IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 197

Suit No 405 of 2019

Between

Inngroup Pte Ltd

… *Plaintiff*

And

M Asset Pte Ltd

… *Defendant*

JUDGMENT

[Contract] — [Breach]

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v
M Asset Pte Ltd

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High Court — Suit No 405 of 2019
Lai Siu Chiu SJ
31 March, 1–2 April; 2 June 2020

16 September 2020 Judgment reserved.

Lai Siu Chiu SJ:

Introduction

1 This suit arose out of a settlement agreement signed between the parties on 27 June 2018 ("the Settlement Agreement") that went wrong. Inngroup Pte Ltd ("the Plaintiff") was incorporated in Singapore on 13 August 2012[1] and is an investment holding company. The Plaintiff's shareholders cum directors include Mr Ng Peng Hong Stanley ("Stanley"), Mr Cheong Soon Seng Michael ("Michael") and Mr Ho Wing Keong Richard ("Richard"). Michael is apparently the biggest shareholder.

[1] AB34 (Statement of Claim in the 2016 Suit, para 1).

2 M Asset Pte Ltd ("the Defendant") is also a Singapore investment holding company, and was incorporated on 22 April 2010.[2] Its two directors are Mr Wong Poon Loong ("Wong") and his wife Mdm Loh Bay Ling ("Mrs Wong").

The facts

3 Since 9 April 2013, the Plaintiff has been the owner of a 99-year leasehold five-storey shop house located at No 41 Hong Kong Street, Singapore 059680 ("the Plaintiff's Property") while the Defendant is the owner of a 99-year leasehold shophouse located at No 42 Hong Kong Street, Singapore 059681 ("the Defendant's Property") which adjoins the Plaintiff's Property. The Defendant has owned the Defendant's Property since 2 August 2010. The Plaintiff's purchase of the Plaintiff's Property came with an existing tenancy.

4 In or around December 2015, the Plaintiff obtained permission from the Building and Construction Authority to convert the second to fifth storeys of the Plaintiff's Property into an approved temporary backpackers' hostel, change the use of the first storey from a temporary backpackers' hostel to a shop, and add a new fifth storey extension at the rear for office use (collectively "the Redevelopment Works").

5 On 13 September 2016, the Plaintiff commenced proceedings against the Defendant in Suit No 974 of 2016 ("the 2016 Suit").

6 The Plaintiff's claim in the 2016 Suit related to the Defendant's unreasonable refusal (according to the Plaintiff) to allow the Plaintiff to

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[2] AB34 (Statement of Claim in the 2016 Suit, para 2).

demolish its own boundary wall at the rear of the fifth storey. It was the Plaintiff's case that the Defendant's refusal caused the Plaintiff to have to adopt a more costly alternative construction method, thereby incurring increased construction costs and consultants' fees as well as loss of potential rental from tenancy agreements that the Plaintiff had entered into with two entities, namely Peramakan Pte Ltd ("Peramakan") and The Keepers Inn Pte Ltd ("Keepers Inn").

7 The Plaintiff's statement of claim ("SOC") in the 2016 Suit alleged that the Defendant and/or its tenant had encroached onto the Plaintiff's boundary wall by mounting and/or installing kitchen cabinets and furnishings directly onto the Plaintiff's boundary wall. Further, the metal roof on the fifth storey of the Defendant's Property and its support protruded beyond the boundary line of the Defendant's Property and encroached or trespassed upon the Plaintiff's Property.

8 As part of the Redevelopment Works, the Plaintiff intended to demolish the existing boundary wall and to re-erect a new boundary wall seated exactly on the boundary line of the Plaintiff's Property.

9 Mr Chew Chin Hui ("Chew"), the Plaintiff's project manager, sent emails to the Defendant on 25 April and on 6 May 2016 to give notice that the Defendant should demolish the kitchen fittings on the boundary wall and re-locate the metal roof and support prior to the Plaintiff's demolition works. By another email dated 16 May 2016, Chew gave notice that the Defendant's refusal to remove their fittings from the boundary wall meant that the Redevelopment Works would be delayed and the Plaintiff would thereby suffer loss and damages.

10 On 29 June 2016, the Defendant via Wong replied by letter to the Plaintiff refusing to consent to the Plaintiff's demolition of the boundary and claiming, without substantiation, that the boundary wall should logically belong to the Defendant's Property.

11 Further, in response to the Plaintiff's SOC, the Defendant filed a defence and counterclaim not only denying that it encroached onto the Plaintiff's Property but also counterclaiming for the alleged encroachment by the Plaintiff onto the Defendant's Property by the erection of standing platforms at the encroachment area.

12 In the interim, the Plaintiff had entered into a tenancy agreement with Peramakan dated 1 June 2016[3] under which the first storey of the Plaintiff's Property would be operated as a restaurant at $12,000 rent per month. Separately, it entered into a lease with Keepers Inn dated 1 July 2016[4] for rental of the second to fifth storeys as well as the mezzanine floor at the fifth storey and the roof terrace at $65,000 per month, to let out rooms.

13 According to Stanley, sometime in 2017 or early 2018, he came up with the idea of using the Plaintiff's Property as a co-working space and a boutique hotel in order to maximise yield. At about the same time, Stanley was introduced to Mr Lim Wei Siong ("Lim"), a director of Nuve Holdings Ltd ("Nuve"), which is a hotel operator. Stanley was keen to get Nuve to operate a hotel at the Plaintiff's Property and broached the subject to Lim. However, Lim declined

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3 AB131–146.

4 AB147–162.

saying he could not commit Nuve to operating another boutique hotel as Nuve had just taken on a third boutique hotel project.

14 In 2018, while the 2016 Suit was ongoing, the Plaintiff changed lawyers to their present solicitors who, upon taking over conduct of the proceedings, decided to amend the SOC. The draft amended SOC was forwarded to the Defendant's solicitors by the Plaintiff's solicitors on 20 June 2018. In the draft amended SOC, the Plaintiff claimed in excess of $3m for the increased construction costs due to using an alternative construction method and the resultant prolonged construction period as well as loss of rental under the tenancies with Peramakan and Keepers Inn due to the delay in completion.

15 With a view to an amicable settlement of the dispute, both parties agreed, and proceeded, to mediation. The session was held on 26 June 2018 and chaired by a retired judge ("the Mediator") of the Supreme Court. Apart from its solicitors, the attendees from the Plaintiff's side were Stanley, Michael, Richard, and Chew (whose wife Mdm Chan Ren Tze is a shareholder of the Plaintiff). Richard left the mediation session sometime in the afternoon.

16 Representing the Defendant at the mediation session were Wong, Mr Ng Dick Young (a professional engineer) and the Defendant's solicitors. At one stage (about 7.25pm), Mrs Wong joined the mediation session at the suggestion of the Mediator since he understood from Wong that the latter needed to consult his wife and obtain her consent to any agreement with the Plaintiff.

17 The mediation session continued into the early hours (2.30am) of 27 June 2018 and culminated in the Settlement Agreement.[5] A contemporaneous attendance note of the mediation session ("the Attendance Note"[6]) drafted by Ms Mabel Wei Suying ("Mabel"), a trainee solicitor from the Plaintiff's solicitors' firm, was produced in court; it recorded what transpired during the open sessions of the mediation when all the parties and their counsel were present together with the Mediator.

18 In his affidavit of evidence in chief ("AEIC"),[7] Stanley recounted what transpired at the mediation session, his recollection being aided by the abovementioned Attendance Note (see [17] above).

19 Amongst the key terms of the Settlement Agreement were the following:

(a) under clauses 1 to 3, the Defendant would contribute $250,000 payable in two tranches (of $100,000 and $150,000) towards the Plaintiff's cost of renovating the Defendant's Property;

(b) under clause 4.1, the renovations would be to the Plaintiff's desired requirements and/or specifications ("the Renovation Works") and the Defendant would give the Plaintiff access to all floors of the Defendant's Property;

(c) under clause 4.2, both parties would apply for regulatory approval for change of use of the Defendant's Property for which the

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5 AB223–227.

6 AB193–222.

7 Stanley's AEIC at paras 38 to 62.

Plaintiff would bear all the costs and expenses with respect to the submissions and applications;

(d) under clause 6, the Defendant would lease the second to fifth storeys of the Defendant's Property to the Plaintiff at $8,000 per month for a term of three years with rent payable three months after 1 August 2018 on the following terms for handover to the Plaintiff:

(i) the fourth and fifth storeys would be handed over by 1 August 2018 for the Renovation Works to commence;

(ii) the second storey would be handed over by end June 2019; and

(iii) the third storey would be handed over by end January 2020;

(e) under clause 7, the Defendant would lease to the Plaintiff the second to fifth storeys of the Defendant's Property at the rate of $12,000 per month for two years after the expiry of the lease in [19(d)] above; and

(f) the parties agreed to enter into a tenancy agreement to reflect the key terms set out in [19(d)] and [19(e)] above, with the Defendant giving the Plaintiff the first option to renew the tenancy agreement at the conclusion of the first five year tenancy at the prevailing market rental rate.

20 The terms of the Settlement Agreement (which were reflected in the Attendance Note) clearly envisaged that the Defendant's Property would be part and parcel of the Plaintiff's plan to convert the Plaintiff's Property into a

boutique hotel and/or co-working space. This was also Stanley's understanding, as seen from his deposition in his AEIC[8] that he intended the hotel lobby for the boutique hotel to be located on the fifth storey of the Plaintiff's Property opening out to a roof terrace. If the Plaintiff could create an access opening on that floor to the Defendant's Property, the entire fifth floor could be expanded and the Plaintiff could use the extra space either for additional rooms or an expanded rooftop terrace coupled with a trendy rooftop bar.

21 After the execution of the Settlement Agreement, the Plaintiff resumed discussions with Lim of Nuve. On 15 July 2018, Nuve issued a letter of intent[9] ("the Letter of Intent") to the Plaintiff stating that it intended to rent the second to fifth storeys of the Defendant's Property at $1,650 plus 10% room revenue per room per month commencing from 15 November 2018 subject to the Plaintiff entering into a tenancy agreement with the Defendant.

22 At about the same time, the Plaintiff came to know another boutique hotel operator, Commeansure Pte Ltd (more commonly known as "Red Doorz"). In September 2018, Red Doorz gave the Plaintiff a letter of intent setting out their intention to operate the Plaintiff's boutique hotel at a hybrid rent/profit arrangement, which comprised a fixed component of $46,000 rent per month plus a variable 12.5% profit sharing component (for amounts above $10,000 net profit).

23 When Stanley conveyed Red Doorz's offer to Lim, he offered the Plaintiff the same hybrid payment arrangement with a higher fixed rent of

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8 Stanley's AEIC at para 39.

9 AB1064.

$49,000 per month plus 10% of gross revenue less a notional fixed sum to account for operating expenses (which was later agreed at $80,000). The Plaintiff and Nuve subsequently signed a hotel management agreement for the Plaintiff's Property on 3 February 2019 ("the Hotel Management Agreement"). To-date the Hotel Management Agreement for the Defendant's Property cannot be implemented because it is the Plaintiff's case that the Defendant has refused to sign a tenancy agreement with, as well as hand over the Defendant's Property to, the Plaintiff.

24 Problems arose subsequent to the signing of the Settlement Agreement. On 5 July 2018,[10] Wong emailed on behalf of the Defendant to the Plaintiff to say that the first tranche of $100,000 of the Defendant's contribution of $250,000 would be paid "in stages" when billed. After consulting the Plaintiff's solicitors, Michael replied on behalf of the Plaintiff to the Defendant's email on the same day[11] rejecting the Defendant's proposal. Michael conveyed the advice from the Plaintiff's solicitors that the first instalment, for which an invoice was unnecessary, was payable in full on 1 August 2018 under clause 2 of the Settlement Agreement.

25 Wong followed up with a second email on 18 July 2018[12] in which he inquired whether the Plaintiff was open to the idea of the Defendant paying the $100,000 by five monthly instalments of $20,000 each with the Plaintiff withdrawing the 2016 Suit upon the Defendant's payment of the first instalment and the Plaintiff's payment of the security deposit under the tenancy agreement.

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10 AB233.

11 AB223.

12 AB237.

26 Michael replied to the Defendant on 20 July 2018[13] rejecting the Defendant's proposal and counter-proposing that the Defendant make payment of the $100,000 by two equal instalments of $50,000 each, payable in August and September 2018. It was only upon the Defendant's full payment of the $100,000 that the Plaintiff would withdraw the 2016 Suit. The Defendant eventually paid the $100,000 on 30 July 2018.[14] The Plaintiff then discontinued the 2016 suit on 8 August 2018.

27 Michael had attached to his email of 20 July 2018 a draft tenancy agreement from the Plaintiff's solicitors ("the Plaintiff's draft TA"). He stated that there should not be any security deposit for the rent as the Defendant still owed the Plaintiff $150,000 for renovation costs.

28 On 20 July 2018,[15] Wong replied to Michael's email of 20 July 2018 (see [26]–[27] above) stating that any draft tenancy agreement should come from the Defendant as the owner/landlord and not from the Plaintiff tenant. He wanted to save on legal costs by not involving lawyers in the tenancy agreement. Michael replied to Wong's email on the same day requesting that the Defendant forward its draft tenancy agreement to the Plaintiff before their proposed meeting on Monday 23 July 2018.

29 Wong followed up on 21 July 2018[16] with another email to Michael stating he would not be forwarding the Defendant's draft tenancy agreement.

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13 AB238.

14 AB312.

15 AB283.

16 AB282–283.

Instead, Wong would let the Plaintiff see this draft ("the Defendant's first draft TA") at their 23 July 2018 meeting. He duly did so.

30 On 4 August 2018, Chew responded to Wong's email (see [29] above) attaching the Plaintiff's draft TA which was prepared based on the Settlement Agreement. He pointed out that there were no costs saving as the Plaintiff had already incurred legal fees in preparing the Plaintiff's draft TA and each party was in any event required to bear their own legal fees under the Settlement Agreement.

31 On 10 August 2018, Wong repeated his earlier contention that the draft tenancy agreement should come from the Defendant as the landlord. He said he had made amendments to the Plaintiff's draft TA. He disagreed with Chew's complaint that the Defendant's first draft TA, which he had handed over to the Plaintiff at the meeting on 23 July 2018, contravened the terms of the Settlement Agreement.

32 In his AEIC,[17] Michael deposed that Wong forwarded to the Plaintiff no less than six draft tenancy agreements between 23 July and 5 October 2018 with each successive draft containing fresh terms, some of which were inconsistent with or contravened the Settlement Agreement. Each of the Defendant's draft tenancy agreements will henceforth be referred to via their numerical order (that is, "the Defendant's second draft TA", "the Defendant's third draft TA", and so on). Michael added that in none of the six drafts did the Defendant include a clause giving the Plaintiff exclusive possession of the Defendant's Property as tenant. Nor was there any reference at all to the Settlement Agreement.

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17 Michael's AEIC at paras 56 to 125.

33 On 10 October 2018,[18] Michael emailed a letter to Wong (on behalf of the Defendant) enclosing the Defendant's fourth draft TA, containing mark-ups of the Plaintiff's proposed amendments which adhered to the terms of the Settlement Agreement. He gave notice that if the Plaintiff did not receive the signed tenancy agreement (in duplicate) by 6pm of 25 October 2018, the Plaintiff would take steps to enforce the Settlement Agreement.

34 On 19 October 2018,[19] Wong replied (i) accusing the Plaintiff *inter alia* of not complying with the spirit of the Settlement Agreement and wanting to avoid signing a tenancy agreement with the Defendant; and (ii) asserting that the Defendant's sixth draft TA that he had forwarded to the Plaintiff on 5 October 2018 contained the essential terms of and conformed with, the Settlement Agreement. Wong gave notice that if the Plaintiff did not sign the tenancy agreement in accordance with the Defendant's sixth draft TA and pay the security deposit by 25 October 2018, he would treat the Plaintiff as not wanting to sign the tenancy agreement and release the Defendant's Property for rent to others.

35 Deciding that it had had enough of Wong's conduct, on 15 November 2018[20] the Plaintiff through its solicitors issued a letter to the Defendant's solicitors demanding that the Defendant forthwith deliver up possession to the Plaintiff of the fourth and fifth storeys of the Defendant's Property for commencement of renovations works and that the Defendant enter into a formal

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18 AB534–547.

19 AB591.

20 AB621–623.

tenancy agreement with the Plaintiff. The Plaintiff's solicitors required the Defendant's solicitors' response by 21 November 2018.

36 The Defendant's former solicitors replied to this letter on 19 November 2018[21] to say they had no instructions from the Defendant. The reply prompted the Plaintiff's solicitors to write directly to the Defendant on 20 November 2018.[22]

37 On 30 November 2018,[23] the Defendant's current solicitors replied to the Plaintiff's solicitors' letter (referred to at [36] above) requesting that the Plaintiff refrain from acting while they obtained the Defendant's instructions. As no substantive reply was forthcoming, the Plaintiff's solicitors sent them a reminder on 7 January 2019.[24]

38 On 9 January 2019,[25] the Defendant's solicitors emailed two draft tenancy agreements (the Defendant's seventh and eighth draft TAs) to the Plaintiff's solicitors for the Plaintiff's consideration. No explanation was provided by the Defendant's solicitors as to why they provided two drafts. Clause 2(i) of the seventh draft TA[26] stated that the tenancy of 42C and 42D Hong Kong Street would commence on 1 August 2018 and terminate on 14 November 2021. Clause 2(ii) stated that the tenancy of 42B Hong Kong Street would commence on 1 February 2020 and expire on 14 November 2021.

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21 AB711.

22 AB712–713.

23 AB768.

24 AB770.

25 AB771.

26 AB772–783.

Clause 2(iii) stated that the tenancy of 42A Hong Kong Street would commence on 1 July 2019 and end on 14 November 2021. Clauses 3 and 4 below clearly departed from clause 6 of the Settlement Agreement:

> 3. In the event that the existing tenant of 42B Hong Kong Street Singapore 059681, Messrs The Rolling Space Pte. Ltd. ["Rolling Space"], exercises the option to renew in its tenancy agreement, Clause 2.ii. above is replaced with the following:
>
> > "42B Hong Kong Street Singapore 059681 for a term commencing the 13th day of December 2020 until the 14th day of November 2021 …"
>
> 4. In the event that the existing tenant of 42A Hong Kong Street Singapore 059681, Messrs Bertsica & Co Pte. Ltd., exercises the option to renew in its tenancy agreement, clause 2.iii. above is deleted.

Clause 3 became academic as the tenant Rolling Stone did not renew its lease and the third storey of the Defendant's Property has been vacant since 27 June 2018.[27]

39 In the Defendant's eighth draft TA[28] the equivalent clauses provided as follows:

> 2. Subject always to Clause 3 below, the tenancy and term for the Premises commences on 15th day of November 2021 until the 14th day of November 2023 …
>
> 3. In the event that the existing tenant of 42A Hong Kong Street Singapore 059681, Messrs Bertsica & Co Pte. Ltd. ["Bertsica"], exercises the option to renew in its tenancy agreement, Clause 2 above is replaced with the following:
>
> > "The tenancy and term for each Unit shall be as follows:
> >
> > i. 42B, 42C and 42D Hong Kong Street Singapore 059681 for a term commencing from the 15th day

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27 AB1203.

28 AB785–797.

> of November 2021 until the 14th day of November 2023 …;
>
> ii. 42A Hong Kong Street Singapore 059681 for a term commencing the 1st day of June 2022 until the 14th day of November 2023 …"

The tenancy agreement between the Defendant and Bertsica, which was produced in court,[29] was for three years from 5 April 2016, and apparently (according to the Plaintiff) was not renewed. It contained an unusual term in clause 4(f)[30] that Bertsica would be allowed to renew the tenancy only if the tenant of 42B (*ie*, Rolling Space) renewed its tenancy at the same time.

40 By its letter dated 22 January 2019[31] to the Plaintiff's solicitors, the Defendant's solicitors *inter alia* (i) denied that the Defendant had refused to hand over the Defendant's Property to the Plaintiff or to enter into a tenancy agreement with the Plaintiff; (ii) denied that the Defendant's draft TAs contravened the terms of the Settlement Agreement: and (iii) pointed out that the Plaintiff's attempt to set off the rent deposit against the Defendant's second payment of $150,000 for the renovation costs was not acceptable as the sum was for renovation costs and not a tenancy term. They reiterated that the Defendant remained willing to discuss and consider any reasonable amendments the Plaintiff may have to the Defendant's draft TAs. The solicitors requested the Plaintiff to provide their amendments to the Defendant's seventh and eighth draft TAs by 1 February 2019.

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29 AB1179.

30 AB1185.

31 AB878–880.

41 On 1 February 2019, the Plaintiff's solicitors replied to the Defendant's solicitors' letter (see [40] above) pointing out that the Defendant was now for the first time (nearly half a year after the signing of the Settlement Agreement) expecting the Plaintiff to sign two tenancy agreements. The Plaintiff's solicitors asserted that it was the Defendant who had failed to comply with the terms of the Settlement Agreement by wilfully refusing to sign a tenancy agreement with the Plaintiff. They proposed a meeting with the Defendant's solicitors to try and resolve the issues.

42 The reply from the Defendant's solicitors dated 11 February 2019[32] was to the effect that the Defendant was agreeable to a meeting on condition that any discussions would be based on the Defendant's eighth draft TA and after the Plaintiff had provided their amendments to the same.

43 The parties and their solicitors met at the office of the Defendant's solicitors on 6 March 2019 but the impasse was not resolved as the Defendant allegedly attempted to renegotiate the terms of the Settlement Agreement, including by seeking a higher rate of rent.

44 The Defendant's solicitors wrote to the Plaintiff's solicitors on 7 March 2019[33] proposing *inter alia* (i) that the Defendant hand over two instead of four storeys of the Defendant's Property; and (ii) an upward revision in the rent agreed in the Settlement Agreement. On 22 March 2019,[34] the Plaintiff's solicitors replied rejecting the Defendant's proposals and expressing frustration over the Defendant's refusal to execute the tenancy agreement forwarded in

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32 AB884–886.

33 AB911.

34 AB913–917.

Michael's email of 20 July 2019 (see [26]–[27] above), or to propose amendments to the Plaintiff's draft TAs (including a second draft TA, which I shall refer to as "the Plaintiff's second draft TA") that were based on the Defendant's drafts.

45 It was only on 8 January 2020 that the Defendant finally returned to the Plaintiff's solicitors the Plaintiff's second draft TA, albeit with amendments that (according to the Plaintiff) still contravened the terms of the Settlement Agreement.

46 The Plaintiff was in the midst of the Redevelopment Works (which have since been suspended) when they commenced these proceedings in April 2019. The Defendant attempted (unsuccessfully) to strike out the Plaintiff's claim.

47 In the event, the Defendant to-date has not handed over to the Plaintiff the fourth and fifth storeys of the Defendant's Property by the deadline of 1 August 2018 pursuant to clause 6.1 of the Settlement Agreement. Nor has the Defendant handed over to the Plaintiff any other storeys of the Defendant's Property.

The pleadings

Statement of Claim

48 The Plaintiff's SOC in the proceedings before me prayed for specific performance of the Settlement Agreement, damages quantified at $25,000 per month commencing from August 2018 until the Defendant's Property was handed over to the Plaintiff, and damages of 10% of the projected gross revenue for the operation of the intended hotel or boarding house (as it has been unable to perform the Hotel Management Agreement with Nuve set out in [23] above).

As an alternative to and in lieu of specific performance, the Plaintiff claimed damages from the Defendant.

Defence and Counterclaim

49 In its very lengthy Defence and Counterclaim ("Defence"), which prompted an equally lengthy Reply being filed by the Plaintiff, the Defendant *inter alia*:

(a) admitted that it had been served with the SOC for the 2016 Suit;

(b) denied that the Plaintiff extended to the Defendant a copy of the proposed amended SOC in the 2016 Suit;

(c) alleged that the Plaintiff made various representations to the Defendant to the effect that:

(i) the Plaintiff has expertise in the business of operating hotels and had obtained the relevant regulatory approvals and/or licences to do so at the Plaintiff's Property;

(ii) given its experience and expertise, the Plaintiff was confident that it could obtain change of use for the Defendant's Property from commercial use to a hotel. The Plaintiff would obtain change of use of the Defendant's Property and carry out renovations at its own cost – no other use for the Defendant's Property was discussed;

(iii) if the Defendant's Property was leased to the Plaintiff, it could be used as a hotel or used as additional rooms for the hotel at the Plaintiff's Property; and

(iv) after the Plaintiff's hotel was completed, the parties would mutually benefit as the two properties could be sold for a higher price;

(d) asserted that the Plaintiff was well aware that the second to fifth storeys of the Defendant's Property had existing tenancies and for that reason, the Defendant could only hand over the Defendant's Property on a staggered basis as and when the tenancies terminated;

(e) averred that the Plaintiff was also aware that the tenancies at the Defendant's Property contained renewal clauses which would result in delayed hand-over to the Plaintiff for which reason and in exchange, the Defendant granted to the Plaintiff a further reduced rental rate;

(f) averred that to cater for a situation where the Defendant's Property was sold before the Plaintiff's tenancy expired, the Plaintiff suggested that the Defendant's Property be sold subject to the Plaintiff's tenancy;

(g) averred that the Defendant was agreeable to the Plaintiff's proposals and the parties signed the Settlement Agreement on 27 June 2018 (the Defendant referred to the key terms of the Settlement Agreement);

(h) pleaded it would rely on the entirety of the Settlement Agreement at the trial for its full terms and effect;

(i) averred that the terms of the Plaintiff's tenancy of the Defendant's Property would have to set out the relevant terms of clauses 6 and 7 of the Settlement Agreement;

(j) claimed that the Settlement Agreement did not provide for the event where the Defendant's tenants chose to exercise their option to renew clauses;

(k) stated that the Settlement Agreement did not provide for events such as where the Defendant's tenants chose to exercise their option to renew clauses; or subletting, *en-bloc* sale, assignability of tenancy agreement, property tax liability, security deposit insurance, air-conditioners maintenance, payment of outgoings, default interest and right of re-entry;

(l) stated that amongst the primary terms in the Settlement Agreement, the Defendant included the following:

(i) the Plaintiff would pay the Defendant discounted rental rates of $8,000 per month for the first three years followed by $12,000 per month for the next two years;

(ii) thereafter the Plaintiff would be given the first option to renew the tenancies at prevailing market rates;

(iii) the Defendant would allow the Plaintiff a rent-free period of three months as part of the first three-year lease to enable the Plaintiff to carry out renovation works for converting the Defendant's Property into a hotel; and

(iv) the Defendant agreed to contribute $250,000 towards the renovation works in two tranches (comprising $100,000 payable by 1 August 2018 and then $150,000 payable within seven days of the completion of the sale of the Defendant's Property);

(m) averred that as the issues at [49(l)] were neither discussed nor agreed, parties had to discuss and agree on suitable clauses for the tenancy agreement to give effect to the Settlement Agreement;

(n) averred that the handover of the Defendant's Property to the Plaintiff was expressly or impliedly conditional upon the parties first entering into a tenancy agreement; and

(o) alleged that the Plaintiff had refused to sign the tenancy agreement provided by the Defendant and has, from on or about 19 October 2018, refused to discuss or negotiate the terms for the tenancy agreement and/or the parties have not been able to reach an agreement over the terms of the tenancy agreement. As such, the Defendant was not obliged to hand over the fourth and fifth storeys of the Defendant's Property.

50 In the Defence, the Defendant did not deny that the Plaintiff had provided it with the Plaintiff's draft TAs. Neither did it deny that it had provided the Plaintiff with the Defendant's second to sixth draft TAs. It admitted that the Defendant's solicitors had forwarded the seventh and eighth draft TAs to the Plaintiff's solicitors by email on 9 January 2019. The Defendant contended that the seventh draft TA contained the relevant key terms set out at clauses 6 and 7 of the Settlement Agreement as well as all other terms necessary for or commonly found in a tenancy agreement that were not expressly agreed or considered by the parties.

51 To the same intents and purposes, the Defendant alleged that it continued to make further proposals in which connection it claimed that it made reasonable amendments to or provided comments regarding the Defendant's

seventh draft TA. However, the Defendant alleged that from about 19 October 2018 onwards the Plaintiff refused to discuss or negotiate the terms for the tenancy agreement and/or the parties have been unable to reach an agreement over the terms of the tenancy agreement and/or execute a tenancy agreement. The Defendant added that the parties have also not been able to agree for the change of use of the Defendant's Property for any use other than as a hotel.

52 The Defendant added that it was an implied term that the parties would negotiate the terms of the tenancy agreement in good faith and alleged that the Plaintiff refused to do so or even consider the proposals made by the Defendant.

53 The Defendant alleged that the Plaintiff was in breach of the Settlement Agreement in refusing to consider the Defendant's numerous proposals for the tenancy agreement and in refusing to have their dispute mediated by the Singapore Mediation Centre.

54 Consequently, the Defendant *inter alia* counterclaimed against the Plaintiff for the loss and damage it suffered which included:

(a) rent due from 1 November 2018 at $8,000 per month;

(b) damage arising from the failure to rectify water leakage caused to the Defendant's Property by construction works carried out at the Plaintiff's Property; and

(c) a declaration that the tenancy portion of clause 8 of the Settlement Agreement is void for uncertainty.

Reply and Defence to Counterclaim

55 In its Reply and Defence to the Counterclaim, the Plaintiff joined issue with the Defendant on its Defence. The Plaintiff maintained that the proposed amended SOC for the 2016 Suit was provided to the Defendant on or about 20 June 2018.

56 The Plaintiff denied making any representations to the Defendant as alleged or at all. It added that at all material times, the Defendant was aware that the Plaintiff intended to operate the business of a boarding house or hostel or hotel (with ancillary food and beverage facilities and amenities as may be required). The Defendant was also aware that that any change of use was subject to approval by the regulatory authorities. The Plaintiff at no time represented to or otherwise informed the Defendant that it could guarantee that regulatory approval would be obtained for the change of use of the Defendant's Property from commercial use to hotel use.

57 To the extent that the Plaintiff and the Defendant had contemplated that the Plaintiff could make convenient use of the Defendant's Property and that the Plaintiff could amongst other potential uses, use the Defendant's Property as part of and/or in connection with the Plaintiff's Property, including as additional rooms for the boarding house or hostel or hotel, the Plaintiff denied the Defence's allegation[35] that the Plaintiff had represented to Wong that the Plaintiff could renovate the Defendant's Property as a hotel or otherwise make convenient use of the Defendant's Property as additional rooms for the hotel on the Plaintiff's Property.

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35 Defence at para 11(d).

58 The Plaintiff averred that because the parties intended to set out fixed deadlines for the handover of the Defendant's Property to the Plaintiff, clauses 6.2 and 6.3 of the Settlement Agreement had handover dates inserted by the Defendant. Further, handover was not contingent on the occurrence of any event. The Plaintiff had no knowledge of the terms of, and was not provided with copies of, the Defendant's tenancy agreements with its tenants at the material time.

59 The Plaintiff averred that the Defendant had given an undertaking in clause 4 of the Settlement Agreement that it would allow renovation works to the Defendant's Property to be carried out in accordance with the Plaintiff's desired requirements or specifications.

60 The Plaintiff averred that it was an implied term of the Settlement Agreement that the tenancy agreement would not introduce or contain terms that contradicted the commercial intent or express terms of the Settlement Agreement. The Plaintiff could introduce additional or boilerplate clauses in the formal tenancy agreement to be entered into, provided that such terms did not contradict the commercial intent or express terms of the Settlement Agreement. It was not the parties' intention that the parties would be allowed to introduce terms into the tenancy agreement that derogated from or wholly undermined the Settlement Agreement.

61 The Plaintiff alleged that the parties' failure to enter into any tenancy agreement was due to the Defendant's unreasonable refusal to abide by the Settlement Agreement and/or wilful refusal to execute a tenancy agreement in accordance with the commercial intent and/or material terms set out in the Settlement Agreement. The Defendant's unreasonable conduct was said to include the following:

(a) refusing to execute the Plaintiff's draft TA sent to the Defendant on or about 20 July 2018; and

(b) repeatedly putting forth its own various versions of the tenancy agreement each of which introduced or maintained clauses that contravened or were inconsistent with the terms and commercial considerations underpinning the Settlement Agreement. Such terms or attempts to introduce such terms included:

(i) a prohibition on assignment despite the Defendant having actual or constructive knowledge that the Plaintiff in the course of its business intended to have or has a separate operator or subtenant to run the boarding house or hotel business, or food and beverage business;

(ii) an entire agreement clause which would supersede the Settlement Agreement;

(iii) an *en-bloc* sale clause stating that any such sale would not be subject to the tenancy agreement (contrary to clause 13 of the Settlement Agreement);

(iv) handover dates for the various storeys of the Defendant's Property that were not in accordance with the dates set out in clause 6 of the Settlement Agreement;

(v) asking for increased rental contravening clauses 6 and 7 of the Settlement Agreement;

(vi) an option to renew clause for one instead of five years;

(vii) a new and onerous term for deeds of indemnity to be provided by the individual shareholders or directors of the Plaintiff; and

(viii) ignoring the Plaintiff's various requests to amend the offending clauses in each version of the Defendant's draft TAs.

62 The Plaintiff maintained it was at all times ready, willing and able to abide by and comply with the Settlement Agreement. It amended the Defendant's fourth draft TA for the Defendant's review and had even proposed on 1 February 2019 a face-to-face meeting to discuss and execute the Tenancy Agreement at the end of the meeting. But the Defendant unreasonably refused its offer.

63 As for the Defendant's counterclaim, the Plaintiff asserted that from the 2016 Suit, the Defendant was well aware that the Plaintiff was redeveloping the Plaintiff's Property for use as a boarding house or hostel or hotel. Needless to say, the Plaintiff disputed the Defendant's Counterclaim.

The evidence

64 In support of its case, the Plaintiff called five witnesses to testify. Besides Stanley and Michael, the Plaintiff's other witnesses were Lim (from Nuve, see [13] above); Mr Chew Hun Keat ("CHK"), a quantity surveyor; and Mr Wilson Lim Yen Kai ("Wilson Lim"), a licensed appraiser. As stated at [17] above, the Attendance Note was produced in court. Indeed, the Defendant consented to the admission of that document as well as Mabel's AEIC without the need to have Mabel testify.

65 On the Defendant's part, Wong turned out to be its only witness although an order of court dated 17 January 2020 also listed Mrs Wong as a witness. In its closing submissions,[36] the Plaintiff argued that the appropriate adverse inferences should be drawn against the Defendant for its belated withdrawal of a key witness.

The Plaintiff's case

66 The Attendance Note[37] (including 2½ handwritten pages) totalled 29½ pages. Mabel's recording started at 10am on 26 June 2018 and concluded at about 11pm when discussions on the drafting of the Settlement Agreement commenced until the document was signed at 2.30am on 27 June 2018.

67 The Attendance Note did not record discussions held in private caucuses between the Mediator and the Plaintiff's representatives or the Defendant's representatives. Neither did it record what transpired between the parties *inter se* when they held their own private discussions. It appeared from the Attendance Note that at one stage (at 11.50am)[38] the parties talked privately at length. Mabel next recorded that the open session resumed at 6.30pm. That meant the parties held a lengthy private discussion in the late morning and for the entire afternoon. The court notes this because of the Defendant's allegations (see [49(c)] above) that the Plaintiff (who denied it) made various representations. The Attendance Note did not record any representations being made by any of the Plaintiff's representatives. The court will return to the

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36 Plaintiff's Closing Submissions ("PCS") at para 62.

37 AB193–222.

38 AB204.

Attendance Note in the course of reviewing the evidence of the various witnesses.

68 Most of the talking during the open sessions was done by the Plaintiff's representatives, particularly Michael, and the Mediator.

69 Stanley's narrative of events was largely consistent with what has been set out at [3]–[44] above. The court therefore turns to review Stanley's testimony during cross-examination.

70 Stanley was questioned on the Attendance Note. He agreed that when Mrs Wong joined the mediation session in the evening, her primary unhappiness was with the figure of $350,000 that the Plaintiff wanted from the Defendant as the contribution for renovations to be carried out by the Plaintiff. That figure was eventually reduced by $100,000 to $250,000, a sum with which Mrs Wong agreed. Mrs Wong was also unhappy about the rents being fixed at $8,000 and then $12,000 but she accepted those figures which were unchanged.

71 Stanley revealed that at the mediation session, he had initially wanted a rent-free period of ten years for renting the Defendant's Property. Wong did not agree, so eventually the Plaintiff agreed to a "five plus five" rental period.

72 Stanley agreed that at the mediation, the Plaintiff's main focus (if an agreement was reached with the Defendant) was to convert the Defendant's Property into a hotel. Failing obtaining approval for a hotel, the Plaintiff would consider turning the Defendant's Property into a co-working space. This would

not require a change of use as the Defendant's Property was already zoned as commercial. This fact was confirmed by Wong during cross-examination.[39]

73 The Defendant's case, which its counsel Mr Murali put to Stanley, was that the Plaintiff did not at the mediation raise the issue of turning the Defendant's Property into a co-working space if it did not obtain approval for conversion into a hotel. Mr Murali relied on the Attendance Note pointing out that only twice[40] and in passing too was there mention of "co-working space" as an alternative use for the Defendant's Property. Stanley disagreed there was no discussion of co-working space or that Wong never agreed to this as an alternative use for the Defendant's Property.

74 As the private sessions between the parties were not minuted, there is no evidence before the court as to whether discussions on co-working space took place between Wong and the Plaintiff's representatives when the Mediator was not present. The court notes however that if indeed no mention of co-working space took place in the private sessions between the parties, when the subject was raised twice in the open sessions, one would imagine that it would have been the natural reaction of Wong to have objected and said something to the effect of "I have never agreed to my (the Defendant's) property being used for co-working space". No such objection was noted to have been raised by either Wong or the Defendant's counsel.

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39 2/4/2020 NE 3.

40 AB205–206.

75 In cross-examination of Stanley and Michael (PW2), Mr Murali placed great emphasis on the fact that the 2016 Suit never went to trial so there was no finding at law on the merits of the Plaintiff's claim.

76 Michael's testimony was similar to Stanley's. To both witnesses, Mr Murali stressed in the course of cross-examination that in the Settlement Agreement, the Defendant *never* agreed to compensation for the Plaintiff's alleged losses, only that the Defendant would make *a contribution sum* towards renovation costs which amount was finally settled at $250,000, a reduction from the Plaintiff's initial demand for $350,000. The reduced figure was agreed only after Mrs Wong joined the mediation session in the evening. In fact, the Attendance Note[41] showed that Mrs Wong, not her husband, was the primary negotiator in relation to the *agreed contribution sum* stated at clause 1 of the Settlement Agreement.

77 As is usually the case, on hindsight, the Settlement Agreement could have been better drafted. The court notes that the focus in the document was on a possible sale of the Plaintiff's and the Defendant's Properties and not on turning either or both properties into a boutique hotel. This was certainly the impression given by Wong's participation in the discussions.

78 Further, the change of use[42] of the Defendant's Property was not clearly spelt out. It was only during cross-examination of Stanley and Michael that the court became aware that the regulatory approved use of the Plaintiff's Property was that of a boarding house, which approval needs to be renewed every three

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41 AB212–217.

42 AB224 (clause 4.2),

years – unlike that for a hotel, which approval is once and for all. The change of use was what the Plaintiff hoped to obtain for the Plaintiff's as well as the Defendant's Property.

79 Yet another shortcoming in the Settlement Agreement was the option to renew clause[43] which was silent on the renewal period(s) for the tenancies spelt out in clauses 6 and 7.

80 Stanley had opined[44] that the Defendant's chances of obtaining change of use (to a boarding house from commercial use) would be higher if the Plaintiff leased the Defendant's Property because the Plaintiff already held the licence for an approved boarding house. It was the Plaintiff's hope that with a hotelier like Nuve coming in as its operator, the Plaintiff's Property's intended change of use to a hotel from a boarding house would be approved[45] although Michael acknowledged there was no guarantee the Plaintiff would obtain such approval, and he had so informed Wong at the mediation session.[46] Failing such approval, the alternative would be for the Plaintiff to convert the Plaintiff's and the Defendant's Properties to co-working spaces.

81 Michael admitted that in or about August 2018, the Plaintiff was aware from press reports as well as from the Urban Redevelopment Authority ("URA"), that no more hotel space would be approved in principle for Hong Kong Street. Michael did not inform Wong orally but insisted he wrote to inform Wong subsequently.

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43 AB225 (clause 8).

44 31/3/2020 NE 47, 74.

45 31/3/2020 NE 47 (Stanley), 1/4/2020 NE 4 (Michael).

46 31/3/2020 NE 95, 96, 113.

82 The thrust of Michael's cross-examination was to the effect that Wong or the Defendant's agreement as encapsulated in various clauses of the Settlement Agreement was premised on the Defendant's Property being used as a hotel and nothing else. It should be noted that Michael (and Stanley) denied giving any assurance or guarantee to Wong or the Defendant that the Defendant's Property, like the Plaintiff's Property, would be converted to hotel accommodation. They further denied they did not inform Wong that co-working space would be the alternative if change of use to a hotel was not approved.

83 The court pointed out to Mr Murali (when he said Wong did not agree to the change of use from hotel to co-working space) that since the subject was raised during the open session when both sides and their counsel was present, that Wong could have and should have objected but he did not.[47]

84 Michael was cross-examined at length on the Plaintiff's draft TAs as well as the Defendant's draft TAs. It would be more expedient for the court to look at the progression of the Defendant's various draft TAs later (see [103] below).

85 During Michael's cross-examination, the court informed Mr Murali that if Wong had not attempted to be penny-wise and pound-foolish by making unilateral changes to the Plaintiff's draft TAs relying on random tenancy clauses he found online instead of consulting lawyers, the Defendant would likely not have ended up in court.[48] For that reason, the strange term "indemnitor"

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47 31/3/2020 NE 118.

48 1/4/2020 NE 9 and 11.

appeared in clause 29 of the Defendant's fifth draft TA.[49] Wong also required a separate deed of indemnity to be signed by two directors of the Plaintiff.

86 Lim's (PW3) testimony essentially corroborated the testimony of Stanley and Michael *vis-à-vis* Nuve's intention to operate a hotel at the Plaintiff's Property in tandem with the Defendant's Property. Lim deposed in his AEIC that Nuve has been running Hotel NuVe Elements at the Plaintiff's Property since December 2019 and occupancy was good. Lim added that Hotel NuVe Elements is Nuve's second highest priced boutique hotel after Hotel NuVe Heritage in the Bugis area. Altogether, the Nuve group operates four boutique hotels plus a capsule hotel in Singapore.

87 In his AEIC, Lim gave an estimate of how much revenue he could generate if Nuve also operated the Defendant's Property as an add-on boutique hotel to the Plaintiff's Property using the same hybrid rent and profit-sharing arrangement he had with the Plaintiff or operating the Defendant's Property as a capsule hotel. Lim disagreed with Mr Murali that his figures (which were not substantiated by any materials) were all his opinions and assumptions and not based on facts.

88 Wilson Lim (PW4), the licensed appraiser, was tasked by the Plaintiff to provide an expert report on the Plaintiff's expected increased value or earnings had the tenancy agreement for the Defendant's Property been executed between the parties pursuant to the Settlement Agreement. In his expert report dated 25 February 2020, Wilson Lim opined that (i) the open market value of the Plaintiff's Property with vacant possession and free of encumbrances as at

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49 AB439.

the date of his report was $27.5m; (ii) the open market value on the same basis for the Defendant's Property was $7m; and (iii) the open market value for both properties with approved use as a hotel was $58m.

89 The Plaintiff's fifth and final witness was CHK (PW5). CHK was engaged by the Plaintiff to provide his expert opinion on the likely construction or renovation costs for the Defendant's Property. CHK's report is dated 25 February 2020.[50] In relation to developing the Defendant's Property as a hotel, CHK gave cost estimates of (i) $1,176,300 (excluding GST) for a three-room boutique hotel; (ii) $1,031,500 (excluding GST) for a 30-room boutique hotel; and (iii) $986,300 (excluding GST) for a capsule hotel with 98 double decker pods.

The Defendant's case

90 The court next turns its attention to the Defendant's case which was presented through Wong's testimony. The court will first look at Wong's AEIC before turning to his cross-examination testimony.

91 Unsurprisingly, Wong's testimony gave a different take on the Settlement Agreement when compared with the Plaintiff's version.

92 In his AEIC,[51] Wong claimed that although the parties had agreed on the key points of the settlement in principle by 11pm on 26 June 2018, the specific terms of the tenancy agreement between the parties and the possible renewal of the existing tenancies were not discussed. More so such issues as subletting,

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50 Chew's AEIC, Exhibit CHK–1.

51 Wong's AEIC at para 37.

indemnitors and security deposit.[52] Third, the Settlement Agreement did not cover a scenario where the Plaintiff was unable to obtain approval for change of use of the Defendant's property to a hotel. In such a case, Wong deposed that the parties would have to discuss and agree on alternate terms on the five year renewal, discounted rent and contribution to renovation costs – all of which were only in the context of hotel usage of the Defendant Property (this third assertion was disputed by the Plaintiff).

93 Under cross-examination, however, Wong conceded that the Settlement Agreement was signed with the underlying understanding that there was only a *possibility* of obtaining a hotel licence, but no *guarantee* of the same.[53] Contrary to the denial in the Defence, Wong admitted that the draft amended SOC for the 2016 Suit was indeed sent to his former solicitors on 20 June 2018.

94 Wong's AEIC disclosed an event which neither Stanley nor Michael referred to in their respective AEICS. He deposed[54] that Chew in a WhatsApp message to him on 11 July 2018[55] told him that there was a potential Japanese buyer who was interested in purchasing both the Plaintiff's and the Defendant's Properties. Chew requested to market the Defendant's property on an "as is" basis for $10m. Wong proposed an asking price of $13m as he believed $10m was below the market price. However, no sale materialised. I should add that during mediation the subject of selling the Defendant's Property was discussed

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52 Wong's AEIC at para 43.

53 2/4/2020 NE 51, 52.

54 Wong's AEIC at paras 50–52.

55 AB1167.

but not pursued because the Defendant's asking price of $17m was well above the market price (according to Michael).[56]

95 In relation to the draft tenancy agreement, Wong deposed he felt (which sentiment he claimed Michael shared) that lawyers could be dispensed with to save costs. Hence, he formally discharged his (former) lawyers in November 2018 and did not involve them in the draft tenancy agreements he sent to the Plaintiff. In this regard, it is noted that the Plaintiff's draft TA (see [27] above) was drafted by its solicitors who act for them in these proceedings. The Plaintiff therefore had already incurred legal costs before the Defendant made its request to dispense with lawyers.

96 In his AEIC, Wong blamed the Plaintiff for the failure to conclude a tenancy agreement. He deposed as to his various efforts to get the Plaintiff to sign a tenancy agreement. He said he was surprised to receive the Plaintiff's first draft TA as it was his understanding that the draft should come from the owner not the tenant. Wong was also uncomfortable with the Plaintiff's draft as the parties had appeared to agree to dispense with their respective lawyers' involvement at that time.

97 Wong therefore contacted Michael via email on 20 July 2018 and requested that the Defendant's draft tenancy be used as it had thus far been accepted by the Defendant's tenants.

98 When he met Michael and Stanley on 23 July 2018 to discuss the tenancy further, Wong said that Michael showed him a marked-up copy of the

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[56] AB206–207.

Defendant's first draft TA. Both sides had discussed the issue of the option to renew clause contained in the Defendant's existing tenancy agreements. Wong believed that the parties had reached agreement in principle on the tenancy agreement as the Plaintiff had marked up the Defendant's first draft TA save for some specific clauses which Michael and Stanley indicated they needed to discuss or check with their lawyers.

99 Wong deposed that he was disappointed to receive Chew's email of 4 August 2018 to the effect that the Plaintiff was not agreeable to the following clauses in the Defendant's first draft TA:

(a) the inclusion of clause 3 providing for a refundable security deposit of $24,000 for the first lease and a roll-over of the said sum to the second lease;

(b) the inclusion of clause 4 providing for the tenant to pay interest for late payment of rent;

(c) the inclusion of clause 38 providing for the Plaintiff to pay stamp duty on the first and second leases; and

(d) the inclusion of clause 39 which allowed the Defendant to terminate the tenancy with three months' notice in the event of an *en-bloc* redevelopment, reconstruction and/or alteration to the existing building.

100 Chew further indicated he wanted to refer to the Settlement Agreement in the tenancy agreement and insisted on using the Plaintiff's first draft TA as the legal costs for this had already been incurred. Wong also disagreed with Chew's comment that the Plaintiff was a "creditor" of the Defendant because of

the outstanding second tranche of $150,000 of the *agreed contribution sum* towards renovation costs.

101 In cross-examination, Wong disclosed he owned four other companies besides the Defendant company and he was therefore familiar with tenancy agreements. The court will take this evidence to mean that Wong would and should be familiar with standard or, as the Plaintiff calls them, "boiler" (meaning boilerplate) clauses in tenancy agreements.

102 In its closing submissions,[57] the Plaintiff described Wong as generally a "shifty and uncooperative witness" who refused to answer simple questions and did his utmost to avoid obvious concessions. Although the court finds that Wong was generally an uncooperative and evasive witness, he did readily acknowledge that the Attendance Note was "pretty accurate except for some of the discussion in the private session, she [*ie*, Mabel] didn't record that".[58]

103 Wong deposed he sent six draft TAs to the Plaintiff with his solicitors sending the seventh and eighth drafts to the latter. It would be appropriate at this juncture to look at the Defendant's numerous draft TAs and compare them with the terms of the Settlement Agreement. The Defendant's first draft TA was dated 23 July 2018,[59] the second was dated 10 August 2018,[60] the third was dated 2 September 2018,[61] the fourth was dated 14 September 2018,[62] the fifth was

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57 PCS at para 53.

58 2/4/2020 NE 13.

59 AB295, 304–310.

60 AB348, 355–362.

61 AB387, 399–406.

62 AB422, 435–446.

dated 15 September 2018,[63] the sixth was dated 5 October 2018,[64] and the seventh and eighth were dated 9 January 2019.[65]

104 In the interval between the Defendant's sixth and seventh draft TAs, the Plaintiff had on 10 October 2018 returned via email to Wong the Defendant's fourth draft TA with mark-ups[66] as well as clean copies of the same. During cross-examination,[67] Wong admitted he never sent back the Defendant's sixth draft TA to the Plaintiff, resulting in the Plaintiff's solicitors sending the Defendant's former solicitors a letter of demand dated 15 November 2018.[68]

105 Besides the various draft TAs, the court's attention was drawn to WhatsApp messages exchanged between Wong and the Plaintiff's representatives in particular with Michael. It is telling that on 14 September 2018, Michael's WhatsApp messages[69] with Wong clearly stated that if the Plaintiff did not obtain URA approval for the Defendant's Property's change of use to a hotel, the Plaintiff would convert the Defendant's Property to co-working space. Just as he failed to object when the subject was raised during mediation, Wong did not respond let alone object to Michael's suggestion which Michael repeated in the same WhatsApp message later that day.[70]

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63 AB486, 487–496.

64 AB506–515.

65 AB772–797.

66 AB557–590.

67 2/4/2020 NE 152.

68 AB621–623.

69 AB1176.

70 AB1177.

106 The court sets out below the salient clauses in the Defendant's various draft TAs which the Plaintiff alleged contravened the terms in the Settlement Agreement or which the court views as not standard clauses in tenancies.

S/N	Clauses in the draft tenancies	Draft tenancy number	Alleged contravention of Settlement Agreement
1	Clause 8 – Occupancy limited to 20 rooms configuration	First draft	No such limitation clause
2	Clause 10 – Property tax increase to be borne by the Plaintiff	First to sixth drafts	No such provision
3	Clause 35 – Property tax increase to be borne by the Plaintiff	Seventh draft	No such provision
4	Recital that the Plaintiff can only use the Defendant's Property as a hotel	Sixth draft	No such provision
5	Clause 1(a) – Option to renew tenancy for 1 year	Sixth draft	Contravenes clause 8 of the Settlement Agreement which does not restrict renewal of tenancy to one year after the first five years
6	Clause 29 – Provision for two indemnitors	Third, fourth, fifth, sixth drafts	No such provision

7	Clauses 38 or 39 – Termination of tenancy with three months' notice in the event of an *en-bloc* sale	First, second, third drafts	No such provision
8	Clause 3 – Handover of 42B to the Plaintiff would only be made on 13 December 2020 if its existing tenant exercised its option to renew the tenancy	Seventh draft	Contravenes clause 6.2 of the Settlement Agreement as the second storey should have been handed over to the Plaintiff by end June 2019
9	Clause 4 – In the event the existing tenant of 42A exercises its option to renew the tenancy, there would be no handover the Plaintiff	Seventh draft	Contravenes clause 6.2 of the Settlement Agreement
10	Clause 42 – Absolute prohibition against assignment and subleasing	Seventh draft (previous drafts allowed assignment and subletting if Defendant consents)	No such provision

It should also be noted that the Defendant's first to sixth draft TAs contained an entire agreement clause (clauses 36 or 37) which was removed from the seventh and eighth draft TAs.

107 Even more noteworthy was the fact that none of the Defendant's draft TAs referred to the Settlement Agreement even though the Settlement Agreement was the genesis of the proposed tenancy agreement. Clause 5.7 of the Plaintiff's draft TA, on the other hand, stated that the Settlement Agreement should be read together with the tenancy agreement.[71]

108 During cross-examination,[72] Wong explained that the Plaintiff's entitlement to renew the tenancy for another five years at a discounted rent after the first five years would only apply if change of use from commercial use to hotel use were granted for the Defendant's Property. Otherwise, the rent would be increased to $12,000 for the first three years and $18,000 for the second two years.

109 As for his inclusion of an "indemnitor" clause, Wong explained that it was a response to the Plaintiff's request (through Michael) to be allowed to sublet or assign the tenancy.[73] In re-examination,[74] Wong explained that he needed to have some sort of guarantee where, as in this case, a limited liability company was the tenant. In answer to the court's question,[75] Wong agreed an "indemnitor" clause is not a standard clause in tenancy agreements but maintained it was standard practice to have such clauses. In this regard, Wong apparently overlooked the fact that the Defendant is itself a limited liability company.

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71 AB251.

72 2/4/2020 NE 158.

73 2/4/2020 NE 142.

74 2/4/2020 NE 185.

75 2/4/2020 NE 186.

110 Despite his prevarication, it was clear from Wong's cross-examination that unless and until the Plaintiff signed a tenancy agreement on *his* terms, he would not hand over the Defendant's Property to the Plaintiff.[76] Even more telling was the fact that despite clause 6.2 of the Settlement Agreement which required the Defendant to hand over 42A (the second storey) to the Plaintiff in end-June 2019, the Defendant, in complete disregard of that obligation, entered into a tenancy with a new tenant called Ink & Pixel Pte Ltd ("Ink & Pixel") on 21 March 2019[77] for 24 months from 1 June 2019 at a monthly rent of $4,750 (excluding GST of another $332.50).Wong's explanation that he did so because no tenancy agreement was signed with the Plaintiff is no excuse for his flagrant disregard of the Settlement Agreement as the court pointed out to him.[78]

The submissions

The Plaintiff's submissions

111 The court will review some of the salient points in the parties' submissions before making its findings.

112 The Plaintiff submitted that the staggered handing over of the various floors in the Defendant's Property to the Plaintiff was not conditional upon the parties entering into a tenancy agreement as the Defendant argued. The two events were contained in separate terms in the Settlement Agreement.

113 Citing the Court of Appeal decision in *Klerk-Elias Liza v K T Chan Clinic Pte Ltd* [1993] 1 SLR(R) 609 *("Klerk-Elias")* as well as the more recent

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76 2/4/2020 NE 161.

77 AB1205–1213.

78 2/4/2020 NE 163–164.

case of *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342, the Plaintiff submitted that the five necessary elements for the making of a lease were present in this case, namely: (i) the parties to the lease; (ii) the property leased; (iii) the term of the lease; (iv) its commencement; and (v) the rent payable under the lease.

114 The Plaintiff submitted that there was nothing to stop the Defendant from handing over to the Plaintiff the various storeys of the Defendant's Property in accordance with the staggered timelines fixed under clause 6 of the Settlement Agreement. Yet the Defendant deliberately chose to enter into a fresh lease with a new tenant (Ink & Pixel) for 42A (the second storey) on 1 June 2019 instead of handing it over to the Plaintiff by end June 2019. The Plaintiff described the Defendant's conduct as "cutting [off] one's nose to spite the face".[79] In refusing to make the handover, the Defendant had deprived the Plaintiff of substantially the whole of the benefit sought to be conferred by the Settlement Agreement.

115 The Plaintiff submitted there was no basis for the implied terms that the Defendant argued in its submissions[80] should be inserted into the Settlement Agreement. Accepting the Defendant's implied terms would be tantamount to rewriting the contract between the parties which the court will not do, citing *Foo Jong Peng and others v Phua Kiah Mai and another* [2012] 4 SLR 1267 ("*Foo Jong Peng*") and *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*").

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79 Plaintiff's Reply Submissions ("PRS") at para 10.

80 Defendant's Closing Submissions ("DCS") at para 96.

116 Contrary to Wong's assertion, the Plaintiff submitted that no clause in the Settlement Agreement stipulates that the Plaintiff *must* operate a hotel at the Defendant's Property. Clause 1 which sets out the agreed contributions sum of $250,000 does not stipulate that the sum must be used for renovations to convert the premises to hotel usage. Nor does the rental rate clause in clause 6 or the option to renew provision in clause 8 have such effect. Additionally, the Defendant's first to fifth draft TAs did not include any condition that the Defendant's Property must be used as a hotel. It was only in the sixth draft TA that the Defendant imposed such a condition.

117 The Plaintiff then addressed the Defence[81] that clause 8 of the Settlement Agreement on the duration of the renewed term is void for uncertainty. Clause 8 states:[82]

> The Parties agree to enter into a tenancy agreement to reflect the key terms set out in the aforesaid clause 6 and 7 above, with the Defendant giving the Plaintiff the first option to renew the tenancy agreement at the conclusion of the first five (5) years tenancy, at the prevailing market rental rate.

The Plaintiff pointed out this defence flies in the face of Wong's AEIC[83] wherein he confirmed that the renewal would be for a duration of five years. Even if there was uncertainty, the Plaintiff relied on the Attendance Note[84] where it was recorded that the various discussions on tenancy renewal were always premised on a "five plus five" term, citing again *Klerk-Elias* where M Karthigesu J (at

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81 Defence at para 36.

82 AB225.

83 Wong's AEIC at paras 34 and 35.

84 AB205.

[41]), delivering the judgment of the majority, endorsed the following extract from *Lewis v Stephenson* (1898) 67 LJQB 296:

> … An option to renew a lease unless delimited as to the period and to the terms on which the lease will be renewed is an option to take a further lease for the same period and on the same terms as the original lease except perhaps the right of a further option to renew.

The Plaintiff added that the Defendant agreed in its closing submissions[85] with the above proposition.

The Defendant's submissions

118 The Defendant cited numerous cases to support its argument that terms must be implied into the Settlement Agreement because the following four key issues were not addressed in the Settlement Agreement:

(a) usage of the Defendant's Property;

(b) duration of the option to renew;

(c) whether handover dates intended to take into account existing tenancies (and renewals thereof); and

(d) whether handover dates were subject to a tenancy agreement being entered.

119 The Defendant argued that even though the Settlement Agreement does not expressly refer to the Defendant's Property being used for a hotel, the

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85 DCS at para 184.

evidence incontrovertibly shows that parties had at all material times, intended for the Defendant's Property to be used as a hotel.[86]

120 The Defendant submitted that the context of the entire discussion during the mediation which led to the Settlement Agreement was based on the Plaintiff's representatives' pitch that both parties would work together such that the Plaintiff would renovate and apply for the change of use for the Defendant's Property to be an extension to the Plaintiff's Property. The commercial considerations to resolve the dispute between the parties – which included the potential enhancement to the value of the Defendant's Property, the discounted rents and the agreed contribution sum – were all made in the context of hotel usage.

121 The Defendant cited the following passage from *Sembcorp Marine* in support of its submission that the terms listed at [118] above must be implied into the Settlement Agreement (*Sembcorp Marine* at [31]):

> 31 … the "construction" of a contract refers to the composite process that seeks to ascertain the parties' intentions, both actual and presumed, arising from the contract *as a whole* without necessarily being confined to the specific words used. Construction, in this sense, encompasses both the interpretation of express terms as well as ***the implication of terms to fill gaps*** … [original emphasis in italics; emphasis added in bold italics]

122 Notably, the Court of Appeal spoke of applying implied terms to fill gaps. It then went on to say:

> 100 … the threshold for implying a term is necessarily a high one. The law remains that a term will only be implied if it is *necessary*. In so far as necessity is a concept that is already built into the business efficacy and officious bystander tests

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86 DCS at para 43.

> (*Foo Jong Peng* ([24] *supra*) at [33]), our decision does not alter the high threshold required to imply in a term under existing law.
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> 101 It follows from these points that the implication of terms is to be considered using a three-step process:
>
> (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.

The court will return to the three-step process in the course of its findings (from [148] below).

123 It is noteworthy that the Defendant's submissions listed as an undisputed term that the sale of the Defendant's Property must be made subject to any tenancy agreement entered into between the Plaintiff and the Defendant.[87] Yet, the Defendant's draft TAs provided for termination of the tenancy with three months' notice if the Defendant's Property was sold *en-bloc* (see S/N 7 of the table at [106] above).

124 The Defendant was highly critical of Lim's evidence and submitted that the court should reject the figures presented by Lim as the basis to award

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87 DCS at para 40(d).

damages to the Plaintiff. It was said that the Letter of Intent dated 15 July 2018 (see [21] above) was non-binding and Lim's projections, as a factual witness, of revenue to be earned from the Defendant's Property do not mean the Plaintiff would have actually earned $1,650 plus 10% room revenue per month. The Defendant argued that Lim relied entirely on hearsay evidence as his calculations were based on architectural layout plans whose maker did not testify; Lim had no personal knowledge of those plans.

125 The Defendant was equally critical of Wilson Lim's testimony. It was said that Wilson Lim's calculations of occupancy rates to project revenues and profits based on the usage of the Defendant's Property as a hotel, as a capsule hotel, and as a hotel-cum co-working space had no supporting documents or materials. Wilson Lim's answers in cross-examination were said to lack credibility and were not based on his personal knowledge. The court should therefore reject his evidence.

126 CHK's evidence was also not spared from criticism. The Defendant pointed out that CHK had no personal knowledge and had not verified the measurements of the architectural drawings provided by the Plaintiff in relation to the 37 rooms and 97 pods configuration, while his statement that the drawings appear to be feasible was entirely speculative. CHK had also agreed that the court had no materials to look at to support his opinions. Accordingly, the court should also reject CHK's evidence.

Reply submissions

127 The parties also filed reply submissions. The Plaintiff's reply submissions were on its claim while the Defendant's reply submissions were restricted to its counterclaim.

128 Not surprisingly, the Plaintiff's reply submissions disputed the Defendant's submissions that:

(a) the usage of the Defendant's Property was restricted to a hotel:

(b) clause 8 of the Settlement Agreement is void for uncertainty;

(c) the fact that other terms not provided in the Settlement Agreement and remained to be agreed meant that all the essential terms required to evidence a lease under s 6(d) of the Civil Law Act (Cap 43, 1999 Rev Ed) were not present; and

(d) hand-over of the various storeys of the Defendant's Property was contingent on the Defendant's existing tenancies not being renewed.

129 On the Defendant's part, its reply submissions were mainly a repeat of its closing submissions. As with the Plaintiff's closing submissions, the court will return to the Defendant's two sets of submissions later if need be.

130 Each party also filed its costs schedule together with its closing submissions.

The issues

131 The only issues the court has to determine are:

(a) Was the Defendant in breach of the Settlement Agreement by providing numerous and changing draft TAs to the Plaintiff?

(b) Was the tenancy agreement to be signed between the parties premised on the Defendant's Property being used solely as a hotel?

The findings

132 This dispute in essence resulted from the parties' inability to sign a tenancy agreement as envisaged under the terms of the Settlement Agreement

133 At the outset, it is the court's finding that the Attendance Note contradicted Wong's testimony and the Defendant's submissions in many respects. This included the fact (contrary to Wong's assertion) that the Plaintiff (through Michael or Stanley) never guaranteed or assured Wong that the Defendant's Property would be converted to a hotel. Indeed, the Defendant's own lawyer at the mediation session was recorded as saying that the prospect of getting a hotel licence was "speculative".[88]

134 The Defendant was legally represented at the mediation session. If indeed it was intended that the Defendant's Property would be used exclusively as a hotel, one would have thought that one of Wong's lawyers present would have said so and a term to that effect inserted into the Settlement Agreement.

135 Moreover, the assertion that no other use of the Defendant's Property other than as a hotel was discussed or contemplated was clearly rebutted by the Attendance Note, which recorded that Michael raised the possibility of using the premises as a co-working space.[89] This was repeated in Michael's WhatsApp exchange with Wong on 14 September 2018 (see [105] above). Wong's contention[90] that he did not agree to the co-working space usage for the Defendant's Property was not reflected in the Attendance Note. In this regard,

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88 AB211.

89 AB205.

90 2/4/2020 NE 59–60.

the court rejects the Defendant's submissions[91] that there was no discussion of co-working space as an alternative usage of the Defendant's Property.

136 No doubt silence may not amount to agreement, as the Defendant submitted.[92] However, contrary to the Defendant's further submission,[93] the court is of the view that there was indeed a duty on Wong's part to speak or voice his objections when co-working was broached by Michael and the Mediator and repeated in Michael's WhatsApp messages dated 14 September 2018. Wong's silence led the Plaintiff to believe he was amenable to usage of the Defendant's Property for co-working space if a hotel was not approved. As the court pointed out to Wong, he could have and should have objected when the subject of co-working space was raised but he failed to do so (see [83] above).

137 It is also no answer for Wong to claim that he did not object when the issue of co-working space was raised by Michael,[94] because it was a private conversation between the Mediator and Michael in his presence. No one could have stopped him if Wong had interjected to voice his objections to the Defendant's Property being used as co-working space if that was his sentiment. It bears remembering that the discussion was an open session where both sides could air their views or ventilate their grievances freely in the course of mediation.

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91 DCS at paras 78, 79.

92 DCS at para 79.

93 DCS at para 81.

94 2/4/2020 NE 171.

138 As alluded to earlier, if the Plaintiff's many representations (according to Wong, see [49(c)] above) including the assurance from the Plaintiff that a hotel licence would be obtained for the Defendant's Property were made during the private caucus discussions, the burden of proof was on Wong to substantiate his allegation (see [67] above). This was a burden which he did not discharge.

139 Stanley had deposed in his AEIC[95] that when he and the Plaintiff's other representatives held private discussions with Wong in the breakout room, they told Wong that they would try to build additional hotel rooms at the Defendant's Property. This would enhance the property's value, but they could not guarantee this. Nor could they guarantee that the URA would give approval for hotel usage. Stanley added that both he and Michael told Wong that if no change of use was permitted, then the Plaintiff would likely use the Defendant's Property as co-working space or for whatever commercial use that would give them the best yield. In particular, for the fifth storey, the Plaintiff was thinking of breaking down the dividing wall between the two properties for access to the Defendant's Property and extending the Plaintiff's rooftop terrace into the Defendant's Property. In cross-examination,[96] Stanley reiterated his evidence. Stanley's testimony was corroborated by Michael during cross-examination.[97]

140 What is telling is the fact that in the Defendant's first five draft TAs, nothing was said about the Defendant's Property being used *only* as a hotel.

141 In making repeated changes to the draft TAs that he himself provided to the Plaintiff, Wong was repeatedly changing his mind and, as Michael agreed,

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95 Stanley's AEIC at paras 48 to 52.

96 31/3/2020 NE 30, 39, 57, 58, 61.

97 31/3/2020 NE 92, 93, 99, 112.

"shifting the goalpost".[98] An example would be his introduction of the *en-bloc* sale clause in the defendant's first draft TA which allowed the Defendant to sell the Defendant's Property free of the Plaintiff's tenancies, thereby contravening clauses 6 and 7 of the Settlement Agreement. Without a doubt Michael's complaint was justified. Wong repeatedly changed clauses in the draft tenancy agreements, even after the Plaintiff had agreed to some of his clauses.

142 To quote from the Plaintiff's solicitors' letter dated 26 February 2020, even though the Plaintiff had no issue with using the Defendant's template for the draft tenancy agreements, "the problem is that each of [the Defendant's] drafts thereafter offended the Settlement Agreement" [original emphasis omitted].[99] That letter went on to say:[100]

> You will see that our client has tried to accommodate your client's request for additional clauses, but our client cannot agree to your client's demand for increased rent, conditional handover dates and other clear deviations from the Settlement Agreement. [original emphasis omitted]

143 When he was cross-examined on the above extract, Wong did not deny asking for higher rent from the Plaintiff.[101] He said it was premised on a hotel licence not being granted. The short answer to Wong's excuse is that there are no clauses in the Settlement Agreement to the effect that non-hotel usage of the Defendant's Property would result in the Plaintiff having to pay a higher rent than what was agreed for renewal of the tenancy agreement.

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98 1/4/20 NE 15, 20.

99 AB979–981 at para 2

100 AB979–981 at para 6.

101 2/4/2020 NE 168.

144 Notwithstanding the evidence before the court, Wong insisted during re-examination that it was the *Plaintiff* who kept changing its position, an example being its refusal to pay the security deposit on the unfounded basis that the Plaintiff is a creditor of the Defendant for $150,000 (part of the agreed contribution sum). In this regard Wong appeared to have overlooked the Plaintiff's email to him dated 13 August 2018 wherein the Plaintiff agreed to pay a security deposit of $24,000 as well as pay 50% of any property tax increment.[102] Wong also admitted that the Plaintiff eventually agreed to pay interest on late payment of rent after its initial refusal.

145 As for the issue of assignment, Wong claimed he was unaware of the existence of Keepers Inn and that the Plaintiff may wish to assign the lease to the latter as the operator of the hotel. Wong did not want the Defendant's Property to be used as a low-cost backpackers' inn or a hostel.[103] The court rejects his testimony as Wong had been informed by the Plaintiff's solicitors' letter dated 20 June 2018[104] to the Defendant's former solicitors which enclosed a draft of the Plaintiff's proposed amended SOC in the 2016 Suit. Paragraph 16(c) of the proposed amended SOC had particularised the Plaintiff's loss and damage resulting from the Defendant's conduct as follows:[105]

> Loss of rental under the lease agreement dated 1 July 2016 between the Plaintiff and Keepers Inn Pte Ltd for the 2nd/3rd/4th/5th Mezzanine & Roof Terrace Storey of the Plaintiff's Property at the rental rate of $65,000 per month for 33 months, from the original commencement date of the term under the said lease agreement (i.e. January 2017) to the

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102 AB372.

103 2/4/2020 NE 184.

104 AB60.

105 AB76.

> expected date of completion of the Redevelopment Works (i.e September 2019), in the aggregate sum of $2,145,000 …

It therefore does not lie in the Plaintiff's mouth to deny any knowledge of the existence of Keepers Inn before the Settlement Agreement was executed.

146 The Defendant's submission on implied terms must be seen in the light of the Court of Appeal's judgment in *Sembcorp Marine*, the relevant extracts of which have been set out at [121]–[122] above.

147 The implied terms the Defendant sought to introduce into the Settlement Agreement bring to mind the extract below from the case of *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 (cited by the Plaintiff) where the Court of Appeal said (at [21]):

> Parties often enter into contracts assuming the accrual of certain benefits upon the occurrence of certain events. These assumptions may be expressed or implied in the negotiation process leading up to and culminating in the final contract. Be that as it may, it is one thing to suggest that the court should contemplate the "factual matrix" in order to assist in the interpretation of a document, but entirely another to refer to extrinsic evidence in a contrived and misguided attempt to persuade the court to "infer" a contingent condition that is clearly inconsistent with the express terms of the contract. …

148 Applying the three-stage process in *Sembcorp Marine* that the Defendant relied on (and referred to at [122] above), the court's tasks and determination are as follows:

(a) Is there a gap in the Settlement Agreement? The court thinks not.

(b) Is it necessary in the business or commercial sense to imply a term or terms in order to give the Settlement Agreement efficacy? Again, the court's answer is "no".

(c) Should the terms listed at [118] be implied dealing with:

(i) usage of the Defendant's Property;

(ii) duration of the option to renew;

(iii) whether handover dates intended to take into account existing tenancies (and renewals thereof); and

(iv) whether handover dates were subject to a tenancy agreement being entered?

149 Based on *either* the business efficacy *or* the officious bystander tests, it is the court's view that none of the above terms need to be implied because there were neither gaps nor ambiguity in the terms of the Settlement Agreement to warrant such implication.

150 To elaborate on the court's determination at [148] above, the Defendant's Property would either be used for office space or, failing that, co-working space. As for the duration of the renewed lease, it would be five years as that was discussed at the mediation session. In relation to the handover dates, it bears repeating that the dates inserted into the Settlement Agreement were all provided by Wong. He of all people should know the answers.

151 In the Defendant's closing submissions,[106] the Defendant requested the court to insert an implied term at the end of clause 8 of the Settlement Agreement as follows:

> The parties agree to enter into a tenancy agreement to reflect the key terms set out in the aforesaid clause 6 and 7 above, with the Defendant giving the Plaintiff the first option to renew

106 DCS at para 128.

> the tenancy agreement at the conclusion of the first (5) year tenancy, at the prevailing market rental rate for a period of five years, subject to a hotel licence being obtained. [original emphasis omitted]

The Defendant argued that such an implied term would give effect to the parties' clear intentions at the time the Settlement Agreement was entered into.

152 It is the court's view that granting the Defendant's request would be tantamount to rewriting the contract between the parties which no court should do (see *Foo Jong Peng* and *Sembcorp Marine* ([115] above).

153 With regard to witness credibility, the court prefers the testimony of the Plaintiff's two factual witnesses, Stanley and Michael, to that of Wong. The Plaintiff's witnesses were forthright in their evidence, unlike Wong who frequently prevaricated during his cross-examination or gave self-contradictory evidence.

154 The court does not agree with the Defendant's submission at [124] above that Lim's testimony is not substantiated and should be rejected. The Defendant overlooks the fact that Nuve has been operating a boutique hotel called Hotel NuVe Elements at the Plaintiff's Property since December 2019 (see [86] above) and the Plaintiff intended for Nuve to use the Defendant's Property to add-on rooms to Hotel NuVe Elements. In other words, Lim's knowledge was based on his company's operations at the Plaintiff's Property. There could not be a better comparison than the yield from an adjoining property. Lim's figure of $1,650 per room per month (in the Letter of Intent) was not plucked from the air but based on the Hotel Management Agreement for the Plaintiff's Property which took effect since last December.

155 The court finds it rich that in the Defendant's closing submissions[107] as well as in its Defence,[108] the Defendant states that there was an implied duty or term in the Settlement Agreement that parties are to negotiate reasonably in good faith for an alternate use of the premises.

156 On the evidence presented, the court cannot believe that Wong acted in good faith throughout his dealings with the Plaintiff. Quite apart from and in addition to his numerous and frequent changes of the Defendant's draft TAs, a prime example of Wong's bad faith is his entering into a tenancy with a new tenant (Ink & Pixel) on 21 March 2019 for 42A Hong Kong Street, when clause 6.2 of the Settlement Agreement required the Defendant to deliver the second storey to the Plaintiff by end-June 2019. Whether it was greed or ill intent that motivated Wong's action is irrelevant. His conduct is reflective of his wholly unreasonable attitude towards the Plaintiff throughout their dealings.

157 Wong's unreasonableness extends to the issue of costs for these proceedings. In the Defendant's closing submissions,[109] it submitted that it should be awarded costs on an indemnity basis if costs were awarded against the Plaintiff whereas if the Plaintiff was awarded costs against the Defendant, costs should be minimal. This double standard, a submission described as a "temerity" by the Plaintiff in its reply submissions,[110] was on the basis that the Defendant[111] allegedly made several genuine attempts to mediate or to discuss the matter so that parties could avoid the need to go for trial (which is contrary

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107 DCS at paras 97–105.

108 Defence at para 40.

109 DCS at para 299.

110 PRS at para 230.

111 DCS at para 298.

to the court's findings). The Defendant blamed the Plaintiff for the parties' inability to negotiate the dispute amicably.

158 Yet another instance of the Defendant's unreasonable attitude relates to its costs schedule. There it gave an estimate of costs for these proceedings with a three days' trial as $217,750 (excluding disbursements of $2,595.40), a sum which the Plaintiff described as exorbitant and unjustified[112] in its reply submissions and which radically departs from Appendix G of the Costs Guidelines (per paragraph 99B of the Supreme Court Practice Directions) under Part III(A)(i). The Defendant's figure is to be contrasted with the Plaintiff's costs schedule, which claimed a sum of $131,636.50 (including disbursements), a drop of around 40% from the Defendant's figure.

159 The Plaintiff submitted that if it succeeds in these proceedings, it is within the court's discretion to award costs closer to what the Defendant itself has claimed in its Costs Schedule, citing the appellate court's decision in *Lipkin International Ltd v Swiber Holdings Ltd and another* [2016] 4 SLR 1079 ("*Lipkin*") at [18]:

> Given that the Appellant's own claim for costs would have been on the high side (at $60,000) had it prevailed, we consider this to be a factor that should be taken into account in deciding the costs payable by it now that it has failed. We therefore fix costs at $50,000 all-in (inclusive of reasonable disbursements) and make the usual consequential orders.

The court agrees with the approach of the Court of Appeal. It is a timely reminder to parties that their claims for excessive, inflated or unjustified costs can backfire on them.

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112 PRS at para 231.

The experts' testimony

160 As mentioned earlier at [125]–[126], the Defendant was highly critical of the testimony given by Wilson Lim and CHK. However, it was not constructive criticism as the Defendant did not present alternative expert testimony for the court's consideration. The court does not accept the Defendant's contention that Wilson Lim does not have particular expertise in hotels when he has had more than 20 years' experience in valuing commercial, residential, industrial buildings as well as shophouses. He had also conducted an onsite inspection of the Defendant's Property.

161 As for CHK, the Defendant's criticism of his evidence being based on the architectural layout plans of Tsok Architect presupposes those plans are inaccurate. However, no evidence was presented by the Defendant in that regard. It bears noting that although CHK did not produce his workings in court, he could not possibly have arrived at the figures in his report without workings which in answer to the court's questions, he confirmed he had.[113] CHK had also been appointed as quantity surveyor for Bencoolen Hotel's project at No 43, Hong Kong Street.[114] He was therefore eminently qualified to render his opinion.

162 The Plaintiff's closing submissions[115] referred to the following oft-cited passage from the Court of Appeal's judgment in *Saeng-Un Udom v Public Prosecutor* [2001] 2 SLR(R) 1 at [26] (quoting *Halsbury's Laws of Singapore* vol 10 (Butterworths, 2000) at para 120.257):

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113 1/4/2020 NE 116.

114 1/4/2020 NE 111.

115 PCS at para 171.

> … The Court should not, when confronted with expert evidence which is unopposed and appears not to be obviously lacking in defensibility, reject it nevertheless and prefer to draw its own inferences. While the court is not obliged to accept expert evidence by reason only that it is unchallenged (*Sek Kim Wah v PP* [1987] SLR 107), if the court finds that the evidence is based on sound grounds and supported by the basic facts, it can do little else than to accept the evidence. [original emphasis omitted]

163 In the same vein, this court in *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd and another* [2007] SGHC 50 noting that the plaintiff did not call any expert witnesses, and said (at [364] and [366]):

> 364 In doing so, the plaintiff took the risk that if the court disagreed with its submission that the WACC should not be applied in favour of awarding based on 2006 values, then the court's evaluation of the expert evidence provided by [the defendant's expert witness] would stand or fall, based on counsel's objections alone, without the plaintiff providing a viable alternative for the court's consideration.
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> …
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> 366 The challenge against [the defendant's expert witness's] evidence came only in the form of the plaintiff's closing submissions and not by way of another expert. While I accept that the plaintiff was not obliged to call another expert to refute [the defendant's expert witness's] expert opinion, it should also be borne in mind that by choosing *not* to call another expert, the court was left with choosing between (a) counsel's objections through submissions and (b) in the event that the court disagreed with all of counsel's objections, [the defendant's expert witness's] evidence in its entirety. The court was not presented with another choice. …

164 Bearing all relevant considerations in mind, the court is of the view that there are no factors that preclude the court's acceptance of the testimony of Wilson Lim and CHK.

165 The court considered the URA Circular dated 27 June 2018 found in Appendix A of Wilson Lim's report. As Nuve is operating a hotel at the Plaintiff's Property, it seems more likely than not that the URA would have

approved the change of use of the Defendant's Property to a hotel as an add-on to Nuve's hotel operations next door.

The decision

166 On the issues:

(a) Was the Defendant in breach of the Settlement Agreement by providing numerous and changing draft TAs to the Plaintiff?

(b) Was the tenancy agreement to be signed between the parties premised on the Defendant's Property being used solely as a hotel?

The court's finding is "yes" to (a) and "no" to (b). The Defendant or Wong apparently overlooked the fact that the Plaintiff provided good consideration for the Settlement Agreement by discontinuing the 2016 Suit.

167 It follows therefrom that the Plaintiff succeeds in its claim. It further follows that the Defendant's counterclaim is dismissed with costs to the Plaintiff.

The reliefs

168 With regard to the reliefs claimed by the Plaintiff, the court notes from the Plaintiff's submissions that the Plaintiff thinks specific performance may not be the most just and equitable remedy in the light of the ongoing Covid-19 crisis as well as the recent tenancy agreement between the defendant and Ink & Pixel, the termination of which would adversely the innocent tenant and cause

hardship.[116] Additionally, the Plaintiff was also of the view that moving forward with the Defendant and having to deal with Wong and Mrs Wong for ten years under the "five plus five" lease contemplated under the Settlement Agreement may be a difficult road fraught with more issues.[117] The court appreciates the Plaintiff's sentiments, having been apprised of Wong's conduct from the time the Settlement Agreement was signed and having observed his demeanour in court.

169 The Plaintiff has elected to claim damages instead from the Defendant. In this regard, the Plaintiff had various heads of claim which the court sets out below.

170 The first claim is for the sum of $170,000 for the interim period of August 2018 to December 2019[118] when the Plaintiff asserts it would have been able to use each floor of the Defendant's Property (relying on Wilson Lim's report and Appendix H) and assuming three months were taken up for outfitting works.

171 The Plaintiff then made several alternative claims on the assumption that hotel usage would have commenced[119] in February 2020 and ended in July 2028 (102 months), after the last staggered handover of 31 January 2020 under clause 2.1(a)(iii) of the Settlement Agreement:

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116 PCS at para 142.

117 PCS at para 142.

118 PCS at para 153.

119 PRS at paras 258.2 to 258.4.

(a) For the boutique hotel option: On the basis that the Defendant's Property can accommodate 37 rooms and at the average daily rental rate of $140 per room and assuming 80% occupancy, the Plaintiff claimed $4,676,634 consisting of $71,617 in rent (based on a fixed element of $61,060 and variable element of $10,567 from Nuve (at $1,650 per month x 102 months) less $1,452,000 in rent payable by the Plaintiff to the Defendant over 10 years x 12 months and less fitting-out costs of $1,176,300); or

(b) For the capsule hotel option: On the basis of rental of $400 per capsule (at daily rental rate of $35 x 196 capsules based on 75% occupancy). The Plaintiff claimed $6,896,740, *ie*, $9,335,040 comprising of $91,520 rent (fixed element of $78,400 and variable element of $13,120) from Nuve x 102 months less $1,452,000 rent payable by the Plaintiff to the Defendant over 10 years x 12 months and less $986,300 fitting-out costs ($35 per day rental was Lim's figure whereas Wilson Lim's rate was $55); or

(c) Under the co-working model: A net expectation loss of $3,458,280. This figure was based on Wilson Lim's loss of profits for the Defendant's Property of $4,910,280[120] (total revenue $11,719,008 less total costs and expenses of $6,808,728) less rent payable to the Defendant over 10 years of $1,452,000.

172 Based on CHK's report the Plaintiff's claims for the opportunity loss due to the Defendant's failure to co-operate to effect a collective sale of the Plaintiff's and the Defendant's Properties are:

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120 Wilson Lim's AEIC, Appendix K at pp 142–143.

(a) $18,731,884.06 (based on boutique hotel option);

(b) $21,123,188.41 (based on capsule hotel cum boutique hotel option); and

(c) $15,543,478.26 (based on co-working space cum boutique hotel option).

173 It is the court's view that the possibility of a collective sale of the parties' properties is too speculative. If the parties could not agree on the terms of a tenancy agreement, it is highly unlikely that the Plaintiff will ever be able to agree on the terms of a collective sale with the Defendant or Wong. The Attendance Note recorded Wong asking for an above-market price for the Defendant's Property at the mediation session, which was clearly not achievable.

174 Consequently, the court finds that the Plaintiff's claim will be confined to its claim for damages. Of the three options set out in [171], the court views options (a) and (b) as the most viable. Those claims of $4,676,634 and $6,896,740 respectively average out to $5,786,687 (being ($4,676,634 + $6,896,740) ÷ 2). The court is mindful of the current sad state of the tourism industry worldwide, including Singapore. While a daily rate of $140 per room per night for a boutique hotel and $35 per capsule per night are achievable in a buoyant market, those targets are well-nigh impossible to attain in the current Covid-19 pandemic situation.

175 Accordingly, the court takes a pragmatic view of Hotel NuVe Elements' operations at the Plaintiff's Property (see [86] above). The Plaintiff should be adequately compensated for its loss, but it should not obtain a windfall at the

expense of the Defendant – however reprehensible Wong's past conduct may have been.

176 The court discounts the figure of $5,786,687 by 50% to arrive at $2,893,343.50. It should be borne in mind that the boutique hotel figure of $4,676,634 was based on 80% occupancy whilst the capsule hotel figure of $6,896,740 was based on 75% occupancy. Consequently, the rates were effectively reduced to 40% and 37.5% respectively. Those rates may seem generous in the current market but had the tenancy agreement been signed between the parties, the Plaintiff's ten-year lease with the Defendant would only have expired in July 2028. It cannot be the case that the tourism market and the hotel industry would remain in the doldrums for another eight years. There would be recovery somewhere along the way, which would improve room rates beyond 50% of $140 and $35 respectively for a boutique and capsule hotel.

177 The court disallows the Plaintiff's claim for $170,000 (see [170]) for the interim period of August 2018 to December 2019. The court does not think that the Plaintiff could have made use of the Defendant's Property by August 2018, barely two months after the signing of the Settlement Agreement, for the reason (according to Wilson Lim's report[121]) that the Defendant's Property was in a run-down state.

Conclusion

178 Consequently, the court awards judgment to the Plaintiff on its claim in the sum of $$2,893,343.50 with interest from the date of the writ until payment and costs. The Defendant's counterclaim is dismissed with costs. With regard

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121 Wilson Lim's AEIC at p 10.

to costs, the court follows the appellate court's approach in *Lipkin* (see [159] above). The costs awarded to the Plaintiff for its claim and the Defendant's counterclaim are pegged to the Defendant's figure of $217,750. Deducting 20% therefrom, the Plaintiff is awarded the global figure of $174,200 as costs for both the claim and counterclaim. The disbursements allowed in relation to the Plaintiff will include the fees and charges of Wilson Lim and CHK.

Lai Siu Chiu
Senior Judge

Looi Ming Ming and Tan Yen Jee (Eldan Law LLP) for the plaintiff;
K Muralitherapany and Sim Jia Qing Marcus (Shen Jiaqing) (Joseph Tan Jude Benny LLP) for the defendant.