Strait Colonies Pte Ltd
v
SMRT Alpha Pte Ltd

[2018] SGCA 36

Court of Appeal — Civil Appeal No 100 of 2017
Tay Yong Kwang JA, Steven Chong JA and Quentin Loh J
16 April 2018

Contract — Misrepresentation — Rescission

4 July 2018

Tay Yong Kwang JA (delivering the judgment of the court):

Introduction

1 This appeal arose from an action for the payment of rent due under a lease over certain units in a shopping mall. The tenant's defence was that the landlord had misrepresented that the premises could be used for the operation of a pub, bar and club with live entertainment when the landlord had not obtained the requisite permission for these uses from the relevant authorities. The High Court Judge ("the Judge") accepted that the landlord had made misrepresentations but held that the tenant affirmed the contract after it had discovered the misrepresentations. The tenant appealed.

2 After hearing the parties' submissions, we dismissed the tenant's appeal with costs on the indemnity basis. The following legal issue arose in the appeal:

where misrepresentation is alleged in a contract and the representee has taken steps which are ostensibly and objectively acts of affirmation of the contract, is it necessary for the representee to know that he has a legal right to affirm or to rescind the contract before he can be said to have affirmed the contract or is it sufficient that he has knowledge of the relevant facts which entitle him to rescind the contract, irrespective of whether he also knows that he has the said legal right?

Facts

The parties

3 The respondent is the landlord and retail operator of Kallang Wave Mall ("the Mall") which is part of the Singapore Sports Hub. Apart from the Mall, the Singapore Sports Hub also comprises the National Stadium, the Singapore Indoor Stadium, the Aquatic Centre and the Water Sports Centre (collectively, "the Sports Facilities").[1]

4 The appellant is in the business of providing food and beverage ("F&B") and live entertainment services. Prior to the events relating to this dispute, it owned and operated a pub, bar and club named "China One" in Clarke Quay.[2]

Events leading up to the opening of the appellant's restaurant

5 On 17 September 2013, at the respondent's invitation, the appellant submitted a concept proposal and business budget plan for the lease of certain units ("the Premises") at the Mall. Following negotiations, the respondent gave the appellant a letter of offer dated 17 December 2013 ("the Letter of Offer")

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1 GD at [4].

2 ROA vol II, pp 17 and 20; ROA vol VC, p 258.

for a five-year lease. The Letter of Offer stated that the respondent permitted the appellant to use the Premises as a "Pub cum F&B – a spacious themed pool hall, bar and club … Live music and dance mix while party, play pool and chill-out". The appellant accepted the Letter of Offer on 19 March 2014, shortly after the Temporary Occupation Permit for the Sports Hub was issued.[3]

6 The parties prepared a five-year lease agreement ("the Lease Agreement") dated 8 April 2014. This stated again that the respondent permitted the appellant to use the Premises as a "pub cum F&B … providing live music and dance mix for partying playing pool and chilling out".[4]

7 On 15 May 2014, the respondent submitted an application to the Urban Redevelopment Authority ("the URA") for planning permission to change the use of the Premises from "restaurant" to "restaurant cum pub", among other things. The URA rejected the respondent's application on 20 June 2014, expressing "concerns that the proposed restaurant cum pub use would cause disamenity to the surroundings". The respondent then revised its proposal and the URA granted planning permission to change the use of the Premises to "restaurant with ancillary bar" for a period of three years ending 24 June 2017.[5]

8 The respondent conveyed the URA's decision to the appellant on 2 July 2014. The appellant requested a reduction in rent on the basis that it could no longer operate under the business model as initially planned but the parties did not reach any agreement. The parties signed the Lease Agreement sometime

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3 GD at [6].

4 GD at [7].

5 GD at [8]–[9].

after 25 August 2014. The appellant took possession of the Premises on 8 September 2014 and carried out fitting works until 8 November 2014.[6]

9 In the meantime, the appellant was in discussions with the URA which expressed its willingness to approve the Premises for use as a "restaurant with ancillary bar and ancillary live entertainment" as long as the respondent consented to this and confirmed that it would undertake to manage any complaints arising out from the appellant's operations at the Premises. The respondent was informed about this on 3 November 2014.[7]

10 On 7 November 2014, the appellant obtained a liquor licence from the Police Licensing & Regulatory Department ("PLRD") for permission to sell liquor at the Premises until 10pm. The appellant subsequently commenced business at the Premises on 8 or 9 November 2014.[8]

11 On 10 November 2014, the respondent gave the consent and undertaking required by the URA. On 27 November 2014, the URA gave its formal planning permission for the Premises to be used as a "restaurant with ancillary bar and ancillary live entertainment" for a period of one year, subject to review.[9]

12 On 4 December 2014, the PLRD issued to the appellant a revised liquor licence which extended the daily operating hours of the Premises to 11.59 pm. The revised licence was valid for one year from 4 December 2014 to

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6 GD at [10]–[11].

7 GD at [10] and [12].

8 GD at [13].

9 GD at [14].

3 December 2015. The appellant also obtained a public entertainment licence for the same period which permitted indoor live entertainment including dancing until 11.59 pm, and outdoor music until 10.30 pm. By 12 December 2014, the appellant's restaurant, bar and club on the Premises had become fully operational.[10]

Events following the opening of the appellant's restaurant

13 On 15 January 2015, the appellant paid the respondent the remaining rent for the month of December 2014, the first part having been paid in advance in May 2014. The appellant then began to fall behind in its payment of rent.[11]

14 On 12 February 2015, the respondent issued a supplemental letter to the Letter of Offer and the Lease Agreement informing the appellant of the actual floor area after final survey, which turned out to be slightly larger than the approximate floor area stated in the Letter of Offer and the Lease Agreement (expressed to be subject to final survey). The appellant objected to the corresponding increase in rent but again, the respondent did not agree to reduce the rent payable.[12]

15 On 28 April 2015, the respondent demanded payment of the outstanding rent for the period from January to April 2015, which amounted to $274,329.43. By way of cheques dated 15 May and 20 June 2015, the appellant made partial payments of $64,143.16 and $10,000 respectively towards the outstanding rent while continuing to ask for a reduction in rent.[13]

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10 GD at [15].

11 GD at [16].

12 GD at [17].

13 GD at [18]–[20].

16 On 14 September 2015, the respondent's solicitors issued a notice of forfeiture demanding payment of $551,166.88 and late payment interest within three days, failing which the respondent would exercise its right to terminate the lease by re-entering the Premises. The appellant requested a meeting to resolve the dispute. The parties met on 25 September 2015. The respondent requested the appellant to demonstrate its sincerity by paying 50% of the amount outstanding and indicated its willingness to explore other options including downsizing of the leased premises. It asked the appellant to propose a settlement plan by 30 September 2015.[14]

17 On 30 September 2015, the appellant ceased its operations and vacated the Premises. The respondent re-entered and repossessed the Premises the next day and found a new tenant to take over the lease of the Premises on 7 December 2016.[15]

Commencement of the suit

18 On 22 October 2015, the respondent commenced legal proceedings against the appellant, claiming:[16]

(a) $562,441.31, being the outstanding rent for the period from February 2015 to September 2015;

(b) late payment interest;

(c) $2,155,294.02, being damages suffered as a result of the appellant's repudiatory breach of contract; and

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14 GD at [21].

15 GD at [22].

16 ROA vol II, pp 8 and 13; GD at [23].

(d) costs on an indemnity basis as agreed under the Lease Agreement.

19 In its defence, the appellant averred that it had been induced to sign the Lease Agreement by the respondent's fraudulent, negligent and/or innocent misrepresentations that the appellant would be able to:[17]

(a) operate a pub, bar and club providing live entertainment services at the Premises ("the Representations on Live Entertainment");

(b) operate a pub, bar and club providing live entertainment services at the Premises until the early hours of the morning ("the Representations on Operating Hours");

(c) cater for the significant number of events and attendees at the Sports Hub including the Sports Facilities ("the Representations on Catering") when in fact, the Sports Hub had appointed an exclusive caterer for its events; and

(d) provide take-out F&B services for the significant number of events and attendees at the Sports Hub including the Sports Facilities ("the Representations on Take-out") when in fact, users of the Sports Facilities were prevented by the respective facilities' conditions of service from bringing in "outside food and beverage".

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17 GD at [24].

Accordingly, the appellant argued that the Lease Agreement should be set aside. The appellant also counterclaimed for damages for the respondent's alleged misrepresentations.[18]

The Judge's decision

20 The Judge held that the alleged representations at [19(b)]–[19(d)] above (*ie*, all of the alleged representations other than the Representations on Live Entertainment) were not proved.

(a) In regard to the Representations on Opening Hours, the Judge saw no express or implied representation that the appellant would be able to operate a pub, bar and club providing live entertainment until the early hours of the morning. The liquor and public entertainment licence applications had nothing to do with the respondent who could not be held responsible for the appellant's inability to obtain the licences. Further, the appellant could not be said to have relied on any such representation knowing that the operating hours depended on the licences that it had to apply for.[19]

(b) In regard to the Representations on Catering and the Representations on Take-out, the Judge found that the evidence fell short of proving that the respondent had expressly or impliedly represented that the appellant would be able to cater and to provide take-out F&B services for the Sports Hub's events and attendees. The Judge remarked that the evidence given by the appellant's director, Mr Tony Tan Hock Kian ("Tony"), at trial was "equivocal" on these points and it appeared

18 ROA vol II, pp 52–55.

19 GD at [36]–[37].

> that the appellant had simply assumed that it could cater for events (other than its own) at the Sports Hub and that its food and beverages could be brought into the Sports Facilities. The Judge added that the appellant did not even operate a catering business. It was a sole proprietorship owned by Tony that did.[20]

21 As for the Representations on Live Entertainment, the Judge agreed with the appellant that the respondent had made such implied representations by stating in the Letter of Offer that it permitted the appellant to use the Premises as a "Pub cum F&B" including a "bar and club" with "[l]ive music and dance mix". These representations were false and the respondent knew that they were false.[21] The Judge rejected the respondent's argument that the Representations on Live Entertainment had subsequently ceased to be false. The URA's decision to allow the Premises to be used as a "restaurant with ancillary bar and ancillary live entertainment" was not the same as the respondent's implied representations to the appellant. The Judge also rejected the argument that the parties had entered into a settlement agreement on 25 August 2014 as this was not pleaded by the respondent.[22] These parts of the Judge's decision were not challenged on appeal.

22 However, the Judge held that the appellant had affirmed the Lease Agreement and was therefore not entitled to rescind it for misrepresentation. The Judge found that the appellant had discovered the misrepresentation arising from the Representations on Live Entertainment at the latest by July 2014, yet

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20 GD at [39]–[42].

21 GD at [29] and [43].

22 GD at [44]–[48].

it took possession of the Premises in September 2014, carried out fitting works until November 2014, commenced business in November 2014 and paid rent.[23] The appellant relied on the English case of *Peyman v Lanjani* [1985] Ch 475 ("*Peyman*") at 487F–G for the proposition that an election to affirm a contract requires not only that the affirming party knows the facts giving rise to the right to rescind but also that the said party knows that the law gives him that right, yet he chooses with that knowledge not to exercise it. However, the Judge held that "the better view is that knowledge of the facts giving rise to the right to rescind is sufficient".[24] In any event, even if knowledge of the right to rescind was required, the Judge was satisfied on the basis of certain Whatsapp messages between Tony and the respondent's manager of leasing, Ms Elyn Tan Li Sin ("Elyn"), that the appellant was aware that it had such a right.[25]

23 The Judge therefore found that the appellant remained liable to pay rent and that its failure to do so breached the Lease Agreement. He held that the respondent had validly terminated the lease by re-entering the Premises according to cl 11.1 of the Lease Agreement and was entitled to recover the outstanding rent, late payment interest at 12% per year (pursuant to cl 13.2),[26] damages and costs on an indemnity basis (pursuant to cl 18.4.2).[27] The appellant did not challenge the respondent's computation of damages totalling $2,155,294.02.[28]

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23 GD at [49] and [59].

24 GD at [56].

25 GD at [57].

26 ROA vol VA, p 726.

27 ROA vol VA, p 729.

28 GD at [60]–[63].

24 In respect of the counterclaim, the Judge held that the appellant was only entitled to nominal damages for its misrepresentation claim based on the Representations on Live Entertainment. This was because there was no evidence of the loss suffered by the appellant as a result of the constraints imposed by the URA.[29]

25 The Judge entered judgment for the respondent for (a) $562,441.31 being outstanding rent and interest as at 1 October 2015, with interest at 12% per year on the principal sum of $538,942.94 from 1 October 2015 until payment, and (b) $2,155,294.02 being damages with interest at 5.33% per year from the date of the writ until judgment. The Judge awarded nominal damages of $5,000 for the appellant's counterclaim. Finally, the Judge awarded the respondent costs on an indemnity basis (as provided for under the Lease Agreement) fixed at $250,000 plus disbursements and GST.[30]

Appellant's case

26 The appellant first contended that the Judge erred in finding that the respondent had not made the Representation on Operating Hours whether expressly or impliedly. Specifically, it argued that:

(a) It was untrue that "[t]he application for the liquor and public entertainment licences had nothing to do with the [respondent]", as the Judge found.[31] Had the respondent applied for the change-of-use permit from the URA at the pre-contractual stage, the appellant would have

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29 GD at [71].

30 GD at [72].

31 GD at [36].

been put on notice regarding the PLRD's restrictions on opening hours before it executed the Letter of Offer and the Lease Agreement.

(b) Even though the appellant had the burden of obtaining licensing approvals from the PLRD, this did not change the fact that the respondent had misrepresented that the appellant could operate a live entertainment outlet until the early hours of the morning and the appellant relied on this misrepresentation. The evidence made it clear that the respondent knew at all material times that the appellant had intended for the Premises to operate beyond midnight.

27 Secondly, the appellant submitted that the Judge erred in finding that the respondent had not made the Representation on Take-out. It argued that:

(a) Two of its witnesses, its F&B Consultant, Mr James Wong Kang Kin, and its Project Manager, Mr Wan Yew Fai, testified that Elyn made the Representations on Take-out. The Judge also appeared to have relied only on Tony's testimony during cross-examination and ignored the subsequent clarifications he gave in re-examination.

(b) The respondent was aware that the appellant had devoted about one-fifth of the length of the Premises to providing take-out food. This was corroborative of the existence of the Representations on Take-out.

(c) Even if the Representations on Take-out were not expressly made, they were impliedly made. Elyn accepted in cross-examination that she had told the appellant that: (i) there would be large crowds attending the events at the Sports Hub; (ii) the Premises would be near the ticketing office where crowds would gather when entering the event premises and during intervals; and (iii) it would be good for the appellant

> to provide take-out food. The ordinary man would have understood this to mean that the crowds attending the Sports Hub events would be able to take away the appellant's food for consumption at the event premises.

The appellant did not challenge the Judge's findings in respect of the Representations on Catering.

28 Thirdly, the appellant contended that the Judge erred in finding that it had affirmed the Lease Agreement. It submitted that:

> (a) Its conduct did not amount to a clear and unequivocal election to affirm the Lease Agreement. This is a high threshold that was not met on the facts. All of the appellant's actions were in the context of ongoing negotiations for alternative leasing arrangements which were evidenced by the documentary exhibits. The appellant had also been in talks with the URA and the PLRD to try to mitigate the effect of the respondent's misrepresentations. It should have been entitled to rescind the Lease Agreement once the negotiations had broken down and this would be in line with the public policy of encouraging parties to negotiate settlements.
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> (b) Further or in the alternative, the appellant's election not to exercise its right to rescind and to proceed with the Lease Agreement was conditional upon the respondent agreeing to reduce the rent or otherwise taking all steps to accommodate the change in the appellant's business model necessitated by the respondent's misrepresentations. This could be inferred from certain e-mails and the fact that the parties had been in negotiations for a full year. As the respondent had failed to

meet these conditions, the appellant's right of rescission "re-emerged" and was exercised when it vacated the Premises.

(c) Moreover, its actions could not have amounted to affirmation when it did not know of its right to rescind the Lease Agreement at the material time. The Judge erred in law in holding that only knowledge of the facts was required for election, as cases such as *Wishing Star Ltd v Jurong Town Corp* [2005] 1 SLR(R) 339 ("*Wishing Star (HC)*"), *The Pacific Vigorous* [2006] 3 SLR(R) 374 and *Peyman* stand for the proposition that an election could only be made by someone with full knowledge of his legal rights. The Judge also erred in finding on the facts that, in any event, the appellant was aware of its rights when it made its election.

29 The appellant submitted that it was entitled to the recovery of a total of $3,318,447.18, being the loss it suffered in reliance on the respondent's misrepresentations. Should the respondent be found liable for innocent misrepresentation rather than fraudulent misrepresentation or negligent misrepresentation under s 2(1) of the Misrepresentation Act (Cap 390, 1994 Rev Ed), then the appellant submitted that it would be entitled to an indemnity of all obligations under the Lease Agreement and all losses incurred in the course of carrying out such obligations.

Respondent's case

30 The respondent argued that the appellant had not articulated any compelling reason for the Judge's findings on any of the issues to be overturned. In particular, it pointed out that the appellant's continued possession of the Premises and its payment of rent, amongst its other acts, amounted to unequivocal acts of affirmation. Further, the respondent submitted that Tony (as

the appellant's representative) knew of his legal right to rescind the Lease Agreement at the material time, as evidenced by the testimony of the appellant's witnesses at trial and certain Whatsapp conversations. All this evidence was considered by the Judge.

31 The respondent also submitted that the Judge was correct in holding that the law does not require a representee to know its legal rights before it affirms a contract. The respondent contended that the judicial pronouncements in the local cases cited by the appellant, such as *Wishing Star (HC)* and *The Pacific Vigorous*, were made *obiter* and without full arguments and that other local cases such as *Goldzone (Asia Pacific) Ltd v Creative Technology Pte Ltd* [2011] SGHC 103 ("*Goldzone*") and *Aero-Gate Pte Ltd v Engen Marine Engineering Pte Ltd* [2013] 4 SLR 409 ("*Aero-Gate*") generally held that it was sufficient that the representee had full knowledge of the facts when affirming the contract.

Issues

32 The following issues arose in this appeal:

(a) whether the Judge erred in finding that the respondent had not made the (alleged) Representations on Operating Hours;

(b) whether the Judge erred in finding that the respondent had not made the (alleged) Representations on Take-out; and

(c) whether the Judge erred in finding that the appellant had affirmed the Lease Agreement and was therefore not entitled to rescind it for misrepresentation and in particular:

(i) that the appellant had made a clear and unequivocal election to affirm the Lease Agreement;

(ii) that the appellant did not need to know its legal right to rescind the Lease Agreement in order to affirm it, as the appellant's knowledge of the relevant facts was sufficient; and

(iii) that, in any event, the appellant knew its legal right to rescind the Lease Agreement when affirming it.

Whether the respondent made the Representations on Operating Hours

33 The legal principles relating to the elements of actionable misrepresentation are not disputed by the parties. In the contractual context, the elements are satisfied when a party relies on a false representation in entering into the contract with the representor. A representee who can establish misrepresentation will be entitled, as a general rule, to rescind the contract such that the parties are restored to their pre-contractual positions (*RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 at [56]; *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 11.003 and 11.006).

34 The appellant's first contention was that the Judge had erred in finding that the respondent had not made the Representations on Operating Hours and that the appellant would not have relied on any such representations even if they had been made. It suffices for us to address this issue briefly as we saw no reason to disturb the Judge's findings in this regard.

35 Even if the respondent was aware that the appellant intended to operate its business at the Premises beyond midnight, this still did not detract from the Judge's reasoning that the appellant knew that the operating hours for selling alcohol and providing live entertainment were contingent upon the PLRD's

grant of the relevant licences. Clause 2(b) of the Letter of Offer and cl 5.1.2 of the Lease Agreement made clear that the responsibility lay with the appellant to apply for these licences.[32] We agree with the Judge that there was no express representation as to the operating hours of the Premises, nor any reason to imply any such representation. Moreover, the appellant would have been familiar with these licensing requirements especially considering that it was running a pub in Clarke Quay at the material time. It could not possibly have relied on any representation from the appellant as to how late the Premises would be allowed to be open for business.

36 The appellant attempted to link this issue to the Representations on Live Entertainment (in relation to which the Judge found that there was actionable misrepresentation) by arguing that it would have applied to the PLRD earlier and would have been put on notice as to the PLRD's restrictions on opening hours sooner, if the respondent had sought and obtained permission from the URA prior to entering into the Lease Agreement. This argument was logically unsustainable as it ignored the above point that it was still ultimately incumbent upon the appellant to apply for the licences. If the appellant had indeed believed and relied on the Representations on Live Entertainment, then there was no reason why it delayed in applying for the relevant licences from the PLRD. This delay was certainly not attributable to the respondent. For these reasons, we rejected the appellant's submissions regarding the Representations on Opening Hours.

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[32] ROA vol VA, pp 507 and 700.

Whether the respondent made the Representations on Take-out

37 In our judgment, the appellant's arguments regarding the Representations on Take-out similarly lacked merit. The appellant was not able to point to any evidence that could show convincingly that the respondent had indeed represented that the appellant would be able to provide take-out F&B services to the users of the Sports Facilities.

38 The appellant relied on assertions made in the testimony of its F&B Consultant and its Project Manager, as well as Tony's testimony during re-examination that Elyn (as the respondent's representative) had in fact made clear representations to this effect. This evidence was expressly considered by the Judge who found Tony's statements at trial "equivocal" when considering the totality of his evidence.[33] Contrary to the appellant's submissions on appeal, the Judge did not ignore Tony's evidence during re-examination that Elyn had said "guests may take things into the stadium and into the nearby places". The Judge preferred Tony's original answer during cross-examination that the respondent had simply not informed him of the prohibition against "outside food and beverages" in the Sports Facilities. The Judge also took into account the testimony of the appellant's other witnesses and noted that the appellant's F&B Manager stated that he had "thought" that they would have some takeaway business. The Judge considered that this indicated that the appellant had made assumptions as to whether food could be brought into the Sports Facilities.[34] We were not satisfied that any of these findings of fact should be overturned on the available evidence.

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33 GD at [40]–[42].

34 GD at [42].

39 Further, the appellant was not prevented from offering take-out F&B services entirely. It was only that the appellant's F&B items could not be brought into the Sports Facilities. The appellant was still able to sell take-out food and drinks to users of the Sports Hub, patrons of the restaurant who were not entering the Sports Facilities and users who had left the Sports Facilities. It followed therefore that the appellant's argument that it had devoted about one-fifth of the length of the Premises to providing take-out food and that the respondent was aware of it could not establish that the relevant representations had been made.

40 The Judge therefore did not err in finding that the Representations on Take-out had not been expressly or impliedly made. This meant that only the Representations on Live Entertainment amounted to actionable misrepresentations and the question thus turned to whether the appellant was entitled to rescind the Lease Agreement.

Whether the appellant affirmed the Lease Agreement

41 The appellant's primary contention in this appeal was that the Judge erred in finding that the appellant had affirmed the Lease Agreement and was therefore not entitled to rescind it for misrepresentation arising from the respondent's Representations on Live Entertainment. Specifically, the appellant contested the following findings of the Judge in fact and law:

(a) first, that the appellant had in fact made a clear and unequivocal election to affirm the Lease Agreement;

(b) second, that it was sufficient as a matter of law that the appellant knew the facts when affirming the Lease Agreement, whether or not it was aware of its legal right of rescission; and

(c) third, that in any case, the appellant knew its legal right to rescind the Lease Agreement when affirming it.

Whether there was clear and unequivocal affirmation

42 A binding election requires the injured party to communicate his choice to the other party in clear and unequivocal terms and he will not be bound by a qualified or conditional decision (*Jurong Town Corp v Wishing Star Ltd* [2005] 3 SLR(R) 283 ("*Wishing Star (CA)*") at [171(a)]). The conduct constituting affirmation "must be unequivocal in the sense that it is consistent only with the exercise of one of the two sets of rights and inconsistent with the exercise of the other" (*Sargent v ASL Developments Ltd* (1974) 131 CLR 634 ("*Sargent*") at 646). This Court stated in *Wishing Star (CA)* at [171(b)] that such conduct can be express or implied. In other words, the appellant must have made a clear and unequivocal election to affirm the Lease Agreement in order for such an election to be binding upon it.

43 The appellant's case was that its conduct did not evince clearly and unequivocally an intention to affirm the Lease Agreement as its actions were taken in the context of ongoing negotiations for alternative leasing arrangements. It had sought an urgent meeting on 2 July 2014 to negotiate with the respondent and it was at this meeting that the parties had purportedly reached a "gentlemen's agreement" to renegotiate the rent.[35] According to the appellant, these negotiations lasted for over a year until September 2015 (see [16] above).

44 We were unable to agree with the appellant's submissions. The parties signed the Lease Agreement on 25 August 2014, which was more than a month

[35] AC, para 35.

after the URA's decision to allow the operation of a "restaurant with ancillary bar" was communicated to the appellant (see [7] above). Counsel for the appellant conceded at the hearing that the appellant did not make any qualification when entering into the Lease Agreement, even though it was open to the appellant to do so. As the Judge noted, there was similarly insufficient evidence that the appellant had acted under protest when it later: (a) took possession of the Premises in September 2014; (b) commenced business in November 2014; and (c) paid rent for December 2014 and made other subsequent payments.[36]

45 Rather, the negotiations for rent appeared to be quite separate from these actions undertaken by the appellant. In particular, certain negotiations on rent had been precipitated largely by the increase in floor area of the Premises after the final survey, as well as other complaints unrelated to the Representations on Live Entertainment such as ones relating to car park space, road closures, air-conditioning issues, WiFi, opening hours, catering and take-out.[37] This suggested that the appellant's unsuccessful attempts to negotiate the reduction of rent were not tied to its clear actions in affirming the Lease Agreement.

46 The appellant was unable to point to any evidence that supported the existence of any gentlemen's agreement reached by the parties at the meeting on 2 July 2014. E-mails showing the respondent's willingness to consider the appellant's proposals and its acknowledgment that a refusal by the URA to accede to the appellant's request for change of use of the Premises might

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36 GD at [50].

37 See CB vol II, pp 72–76 and 207–210.

"potentially become a deal-breaker"[38] did not suffice for this purpose. Tony conceded during his cross-examination that the respondent had never agreed to reduce the appellant's rent.[39] Indeed, on the written terms of the Lease Agreement, the respondent was not obliged to do so. Nothing could be inferred from the fact that the parties had been in negotiations for over a year, especially considering that these negotiations were initiated repeatedly by the appellant and rejected by the respondent.

47 For the same reasons, we disagreed with the appellant's related argument that its affirmation was conditional upon the respondent agreeing to reduce the rent or otherwise taking all steps to accommodate the change in the appellant's business model necessitated by the respondent's misrepresentations. If the appellant had truly intended its affirmation of the Lease Agreement to be conditional upon certain actions by the respondent, it was difficult to see why there were no documents in which it made its intention known.

Whether a representee needs to know of his legal rights before affirmation

48 The appellant submitted that the Judge was wrong in holding that affirmation of a contract only requires the affirming party to have knowledge of the facts giving rise to his right to rescind and that it is not necessary for that party to know in law that he has such a right to rescind. It appears that local and foreign case authorities have expressed differing views on this issue.

49 The main case relied on by the appellant was *Peyman* in which May LJ, sitting in the English Court of Appeal, remarked (at 494):

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38 Appellant's Case, para 60.

39 Respondent's Case, para 4(c), citing the Respondent's Supplemental Core Bundle of Documents ("RSCB"), pp 107–108.

> … I do not think that a party to a contract can realistically or sensibly be held to have made this irrevocable choice between rescission and affirmation unless he has actual knowledge not only of the facts of the serious breach of the contract by the other party which is the pre-condition of his right to choose, but also of the fact that in the circumstances which exist he does have that right to make that choice which the law gives him…

Slade LJ concurred, stating (at 500) that he did "not think that a person … can be held to have made the irrevocable choice between rescission and affirmation which election involves unless he had knowledge of his legal right to choose and actually chose with that knowledge". Slade LJ's comments were quoted with approval by the Singapore High Court in *The Pacific Vigorous* at [23].

50 *Peyman* was also cited with approval in another Singapore High Court case, *Wishing Star (HC)*. The High Court there said (at [15]):

> … One cannot make an election whether of or on facts. An election can only be made as regards one's rights. Naturally, such an election is impossible unless he knows that he has a right upon which to make a choice. Further, in order that he may exercise his choice, it would also be necessary for him to be informed of the facts because a decision whether to insist on his rights depends on the contextual background, and that can only be provided by a knowledge of the facts…

Although *Wishing Star (HC)* was overruled on appeal, the Court of Appeal in *Wishing Star (CA)* did not make any comments regarding this aspect of the High Court's decision.

51 In another local case, *Chng Heng Tiu v Sime Derby Holdings Ltd* [1977–1978] SLR(R) 372 ("*Chng Heng Tiu*") at [33], the High Court remarked that "only when a party to a contract has become aware of his rights or his strict rights at law can he elect to reject or affirm."

52 The respondent submitted that the statements relied upon by the appellant in the above-cited local cases of *The Pacific Vigorous*, *Wishing Star (HC)* and *Chng Heng Tiu* were *obiter dicta*:

(a) In *The Pacific Vigorous*, Belinda Ang J held at [18]–[22] that the plaintiff did not have two inconsistent rights to choose from and thus the doctrine of election was inapplicable. Further, the plaintiff's conduct was not sufficiently unequivocal for it to amount to an act of election. This case was expressly considered in *Aero-Gate*, where Vinodh Coomaraswamy J remarked at [42] that "Ang J in *The Pacific Vigorous* did not say that this knowledge [of the right to terminate the contract] was required" and he decided to leave the question open as it was not necessary to determine it on the facts of that case.

(b) In *Wishing Star (HC)*, Choo Han Teck J held at [12] that the plaintiff's misrepresentations had not induced the defendant to enter into the contract. Choo J also found that the defendant did in fact have knowledge of its legal right to rescind the contract (at [16]).

(c) In *Chng Heng Tiu*, the defendant unsuccessfully argued that the plaintiff had affirmed the contract by taking five weeks to seek legal advice before exercising its right to terminate it. D'Cotta J's statement at [33] that a party must be aware of his rights before he can elect to rescind or to affirm was made in the context of rejecting the defendant's argument in this regard and he did not consider whether knowledge of the facts would have been sufficient. Indeed, the English cases relied upon by D'Cotta J at [30]–[32] stand for the proposition that the electing party's duty to take action only arises when he knows all the facts and that he must have reasonable time to make up his mind: see *McCormick*

> *v National Motor & Accident Insurance Union* (1934) 49 Ll L Rep 361 at 365.

53 The respondent in turn relied on two local High Court cases in support of its case. In *Song Ching Pte Ltd v Amara Hotel Properties Pte Ltd* (Civil Appeal No 8 of 1991), reported in 3(2) *Mallal's Digest* (4th ed, LexisNexis, 2009 Reissue) at 953, it was held that "affirmation of a contract was complete and binding when the representee, with full knowledge of the facts and of the representation, either declares his intention to proceed with the contract or does some act from which such an intention may reasonably be inferred". In *Goldzone*, Andrew Ang J noted *obiter* at [39] that "no election can be said to have been made unless the misled party is broadly aware of the true facts."

54 The respondent further cited *Chai Cher Watt (trading as Chuang Aik Engineering Works) v SDL Technologies Pte Ltd and another appeal* [2012] 1 SLR 152, where this Court did not find it necessary to determine this issue on the facts of the case but remarked nonetheless at [34]:

> … As to what knowledge is relevant, it would appear that the party waiving his right should at least have knowledge of the facts giving rise to those rights. (Note, however another view espoused in *Peyman* … that there must be knowledge of the *existence* of contractual rights themselves, at least in so far as they are express contractual rights, though this decision has been critiqued by The Hon Mr Justice K R Handley, in *Estoppel by Conduct and Election* (Thomson/Sweet & Maxwell, 2006), especially at para 14-015)… [emphasis in original]

As the Court noted in the above passage, the *Peyman* decision has been criticised by Handley J in *Estoppel by Conduct and Election*, as well as in a separate article, K R Handley, "Exploring Election" (2006) 122 LQR 82 ("*Exploring Election*"): As Handley J states in *Exploring Election* at p 96, "[i]n so far as *Peyman* … held that there can be no election without knowledge of the

right to elect, it was wrongly decided". We will discuss this in greater detail subsequently.

55 The above cases show that the law in Singapore on this specific legal issue is unsettled and that the relevant judicial pronouncements made by our courts thus far were *obiter dicta*. After hearing the parties on this issue, we declined to follow *Peyman* for the reasons that follow.

56 First, the factual circumstances in *Peyman* were quite unusual. The plaintiff in that case was an Iranian who spoke no English. The plaintiff entered into an agreement to purchase a leasehold interest from the 1st defendant. The 1st defendant's title to the lease was defective as he had arranged for a third party to impersonate him at interviews with the landlords' managing agents because he feared that the agents would not recommend assigning the lease to someone with his profile and scruffy appearance. When the plaintiff was later faced with the choice of whether to affirm or to rescind his contract, he was advised erroneously to continue with the contract by the 2nd defendant, a solicitor who was acting improperly for both the plaintiff and the 1st defendant at the same time. As the Judge noted,[40] the authors of *The Law of Contract* (Michael Furmston, ed) (LexisNexis, 4th Ed, 2010) ("*Furmston on Contract*") express the view (at p 930) that *Peyman* "might be seen in the context of its special facts, notably, the helplessness of [the plaintiff], however, commercial law rarely makes allowance for ignorance of language or of local law".

57 Second, as Handley J observes in *Exploring Election* at p 96, the *Peyman* decision was based on the *dictum* of Lord Blackburn in *Kendall v Hamilton* (1879) 4 App Cas 504 ("*Kendall*") at 542 which must be read in its

[40] GD at [54].

proper context. Lord Blackburn was quoted in *Peyman* (at 482) as saying that "there cannot be election until there is knowledge of the right to elect". However, as Handley J points out, *Kendall* "had nothing to do with election", and Lord Blackburn was in fact really referring to the plaintiffs' knowledge of the facts (*Exploring Election* at pp 84 and 86). In two other cases, Lord Blackburn also articulated his view that knowledge of the facts is sufficient for a person to make an election between his rights (*Exploring Election* at pp 83–85, citing *Scarf v Jardine* (1882) 7 App Cas 345 at 360–361 and *Clough v London and North Western Railway Co* (1871) 7 Ex 26 at 34).

58 Another English case cited in *Peyman* (at 483–484) and relied upon by the appellant was *Evans v Bartlam* [1937] AC 473 ("*Evans*"), a House of Lords decision in which Lord Atkin said, "to infer election it must be shown that the person concerned had full knowledge of the various rights amongst which he elects" (at 479). However, Lord Russell expressed the conflicting view (at 483) that "[t]he doctrine of election only applies to a man who elects with full knowledge of the facts". In any case, *Evans* was about the question of whether a defendant against whom a default judgment is entered is taken to have elected to treat the judgment as valid when he obtains a stay of execution for more time to make payment. The House of Lords was not referred to and did not deal with the authorities on election between rights (*Exploring Election* at p 88). Another case, *Young v Bristol Aeroplane Co Ltd* [1946] AC 163 was cited in *Peyman* (at 483–484) but that case turned on a question of statutory construction and, as Handley J opines, provides no support for *Peyman* either (*Exploring Election* at p 89).

59 Counsel for the appellant acknowledged that *Peyman* has not been followed in any subsequent English decisions. In the later House of Lords case of *The Kanchenjunga* [1990] 1 Lloyd's L R 391 (see *Wishing Star (HC)* at [15]),

Lord Goff observed (at 399) in the context of an uncontractual tender of performance that "if, with knowledge of the facts giving rise to his right to reject, [a party] nevertheless unequivocally elects not to do so, his election will be final and binding upon him and he will have waived his right to reject the tender as uncontractual". However, Lord Goff had said earlier in that decision that it was not necessary for him to consider the cases in which it had been held that, as a prerequisite of election, the party must be aware not only of the facts giving rise to his rights but also of the rights themselves because it was not in dispute in the case before him that the relevant party was aware both of the facts and of its rights (at 398).

60 The Australian courts have departed from the *Peyman* position. In *Sargent* at 658, the High Court of Australia stated expressly that "knowledge of the existence of the alternative right, as distinct from knowledge of the facts giving rise to the right, is not essential to the making of a binding election." As the Judge noted, the authors of Dominic O'Sullivan, Steven Elliott & Rafal Zakrzewski, *The Law of Rescission* (Oxford University Press, 2008) at paras 23.34–23.49 came to the same conclusion as the High Court of Australia did in *Sargent* after having reviewed the English and Australian authorities on this question.[41]

61 Finally, in our view, the policy considerations are firmly in favour of the respondent's position. As a general principle, no one should be allowed to benefit from his ignorance of the law. As described in the following passage by Handley J in *Exploring Election* (at p 97) quoted in the Judge's decision below:[42]

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41 GD at [55].

42 GD at [53].

> … Ignorance of the law is generally treated as a misfortune, not an advantage. In *Hourigan v Trustees Executors & Agency Co Ltd* Dixon J quoted Knight Bruce LJ saying in 1857 "generally when the facts are known … the right is presumed to be known".
>
> Disputes about an election normally arise because the other party relies on an earlier election to defeat a later attempt to elect the other way. Legal professional privilege would make it difficult for that party to prove that the elector was aware of his right at the earlier time. A rule that knowledge of the right had to be proved would encourage perjury and reward those who do not seek advice …

The appellant's position that knowledge of one's legal rights is required for affirmation could lead to unfairness if the representee is allowed to hide behind his ignorance of the law and to choose deliberately not to seek legal advice.

62 There are also considerable practical difficulties in real life if the appellant's position is correct. When a representor is faced with what ostensibly and objectively are acts of affirmation by a representee, would he have to inquire further and seek confirmation from the representee that he was aware of his contractual rights when he did the said acts in spite of the misrepresentation? Further, it is often the case (as it was in the present case) that the representor does not even accept that there was misrepresentation in the first place. There would therefore be no reason for him to even make such an inquiry. Moreover, short of the representee stating expressly when he did the said acts that he was aware of his contractual rights or admitting such knowledge subsequently, how is the representor going to prove that the representee possessed the requisite knowledge of his legal rights when affirming the contract? It will often be an impossible task to inquire into or to find objective evidence of the representee's subjective state of mind.

63 Perhaps one way of proving knowledge of legal rights is by showing that the representee had legal advice when he did the acts in ostensible affirmation

of the contract. However, how does one show what sort of legal advice was given when solicitor-client privilege stands firmly in the way? Other problems may also arise. For instance, what is the significance of a representee's delay in seeking legal advice, as the appellant did in the present case? What happens if the legal advice obtained by the representee is erroneous or defective, as it was on the facts of *Peyman*? These are some of the thorny questions which may have be dealt with if the court is required to inquire into whether a party had knowledge of his legal right of rescission before his affirmation could be regarded as binding. Commercial relationships may then become fraught with uncertainty. As the authors of *Furmston on Contract* at p 930 opine, "a rule by reference to actual knowledge of rights makes it very difficult for the other party to decide whether he can safely rely on what appears to be affirmation".

64 Having considered the local and foreign case authorities, the criticism of *Peyman* and the relevant policy considerations, we are of the view that knowledge of the facts giving rise to the right of rescission is sufficient for affirmation to take place. In the present case, it was therefore not necessary for the respondent to show that the appellant knew of its legal right to rescind the Lease Agreement when it did the acts in apparent affirmation of that agreement despite having known about the misrepresentation.

65 At the hearing, counsel for the appellant advanced the further argument that even if knowledge of the facts is ordinarily sufficient for a binding election to be made, knowledge of the legal right is nonetheless required when a party is said to have affirmed a contract in spite of fraudulent misrepresentation. In support of this proposition, counsel cited the Supreme Court of Victoria case of *Coastal Estates Pty Ltd v Melevende* [1965] VR 433 ("*Coastal Estates*") at 435, which was cited in *Peyman* at 489 and *Sargent* at 657. However, a closer reading of the case will show that Herring CJ, in distinguishing cases involving

fraudulent misrepresentation, was merely expressing the view that a representee in such a case cannot be presumed to have knowledge of his right to elect under the contract. Ultimately, the court in *Coastal Estates* adopted the same approach as was taken later in *Peyman*, on the basis of its interpretation of Lord Blackburn's "general principle" in *Kendall* that a party cannot make a biding election until he has knowledge of the right to elect. As mentioned at [60] above, this view was rejected conclusively by the High Court of Australia in *Sargent*.

66 Although Mason J noted in *Sargent* (at 658) that the court did not need to determine whether cases involving fraudulent misrepresentation should be treated any differently from other cases involving election between rights, he remarked that "it should be kept firmly in mind that the doctrine of election is of general application and that no good purpose is to be served by drawing distinctions in its various applications unless considerations of justice make it necessary or expedient so to do." We were unable to see any special considerations in cases involving fraudulent misrepresentation which would warrant a derogation from the general principle that the representee's knowledge of the facts is sufficient. At the time of the affirmation, a representee who is aware of all the relevant facts would not be under any misapprehension caused by the misrepresentation. There is therefore no need to accord such a representee additional protection from any potential unfairness. On the basis of the Judge's finding that the respondent had made the Representations on Live Entertainment with the knowledge that they were false (see [21] above), the elements of fraudulent misrepresentation were made out in this case but this was ultimately of no assistance to the appellant's case on the issue of affirmation.

Whether the appellant knew of its legal right to rescind the Lease Agreement

67 In any event, we saw no reason to depart from the Judge's finding of fact that the appellant was aware of its legal right of rescission when it affirmed the Lease Agreement. In reaching this finding, the Judge relied mainly on certain Whatsapp messages between Tony and representatives of the respondent on 1 and 2 August 2014.[43] In one message, Tony said that he hoped that the parties could "close the case" at the meeting "or [the appellant] may have to close this chapter". In another message, Tony was told that the respondent would try to secure more season parking lots for the appellant and his reply was as follows:[44]

> This is the least that is there before we have to walk away.
>
> URA clause stated very clearly. Very dangerous for us to proceed without support from landlord themselves.

68 The appellant attempted to explain that Tony had simply meant that he would need to seek legal help when he said in these messages that the appellant might have to "close this chapter" and that "walk away" had only meant that the respondent could not move forward. Neither of these explanations was convincing as they did not accord with the context and the wording of Tony's messages. Instead, as the Judge found, the messages showed that Tony believed that the appellant could have walked away from the Lease Agreement without being in breach. The respondent further pointed out that Tony was being advised by a project manager from Strix Strategies Pte Ltd at the time and was himself a savvy businessman who had incorporated several legal entities with the intention of having them operate at the Premises.[45]

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43 GD at [57].

44 RSCB, pp 11–12.

45 RC, para 73.

69 There was limited evidence on this issue. Again, this underscored the practical difficulty of proving that a representee possessed the requisite knowledge of his legal rights (see [62] above). We saw no basis to disagree with the Judge's finding on the available evidence that the appellant was aware of its right to rescind the Lease Agreement at the time of its affirmation. As a result, we upheld the Judge's conclusion that the appellant had affirmed the Lease Agreement by its actions and was no longer entitled to rescind it for misrepresentation.

Conclusion

70 For the above reasons, we dismissed the appeal and ordered $60,000 costs (inclusive of disbursements) against the appellant on an indemnity basis, as provided under cl 18.4.2 of the Lease Agreement.[46]

Tay Yong Kwang Judge of Appeal	Steven Chong Judge of Appeal	Quentin Loh Judge

Suhaimi bin Lazim and Chiong Song Ning (Mirandah Law LLP) for the appellant;
Ling Tien Wah, Wah Hsien-Wen Terence and Chew Di Shun Dickson (Dentons Rodyk & Davidson) for the respondent.

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[46] ROA vol VA, p 729.