IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 9

Suit No 774 of 2020

Between

(1) Saha Ram Krishna
(2) Jay Mondal
(3) J M Business World Pte Ltd

… *Plaintiffs*

And

Tan Tai Joum
(acting in his capacity as the personal representative of the estate of Tan Hee Liang, deceased)

… *Defendant*

GROUNDS OF DECISION

[Contract — Breach]
[Contract — Contractual terms — Implied terms]
[Contract — Discharge — Breach]
[Contract — Remedies — Damages]
[Contract — Remedies — Mitigation of damage]

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Saha Ram Krishna and others
v
Tan Tai Joum
(acting in his capacity as the personal representative of the estate of Tan Hee Liang, deceased)

[2024] SGHC 9

General Division of the High Court — Suit No 774 of 2020
Vinodh Coomaraswamy J
12–13, 17–18 January, 17, 25 April 2023

23 January 2024

Vinodh Coomaraswamy J:

Introduction

1 This is an action brought by three tenants against their landlord. Each side claims that the other is in breach of the tenancy agreements between them and asks for an award of substantial damages against the other.

2 The tenants are the plaintiffs in this action. The third plaintiff is a company incorporated in Singapore in 2017 to carry on business as a restaurant.[1] The first plaintiff was one of the third plaintiff's directors from the time of its

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[1] SOC(A3) at para 4.

incorporation until he resigned in January 2019.[2] The second plaintiff has been the majority shareholder of the third plaintiff and one of its directors from the time of its incorporation until trial.[3] It is not necessary to distinguish between the plaintiffs in deciding any of the issues that arise in this action. I shall therefore use the term "the plaintiffs" to refer to any one or more of the plaintiffs.

3 The plaintiffs originally named their landlord, one Mr Tan Hee Liang, as the defendant in this action. But in March 2021, about seven months after this action was commenced, Mr Tan Hee Liang died.[4] In July 2021, Mr Tan Tai Joum substituted himself for Mr Tan Hee Liang as the defendant in this action.[5] Mr Tan Tai Joum is Mr Tan Hee Liang's son and the administrator of his estate.[6]

4 Mr Tan Tai Joum was not personally involved in any of the events that are material to the dispute between the parties.[7] Only Mr Tan Hee Liang was personally involved in those events. I shall therefore use the term "the defendant" to refer to Mr Tan Hee Liang and his estate rather than to Mr Tan Tai Joum in any capacity.

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2 Exhibit D1 (Accounting and Corporate Regulatory Authority (ACRA) People Profile Search on 1st Plaintiff); Transcript, 12 January 2023 at p 8, lines 4–20.

3 Affidavit of Evidence–in–Chief of Jay Mondal affirmed on 17 October 2022 at para 1; Affidavit of Evidence–in–Chief of Tan Tai Joum affirmed on 19 September 2022 ("TTJ's AEIC") at p 93 (Tab 3: Accounting and Corporate Regulatory Authority (ACRA) Business Profile Search on 3rd Plaintiff dated 29 October 2020 at p 3); Statement of Claim (Amendment No. 3) dated 28 November 2022 ("SOC(A3)") at para 3.

4 Affidavit of William Ong Meng Hwa affirmed on 26 July 2021 at para 6.

5 HC/ORC 4720/2021 dated 31 July 2021 filed 23 August 2021.

6 TTJ's AEIC at para 1.

7 TTJ's AEIC at para 2.

5 The subject-matter of the tenancy agreements between the plaintiffs and the defendant is a three-storey shophouse owned by the defendant at 29 Lembu Road, Singapore 208456 ("the Property").[8] In December 2018, the defendant granted a tenancy of the Property to the three plaintiffs jointly and severally under two tenancy agreements.[9] The first tenancy agreement was for the first storey of the Property. The second tenancy agreement was for the second and third storeys of the Property. The plaintiffs intended to operate a restaurant at the first storey and to house the restaurant's employees on the second and third storeys.[10]

6 In February 2019, certain issues arose with the regulatory authorities about the approved use of the Property under the Planning Act (Cap 232, 1998 Rev Ed) ("Planning Act") and about the lawfulness of the construction of the third storey. The plaintiffs entered into correspondence with the defendant and with the regulatory authorities to address these issues.

7 The plaintiffs ceased paying rent under both tenancy agreements in late 2019. In January 2020, the plaintiffs yielded up the Property to the defendant. The plaintiffs and the defendant now accuse each other of having breached the tenancy agreements.

8 I have held as follows.

(a) The two tenancy agreements are separate and independent agreements. The plaintiffs committed a breach of the first tenancy

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8 Affidavit of Evidence–in–Chief of Saha Ram Krishna affirmed on 17 October 2022 ("SRK's AEIC") at para 5; TTJ's AEIC at para 3.

9 SRK's AEIC at para 9.

10 SRK's AEIC at para 11.

agreement by ceasing to pay rent under it in late 2019 and by yielding up the first storey to the defendant before the end of the first tenancy agreement's term. The plaintiffs are therefore liable to the defendant in damages for breaching the first tenancy agreement.

(b) The defendant committed a repudiatory breach of an implied term of the second tenancy agreement under which the defendant warranted that the third storey had been constructed lawfully.

(c) But the plaintiffs affirmed the second tenancy agreement with knowledge of the defendant's repudiatory breach. The plaintiffs therefore have only a right to recover damages from the defendant for breach of contract and have lost the right to terminate the second tenancy agreement for repudiatory breach of contract. The plaintiffs therefore committed a breach of the second tenancy agreement by ceasing to pay rent under it in late 2019 and by yielding up the second and third storeys to the defendant before the end of the second tenancy agreement's term.

(d) The plaintiffs and the defendant are therefore liable to each other in damages for their respective breaches of the second tenancy agreement.

9 The plaintiffs have appealed against my decision to the Appellate Division of the High Court. I now set out the detailed grounds for my decision.

Factual background

The Property

10 The defendant bought the Property in November 1999.[11] The Property was constructed in Little India before the Second World War. Little India has since been gazetted under the Planning Act as a historic district.[12] Since the gazetting, and by reason of it, the Property has been a conservation property.

11 The Property is the only three-storey shophouse on Lembu Road.[13] All the other shophouses there are two-storey shophouses.[14] It is accordingly not disputed that the Property was constructed as a two-storey shophouse. It is not clear from the evidence precisely when or by whom the third storey was constructed. But the earliest record in the evidence of the existence of a third storey is a document from 2002.[15]

12 The defendant has produced some correspondence between himself or the plaintiffs' predecessors as tenants of the Property, on the one hand, and the Urban Redevelopment Authority ("the URA") or the Building Control Authority ("the BCA"), on the other. It appears from this correspondence that the URA and the BCA considered the Property to be a two-storey shophouse even in 2006 and as recently as 2012. The details of the correspondence are set out in the following paragraphs.

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11 TTJ's AEIC at para 9.

12 Affidavit of Tan Hee Liang affirmed on 31 December 2020 at para 11; TTJ's AEIC at para 3.

13 Affidavit of Evidence–in–Chief of Tan Bin Keong affirmed on 19 September 2022 ("TBK's AEIC") at para 4.

14 TBK's AEIC at para 4.

15 TTJ's AEIC at p 346 (Tab 24: Urban Redevelopment Authority (URA)'s Enforcement Notice dated 29 May 2002).

13 In February 2006, the URA granted the defendant permission under the Planning Act to: (a) change the use of the first storey to "eating establishment (coffee shop)"; and (b) to carry out additions and alterations at the first storey.[16] The plans attached to the URA's grant of permission show the Property as having only two storeys.[17] The permission also provides expressly that the change of use for the first storey would lapse in February 2009 unless extended upon further application.[18]

14 At some point in 2008, the defendant carried out further additions and alterations at the first storey. In October 2008, the BCA issued to the defendant a certificate of statutory completion certifying that the additions and alterations had been completed in accordance with the provisions of the Building Control Act (Cap 29, 1999 Rev Ed) ("Building Control Act"). In this certificate of statutory completion, the BCA describes the first storey as an "eating establishment (coffee shop)".[19]

15 In October 2012, the URA granted permission under the Planning Act to the defendant's tenant at that time to change the approved use of the first storey "from shop to restaurant".[20] The URA's grant of permission describes the Property as a "2-storey building". The permission also provides that the change

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16 TBK's AEIC at p 48 (Tab 2: Urban Redevelopment Authority (URA)'s Grant of Written Permission (Temporary) dated 15 February 2006 at p 1).

17 TBK's AEIC at p 50 (Tab 2: Urban Redevelopment Authority (URA)'s Grant of Written Permission (Temporary) dated 15 February 2006 at p 3).

18 TBK's AEIC at p 49 (Tab 2: Urban Redevelopment Authority (URA)'s Grant of Written Permission (Temporary) dated 15 February 2006 at p 2).

19 TTJ's AEIC at para 9 and p 167 (Tab 6: Building and Construction Authority (BCA)'s Certificate of Statutory Completion (CSC) dated 24 October 2008).

20 TBK's AEIC at p 51 (Tab 2: Urban Redevelopment Authority (URA)'s Grant of Written Permission (Temporary) dated 18 October 2012 at p 1).

of use to restaurant would lapse in October 2014 unless extended upon further application.[21]

The tenancy agreements

16 In late 2017 and early 2018, the plaintiffs were searching for suitable premises in Little India from which to operate a restaurant.[22] In the course of their search, in January 2018, the plaintiffs identified the Property as being suitable.[23] As I have mentioned, they intended to operate a restaurant at the first storey and to house the restaurant's employees on the second and third storeys.[24] The Property was occupied at that time by an unrelated restaurant operator under a tenancy agreement with the defendant expiring end July 2018.[25]

17 In July 2018, while the plaintiffs were in discussions with the defendant about taking a tenancy of the Property, the defendant renewed the existing tenancy of the Property for one year until end July 2019.[26] The renewal was

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21 TBK's AEIC at p 52 (Tab 2: Urban Redevelopment Authority (URA)'s Grant of Written Permission (Temporary) dated 18 October 2012 at p 2).

22 TTJ's AEIC at pp 258 and 260 (Tab 9: WhatsApp Conversations Between 1st Plaintiff and Tan Hee Liang from 10 January 2018 to 25 April 2018; Tab 10: 1st Plaintiff's Rental Proposal for the Property dated 5 February 2018).

23 TTJ's AEIC at para 10(a); Agreed Bundle of Documents Volume 2 ("2AB") at p 399 (1st Plaintiff's Rental Proposal for the Property dated 5 February 2018).

24 SRK's AEIC at para 11.

25 TTJ's AEIC at paras 9 and 10(b); page 238.

26 TTJ's AEIC at pp 170–171 and 203–204 (Tab 7: First Tenancy Agreement Between Tan Hee Liang and Mohd Rabiul Islam and Habeeb Jan Amjith Ali dated 20 July 2018 at pp 1–2; Tab 7: Second Tenancy Agreement Between Tan Hee Liang and Mohd Rabiul Islam and Habeeb Jan Amjith Ali dated 20 July 2018 at pp 1–2); Defence and Counterclaim (Amendment No. 3) dated 15 February 2022 ("DCC(A3)") at para 3C(iii).

documented by two tenancy agreements: one for the first storey and another for the second and third storeys.[27]

18 Despite the renewal, the plaintiffs remained intent on taking a tenancy of the Property.[28] The plaintiffs therefore agreed to pay $36,500 to the existing tenant as compensation for terminating its tenancy agreements with the defendant early and thereby to permit the plaintiffs to take a tenancy of the Property.[29]

19 On 3 December 2018, the plaintiffs and the defendant entered into two tenancy agreements with the defendant in respect of the Property. These are the two tenancy agreements that form the subject matter of this action. The term under both tenancy agreements was precisely the same: four years from 1 December 2018 to 30 November 2022.

20 The material terms of the first tenancy agreement are as follows.[30] Under cl 1.2, the plaintiffs were obliged to pay rent to the defendant in respect of the first storey at $11,000 per month until 30 November 2020 and at $12,000 per month until 30 November 2022.[31] Under cl 2.1, the plaintiffs were obliged to pay $44,000 to the defendant as security for the due performance of their obligations under the agreement.[32] Under cl 20.1, the plaintiffs were obliged to

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27 TTJ's AEIC at pp 170 and 203.

28 2AB at pp 395–397 (WhatsApp Conversations Between 1st Plaintiff and Tan Hee Liang from 10 January 2018 to 26 November 2018).

29 SOC(A3) at paras 6 and 9; SRK's AEIC at paras 21–22.

30 TTJ's AEIC at pp 98–128 (Tab 4: First Tenancy Agreement Between Tan Hee Liang and the Plaintiffs dated 3 December 2018).

31 SOC(A3) at para 9(a).

32 TTJ's AEIC at para 12(c).

use the first storey only as "a restaurant or eating house".[33] Because this was a commercial use, the plaintiffs were therefore also obliged to pay goods and services tax ("GST") to the defendant on the rent at the prevailing rate. Finally, under cl 31, the plaintiffs were obliged "[t]o obtain at [their] cost all necessary approvals, permits and licences from the relevant authorities to use the Demised Premises as [a restaurant or eating house]". Clause 31 also provided that "[a]ny delay or failure in obtaining … any necessary approval, permit or licence shall not affect the tenancy" of the first storey.[34]

21 The material terms of the second tenancy agreement are as follows.[35] Under cl 1.1, the plaintiffs were obliged to pay rent to the defendant in respect of the second and third storeys at $6,000 per month until 30 November 2022. Under cl 2.1, the plaintiffs were obliged to pay $24,000 to the defendant as security for the due performance of their obligations under the agreement.[36] Under cl 20.1, the plaintiffs were obliged to use the second and third storeys as "a Residential unit only".[37] As this was a non-commercial use, no GST was payable on the rent. Finally, under cl 31 of the second tenancy agreement, the plaintiffs were obliged to "obtain at [their] cost all necessary approvals, permits and licences from the relevant authorities" to use the second and third storeys as a residential unit, with "[a]ny delay or failure in obtaining … any necessary

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33 TTJ's AEIC at para 12(a).

34 TTJ's AEIC at p 115 (Tab 4: First Tenancy Agreement Between Tan Hee Liang and the Plaintiffs dated 3 December 2018 at cl 31).

35 TTJ's AEIC at pp 133–163 (Tab 5: Second Tenancy Agreement Between Tan Hee Liang and the Plaintiffs dated 3 December 2018).

36 TTJ's AEIC at para 12(b).

37 TTJ's AEIC at para 12(b).

approval, permit or licence" not affecting the tenancy of the second and third storeys.[38]

22 The plaintiffs took possession of the Property immediately after signing both tenancy agreements and after paying $68,000 to the defendant, being the security deposits due under the agreements.

The legal status of the third storey

23 Upon taking possession of the Property, the plaintiffs initially continued to operate without interruption the previous tenant's restaurant at the first storey.[39]

24 In January 2019, in anticipation of carrying out additions and alterations at the first storey, the plaintiffs made a formal enquiry with the URA about the approved use of the Property under the Planning Act. In February 2019, the URA replied to the plaintiffs informing them: (a) that the approved use of the first storey under the Planning Act was for use as a shop, not as a restaurant or eating house; and (b) that there was no approved use for the second storey. Most significantly, the URA's reply made no mention whatsoever that a third storey even existed, let alone what its approved use was.[40]

25 The URA's reply raised three issues that *prima facie* needed to be addressed. The first issue was that, under cl 20 of the first tenancy agreement,

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38 TTJ's AEIC at pp 149–150 (Tab 5: Second Tenancy Agreement Between Tan Hee Liang and the Plaintiffs dated 3 December 2018 at cl 31).

39 SRK's AEIC at para 38.

40 SRK's AEIC at p 109 (Tab F: Response to 1st Plaintiff's Enquiry by Urban Redevelopment Authority (URA) dated 13 February 2019); Agreed Bundle of Documents Volume 1 ("1AB") at p 163–164 (Email from 1st Plaintiff to Tan Hee Liang dated 15 February 2019).

the plaintiffs would have to apply for a change of use of the first storey from "shop" to "restaurant or eating house". The second issue was that, under cl 31 of the second tenancy agreement, the plaintiffs would have to apply to the URA to approve the second storey for use as a "residence". The third and most significant issue was that the plaintiffs were put on notice that the third storey had been constructed unlawfully, *ie*, that it had not been constructed in accordance with, and in satisfaction of, all regulatory approvals including but not limited to the necessary approvals from the URA under the Planning Act, from the BCA under the Building Control Act and from those two authorities under the subsidiary legislation enacted pursuant to each of those Acts.[41]

26 The core of the dispute between the parties is to whom the tenancy agreements allocated this risk.

Correspondence after February 2019

27 Between February 2019 and September 2019, the plaintiffs corresponded with the defendant and with the authorities in an effort to address these three issues. In the course of this correspondence, the plaintiffs paid $535 to the URA as a fee for an application to change the use of the first storey from "shop" to "restaurant or eating house".[42]

28 Following this correspondence, the plaintiffs stopped paying rent under the second tenancy agreement in September 2019 and under the first tenancy agreement in December 2019.[43] On 3 January 2020, the plaintiffs returned all

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41 SOC(A3) at para 8(c) read with paras 15–16.

42 SOC(A3) at para 32.

43 TTJ's AEIC at paras 30–31.

the keys to the Property to the defendant, thereby yielding up the Property to the defendant.[44]

29 The plaintiff commenced this action in August 2020. The defendant filed his defence and raised his counterclaim in September 2020.

The parties' cases

The plaintiffs withdraw three of their four claims

30 The plaintiffs' case as originally pleaded asserted four alternative bases for their claim against the defendant: contract, negligence, misrepresentation and restitution for unjust enrichment. For the reasons which follow, the plaintiffs have withdrawn the last three of these four alternative bases, leaving only their claim in contract.

31 The first alternative claim that the plaintiffs have withdrawn is their claim in negligence.[45] It so happens that Mr Tan Hee Liang was a practising advocate and solicitor. The plaintiffs' case as pleaded asserts a claim for damages against him for his alleged professional negligence in acting as the plaintiffs' solicitor when they negotiated and entered into the tenancy agreements with him. This claim is without any legal or factual basis.[46] That is no doubt why the plaintiffs have withdrawn it.[47]

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44 TTJ's AEIC at para 37; Defendant's Opening Statement dated 9 January 2023 at para 28.

45 Transcript, 12 January 2023 at p 4, lines 22–25, and p 5, lines 1–7.

46 Transcript, 13 January 2023 at p 17, lines 14–20, and p 23, lines 10–25.

47 Transcript, 18 January 2023 at p 71, lines 16–19.

32 The second alternative claim that the plaintiffs have withdrawn is their claim in misrepresentation.[48] The plaintiffs' case as pleaded asserts a claim for damages against the defendant for allegedly making fraudulent or negligent misrepresentations to them in the course of the negotiations for the tenancy agreements in order to induce them to enter into those agreements.[49] But the plaintiffs' affidavits of evidence in chief contain no evidence whatsoever to support this claim. Further, the plaintiffs' own evidence in cross-examination at trial contradicted the plaintiffs' pleaded case on this claim.[50] That is no doubt why the plaintiffs have withdrawn this claim.

33 The third alternative claim that the plaintiffs have withdrawn is their claim in restitution for unjust enrichment.[51] Save in exceptional circumstances, a claim in restitution cannot succeed unless any contract that exists between the parties has been invalidated (Tang Hang Wu, "The Role of the Law of Unjust Enrichment in Singapore" (2021) 9 Chin J Comp Law 1 at 16–17;[52] *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd* [2002] 2 SLR(R) 136 at [89];[53] *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [104]–[109];[54] *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR

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48 Plaintiffs' Closing Submissions ("PCS") dated 3 March 2023 at para 18.

49 SOC(A3) at paras 5 and 8; 1st Plaintiff's Further and Better Particulars dated 26 November 2020 at p 4–6, para 2; SOC(A3) at para 18.

50 Transcript, 13 January 2023 at p 17, lines 14–20; p 23, lines 10–25; p 47, lines 10–21.

51 Reply and Defence to Counterclaim (Amendment No. 2) dated 20 January 2022 ("RDCC(A2)") at para 16.

52 Defendant's Bundle of Authorities dated 1 March 2023 ("DBOA") TAB 7 at pp 299–300.

53 DBOA TAB 9 at p 483.

54 DBOA TAB 10 at pp 526–530.

136 at [249]–[250].[55] The plaintiffs do not, in this action, seek any relief directed at invalidating the tenancy agreements on any ground, whether by reason of rescission for misrepresentation or otherwise. Nor do the plaintiffs argue that this case falls into any exceptional class of case where restitution for unjust enrichment is available notwithstanding a contract subsisting between the parties. This alternative claim in unjust enrichment cannot possibly succeed. That is no doubt why the plaintiffs have withdrawn it.

The plaintiffs' case

34 The only case that the plaintiffs now pursue is their case in contract.

35 The plaintiffs' case in contract is as follows. The two tenancy agreements constituted a single contract under which the plaintiffs agreed to take a tenancy of the entire Property from the defendant in order to use the first storey to operate a restaurant and the second and third storeys to house the restaurant's employees.[56]

36 This single contract contained an implied term by which the defendant warranted to the plaintiffs that all three storeys of the Property had been constructed lawfully, *ie*, in accordance with, and in satisfaction of, all regulatory approvals including but not limited to the necessary approvals from the URA under the Planning Act, from the BCA under the Building Control Act and from both of these authorities under the subsidiary legislation enacted pursuant to each of those Acts.[57]

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55 DBOA TAB 8 at pp 450–451.

56 SOC(A3) at para 15.

57 SOC(A3) at para 16 read with para 8(c).

37 The URA confirmed in February 2019 that it had no record of any third storey at the Property. The third storey had therefore been constructed unlawfully. The defendant was in breach of the warranty comprised by the implied term.[58]

38 The defendant's breach of this implied term deprived the plaintiffs of substantially the whole of the benefit of the single contract. His breach was therefore a repudiatory breach of the single contract and entitled the plaintiffs to terminate their tenancy of all three storeys of the Property. The plaintiffs accepted the repudiatory breach in December 2019 by ceasing to pay rent to the defendant,[59] alternatively by a letter sent to the defendant by their solicitors.[60] The plaintiffs have thereby terminated the single contract.[61] The plaintiffs are therefore relieved of any obligation to pay rent under the single contract after December 2019.[62]

39 In the alternative, if the two tenancy agreements do not constitute a single contract, there was an implied term in the second tenancy agreement to the same effect as the one implied into the single contract, *mutatis mutandis*.[63] Even on this alternative, the defendant was in repudiatory breach of the second tenancy agreement and the plaintiffs accepted that repudiatory breach in December 2019. The second tenancy agreement has been terminated, relieving the plaintiffs of any liability to pay rent under that agreement.

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58 SOC(A3) at para 19.

59 SOC(A3) at para 29.

60 SOC(A3) at para 31.

61 SOC(A3) at para 19.

62 Transcript, 18 January 2023 at p 86, lines 15–19.

63 SOC(A3) at para 16.

40 The plaintiffs accordingly claim as damages the following sums from the defendant:[64]

(a) The security deposits that the plaintiffs paid to the defendant under the tenancy agreements amounting to $68,000;

(b) The rent that the plaintiffs paid to the defendant under the tenancy agreements from December 2018 to November 2019 amounting to $195,240;[65]

(c) The sum that the plaintiffs paid to renovate the first storey amounting to $63,856.03;

(d) The compensation that the plaintiffs paid to the previous tenants of the Property amounting to $36,500;

(e) The fee that the plaintiffs paid to the URA when they applied to change the use of the first storey from "shop" to "restaurant or eating house" amounting to $535;[66] and

(f) The profits that the plaintiffs would have earned from operating a restaurant at the first storey over the remaining duration of the lease amounting to $321,000.[67]

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64 SOC(A3) at prayer (f) read with para 32.

65 SOC(A3) at para 32.

66 SOC(A3) at para 32.

67 SOC(A3) at para 32.

The defendant's case

41 The defendant's case is as follows. The two tenancy agreements do not constitute a single contract but are two separate and independent contracts. The plaintiffs are therefore undoubtedly in breach of the first tenancy agreement by ceasing to pay rent under it.

42 There was no implied term in the second tenancy agreement by which the defendant warranted that the second and third storeys had been constructed lawfully. Any such term would be inconsistent with the express term in that agreement: (a) obliging the plaintiffs to apply for all necessary approvals to use the second and third storeys for the contractually stipulated purpose of a residence; and (b) providing that the second tenancy agreement would be unaffected by any delay or failure to obtain the necessary approvals.

43 Even if there was such an implied term, the alleged breach of that term does not amount to a repudiatory breach of contract and does not entitle the plaintiffs to terminate either the single contract or the second tenancy agreement. Finally, even if the defendant was in repudiatory breach of contract, the plaintiffs have affirmed the contract by continuing to pay rent to the defendant with knowledge of the repudiatory breach after February 2019.[68]

The issues

44 Arising from the plaintiffs' and the defendant's cases, I had to decide the following issues:

(a) Did the plaintiffs take their tenancy of the Property under a single contract or under two separate and independent tenancy agreements?

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68 SRK's AEIC at para 31.

(b) Is it an implied term of the parties' contract that all three storeys of the Property, or alternatively, the second and third storeys, have been constructed lawfully?

(c) If so, what damages are payable by the defendant to the plaintiffs for his breach of contract?

(d) Are any damages payable by the plaintiffs to the defendant for any breach of contract?

Two separate and independent contracts

45 The first issue is whether the plaintiffs took their tenancy of the Property under a single contract or under two separate and independent contracts.

46 This issue is significant because the plaintiffs cannot establish – and therefore do not allege – that the defendant ever committed any breach of any of the terms of the first tenancy agreement, repudiatory or otherwise. In other words, it is no part of the plaintiffs' case that the defendant is in breach of the first tenancy agreement by reason of the URA's confirmation in February 2019 that the approved use of the first storey under the Planning Act was as a shop and not as a restaurant or an eating house. The plaintiffs therefore raise the first issue only to establish that the breach of the term that they seek to imply into the single contract gave the plaintiffs the right to terminate their tenancy of the entire Property, *ie*, their tenancy of all three storeys including the first storey.

47 The plaintiffs submit that that they took their tenancy of the Property under a single contract for four reasons. First, it was always their intention to lease the entire Property for a single commercial purpose: to operate a restaurant

and to house the restaurant's employees.[69] That is why the plaintiffs paid $36,500 to the previous tenant, *ie*, to secure a new tenancy of all three storeys.[70] Second, there was no separate means of access to the second and third storeys. The upper storeys could be accessed physically only by entering the first storey.[71] Third, the only reason the defendant required the plaintiffs to sign two tenancy agreements was because the rent for the first storey was subject to GST whereas the rent for the second and third storeys was not subject to GST.[72] Therefore, the plaintiffs' tenancy of the Property was expressed in two documents purely for reasons of drafting form and not for any reasons of commercial substance. Fourth, the first time the plaintiffs saw the two tenancy agreements was when the defendant presented them to the plaintiffs as a *fait accompli* for their signature at his office on 3 December 2018.[73] The plaintiffs therefore could not object to the defendant's decision to separate the plaintiffs' tenancy of the Property into two tenancy agreements.

48 I do not accept the plaintiffs' submission. Instead, I accept the defendant's submission that the two tenancy agreements are separate and independent contracts. I arrive at this conclusion for four reasons.

49 First, the express terms of the two tenancy agreements show that the agreements are separate and independent in substance, not merely form. The plaintiffs accept that the defendant informed them at the outset, *ie*, when they agreed to take a tenancy of the Property, that they would have to enter into

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69 PCS at para 13.

70 PCS at para 16.

71 PCS at para 13; SRK's AEIC at para 15.

72 PCS at para 14; SRK's AEIC at para 16.

73 PCS at para 15; SOC(A3) at para 11(a).

separate tenancy agreements for the first storey and for the second and third storeys. It is true that the differing incidence of GST was the reason for the separation. But the two tenancy agreements that resulted are separate and independent as a matter of contractual substance and not merely as a matter of drafting form. There is no term in one tenancy agreement which makes any of the parties' rights or obligations under that tenancy agreement dependent on the mere existence of the other tenancy agreement, let alone on the rights and obligations under the other tenancy agreement. Indeed, neither tenancy agreement makes any reference whatsoever to the other tenancy agreement, even as part of the commercial background in recitals. If the parties wanted the performance of one tenancy agreement to be dependent upon the performance of the other tenancy agreement, they would and could have included an express term to capture and define the scope of the dependence in the tenancy agreements. There is no such term.

50 Second, there is no contractual basis on which any such dependence can arise in the absence of an express term, *ie*, by implication. The mere fact that the defendant presented the two tenancy agreements to the plaintiffs for their signature as a *fait accompli* cannot give rise to any such dependence by implication. Equally, there is no contractual basis on which a term giving rise to such dependence can be implied into the tenancy agreements, whether as a term implied in law or as a term implied in fact. Each tenancy agreement is a self-contained contract, commercially workable on its own terms.

51 Third, contrary to the plaintiffs' submission, each tenancy agreement had a separate commercial purpose. The commercial purpose of the first tenancy agreement was to operate a restaurant at the ground floor. The commercial purpose of the second tenancy agreement was to house the restaurant's employees on the second and third storeys. These two purposes were

undoubtedly intended to be complementary commercial purposes. But equally undoubtedly, they are independent commercial purposes. Thus, as the defendant points out, even if the plaintiffs were relieved of their obligations under the second tenancy agreement, they were still perfectly able to achieve the commercial purpose of the first tenancy agreement by continuing to operate a restaurant at the first storey.

52 Fourth, the plaintiffs themselves treated the two tenancy agreements as independent agreements. In October 2019, after the dispute had arisen between the parties, the plaintiffs proposed to the defendant that the defendant suspend the plaintiffs' obligations under the second tenancy agreement pending clarification from the authorities on the lawfulness of the third storey while keeping the first tenancy agreement on foot.[74] No doubt the plaintiffs suggested this only to make the best of a bad situation. But the mere fact of the proposal shows that the first tenancy agreement is commercially workable on its own terms. And the fact that it was the plaintiffs who made the proposal shows that they subjectively accepted that it was commercially workable on its own terms as late as October 2019.

53 Accordingly, I hold that the two tenancy agreements are separate and independent contracts and do not constitute a single contract. As I have mentioned, it is not the plaintiffs' case that the defendant committed any breach of the first tenancy agreement if the two tenancy agreements are found to be separate and independent contracts.[75] It therefore follows that the plaintiffs breached the first tenancy agreement by ceasing to pay rent for the first storey

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74 2AB at pp 852–918 (WhatsApp Audio dated 6 October 2021 transcribed on 10 June 2022); Transcript, 12 January 2023 at p 66, lines 5–19.

75 Transcript, 18 January 2023 at p 83, lines 5–11.

from December 2019. I quantify the plaintiffs' liability in damages to the defendant below.

The implied term

54 The plaintiffs' case, when read subject to my finding at [53] above and shorn of legal technicalities, is that there is an implied term in the second tenancy agreement that the second and third storeys were constructed lawfully.[76]

55 The plaintiffs do not plead whether this implied term is a term implied in law or a term implied in fact. Counsel for the plaintiffs submitted at the conclusion of the evidence that the plaintiffs rely on a term implied in law and not on a term implied in fact.[77] But he took a different position in oral closing submissions. He submitted then that the plaintiffs rely on both types of implied term in the alternative, *ie*, on a term implied in law *and* on a term implied in fact.[78]

56 I have allowed the plaintiffs to advance this submission in the alternative for two reasons. First, doing so is not a departure from the plaintiffs' pleaded case but remains consistent with it. Second, and more importantly, I do not consider it unfair to the defendant to allow the plaintiffs to advance this submission. The defendant's case on the implied term does not turn on the distinction between a term implied in law and a term implied in fact. The defendant's case is that: (a) the content of the implied term contradicts the express terms of the second tenancy agreement; and (b) the implied term is not of a type that gives the plaintiffs a right to terminate the contract upon a breach

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76 SOC(A3) at para 8(c) read with paras 15–16.

77 Transcript, 18 January 2023 at p 81, lines 14–25, and p 82, lines 1–6.

78 Transcript, 17 April 2023 at p 8, lines 14–25, and p 9, lines 1–11.

of it. Allowing the plaintiffs to rely on a term implied in fact therefore causes no unfairness to the defendant.

Implied term in fact

57 I deal first with the plaintiffs' submission that there is an implied term in fact in the second tenancy agreement that second and third storeys were constructed lawfully.

58 In its seminal decision in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*SembCorp*"), the Court of Appeal set out authoritatively the process by which a term will be implied in fact into a contract (*SembCorp* at [93]–[101]). That process "is best understood as an exercise in giving effect to the parties' *presumed* intentions [emphasis in original]" (*SembCorp* at [93]). It is only ever appropriate for a court to imply a term into a contract if it does so in order to fill a contractual gap that has arisen because "the parties did not contemplate the issue at all" (*SembCorp* at [94]–[95]). The court will therefore not imply a term into a contract simply because the term is reasonable, equitable, clear or consistent with the other terms in the contract (*SembCorp* at [98] and [100]).

59 In *SembCorp* at [101], the Court of Appeal set out the three-step process for implying a term in fact into a contract under Singapore law. In short, such a term will be implied into a contract if and only if there is a gap in the contract on a particular issue which exists because the parties did not contemplate the issue and if the term to be implied to fill the gap is necessary to give the contract business efficacy and if the content of that term is obvious having regard to the need for business efficacy. As the Court of Appeal put it:

> (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns

> that the gap arose because the parties did not contemplate the gap.
>
> (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
>
> (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

60 Applying *SembCorp*'s three-step process, I accept the plaintiffs' submission that there was a term implied in fact in the second tenancy agreement that the second and third storeys were constructed lawfully.

61 At *SembCorp's* first step, I accept that there is a gap in the second tenancy agreement on a specific issue (see *SembCorp* at [101(a)]). That issue is whether the second and third storeys had been constructed lawfully. Nowhere in the second tenancy agreement do the parties make any provision as to who should bear this risk or address this issue even obliquely. Further, I accept that this gap arose because the parties failed to contemplate the issue. There is no evidence whatsoever that the parties contemplated this issue and nevertheless chose not to provide for it because they thought mistakenly that the express terms of the contract addressed it or because they could not agree on a solution to address it (see *SembCorp* at [94(b)] and [94(c)]).

62 The defendant submits that an implied term to this effect in the second tenancy agreement would be contrary to the express terms of that agreement, *ie*, cl 31 read with cl 20.1 (see [21] above). The effect of these clauses is to place the burden on the plaintiffs to obtain the necessary approvals, permits and licences to use the second and third storeys for residential use. I do not accept the defendant's submission. The subject matter of these express terms is only

the *use* of the second and third storeys. These express terms have nothing to do with the second and third storeys having been constructed lawfully. The defendant's submission meets the issue of lawfulness only if it is understood as an extended submission that the express terms of the second tenancy agreement makes it the plaintiffs' obligation to obtain approval for the construction of the third storey as an essential condition precedent to obtaining approval from the URA to use the third storey for residential use. I consider this extended submission to be absurd and reject it out of hand.

63 At *SembCorp*'s second step, I accept that it is necessary in the business or commercial sense to imply this term to give the second tenancy agreement efficacy (see *SembCorp* at [101(b)]. The plaintiffs contractually bargained for the right in law and in fact to use the second and third storeys in exchange for their obligation to pay rent to the defendant. It is efficacious in the business or commercial sense that they should be able to use the second and third storeys as bargained for without physical or legal impediment and without precarity. The implied term is necessary to achieve that efficacy.

64 At *SembCorp's* third step, I accept that the content of this implied term satisfies the test of obviousness. Having regard to the need for business efficacy, I accept that the parties would have responded "Oh, of course!" had it been put to them when they executed the second tenancy agreement that the defendant was impliedly warranting that the second and third storeys had been constructed lawfully (see *SembCorp* at [101(c)]). The defendant is the owner of the Property. As between the plaintiffs and the defendant, the defendant is in a far better position to ensure that the second and third storeys are constructed lawfully or to know or ascertain whether they have been constructed lawfully. The business and commercial benefit of those storeys having been constructed lawfully accrues ultimately to the landlord as the owner of the Property. This

benefit is a permanent benefit and is transmissible with the Property. It therefore endures for the defendant's benefit even after the plaintiffs' tenancy of those two storeys ends. Any business or commercial benefit to the plaintiffs from the second and third storeys having been constructed lawfully, or from regularising the position if they have not, is purely transient. It lasts only for the duration of the tenancy. It is obvious that, if the defendant as landlord enters into a tenancy agreement demising the second and third storeys to the plaintiffs as tenants, it is the defendant who should bear and would accept the risk of one or both of those two storeys having been constructed unlawfully.

65 I find therefore that there is an implied term in fact in the second tenancy agreement by which the defendant, as landlord, warranted that the second and third storeys had been constructed lawfully. Given this finding, it is not necessary for me to decide whether there is an implied term in law to the same effect. For completeness and if it had been necessary for me to do so, I would have been prepared to find that there is an implied term in law in every tenancy agreement by which the landlord warrants to the tenant that every part of the premises demised under the tenancy agreement has been constructed lawfully. But I choose to rest my decision on an implied term in fact because it is unnecessary for me to make a finding on an implied term in law to decide this case, and because such a finding would have far reaching consequences for all tenancy agreements and leases (see *Chua Choon Cheng and others v Allgreen Properties Ltd and another appeal* [2009] 3 SLR(R) 724 at [69]).

The defendant breached the implied term

66 There is no doubt that the defendant has breached this implied term. It is not in dispute that the third storey was not constructed lawfully. The URA confirmed this in October 2019, when it confirmed to the defendant that it had

no record of ever having approved the construction of the third storey and imposing conditions if the defendant wanted to retain it:[79]

> 3. … [I]t appears that unauthorised works have been carried out to the building which we do not have records of. As this is a conserved building in the Little India Historic District, all works are to comply with the Conservation Guidelines for Historic Districts and the Specific Façade Restoration Guidelines for the building.
>
> 4. From our preliminary assessment, unauthorised works to the front facade and roof have been carried out and are to be removed. The building is to be reinstated in accordance to the Conservation Guidelines and Specific Façade Restoration Guidelines for the building. However, the full extent of rectification works required can only be assessed when a formal submission for Addition & Alteration (A&A) works is submitted for our evaluation.
>
> 5. We also note that the building has a 3rd storey rooftop extension which we have no approval records of. As an exception for your unit, we are prepared to consider the retention of this extension. Should you choose to keep the extension, it is to be restored in accordance to the specific façade restoration guidelines for this building.
>
> 6. Please engage a Registered Architect to submit a formal submission for Addition & Alterations (A&A) to the building as soon as possible. The retention of the extension and submission of the layout plan and letter of undertaking for the residential uses at the 2nd and 3rd storeys can be incorporated in your formal A&A submission.
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> …
>
> 8. In the meantime, we are unable to grant planning approval for the use of the 2nd and 3rd storeys until the unauthorized works as outlined in paragraph 4 are removed and the building is reinstated. …

[79] TTJ's AEIC at pp 357–358 (Tab 26: Letter from Conservation and Urban Design Division of the Urban Redevelopment Authority (URA) to Messrs B K Tan Consultants copying Tan Hee Liang dated 8 October 2019 at paras 3–6 and 8).

67 It is also not in dispute that the BCA does not have any approved plans for the third storey.[80]

68 It is no contractual defence for the defendant to argue that he was not responsible for constructing the third storey unlawfully, that he did not know that the third storey (even if it had been constructed by a predecessor in title) had not been constructed lawfully or that he exercised reasonable care in assuming that the third storey had been constructed lawfully. Subject only to contrary agreement, liability for breach of contract is strict and does not turn on personal responsibility, knowledge or negligence. There is no relevant contrary agreement in this case.

The breach was a repudiatory breach

69 I turn now to address the consequences of the defendant's breach of this implied term.

70 The plaintiffs submit that the defendant's breach of this implied term was a repudiatory breach giving the plaintiffs a right to terminate the second tenancy agreement. I accept the plaintiffs' submission.

71 In *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete*"), the Court of Appeal set out authoritatively at [89]–[113] the situations in which a breach of contract gives the innocent party a right to terminate a contract and thereby to relieve itself of its future obligations under the contract. The most obvious situation is where the contract clearly and unambiguously provides that certain events will, if they

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80 TTJ's AEIC at p 349 (Tab 24: Email from the Urban Redevelopment Authority (URA) to Tan Hee Liang dated 27 September 2019).

occur, entitle the innocent party to terminate the contract. But that situation will rarely give rise to a dispute. Leaving that situation aside, the first situation is where the contract-breaker renounces its contract, *ie*, "clearly conveys to the other party to the contract that it will not perform its contractual obligations at all [emphasis in original omitted]" (*RDC Concrete* at [93]). The second situation is where the parties' intention, ascertained in the usual contractual way, was "to designate that term as one that is so important that any breach, regardless of the actual consequences of such a breach, would entitle the innocent party to terminate the contract [emphasis in original omitted]" (*RDC Concrete* at [97]). The third situation is where "the breach in question will 'give rise to an event which will deprive the party not in default … of substantially the whole benefit which it was intended that he should obtain from the contract' [emphasis in original omitted]" (*RDC Concrete* at [99], citing the judgment of Diplock LJ (as he then was) in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 70).

72 This case is not one where the plaintiffs claim a right to terminate the second tenancy agreement arising from an express term in that agreement entitling them to do so. Indeed, that will always be the case where the term breached is, as here, an implied term rather than an express term. By the very nature of the first step of three-step process leading to an implied term in fact, it cannot be the subject of any express agreement between the contracting parties.

73 I do, however, accept the plaintiffs' submission that the breach of the implied term falls within the second limb of the third situation identified in *RDC Concrete* at [99]–[101]. The defendant's breach of the implied term deprived the plaintiffs of substantially the whole benefit which both the plaintiffs and the defendant intended that the plaintiffs should obtain under the second tenancy

agreement. The plaintiffs entered into this agreement and undertook the obligation to pay rent to the defendant under it for the very purpose of making lawful use of the second and third storeys without physical or legal impediment or precarity. Yet the plaintiffs were unable to do so because the third floor had been constructed unlawfully. Once they appreciated that the regulatory authorities could, at any time, have ordered the plaintiffs to cease any use of the third storey or even ordered the defendant to demolish it, it was entirely reasonable for the plaintiffs to make no further use of the second and third storeys. The defendant's breach therefore deprived the plaintiffs of substantially the whole of the bargained-for benefit under the second tenancy agreement.

The plaintiffs affirmed the contract

74 The next issue is to ascertain the contractual consequence of the defendant's repudiatory breach of the implied term in the second tenancy agreement. The plaintiffs submit that they accepted the repudiatory breach, thereby terminating the second tenancy agreement and relieving themselves of any obligation to pay rent to the defendant under it. The defendant submits that the plaintiffs lost the right to terminate the second tenancy agreement because they affirmed the agreement with knowledge of the repudiatory breach.

75 The principles governing the consequences of a repudiatory breach of contract are set out in *Chitty on Contracts* (HG Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) ("*Chitty*") at §24–003:

> Where the innocent party, being entitled to choose whether to treat the contract as continuing or to accept the repudiation and treat himself as discharged, elects to treat the contract as continuing, he is usually said to have 'affirmed' the contract. … Affirmation may be express or implied. It will be implied if, with knowledge of the breach and of his right to choose, he does some unequivocal act from which it may be inferred that he intends to go on with the contract regardless of the breach or from which it may be inferred that he will not exercise his right

> to treat the contract as repudiated. Affirmation must be total: the innocent party cannot approbate and reprobate by affirming part of the contract and disaffirming the rest, for that would be to make a new contract.
>
> … [I]f the innocent party unreservedly continues to press for performance or accepts performance by the other party after becoming aware of the breach and of his right to elect, he will be held to have affirmed the contract.

76 The plaintiffs discovered the defendant's repudiatory breach of the second tenancy agreement in February 2019. That was when the plaintiffs discovered that the URA had no record of a third storey at the Property. Despite this, the plaintiffs continued to pay rent to the defendant under the second tenancy agreement for seven months, until September 2019.

77 The defendant submits that the plaintiffs, by continuing to pay rent to the defendant until September 2019, elected to affirm the second tenancy agreement and therefore lost the right to terminate it. The defendant further submits that the plaintiffs' failure to pay rent after September 2019 was itself a repudiatory breach of the second tenancy agreement which the defendant accepted in December 2019. By that acceptance, the defendant terminated the second tenancy agreement with effect from December 2019.[81]

78 I accept the defendant's submission that the plaintiffs' conduct in paying rent to the defendant under the second tenancy agreement affirmed the agreement. It is clear from the correspondence that the plaintiffs, with knowledge of the defendant's repudiatory breach of contract, made a commercial decision to keep the second tenancy agreement on foot while the defendant worked with the URA and the BCA to regularise the lawfulness of the third storey. As a result of this affirmation, the plaintiffs lost their right to

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81 TTJ's AEIC at para 36.

terminate the second tenancy agreement arising from the defendant's repudiatory breach of contract. Of course, the defendant remains liable in damages for this breach (see *RDC Concrete* at [40] and [114]).

79 As a result of the plaintiffs' affirmation of the second tenancy agreement, the plaintiffs remained bound to pay rent to the defendant under that agreement even after September 2019. The plaintiffs' failure to pay rent after September 2019 is therefore a breach of contract. That is so even though the defendant was in breach of the implied term of the second tenancy agreement. Subject to contrary agreement, a tenant's obligation to pay rent to a landlord is independent of the landlord's performance of his obligations under a tenancy agreement. There is no suggestion of any such contrary agreement. As a result, the defendant's breach of the second tenancy agreement did not, in itself, relieve the plaintiffs from their obligation to pay rent to the defendant under the second tenancy agreement. The plaintiffs are therefore liable to pay damages to the defendant for this breach of the second tenancy agreement.

Damages payable by the defendant

80 I now turn to the question of damages. I begin with the damages payable by the defendant to the plaintiffs for his breach of the implied term in the second tenancy agreement.

81 The plaintiffs claim the following sums from the defendant as damages:[82]

(a) The security deposits that the plaintiffs paid to the defendant under the tenancy agreements amounting to $68,000;

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82 SOC(A3) at prayer (f) read with para 32.

(b) The rent that the plaintiffs paid to the defendant under the tenancy agreements from December 2018 to November 2019 amounting to $195,240;[83]

(c) The sum that the plaintiffs paid to renovate the first storey amounting to $63,856.03;

(d) The compensation that the plaintiffs paid to the previous tenant of the Property amounting to $36,500;

(e) The fee that the plaintiffs paid to the URA when they applied to change the use of the first storey from "shop" to "restaurant or eating house" amounting to $535;[84] and

(f) The profits that the plaintiffs would have earned from operating a restaurant at the first storey over the remaining duration of the lease amounting to $321,000.[85]

82 The plaintiffs claim these sums under both the first tenancy agreement and the second tenancy agreement. But the defendant did not breach any term of the first tenancy agreement. The plaintiffs therefore have no right to recover damages from the defendant under the first tenancy agreement. The plaintiffs' only entitlement to recover damages from the defendant is in respect of the defendant's breach of the implied term in the second tenancy agreement.

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83 SOC(A3) at para 32.

84 SOC(A3) at para 32.

85 SOC(A3) at para 32.

Security deposits

83 The defendant himself accepts that the plaintiffs are entitled, subject only to set off, to recover the security deposits they paid under both the first tenancy agreement and the second tenancy agreement.

84 The security deposits are not, strictly speaking, recoverable as heads of any kind of loss or damage. That is because the deposits were not, by the terms of either tenancy agreement, a wasted expense that the plaintiffs incurred or a profit that the plaintiffs expected to earn by reason of the defendant performing his contractual obligations. Instead, the security deposits are sums which the defendant was contractually obliged to refund to the plaintiffs under and subject to cl 2.5 of both tenancy agreements.

85 The plaintiffs are therefore entitled to recover from the defendant the sum of $68,000. This entitlement is contractually subject only to the defendant's entitlement to deduct from these deposits any sums due from the plaintiffs to the defendant for breach of their obligations under either of the two tenancy agreements. I will account for that contractual entitlement when I set off the damages due to the defendant against the damages due to the plaintiffs.

Rent paid from December 2018

Under the first tenancy agreement

86 The plaintiffs are not entitled to recover the rent that they paid to the defendant for the eleven months from December 2018 to November 2019 under the first tenancy agreement. I have found that the first tenancy agreement was a separate and independent contract from the second tenancy agreement. And, as I have pointed out, it is not the plaintiffs' case that the defendant breached the first tenancy agreement.

87 The plaintiffs therefore have no basis to recover the rent that the paid under the first tenancy agreement as damages.

Under the second tenancy agreement

88 I accept, however, that the plaintiffs can claim as reliance loss the rent that they paid under the second tenancy agreement for the nine months from December 2018 to August 2019 totalling $54,000.

89 Reliance loss is defined generally as the expense that a party incurs in reliance on the other party performing its contractual obligations, but which is wasted because of the other party's breach of those obligations. An innocent party may recover reliance loss as damages for breach of a contract even if he incurred the relevant expense in order to perform his own obligations under the contract. Thus, if the wasted expense is the payment of a sum due under a contract, that sum remains recoverable in principle as reliance loss.

90 In the present case, the plaintiffs as tenants paid rent to the defendant as landlord in reliance on the implied term warranting that the third storey had been constructed lawfully. The rent paid from December 2018 to August 2019 was a wasted expense because the third storey had not in fact been constructed lawfully. Use of the third storey for the contractual purpose stipulated under the second tenancy agreement would have been equally unlawful. The fact that the plaintiffs affirmed the second tenancy agreement by continuing to pay rent to the defendant from February 2019 to August 2019 disentitles them from terminating the second tenancy agreement as a result of the defendant's repudiatory breach but does not disentitle them from recovering this rent as damages for the defendant's breach on the reliance measure.

91 The rent that the plaintiffs paid after affirming the second tenancy agreement constitutes their reliance loss just as much as the rent that they paid before affirming this agreement. That is because the plaintiffs paid the rent after affirming this agreement in anticipation of the defendant regularising the lawfulness of the third storey and thereby curing his breach of the implied term.

92 Accordingly, the plaintiffs are entitled to recover the sum of $54,000 being the rent which they paid from December 2018 to August 2019 under the second tenancy agreement.

Renovation at the first storey

93 The plaintiffs cannot recover as damages the sums which they paid to renovate the first storey in anticipation of operating a restaurant there under the first tenancy agreement. As the defendant did not breach the first tenancy agreement, the plaintiffs have no right to recover damages under the first tenancy agreement.

Compensation paid to previous tenant

94 I accept that the plaintiffs can recover as reliance loss at least part of the compensation that they paid to the previous tenant of the Property to induce them to terminate their tenancy of the Property early.

95 This compensation is an expense that the plaintiffs incurred before they entered into the second tenancy agreement. A pre-contractual expense of this kind is recoverable as reliance loss if it was reasonably in the contemplation of the parties as likely to be wasted if the contract, once entered into, were to be breached.

96 In November 2018, the previous tenant informed the defendant that the plaintiffs had paid an unspecified sum of money in exchange for the plaintiffs' taking over the previous tenant's restaurant business and tenancy agreements. I am therefore satisfied that it was within the reasonable contemplation of the defendant that this sum would be wasted, at least in part, if the defendant breached the express or implied terms of either or both of the first and second tenancy agreements.

97 The plaintiffs paid $36,500 to the previous tenant as compensation. This payment was paid to secure a tenancy of all three storeys. The defendant did not breach the implied term in the first tenancy agreement. In light of my finding that the defendant breached only the second tenancy agreement, the plaintiffs are entitled to recover only a proportionate amount of the compensation. I therefore hold that the plaintiffs are entitled to recover only two-thirds of this compensation, the one-third referable to the first storey being irrecoverable.

98 I therefore set the recoverable proportion of the compensation payment at two-thirds of $36,500 being $24,333, rounded off to the nearest dollar.

Fee paid to the URA

99 The fee that the plaintiffs paid to the URA was referable to the first tenancy agreement and to the restaurant business that the plaintiffs operated at the first storey under that agreement. As the defendant did not breach the first tenancy agreement, the plaintiffs have no right to recover this sum as damages.

Loss of profits

100 The plaintiffs also claim expectation loss that they quantify at $321,000 being the profits that they lost by being unable to operate a restaurant on the Property during the entire duration of the first tenancy agreement.

101 This loss is irrecoverable for two reasons.

102 First, as a matter of principle, the defendant's breach of the second tenancy agreement has no connection to any loss of profits from the restaurant business that the plaintiffs were operating at the first storey under the first tenancy agreement. As the defendant did not breach the first tenancy agreement, the plaintiffs have no right to recover this sum as damages.

103 Second, even if I accept that there is such a connection, I do not accept the calculation presented by the plaintiffs. The plaintiffs' claim is based on estimated sales of $2,000 to $2,500 per day. This estimate is entirely unsupported by evidence and is wholly speculative. The plaintiffs rely on a business plan to support these estimates.[86] But they adduce no credible or independent evidence to prove either the figures or the assumptions in the business plan. Indeed, the plaintiffs candidly conceded in cross-examination that their quantification of expectation loss was based on "guessing".[87]

104 Further, the plaintiffs concede that their figures fail to account for the COVID-19 pandemic.[88] That pandemic had a significant effect on profitability in Singapore's food and beverage sector from March 2020 onwards. The

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86 Transcript, 17 January 2023 at p 29, lines 1–24.

87 Transcript, 17 January 2023 at p 62, lines 15–17.

88 Transcript, 17 January 2023 at p 58, lines 11–20.

plaintiffs were prepared to accept in cross-examination that the pandemic would have affected their sales by 50% and that their claim for expectation loss should therefore be reduced by 50% to $160,500.[89] But even this reduced claim is entirely unsupported by evidence and is wholly speculative.

Damages payable by the plaintiffs

105 I now turn to the damages payable by the plaintiffs to the defendant for their breach of both the first tenancy agreement and the second tenancy agreement.

106 The plaintiffs breached the first tenancy agreement when they ceased paying rent from December 2019. They breached the second tenancy agreement when they ceased paying rent from September 2019. It is also the defendant's case that the plaintiffs breached their obligation to reinstate the premises before yielding them up to the defendant on 3 January 2020.

107 The defendant therefore claims the expectation measure of damages under both tenancy agreements. This comprises (a) rental arrears; (b) loss of rental income; and (c) reinstatement costs.

Rental arrears

108 I accept the defendant's submission that he is entitled to recover the sum of $18,452.36 from the plaintiffs under the first tenancy agreement. This encompasses the following sums:

(a) rental arrears for the month of December 2019 and GST amounting to $11,770;

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89 Transcript, 17 January 2023 at p 61, lines 7–25, and p 62, lines 1–17.

(b) rental arrears for three days in January 2020 and GST amounting to $1,139.03;

(c) contractual charges for late payment of rent amounting to $80; and

(d) contractual interest for late payment of rent amounting to $5,463.33.

109 I also accepted the defendant's submission that that he was entitled in principle, subject to what I say at [120]–[123] below, to recover the sum of $38,879.98 from the plaintiffs under the second tenancy agreement. This encompasses the following sums:

(a) rental arrears for the four months from September to December 2019 totalling $24,000;

(b) rental arrears for three days in January 2020 amounting to $580.65;

(c) contractual charges for late payment of rent amounting to $320; and

(d) contractual interest for late payment of rent amounting to $13,979.33.

Loss of rental income

110 The defendant claims loss of rental income from the day the plaintiffs yielded up the Property, *ie*, 3 January 2020 to 30 November 2022, being the end of the term under both tenancy agreements.

Mitigation

111 The plaintiffs submit that the defendant did not act reasonably in mitigation of his loss after the plaintiffs yielded up the Property. In response, the defendant submits that the burden of establishing a failure to mitigate lies on the plaintiffs and that they have failed to discharge this burden.

112 The evidence shows that the defendant advertised the Property in an effort to secure a replacement tenant from January 2020 to November 2020 and then stopped. The defendant found a replacement tenant for the first storey only in March 2022.[90] The replacement tenancy agreement provided for a three-month rent-free period. Under the replacement tenancy agreement, the replacement tenant agreed to pay rent to the defendant of $8,000 a month plus GST from June 2022 to August 2022 and $12,000 a month plus GST from September 2022 to February 2024.

113 The defendant has not found a replacement tenant for the second and third storeys.

114 On the issue of mitigation, I accept the defendant's submission that the plaintiffs have not established what else the defendant could or should have done after November 2020 to secure a replacement tenant for the Property. I take judicial notice that the COVID-19 pandemic had a severe impact on the food and beverage sector in 2020 and 2021, making it difficult for a landlord to find a replacement tenant in that sector. In my view, even if the defendant had continued advertising the property after November 2020, the prospect of securing a new tenant before March 2022 were slim.

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90 TTJ's AEIC at para 71.

115 For the foregoing reasons, in my view, the plaintiffs have not discharged their burden of showing that the defendant failed to act reasonably in finding a replacement tenant for the Property after the plaintiffs yielded up the Property in January 2020.

The first tenancy agreement

116 The defendant quantifies his claim for loss of future rent under the first tenancy agreement at $347,935.48.[91] This is the rent which would have fallen due from the plaintiffs to the defendant under this agreement for the 34 months and 28 days from 3 January 2020 to 30 November 2022 after giving the plaintiffs credit for the rent which the defendant received from the replacement tenant from June 2022 to November 2022.

117 The defendant is entitled to recover this sum from the plaintiffs as his expectation loss under the first tenancy agreement.

The second tenancy agreement

118 The defendant quantifies his claim for loss of future rent under the second tenancy agreement at $209,419.35. This is the rent which would have fallen due from the plaintiffs to the defendant under the second tenancy agreement for the 34 months and 28 days from 3 January 2020 to 30 November 2022. As the second and third storeys remain vacant with no failure on the defendant's part to mitigate his loss, the defendant need not bring any sums into account for the plaintiffs' credit.

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[91] DCS at para 162.

119 The defendant is entitled in principle to recover this sum from the plaintiffs under the second tenancy agreement as his expectation loss.

120 But the result of awarding the defendant his expectation loss under the second tenancy agreement – comprising the rental arrears from September 2019 to January 2020 (see [109] above) and unpaid future rent from January 2020 to November 2022 (see [118] above) – appears odd in a situation such as the present where both the landlord and the tenant are in breach of the same tenancy agreement. It would appear to make no sense to hold that the plaintiffs can recover from the defendant the rent that they paid *before* August 2019 as their reliance loss (see [88]–[92] above) while at the same time holding that the defendant can recover from the plaintiffs the rent that became payable *after* September 2019 as his expectation loss. This amounts to holding that the plaintiffs are contractually excused from their obligation to pay rent for a period of time in which the second tenancy agreement remained on foot and they were in possession of the second and third storeys (*ie*, from December 2018 until August 2019) but have to pay damages to the defendant for failing to pay rent for a period of time after the second tenancy agreement had been terminated and when they were not in possession of the second and third storeys (*ie*, from January 2020 until November 2022).

121 To my mind, the answer to this oddity lies in the formulation of the test for expectation loss. A party claiming expectation loss – the defendant in this case – is not entitled to be put in the position he would have been in if his contractual counterparty had performed his obligations under the contract in some purely notional or abstract sense. A party claiming expectation loss is entitled to be put in the position he would have been in if the counterparty had performed *this* contract in accordance with the *specific* circumstances surrounding *this* breach of contract.

122 This formulation means that I cannot assess the defendant's expectation loss arising from the plaintiffs' breach of the second tenancy agreement while ignoring the defendant's own breach of the implied term in the second tenancy agreement. If the plaintiffs had performed their obligation to pay rent under the second tenancy agreement after August 2019, they would have paid the rent of $6,000 due every month to the defendant in compliance with that primary obligation. But as soon as the plaintiffs had paid that rent to the defendant, the defendant would have come under a secondary obligation – by reason of his own breach of the implied term in the second tenancy agreement – to pay damages to the plaintiffs equivalent to the sum he had just received from them as rent, being the plaintiffs' reliance loss for the defendant's breach of contract.

123 The result is that the plaintiffs' primary obligation to pay rent to the defendant under the second tenancy agreement from September 2019 until November 2022 is entirely set off by the defendant's secondary obligation to pay those same sums back to the plaintiffs as their reliance loss arising from the defendant's breach of the implied term in the second tenancy agreement. This leaves nothing owing to the defendant for his expectation loss for the plaintiffs' breach of the second tenancy agreement.

Conclusion on loss of rental income

124 For loss of rental income under both tenancy agreements, therefore, the defendant is entitled to recover from the plaintiffs only his expectation loss under the first tenancy agreement amounting to $347,935.48.[92]

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92 DCS at para 162.

Reinstatement expenses

125 The defendant's case is that the plaintiffs breached their obligation to reinstate the Property before yielding it up to the defendant in January 2020. The plaintiffs accept that cl 44 of both tenancy agreements obliges them to yield up the Property to the defendant in good and tenantable repair and condition at the end of the tenancy agreements or upon their sooner determination. The plaintiffs also accept that under cll 45.1 and 45.3 of both tenancy agreements, the defendant was entitled to remedy any breach of cl 44 by reinstating the Property and recovering the cost of doing so from the security deposits.

126 In support of the claim for the expenses that the defendant incurred in reinstating the Property, the defendant relies on a visual inspection report prepared by his professional engineer in November 2019 and a further report prepared by the same professional engineer in March 2020.[93] Both of these reports are supported by photographs. This professional engineer also filed an affidavit of evidence in chief and gave evidence at trial. His evidence confirmed and supplemented the contents of these reports. As against this, the plaintiffs produced only their own self-serving assertions and denials. I therefore accept the professional engineer's reports and evidence at trial as credible and reliable evidence of the state of the Property at or about the time the plaintiffs yielded it up to the defendant on 3 January 2020.

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93 TBK's AEIC at pp 158–272 (Tab 10: Visual Inspection Report Prepared by Messrs B K Tan Consultants for Tan Hee Liang dated 3 November 2019; Tab 11: Professional Engineering Report Prepared by Messrs B K Tan Consultants for Tan Hee Liang dated 25 March 2020).

The first tenancy agreement

127 The defendant quantifies his claim for reinstatement costs under the first tenancy agreement at $9,451.66. This comprises the following expenses that he incurred:

(a) $6,063.33 for air conditioning works at the first storey;

(b) $1,783.33 for electrical works at the first storey; and

(c) $1,605.00 for removal of rubbish at the first storey.

128 The air conditioning works were necessary to replace a cassette air conditioning unit that was installed at the first storey when the plaintiffs took possession of the Property in December 2018. The plaintiffs allege that they left the cassette air conditioning unit at the first storey when they yielded the Property up the defendant in January 2020. In support of this, the plaintiffs rely on a photograph taken in April 2022 which shows a cassette air conditioning unit installed at the first storey.[94] But the defendant produced a photograph taken by his professional engineer in late January 2020 showing that the cassette air conditioning unit was then missing.[95] I accept that the plaintiffs' photograph taken in April 2022 shows the replacement cassette air conditioning unit and not the original cassette air conditioning unit that was present when the plaintiffs took possession of the Property. I accept the professional engineer's evidence that this cassette air conditioning unit was missing when the plaintiffs yielded

94 SRK's AEIC p 192 (Tab Y: Photograph taken on or about 9 April 2022 of the ground floor of the Property).

95 2AB at p 665 (Professional Engineering Report Prepared by Messrs B K Tan Consultants for Tan Hee Liang dated 25 March 2020 at p 8).

up the Property to the defendant in January 2020. The plaintiffs are therefore obliged to bear this cost under the first tenancy agreement.

129 I accept also the professional engineer's evidence that the defendant incurred the cost of the electrical works and for the removal of rubbish. The plaintiffs are therefore obliged to bear this cost under the first tenancy agreement.

The second tenancy agreement

130 The defendant quantifies his claim for reinstatement costs under the second tenancy agreement at $36,859.16. This comprises the following expenses that he incurred:

(a) $6,063.33 for air conditioning works at the second storey;

(b) $1,783.33 for electrical works at the second storey;

(c) $1,605.00 for removal of rubbish at the second storey;

(d) $2,407.50 for removal of timber boards and carpets at the second storey; and

(e) $25,000 for rectification of the timber floor and ceiling at the second storey.

131 The professional engineer's evidence is that the air conditioning works at the second storey were necessary because the plaintiffs failed to maintain the air conditioning units at the second storey. The electrical works and the removal of rubbish were necessary for the same reasons. I accept his evidence. These were breaches of the second tenancy agreement. I therefore allow the

defendant's claim for the cost of air conditioning works, electrical works and the removal of rubbish under the second tenancy agreement.

132 I also allow the defendant's claim for the cost of removing the timber boards and carpets and for rectification of the timber floor and ceiling at the second storey, but with a small deduction. I accept that the defendant incurred these costs and that the plaintiffs were obliged to bear them under the second tenancy agreement. But I do not allow the defendant's claim for the entire cost of removing the plywood planks and the original timber flooring. I accept that the plaintiffs did install plywood planks over the original timber flooring at the second storey. After the plaintiffs yielded up the Property, the defendant had to remove the plywood planks because this created an additional and unacceptable load and had to replace the original timber flooring because the plywood planks had damaged the original timber flooring.

133 Clause 44 of the second tenancy agreement obliges the plaintiffs to "remove all … fixtures and installations of the [plaintiffs] or any part thereof" at the plaintiffs' expense before yielding up the Property. But it is a condition precedent to this obligation that the defendant must require the plaintiffs to do so. There is no evidence that the defendant ever required the plaintiffs to remove the plywood planks. Therefore, the cost of removing the plywood planks falls outside the scope of the plaintiffs' obligation under cl 44 of the second tenancy agreement. The defendant is therefore not entitled to recover from the plaintiffs the cost of removing the plywood planks.

134 The defendant is, however, entitled to recover the cost of replacing the underlying timber flooring. I accepted the professional engineer's evidence that the timber flooring was not in good and tenantable repair and condition as required by cl 44 of the second tenancy agreement.

135 The combined cost of removing the plywood planks and of replacing the original timber flooring was $2,407.50. In light of my finding that the plaintiffs are obliged to bear only the cost of replacing the timber flooring, I set the sum recoverable by the defendant at half of this cost, *ie*, $1,203.75.

136 For the foregoing reasons, the defendant is entitled to recover only the sum of $35,655.41 as reinstatement costs for the second storey under the second tenancy agreement.

Conclusion

137 In conclusion, I restate my findings as follows.

138 The two tenancy agreements are separate and independent agreements.

139 The defendant committed no breach of the first tenancy agreement. The plaintiffs committed a breach of the first tenancy agreement by ceasing to pay rent under it in December 2019 and by yielding the first storey up to the defendant prematurely. The plaintiffs are liable to the defendant in damages for this breach of contract.

140 The defendant committed a repudiatory breach of an implied term of the second tenancy agreement. But the plaintiffs affirmed the second tenancy agreement and thereby lost the right to terminate it for repudiatory breach. The plaintiffs did, however, retain their right to recover damages from the defendant for this breach. The plaintiffs committed a breach of the second tenancy agreement by ceasing to pay rent under it in September 2019 and by yielding the second and third storeys up to the defendant prematurely. The plaintiffs and the defendant are therefore liable in damages to each other for their respective breaches of the second tenancy agreement.

141 The plaintiffs are entitled to recover damages in the sum of $146,333 from the defendant on the plaintiff's claim. The defendant is entitled to recover damages in the sum of $411,494.91 from the plaintiffs on the defendant's counterclaim.

142 I decline to award the defendant pre-judgment interest on the arrears of rent due to the defendant at the contractual rate specified in the first tenancy agreement. That agreement obliges the plaintiffs to pay interest at the rate of 5% per month, or 60% per annum, on arrears of rent. I consider such a provision to be extravagant and unconscionable and to be a penalty clause. The defendant shall therefore recover interest on arrears of rent only at the statutory rate prescribed in the Civil Law Act 1909.

143 The sums that each party owes the other can be set off against each other. The defendant is therefore, on balance, entitled to recover the net sum of $265,161.91 from the plaintiffs.

144 The sum awarded on the defendant's counterclaim is significantly larger than the sum awarded on the plaintiffs' claim. I therefore consider the event in this action to be in the defendant's favour. That justifies an award of costs against the plaintiffs and in favour of the defendant.

145 However, the defendant has succeeded in only about half of his counterclaim. He has recovered substantial damages for breach of the first tenancy agreement. But he has been found to have been in repudiatory breach of the second tenancy agreement and therefore unable to recover any expectation loss under it. In these circumstances, I would ordinarily have considered it just on a broad-brush approach to award the defendant only 50% of his costs. But both tenancy agreements require the plaintiffs to pay legal costs

to the defendant on the indemnity basis. Taking that into account, I consider it just to award the defendant 70% of his costs instead of 50%.

146 The defendant quantifies his costs in his costs schedule at $213,551.26. 70% of that figure is $149,485.88. I have rounded that up for convenience to $150,000.

147 I therefore order that the plaintiffs shall pay to the defendant his costs of and incidental to this action, including both his counterclaim and his defence to the plaintiffs' claim, such costs fixed at $150,000 including disbursements.

Vinodh Coomaraswamy J
Judge of the High Court

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Ng Lip Chih and Chung Jun Hui Joel (Foo & Quek LLC)
for the defendant.