included a plan of the Premises which, both parties agreed, depicted a supermarket. The Second Schedule similarly contained a list which included a cargo lift, a passenger lift, travellators and escalators consistent with use as a supermarket. Various terms not contained in the MTS were included in the executed Tenancy Agreement. In particular, cl 4 of the executed Tenancy Agreement states:

> The Tenant hereby covenants with the Landlord as follows:-
>
> (1) ...
>
> (2) Use
>
> (a) To use or occupy the Demised Premises only for the purpose(s) specified in **item 7 of**

> **the First Schedule** hereto or for such other purposes as approved by the Landlord from time to time, Provided that all necessary approvals/licences from the relevant authorities shall have been obtained for such use of the Demised Premises.

[emphasis in original]

Also of note, cl 18(1) states:

> This Agreement sets out the entire understanding between the parties, is in substitution for all previous agreements between the parties hereto and contains the whole agreement between the parties relating to the subject matter of this Agreement.

9 At a meeting between the parties on 6 March 2009, Sheng Siong signed and returned the executed Tenancy Agreement to Carilla, along with two cheques: one for $453,210 (*ie*, a requested 4-month security deposit and money for legal fees) and another for $22,954 to the "Commissioner of Stamp Duties". Carilla acknowledged receipt of the payments.

10 A side dispute arose here regarding the signed copy of the executed Tenancy Agreement. Sheng Siong insists that they requested for Jeffrey Lau to return a signed copy to them but that this was not done. However, Michael Leow Chin Huat ("Michael Leow") disputes this and asserts that a signed copy was enclosed in a letter dated 30 June 2009.

11 On 11 April 2009, Carilla submitted three sets of plans to the HDB proposing that the first and second storeys be used as a supermarket and the third storey be used as a food court.

12 On 27 April 2009, the HDB responded to Carilla, rejecting the proposed plans submitted. The day after, on 28 April 2009, Carilla informed Sheng Siong of the HDB's rejection and suggested that "Supermarket" be renamed "Retail" and the "Multi-Purpose Hall" be renamed "Function Hall".

13 On 29 April 2009, David Teo replied to Ching Ngee Yong ("Ching"), from Crescendas (*ie*, Carilla's architect), that Sheng Siong could not change the name from "Supermarket" to "Retail".

14 On 5 May 2009, Carilla sent the executed Tenancy Agreement for stamping. At some point after this, Carilla asked Sheng Siong to appeal and offered to compose an appeal letter to the HDB on Sheng Siong's behalf. This was anomalous given that it was for the applicant, Carilla, as the leasehold owner, to appeal to the HDB. Jeffrey Lau handed David Teo the appeal letter dated 20 May 2009 when the two, along with Gabriel Teo, agreed to meet at a hawker centre near Sheng Siong's office. David Teo returned to his office, rubber-stamped Sheng Siong's logo on the letter and returned with a list outlining points of appeal that Sheng Siong wished to be conveyed to the HDB which he passed to Jeffrey Lau.

15 On 1 June 2009, Leow Chin Hai, from Carilla, forwarded to the HDB the list that David Teo passed to Jeffrey Lau. Leow Chin Hai then sent a letter to Sheng Siong informing them that they had forwarded the letter to the HDB, adding that if approval was not granted Sheng Siong would need to amend its proposal to suit the HDB's requirements. A day later, on 2 June 2009, David Teo responded (in an e-mail to Gabriel Goh) that Sheng Siong was unable to accept an amendment of proposal to suit the HDB's requirements.

16 On 9 June 2009, the HDB replied with another rejection that "supermarket use" was not acceptable, with a suggestion to "reconsider other uses" like that of a "hotel or hostel".

17 On 15 June 2009, with the 9 June 2009 reply from the HDB enclosed, Carilla informed Sheng Siong that they were to "adjust [its] operation at the Premises so as to be in line with the usage as allowed by HDB".

18 On 28 June 2009, Lim Hock Chee ("Lim"), Sheng Siong's managing director and Michael Leow spoke over the telephone. Lim alleged that Michael Leow assured him that he would look into the matter of the HDB approval. Pursuant to this conversation, Lim sent a letter to Michael Leow to follow up, detailing their conversation. Two days later, on 30 June 2009, Michael Leow sent Sheng Siong a reply informing that:

(a) Sheng Siong was to liaise with the HDB directly regarding its concern;

(b) refusal to comply with the HDB's requirement and the executed Tenancy Agreement would result in Sheng Siong owing Carilla additional "holding cost"; and

(c) if Sheng Siong failed to respond, Sheng Siong would lose "all monies [paid to Carilla] relating to the lease of the Premises".

19 A few months later, on 27 August 2009, Lim sent a letter to Michael Leow agreeing to a change of name to "Retail", albeit provided that they would be able to use the Premises for a supermarket and food court. He also asked Carilla to appeal to the HDB on Sheng Siong's behalf.

20 There is no evidence of any communications between the parties in the week or so between this (*ie*, 27 August 2009) and when Sheng Siong began legal proceedings on 4 September 2009. Its claim in these proceedings is for:

(a) the return of the security deposit of $450,000 and the legal fee of $3,210 paid to Carilla for the lease or, alternatively, for damages to be assessed;

(b) reimbursement of the stamp duty of $22,954 paid to the Inland Revenue Authority of Singapore;

(c) interest on the sum of $453,210 from 27 April 2009 (*ie*, the date that the HDB rejected the application for change of use) at such rate and for such period the court thinks fit;

(d) costs on an indemnity basis; and

(e) further or other relief as may be deemed appropriate by this court.

21 Carilla counterclaims for the following:

(a) a declaration that the executed Tenancy Agreement is repudiated by reason of Sheng Siong's breach;

(b) a declaration that the security deposit of $450,000 which Sheng Siong paid is to be forfeited pursuant to cl 3(4) of the executed Tenancy Agreement;

(c) damages to be assessed;

(d) interest;

(e) costs on an indemnity basis; and

(f) further or other relief as may be deemed fit by this court.

Material issues

22 The main issue is whether Carilla can enforce the executed Tenancy Agreement against Sheng Siong despite the Premises not being capable of use as a supermarket. Parties submitted on two sub-issues:

(a) Whether there was an express condition in the executed Tenancy Agreement that the Premises were to be leased for use as a supermarket.

(b) Whether the court should imply into the executed Tenancy Agreement a term that the Premises were to be used for a supermarket and food court and that there would be no lease if the HDB's approval regarding use of the Premises as a supermarket, food court or wet market was not secured.

23 These two grounds are, of course, in the alternative. If I find in the affirmative on either ground, the other will be unnecessary. If there is an express term to a certain effect there cannot be an implied term to the same effect. I also pause here to observe that Sheng Siong has, somewhat strangely, asserted slightly inconsistent scopes in its two respective sub-arguments: its argument on an express condition (*ie*, [22(a)] above) is confined to *supermarket usage* as the alleged condition; however, its argument on implied terms (*ie*, [22(b)] above) pertains to use as "a supermarket, food court or wet market". Clearly, the manner in which Sheng Siong presented its arguments could have been better. Nevertheless, it is for the court to scrutinise the evidence before it and decide what conclusion the evidence objectively supports, *ie*, whether there was any term at all, express or implied, making the lease conditional on the Premises being permitted to be put to certain uses and, if so, what the scope of this condition was. I will return to this point further below at [49].

24 Various other issues less significant and relevant than the above were also pleaded by the parties and I deal with those briefly at the end.

Interpretation of the executed Tenancy Agreement

The parties' submissions

25 Sheng Siong argues that there was an express provision that the Premises were to be leased for use as a supermarket. Sheng Siong bases this on the fact that the plans in Annex 1 of the executed Tenancy Agreement ("the Plans") reflect a supermarket and contain provisions for trolleys, a substation switch room and travellators consistent with the use of the property as a supermarket.

26 Carilla accepts that the Plans reflect a supermarket and contain the above provisions. However, Carilla contends that the Plans were merely instructions from Sheng Siong that were sent to Surbana International Consultants Pte Ltd, the architects engaged by Carilla to renovate the property pursuant to the lease. Carilla therefore argues that the Plans should not be interpreted as reflecting an express provision that the lease was conditional on the Premises being capable for use as a supermarket.

27 Further, while Carilla admits that the plan was to use the first and second storeys as a supermarket, it argues that it had always represented that it "wanted to rent out the Premises in

entirety", and had Sheng Siong insisted on a condition that allowed the latter to terminate in the event that a specific use was not approved, Carilla would not have agreed.

A preliminary issue

28 The question of interpretation before me is therefore whether the Plans represented an express provision that the lease of the property was to be conditional on it being permitted to be used as a supermarket. Before I begin an analysis of this question, however, I first address a preliminary issue regarding the admissibility of evidence. Carilla argues that Sheng Siong is precluded from relying on evidence extrinsic to the executed Tenancy Agreement to prove the terms agreed upon between the parties (implicitly, the famous common law "parol evidence rule"). Carilla cites, in support, s 93 and/or s 94 of the Evidence Act (Cap 97, 1997 Rev Ed) and cl 18(1) of the executed Tenancy Agreement ("the entire agreement clause").

29 I should point out at the outset (though this should be obvious) that, contrary to Carilla's submission, the Plans annexed to the executed Tenancy Agreement are not extrinsic evidence but part of the executed Tenancy Agreement.

The applicable law

30 Contrary to Carilla's submissions, I find that ss 93 and 94 are not absolute bars to the adducing of extrinsic evidence.

31 As the Court of Appeal held in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich*"), extrinsic evidence is *always* admissible to aid contractual interpretation by demonstrating the context of the contract, as long as the evidence is merely to "illuminate the contractual language" and not as a pretext to contradict, vary, add to or subtract from the terms of the contract (*Zurich* at [113], [122]–[123]). It is *not* a pre-requisite that the contract must contain a latent ambiguity (*Zurich* at [114] and [132(c)]). Crucially, however, the evidence sought to be admitted must be:

(a) relevant (*ie*, it would affect the way in which the language of the document would have been understood by a reasonable man);

(b) reasonably available to all contracting parties; and

(c) relating to a clear or obvious context (per V K Rajah JA at [125] and [132]).

32 This is consistent with the "contextual approach" which the Court of Appeal in *Zurich* affirmed as the correct approach under Singapore law even within the framework of the Evidence Act (*Zurich* at [124]). This approach is also known as the "commonsensical approach" or the "purposive approach". Arguably, the most oft-cited formulation of this approach is Lord Hoffmann's in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 ("*Investors Compensation Scheme*") at 912–913:

> ... The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows:
>
> (1) *Interpretation is the ascertainment of the meaning which the document would*

convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact,' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v Eagle Star Life Assurance Co. Ltd*. [1997] A.C. 749.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had ...

[emphasis added]

33 The Court of Appeal in *Zurich* engaged in a comprehensive analysis of this area of the law summarised at [110]–[115] and [125]–[131] of *Zurich*) and concluded that "the contextual approach is here to stay in Singapore" (at [133]).

34 However, the Court of Appeal made some qualifications to Lord Hoffmann's formulation as excerpted above. In particular, it removed the near-absolute bar against evidence of previous negotiations and declarations of subjective intent (*viz*, Lord Hoffmann's third proposition above at [32]). Instead, such evidence is merely "likely to be inadmissible" for it does not aid in determining the intention of the parties as *objectively* ascertained, which is the cornerstone of contractual interpretation (*Zurich* at [125]–[127]).

35 The fact that the executed Tenancy Agreement contains an entire agreement clause does not affect this analysis. Rather, the admissibility of extrinsic evidence is only an issue *because* the executed Tenancy Agreement is an entire agreement. By definition, the parol evidence rule embodied

in s 94 of the Evidence Act applies only to entire agreements. In the words of the Court of Appeal in *Zurich* at [112]–[113]:

> 112 ... the parol evidence rule only operates where the contract was intended by the parties to contain all the terms of their agreement. ...
>
> 113 Assuming that the contract is one to which the parol evidence rule applies, no extrinsic evidence is admissible to contradict, vary, add to or subtract from its terms (see s 94 of the Evidence Act).

36 Similarly, the Court of Appeal in *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 ("*Lee Chee Wei*") held at [41] that entire agreement clauses will usually not prevent a court from adopting a contextual approach in contractual interpretation. The Court of Appeal held that the effect of such a clause is to render inadmissible extrinsic evidence which reveals terms *inconsistent* with those in the written contract – this is consistent with the holding in *Zurich* that extrinsic evidence is admissible as long as it is for the purposes of "illuminat[ing] the contractual language" and not as a pretext to contradict, vary, add to or subtract from the terms of the contract (see above at [31]. Accordingly, cl 18 of the executed Tenancy Agreement does not preclude Sheng Siong from adducing extrinsic evidence to aid the interpretation of the contract in line with the principles in *Zurich*.

37 The above authorities establish that, in the admission of extrinsic evidence, the ultimate lynchpin is *what this court seeks to do* with the extrinsic evidence on which Sheng Siong relies. Relying on such evidence to interpret the contract in its proper context is permissible; relying on the same to "contradict or vary or add to or subtract from" the contract is impermissible. Is seeking to establish whether the Plans represent an express provision that the lease was conditional upon the property being permitted to be used as a supermarket an exercise in contradicting or varying, *etc*, the executed Tenancy Agreement?

38 A comparison of the case of *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR(R) 891 ("*Sandar Aung*") with the cases of *Zurich* and *Lee Chee Wei* is illuminating as to what constitutes "contradicting or varying or adding to or subtracting from" and what does not. In *Sandar Aung*, the appellant's mother was admitted to the respondent hospital to undergo an angioplasty. At the time of her mother's admission, the appellant had signed two hospital documents: an estimate of hospital charges ("the Estimate") and a standard form contract stating the hospital's conditions of services and hospital policies ("the contract"). The Estimate for the patient's angioplasty computed the total estimated hospital charges to be $15,227.30 but unanticipated complications in the patient's recovery after the surgery resulted in a medical bill that was far greater than that presented in the Estimate. The undertaking in the Contract was, on its face, extremely clear: the appellant as guarantor agreed to be jointly and severally liable with her mother for "all charges, expenses and liabilities incurred by and on behalf of the patient". Despite this apparently clear language, the Court of Appeal held that the threshold question was *what* type of charges, expenses and liabilities the parties intended to be covered under the contract. It would then follow that the appellant would be liable for all the charges that fell within the ambit and scope of the contract (*Sandar Aung* at [19]). On the basis of extrinsic evidence, particularly the Estimate, the Court of Appeal determined this ambit and scope to pertain *only to the envisaged angioplasty* and not all other charges, expenses and liabilities. The Court of Appeal in *Zurich* cited with approval *Sandar Aung*'s "reading down" what would *prima facie* seem to be a much broader term. The Court of Appeal in *Zurich* rejected the proposition that this amounted to a "variation" of the relevant contractual terms in violation of s 94 of the Evidence Act: this was because the court's interpretation of the material words in *Sandar Aung* fell "well *within the scope of the meaning that those words could bear*" (*Zurich* at [108] and [122]–[123]. Therefore, whether the reliance on extrinsic evidence amounts only to contractual

construction of a contract or strays beyond that to impermissible contradiction or variation, *etc*, turns on whether the construction *falls within the scope of meaning that the contractual words are capable of bearing*. By contrast, in *Zurich*, the Court of Appeal considered the High Court to have erred in relying on extrinsic evidence because the High Court had read an entire provision out of the contract being construed (*Zurich* at [134]). In *Lee Chee Wei*, the defendants attempted to rely on extrinsic evidence to argue that the listing of a company was a contingent condition in an agreement for the purchase of that company's shares, and therefore that the failure to list the company frustrated the purpose of the contract. The Court of Appeal rejected this because it was completely at odds with an express clause in the agreement spelling out the parties' positions in the event that listing did not take place (*Lee Chee Wei* at [14]–[17]).

39 Our case here clearly falls within a scope of construction analogous to *Sandar Aung* rather than to *Zurich* and *Lee Chee Wei*. An interpretation of the Plans as representing that the lease was to be conditional on the property being permitted to be used as a supermarket is far from reading words out of the contract as in *Zurich*. Neither would it be completely at odds with any express provision in the executed Tenancy Agreement, as in *Lee Chee Wei*. Such an interpretation clearly *falls within the scope of meaning that the Plans are capable of bearing*. Of course, our case is somewhat unusual in the sense that the exercise of construction revolves around diagrams contained in the contract rather than the words of any particular clause. However, there is no reason why the same principles of contractual interpretation should not apply with equal force. Parties clearly included the Plans *within* the executed Tenancy Agreement for a reason. It therefore behoves this court to examine what those Plans evince of the parties' intention, *objectively* speaking.

40 As convenient shorthand, I find the following non-exhaustive list of general principles excerpted from Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2007 Ed) at paras 1.124 to 1.133 (and endorsed by the Court of Appeal in *Zurich* at [131]) particularly helpful in outlining the contextual approach in contractual interpretation:

> *The aim of construction*
>
> 1.124 First, the aim of the exercise of construction of a contract or other document is to ascertain the meaning which it would convey to a reasonable business person.
>
> *The objective principle*
>
> 1.125 Secondly, the *objective principle* is therefore critical in defining the approach the courts will take. They are concerned usually with the expressed intentions of a person, not his or her actual intentions. The standpoint adopted is that of a reasonable reader.
>
> *The holistic or 'whole contract' approach*
>
> 1.126 Thirdly, the exercise is one based on the *whole contract* or an *holistic approach*. Court are not excessively focused upon a particular word, phrase, sentence, or clause. Rather the emphasis is on the document or utterance as a whole.
>
> *The contextual dimension*
>
> 1.127 Fourthly, the exercise in construction is informed by the *surrounding circumstances* or *external* context. Modern judges are prepared to look beyond the four corners of a document, or the bare words of an utterance. It is permissible to have regard to the *legal, regulatory, and factual matrix* which constitutes the background in which the document was drafted or the utterance was made.
>
> *Business purpose*

1.128 Fifthly, within this framework due consideration is given to the *commercial purpose* of the transaction or provision. The courts have regard to the overall purpose of the parties with respect to a particular transaction, or more narrowly the reason why a particular obligation was undertaken.

Lawful effect

1.129 Sixthly, a construction which entails that the contract and its performance are lawful and effective is to be preferred.

Contra proferentem

1.130 Seventhly, where a particular species of transaction, contract, or provision is one-sided or onerous it will be construed strictly against the party seeking to rely on it.

Avoiding unreasonable results

1.131 Eightly, a construction which leads to very unreasonable results is to be avoided unless it is required by clear words and there is no other tenable construction.

Specially negotiated terms

1.132 Ninthly, a specially agreed provision should override an inconsistent standard provision which has not been individually negotiated.

General provisions versus precise provisions

1.133 Tenthly, a more precise or detailed provision should override an inconsistent general or widely expressed provision.

[emphasis in original]

41 With these principles in mind, we can now embark on the analysis of the contextual evidence. Of course, each piece of evidence sought to be admitted must also cross the thresholds of (i) relevance; (ii) reasonable availability to all contracting parties; and (iii) relation to a clear or obvious context (see [31] above), and this will be analysed with reference to each specific piece of evidence below.

Contextual interpretation of the Plans

42 I find there to be strong evidence that the Plans objectively represented the parties' intention that the lease was conditional on the use of the property as a supermarket. They were not merely "instructions" to the relevant architects without any contractual effect. Four pieces of evidence in particular are relevant and I analyse them below.

(1) The 12 January 2009 e-mail from David Teo to Gabriel Goh and Carilla's response

43 In this e-mail which Gabriel Goh forwarded to both Lawrence Leow and Jeffrey Lau, as excerpted above at [5], David Teo specified that:

> ... our co. business is operating supermarket, Air-conditioning wet market and Food Court ... In the event, if either one of these business is being rejected or disapproved by authorities, we were [*sic*] not consider to rent the said premises.

44 I find that the *Zurich* requirements (above at [31]) are fulfilled with respect to this piece of evidence. The relevance of this e-mail (*viz*, what the Premises were to be used for) is self-evident; it was definitely – and not merely reasonably – available to both parties; and, finally, it relates to a clear context. The potential problem with its admissibility, however, is that it may be said to merely constitute a declaration of Sheng Siong's subjective intent and therefore *prima facie* inadmissible (see above at [34]). However, according to the Court of Appeal in *Zurich*, the reason why declarations of subjective intent have been said to be normally inadmissible under English law is that "the extrinsic material sought to be admitted must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon" (*Zurich* at [127]). The Court of Appeal then held that evidence of subjective intent is only *prima facie* inadmissible because it is likely to violate this objective principle, but is not absolutely inadmissible as per Lord Hoffmann's formulation (*Zurich* at [127] and [132]). It follows, therefore, that if it can be shown that what appears to be merely evidence of subjective intent actually goes towards proof of what the parties *objectively* intended, such evidence is admissible.

45 In my view, this e-mail from David Teo to Gabriel Goh is significant not only for what it reveals of Sheng Siong's intentions, but also for *Carilla's response to it* – these two together go towards an objective ascertainment of what the parties intended. Lawrence Leow gave evidence before me that, upon receipt of this e-mail, he objected to Sheng Siong's condition of specific usage and that he had asked his brother Michael Leow to inform Jeffrey Lau to convey his objection to Gabriel Goh who was to finally convey the message to Sheng Siong. The accuracy of this aspect of Carilla's evidence merits some discussion.

46 I have difficulty understanding why Lawrence Leow chose such a convoluted method to respond to David Teo's e-mail, particularly since by Lawrence Leow's own admission (and also that of his father, Leow Chin Hai's), Carilla maintains a policy of formal communication via electronic means with its clients. From a commonsense perspective, it seems infinitely more sensible and convenient for one to respond to an e-mail by hitting the "reply" button instead of having one's message verbally conveyed through no less than three intermediaries. Further, from a commercial perspective, when one party insists on a condition to which the other party objects, there would in all likelihood be at least some discussion regarding this business disagreement. Curiously, there is no evidence at all of any such further communication. Furthermore, if Carilla had made its intention clear to Sheng Siong and Carilla was so strongly opposed, I would have expected the tenancy agreement to have been strengthened in Carilla's favour with the inclusion of some term or clause that the lease was *not* contingent on permission being obtained for some specific usage. I therefore conclude that if Lawrence Leow had (as he insisted) instructed his brother, a failure in communication must undoubtedly have occurred at some point, resulting in Sheng Siong not being notified.

47 Furthermore and extraordinarily, despite being the alleged messenger of Lawrence Leow's objection, Jeffrey Lau conceded (a total of nine times) that there was an understanding between the parties that if the Premises could not be used to operate a supermarket, food court or wet market, there would be no deal.

48 Accordingly, I find it difficult to believe that Carilla did in fact notify Sheng Siong of its objection to the intention evinced (*viz*, that the lease be conditional on the Premises being permitted to be used as a supermarket, food court or wet market) in David Teo's e-mail. Therefore, I find that this e-mail, together with Carilla's response to it, constitutes proof from an objective point of view, that the parties intended the lease to be conditional on the property being permitted to be used for certain purposes. I pause here to make an important clarification on the scope of this finding of fact.

49 David Teo's e-mail seems to be pitched at a higher threshold, *ie*, that Sheng Shiong will not

rent the premises if *any* of the three businesses of "supermarket, Air-conditioning wet market [or] Food Court" are denied approval by the HDB. However, in interpreting the executed Tenancy Agreement, this e-mail cannot be viewed in isolation but must be viewed together with the rest of the contextual evidence. I do not think the totality of the evidence is quite wide enough to support such a high threshold – this is also important in light of my observation at [23] above. All the other objective evidence, as will be seen below, pertains only to the condition that the Premises be permitted to be used as a supermarket. In any event, this case only requires me to decide whether there was *at least* a condition that the Premises must be allowed to be used (at least in part) as a supermarket – it is irrelevant what the legal consequences would be had the HDB granted approval for supermarket use but not for either of the other two uses specified in the e-mail. Therefore, I confine my finding of fact to the extent that Sheng Siong and Carilla intended the lease to be conditional on at least part of the premises being permitted to be used as a supermarket.

(2) MTS of 14 January 2009

50 At first glance, this appears to constitute evidence of prior negotiations of the parties and is therefore *prima facie* inadmissible (see above at [34]). Looking deeper, however, the MTS is actually the product of prior negotiations that the parties intended to directly incorporate into the contract. This is akin to a statement of intent, more than merely evidence of prior negotiations but less than a contract in itself and so, in a sense, "inchoate". The MTS thus captures the intentions of the parties as they stood *post*-negotiation. Consequently, the rationale for *prima facie* inadmissibility of evidence of prior negotiations (*ie*, it contributes to contractual uncertainty and does not go directly to the matter of ascertaining the objective intentions of the contracting parties, see above at [34], does not apply here. The MTS, in evincing the actual intention of the parties, *post*-negotiation, goes directly to the matter of ascertaining the objective intentions of the parties.

51 I also find that the *Zurich* requirements are fulfilled to justify admitting this piece of extrinsic evidence. The MTS is clearly relevant to the issue of the parties' objective intentions with regard to use of the Premises; there is no question that it was available to both parties; and, finally, as the final product of the parties' negotiations, it relates to a clear and obvious context.

52 Although the MTS does not include an express condition as to the use of the property, cl 10 (translated into English from the original Chinese) alludes to this where it reads: "Tenant usage comprises supermarket, wet market, thematic F&B, offices and others." From this, I conclude that objectively ascertained both parties intended that the Premises were to be leased for use as a supermarket.

53 In an attempt to explain why this clause referring to the use of the property was included in the MTS but not the executed Tenancy Agreement, Lawrence Leow stated that this was to "tell the tenant that when you are talking about any use, there's this percentage you must comply". I do not find this reply satisfactory – the question still remains as to why this change was not communicated to Sheng Siong.

54 Pausing for a moment, in light of what I have concluded with regard to David Teo's e-mail and the MTS, I would like to state that I do find it improper for Carilla to have made unilateral amendments to the tenancy agreement in the manner that it did, unilaterally incorporating terms (other than boilerplate clauses) without drawing Sheng Siong's attention to them, and, even more egregiously excluding terms to which the evidence shows the parties had agreed. To be fair, Sheng Siong also failed to take due care to vet the executed Tenancy Agreement.

(3) Jeffrey Lau assuring Sheng Siong that 40% of the floor area could be used as "Retail" and that

supermarket use qualified as "Retail"

55 This piece of extrinsic evidence is slightly more complex because it both constitutes evidence of subsequent conduct and evidences Carilla's subjective intent. As mentioned above, the Court of Appeal in *Zurich* (see above at [31]) clarified that there is no absolute bar against adducing evidence of subsequent conduct or evidence of prior negotiations (*Zurich* at [132]). However, in relation to subsequent conduct, the Court of Appeal added parenthetically that "the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture" (*Zurich* at [132]). In light of this, since the above assurance constitutes both evidence of subsequent conduct and subjective intention, I find that it would tilt the balance towards uncertainty and thus does not constitute helpful evidence that goes towards proof of what the parties, from an objective viewpoint, ultimately agreed upon.

(4) The A&A works being consistent with the use of Premises as a supermarket

56 Viewed in isolation, this does not indicate any intention on the parties' part that the Premises were to be leased for use as a supermarket. However, when viewed in tandem with reference to the Plans, I find that the only legitimate conclusion one can draw is that the parties intended that the Premises were to be used, at least in part, for Sheng Siong's main business of operating supermarket, food court or wet market facilities.

Does anything in the executed Tenancy Agreement contradict the contextual evidence?

57 Cumulatively, the contextual evidence above strongly shows that the Plans represent an express provision that the lease was conditional on the Premises being permitted to be used as a supermarket. It remains for me to address, however, the potential problem that a certain feature of the executed Tenancy Agreement militates against such a finding. The potential problem is that where the Plans are referred to in the First Schedule, under the definition of "the Demised Premises", they are stated to be "for the purpose of identification only" ("the Qualification").

58 On its face, the Qualification appears clear in its intent that the Plans are merely for the purpose of identifying the property and cannot be interpreted for any other purpose. However, the court is not precluded, albeit in the narrowest of circumstances, from finding that the language employed in a contract cannot have been what the parties intended, in light of the context of the contract. In the words of Lord Hoffmann in *Investors Compensation Scheme* (see above at [32]) at 913:

> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. *The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.*[1997] A.C. 749.
>
> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, *if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not*

have had ...

[emphasis added]

59 The same was held in *Sandar Aung* (see above at [38]) at [29] (endorsed in *Zurich* at [128]):

> ... We would go so far as to state that *even if the plain language of the contract appears otherwise clear, the construction consequently placed on such language should not be inconsistent with the context in which the contract was entered into if this context is clear or even obvious*, since the context and circumstances in which the contract was made would reflect the intention of the parties when they entered into the contract and utilised the (contractual) language they did. *It might well be the case that if a particular construction placed on the language in a given contract is inconsistent with what is the obvious context in which the contract was made, then that construction might not be as clear as was initially thought and might, on the contrary, be evidence of an ambiguity*.
>
> [emphasis in original underlined; emphasis added in italics]

60 These principles are echoed in the observations of Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 ("*Chartbrook*") at [14] to [25], where the House of Lords found that "to interpret [the contractual definition at issue] in accordance with ordinary rules of syntax makes no commercial sense" (*Chartbrook* at [16]) and therefore held that the parties had made the sort of linguistic error referred to in *Investors Compensation Scheme* (extracted at [58] above). The ultimate task of a court in contractual interpretation is to ascertain the objective intentions of the parties. If the weight of the contextual evidence is such that the language used in the contract simply cannot objectively be said to represent the intentions of the parties, the court must at the end of the day give effect of the intentions of the parties. Of course, I stress that *it will not be easily found* that the plain language used in a contract is not consistent with the parties' intentions. The threshold for such a finding must be high. However, I find that this case is one in which the high threshold is met, for the reasons below.

61 In the first place, even on the face of the executed Tenancy Agreement, the Qualification that the Plans are for the purpose of identifying the demised premises is, frankly, bizarre. I cannot imagine why the Plans would be necessary to identify the demised premises when the definition in the First Schedule already provides the address of the demised premises. More importantly, *the Plans do not even represent to the demised premises as they stood then*. The Plans are clearly entitled "*Proposed* Additions and Alterations to Convert Existing Cinema to 3-Storey Commercial Retail and Entertainment Centre" [emphasis added]. The Plans did not reflect what the demised premises looked like then, but rather what they were envisioned to look like after the requisite A&A works had been done to convert them into premises capable of being to be used as a supermarket. In this light, I fail to see how the Plans could possibly be for the purpose of identifying the demised premises under the executed Tenancy Agreement.

62 Second, when we place the Qualification against strong contextual evidence (above at [42]–[56]) that the parties intended for the Premises to be used as a supermarket, it would be inconsistent with this contextual evidence to construe the Qualification as precluding a finding that the Plans represented the parties' intentions as to the use of the property once leased. In these circumstances, I find that the principles enunciated in *Investors Compensation Scheme* and *Sandar Aung* apply here in full force.

Decision

63 Despite the able submissions of Carilla's counsel, having regard to the factual context in which the executed Tenancy Agreement was concluded between the parties, I find that the parties' intention, objectively ascertained, was for the Premises to be leased for use as a supermarket, an intention captured in the executed Tenancy Agreement in the form of the Plans.

64 Indeed, bearing in mind the commercial nature and purpose of the transaction, I find it hard to believe that Sheng Siong wished to rent the Premises no matter what uses the Premises could be put to. There is no evidence that there is anything special about the Premises that could cause Sheng Siong unconditionally to accept a lease of them regardless of the commercial uses to which they could be put.

65 In light of this conclusion, it is not necessary for me to consider the parties' arguments as to whether a term should be implied into the executed Tenancy Agreement with respect to the use of the Premises. Indeed, as I have alluded to at [23] above, once it has been found that a contract makes *express* provision to a certain effect, it is not logical that a term to the same effect should be *implied*.

66 As a side note, I observe that had Sheng Siong brought an action for rectification of the executed Tenancy Agreement, I would have been inclined to allow such an action in the alternative. Needless to say, had such an action been brought, the admissibility of evidence extrinsic to the executed Tenancy Agreement would not be an issue. Rectification may be allowed on the basis of a common mistake or a unilateral mistake (see Beatson, Burrows & Cartwright, *Anson's Law of Contract* (Oxford University Press, 29th Ed, 2010) ("*Anson*") at pp 262–265). The requirements for allowing rectifications on the ground of unilateral mistake, which requires a higher threshold than that for common mistake, are succinctly set out in *Anson* at pp 262–265). Three conditions must be satisfied.

67 First, the non-mistaken party must have actual knowledge of the mistaken party's intentions and of the mistake, and this includes wilfully shutting one's eyes to the obvious. Second, the non-mistaken party must have failed to draw the mistaken party's attention to the mistake. Third, the mistake must be such that the non-mistaken party would derive a benefit, or the mistaken party would suffer a detriment, if the inaccuracy in the document were to remain uncorrected. It is not necessary that the conduct of the non-mistaken party amounts to fraud. All that is necessary is that the knowledge or conduct of the non-mistaken party must be such as to make it inequitable for that party to object to rectification. I am inclined to the view that there is ample evidence that all three conditions were satisfied.

68 It is clear from the evidence set out at [43]–[54] and [56] above, especially David Teo's e-mail of 12 January 2009 and Carilla's reaction to it as well as the MTS of 14 January 2009, that Sheng Siong intended for the lease to be conditional on the Premises being used as a supermarket and that Carilla was well aware of this. The MTS of 14 January 2009 specifically required that its terms be incorporated into the executed Tenancy Agreement. Despite knowing this, Carilla failed to spell out this condition unambiguously in the executed Tenancy Agreement which it unilaterally drew up (see also [54] above).

69 There is no evidence that Carilla drew Sheng Siong's attention to the fact that such a fundamental point of understanding between the parties was not expressly spelled out in the executed Tenancy Agreement. If Carilla thought it could thereby omit from the executed Tenancy Agreement the condition that had been agreed between the parties, it certainly did so in the hope that the risk would fall on Sheng Siong rather than itself should the HDB withhold approval to use the Premises as a supermarket; this would have constituted a benefit to Carilla and a detriment to Sheng Siong. In the circumstances, I am inclined to the view that Carilla's knowledge and conduct was such

as to make it inequitable for it to object to rectification had Sheng Siong sought such a remedy.

70 There is no evidence of any circumstances that would bar the remedy of rectification in this case, *eg*, that the mistaken party waived its claim to the remedy; that the equitable doctrine of *laches* applies; or that it would prejudice the rights of an innocent third party (*Anson* at p 265).

71 Of course, I do not make any conclusive findings on the remedy of rectification given the absence of pleadings and submissions before me. In any case, the mistake was only that the condition of supermarket use was not *expressly spelled out*, and not that the executed Tenancy Agreement *actually excluded* (on a proper construction) such a condition. Given that I have held that the parties' intentions can be given effect through a proper contextual construction of the contract, there is – happily – no need to rely on the remedy of rectification.

Effect of Premises not being permitted to be used as a supermarket

72 Having established that the parties objectively intended that the executed Tenancy Agreement be conditional on the Premises being permitted to be used as a supermarket, I go on to consider the legal effect of this condition not being met. Sheng Siong argues that the failure to secure HDB's approval to use the Premises at least in part as a supermarket has rendered the contract frustrated.

Whether the executed Tenancy Agreement has been frustrated

73 The law relating to frustration is trite. To quote Lord Radcliffe in the House of Lords' decision of *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 ("*Davis Contractors*") at 729:

> ... frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. ...

The above formulation was approved by the Singapore Court of Appeal in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [59].

74 There has been some debate as to whether the doctrine of frustration is applicable to leases. Following *National Carriers Ltd v Panalpina (Northern Ltd* [1981] AC 675, it is clear that in principle a lease can be frustrated although most of their Lordships opined that these would be rare cases (at 629 and 709). Nevertheless, the authors of *Chitty on Contracts* vol 1 (Sweet & Maxwell, 30th Ed) ("*Chitty*") note at para 23–054 that the House of Lords appears to have qualified this reluctance to find frustration and carve out an exception for leases which contain provisions on specified use or provisions which restrict use:

> The following passage in Corbin, *Contracts* was cited with approval in the House of Lords in *National Carriers Ltd v Panalpina (Northern) Ltd*:
>
> > 'If there was one principal use contemplated by the lessee, known to the lessor, and one that played a large part in fixing rental value, a governmental prohibition or prevention of that use has been held to discharge the lessee from his duty to pay the rent. It is otherwise if other substantial uses, permitted by the lease and in the contemplation of the parties, remain possible to the lessee.'

75 Similarly, although there have been no reported cases in England or Singapore where a lease

has been held to be frustrated, the American courts have found leases which included clauses on intended use or clauses restricting the use of the demised premises have to be frustrated following the enactment of provisions prohibiting the specified use (*Doherty v Monroe Eckstein Brewing Co* (1921) 191 NYS 59; *Industrial Development and Land Co v Goldschmidt* 206 P 134 (1922) as cited in *Chitty* at para 23–054).

76 As concluded above, the Plans are to be interpreted to mean that the executed Tenancy Agreement was conditional on the Premises being permitted to be used, at least in part, as a supermarket. Pursuant to this interpretation, I find that the executed Tenancy Agreement has been frustrated following the HDB's rejection of the proposed plans to use the Premises as a supermarket.

77 The situation in this case is even stronger than the hypothetical described by Corbin (excerpted in the quote from *Chitty* at [74] above, approved by the House of Lords in *National Carriers*. The situation here is not merely that use as a supermarket was a principal use contemplated by the lessee (and known to the lessor) and played a large part in fixing the rental value. Rather, the basis for Sheng Siong entering into the lease *at all* was on the *condition* that at least part of the Premises could be used as a supermarket – and Carilla admitted having knowledge of this. The fact that parties contemplated putting the Premises to other uses side by side with the supermarket, such as "wet market" and "thematic F&B" (see above at [7]) do not detract from this condition. In this light, the executed Tenancy Agreement is clearly frustrated by the failure of this condition.

Effect of frustration

78 The legal consequence of frustration is provided for in s 2 of the Frustrated Contracts Act (Cap 115, 1985 Rev Ed), reproduced below:

> 2.— (1) Where a contract has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, this section shall, subject to section 3, have effect in relation thereto.
>
> (2) *All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged* (referred to in this Act as the time of discharge) *shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable*:
>
> > Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.
>
> (3) Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which subsection (2) applies) before the time of discharge, there shall be recoverable from him by that other party such sum (if any), not exceeding the value of that benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular —
>
> > (a) the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable

by that party under subsection (2); and

(b) the effect, in relation to the benefit, of the circumstances giving rise to the frustration of the contract.

(4) In estimating, for the purposes of this action, the amount of any expenses incurred by any party to the contract, the court may, without prejudice to the generality of this section, include such sum as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by that party.

(5) In considering whether any sum ought to be recovered or retained under this section by any party to the contract the court shall not take into account any sums which have, by reason of the circumstances giving rise to the frustration of the contract, become payable to that party under any contract of insurance unless there was an obligation to insure imposed by an express term of the frustrated contract or by or under any enactment.

(6) Where any person has assumed obligations under the contract in consideration of the conferring of a benefit by any other party to the contract upon any other person, whether a party to the contract or not, the court may, if in all the circumstances of the case it considers it just to do so, treat for the purposes of subsection (3) any benefit so conferred as a benefit obtained by the person who has assumed the obligations as aforesaid.

[emphasis added]

79 Pursuant to s 2(1), I conclude that the executed Tenancy Agreement became impossible of performance or was frustrated the moment the reply from the HDB was received (*ie*, 9 June 2009) and the parties thereto from that date have been discharged from further performance of the contract. Pursuant to s 2(2), I conclude two things:

(a) The remaining sums payable under the executed Tenancy Agreement cease to be payable by Sheng Siong.

(b) Sheng Siong is entitled to recover the sums paid to Carilla pursuant to the executed Tenancy Agreement (*ie*, the security deposit in the sum of $450,000 and the legal fee of $3,210.

80 However, pursuant to s 2(3), whatever were the expenses incurred by Carilla in relation to the A&A works and preparation of the proposal submitted to the HDB (*eg*, in developing the plans submitted to the HDB, engaging the firm of architects, *etc*) should be subtracted from this sum.

Miscellaneous issues

81 Counsel for Sheng Siong was rather over-zealous in his pleadings and submissions and raised the following additional issues most of which, to say the least, were without merit:

(a) That the executed Tenancy Agreement was not valid because of unilateral amendments made by Sheng Siong, a total failure of consideration of s 50 of the HDA;

(b) That the executed Tenancy Agreement ought to be set aside based on the plea of *non est factum*, common mistake or unconscionability on Carilla's part;

(c) That there was a collateral agreement that the lease was conditional on the Premises being capable of use as a supermarket and food court;

(d) That there was a collateral warranty on Carilla's part that, first, the Premises could be used to operate Sheng Siong's main supermarket and food court businesses and, second, that the HDB's categorisation of "Retail" included supermarket;

(e) That Carilla contravened ss 33 and 34 of the Legal Profession Act (Cap 161, 2009 Rev Ed).

82 With regard to validity of the contract, the terms of the executed Tenancy Agreement had been duly incorporated by signature and there was plainly no total failure of consideration: Sheng Siong benefited from Carilla's promise to lease the Premises and Carilla suffered a detriment in being deprived of negotiation with other potential tenants. Also s 50 of the HDA is not a bar to enforceability despite approval for the change of lease not having been obtained.

83 Similarly, it is almost self-evident that the executed Tenancy Agreement cannot be set aside on the grounds of *non est factum*, common mistake or unconscionability. Sheng Siong, in failing to read the document properly, was not eligible to invoke *non est factum* (following *United Dominions Trust Ltd v Western B S Romanay* [1976] QB 513). As to the contention that parties proceeded under the common assumption that the HDB would approve the usage of the Premises as a supermarket, I fail to see how the two parties would take for granted that the HDB would decide one way rather than another. Indeed, Sheng Siong adduced no evidence as to what basis the parties could have had for presuming so. Finally, I found the unconscionability allegation both speculative and lacking in evidential support.

84 With regard to the existence of either a collateral agreement or warranty, I find that Sheng Siong neglected to plead with sufficient particularity the contractual effect of the various statements, assurances and events which it presented as evidence. Nor did it plead the basic element of consideration or demonstrate that it entered into the executed Tenancy Agreement in reliance on the statements and assurances provided by Carilla. Besides, given that the executed Tenancy Agreement contains an entire agreement clause, it was difficult, too say the least, for Sheng Siong to plead that there was a collateral agreement.

85 Finally, Carilla contravened ss 33 and 34 of the Legal Profession Act by collecting a legal fee in the amount of $3,210 from Sheng Siong for the preparation of the executed Tenancy Agreement, although this became a non-issue since Sheng Siong acknowledged Carilla offered a few days before trial to return the fee.

Conclusion

86 There will, accordingly, be judgment for Sheng Siong in its claim for the return of the sum of $453,210 comprising the security deposit and the legal fee (see above at [20]).

87 However, I dismiss Sheng Siong's claim for reimbursement of the stamp duty of $22,954 paid to the Commissioner of Stamp Duties. Sheng Siong makes this claim on the basis that Carilla sent the executed Tenancy Agreement for stamping despite the HDB rejecting the proposal to use the Premises as, *inter alia*, a supermarket, on 27 April 2009 (see above at [11]–[12]) However, this argument overlooks the fact that the executed Tenancy Agreement was an instrument *required* to be stamped under the Stamp Duties Act (Cap 312, 2006 Rev Ed) and the parties would have been in breach of this Act had Carilla not sent the executed Tenancy Agreement for stamping.

88 I reject Carilla's counterclaim in its entirety (see above at [21]).

89 I will hear the parties on costs as well as on Sheng Siong's claim for interest on the sum of $453,210 (see above at [20]).