Overseas Union Enterprise Ltd *v* Three Sixty Degree Pte Ltd and another suit [2013] SGHC 71

Case Number : Suit No 839 of 2011/Q consolidated with Suit No 840 of 2011/G

Decision Date : 28 March 2013

Tribunal/Court : High Court

Coram : Vinodh Coomaraswamy JC

Counsel Name(s) : Melvin Chan and Olivia Low (TSMP Law Corporation) for the plaintiff; Tan Spring (KhattarWong LLP) for the defendant.

Parties : Overseas Union Enterprise Ltd — Three Sixty Degree Pte Ltd

Landlord and Tenant – Covenants – Implied

Landlord and Tenant – Covenants – Quiet Enjoyment

Landlord and Tenant – Termination of leases

Equity – Defences – Equitable set-off

28 March 2013 Judgment reserved.

Vinodh Coomaraswamy JC:

Introduction

Consolidated suits

1 These consolidated actions arise out of a dispute under a lease between the plaintiff, Overseas Union Enterprise Limited ("OUE"), and the defendant, Three Sixty Degree Pte Ltd ("Three Sixty"). OUE owns a hotel at 333 Orchard Road, Singapore 238867 known as the Mandarin Orchard Singapore ("the Mandarin"). Under the lease between the parties, OUE let to Three Sixty the whole of the 39th level ("Level 39") of the Orchard Wing of the Mandarin. OUE retained control of the rest of the Mandarin, including the 38th level of the Orchard Wing ("Level 38").

2 Three Sixty is a company incorporated in Singapore in October 2010. It was incorporated for the purpose of operating a "bar/lounge with a royal theme and décor inspired by the princely estate of Rajasthan, India" [note: 1] at Level 39.

Design feature of Level 38 and Level 39 of the Mandarin

3 Although these proceedings encompass a number of disputes, the root of the dispute lies in a design feature of Level 38 and Level 39. Level 39 is connected to the ground floor by an exit staircase and a service lift. But the public passé nger lifts in the Mandarin do not go all the way up to Level 39. Instead, they stop at Level 38. [note: 2] The public gains access to Level 39 only from and through Level 38. [note: 3] Even then, there is no separate, dedicated passenger lift between the two floors. Public access from Level 38 to Level 39 is only via an internal feature staircase. This staircase is open. That means that the staircase is not protected from fire. It also means that air circulates

freely between Level 38 and Level 39.

4 Because of this design feature, the Singapore Civil Defence Force ("SCDF") treated Level 38 and Level 39 as one compartment for the purposes of fire safety. The SCDF therefore declined to grant Three Sixty a fire safety certificate ("FSC") for Level 39 alone. Instead, the SCDF agreed to grant Three Sixty an FSC subject to a condition, amongst others, that the combined occupancy load for both Level 38 and Level 39 *taken together* should not exceed 120 persons. Without the FSC, Three Sixty could not commence operations. But Three Sixty says it could not accept the SCDF's condition because OUE retained control of Level 38 and Three Sixty had no control over how many people OUE would let in on Level 38. So Three Sixty abandoned its FSC application. It also abandoned its plans to operate a bar/lounge at Level 39. It claims to have suffered considerable losses. In its counterclaim, it holds OUE responsible for all these losses.

5 The essence of these proceedings, therefore, is which party bore the commercial risk of this unique design feature in the context of the express and implied obligations under the Lease in light of what was within the reasonable contemplation of the parties at the time when they Lease was entered into and in the context of all the surrounding circumstances.

The Lease

Three Sixty's obligations under the Lease

6 Under the Lease, OUE let Level 39 to Three Sixty for a period of three years. The Lease commenced on 15 November 2010. [note: 4] The Lease included a rent free fit-out period of 37 days. The fit-out period ended on 22 December 2010. [note: 5] Three Sixty therefore became obliged to pay rent to OUE on and from 23 December 2010.

7 Under the Lease, Three Sixty was obliged to pay the following sums every month to OUE for its lease of Level 39:

(a) Base rent of $45,000 per month (plus 7% GST): part 11 of the First Schedule (Particulars of Lease).

(b) Service charge of $9,268.88 (including 7% GST) per month for costs incurred by OUE in the upkeep and maintenance of the building: clause 4 and part 12 of the First Schedule of the Lease [note: 6].

(c) Utilities charges: under clause 11.9 of the Lease, Three Sixty covenanted to reimburse and indemnify OUE on demand against all charges imposed in respect of fees for electricity and water supplied to Level 39 ("the Utilities Charges") [note: 7].

Material clauses of the lease

8 The material clauses of the Lease provided as follows [note: 8]:

(a) Clause 4.1 of the Lease provided that Three Sixty was obliged to pay the base rent and service charge "without any demand, set off, abatement or deduction whatsoever".

(b) Clause 6.1 of the Lease provided that Three Sixty was obliged to pay to OUE all payments under the Lease – including obviously the sums listed at [7] above – to OUE "promptly as and

when due without demand or set-off of any claim . . . whether for non-performance or breach of [OUE's] obligations hereunder or otherwise".

(c) Clause 6.2 of the Lease provided that Three Sixty was obliged to pay interest to OUE at 18% per annum on any overdue sums under the Lease. The interest was to be calculated daily until OUE actually received payment.

(d) Clause 11.33 of the Lease provided that Three Sixty was obliged to, at its own cost and expense, "obtain, maintain and/or renew the necessary licenses, permits, registration, authorities and approvals… and other consents necessary from the relevant authorities for the carrying on of the business stipulated in part 15 of the First Schedule (*Particulars of Lease*)…". The license relevant for present purposes action was a FSC from the SCDF. Without an FSC, Three Sixty could not obtain a Public Entertainment License ("PEL") from the Singapore Police Force ("SPF"). Without either an FSC or a PEL, Three Sixty could not commence its intended business as a bar/lounge.

(e) Clause 16.1 of the Lease provided that OUE was entitled to forfeit the security deposit and re-enter upon Level 39 or any part of Level 39 if, amongst other things:

(i) the rent or Service Charge remained unpaid for twenty-one days after it had become due and payable under the Lease;

(ii) Three Sixty committed any breach in the punctual performance of any of the provisions of the Lease; or

(iii) Three Sixty failed to commence business by the expiry of the fit-out period, *ie*, on or before 23 December 2010. [note: 9]

(f) Clause 16.3 of the Lease reiterated that Three Sixty was obliged to deliver vacant possession of Level 39 to OUE upon termination of the Lease pursuant to clause 16.1, failing which Three Sixty would be deemed to remain on Level 39 unlawfully.

(g) Clause 16.4 of the Lease provided that if Three Sixty failed to surrender or yield up the whole of Level 39 to OUE after the termination of the lease pursuant to clause 16.1 and instead continued to remain in occupation of Level 39, Three Sixty was obliged to pay OUE double the prevailing rent, defined in part 10 of the First Schedule to the Lease as comprising the base rent and the Service Charge including GST. The prevailing rent was $57,418.88 per month (including GST). Double the prevailing rent was 114,837.76 per month (including GST).

(h) Clause 16.4 also provided that Three Sixty was to pay indemnity costs of any proceedings which OUE was compelled to bring to secure repossession of Level 39.

Three Sixty pays $415,000 in advance

9 Pursuant to the Lease and pursuant to a letter of intent dated 3 November 2010 signed as a precursor to the Lease, Three Sixty paid a total of $415,000 to OUE as advance payments comprising the following: [note: 10]

(a) A non-refundable good faith deposit of $45,000, being one months' base rent without GST. Three Sixty paid this pursuant to the letter of intent;

(b) Advance rental of $225,000. Three Sixty paid this upon signing the Lease. [note: 11] It represented 5 months' base rent, without GST. Taken together with the good faith deposit paid earlier under the letter of intent, the total payment of $270,000 comprised payment of six months' base rent in advance, without GST. This advance rent covered the period from 23 December 2010 to 22 June 2011.

(c) A security deposit of $135,000. This is the equivalent of three months' base rent. Three Sixty paid this upon signing the Lease too; and

(d) A fit-out deposit of $10,000.

Termination of the Lease

10 On 15 November 2010, Three Sixty went into possession of Level 39. Disputes arose between OUE and Three Sixty fairly soon after that date.

11 The most significant of these disputes arises from Three Sixty's failure to secure an FSC (see [3] above). Apart from the advance payments totalling $415,000, Three Sixty has not paid anything to OUE, whether for base rent, service charge, utilities charges or otherwise. [note: 12] It has, however, retained possession of Level 39 from 15 November 2010 to date.

12 By a letter dated 2 September 2011 from OUE's solicitors to Three Sixty's solicitors, OUE demanded payment by 7 September 2011 of all payments in arrears at that time. Three Sixty did not comply with OUE's demand [note: 13].

13 By a further letter dated 9 September 2011 from OUE's solicitors to Three Sixty's solicitors, OUE gave notice that by reason of Three Sixty's failure to pay the base rent and service charge then due and payable, OUE exercised its right to re-enter Level 39 and to terminate the Lease pursuant to clause 16.1 of the Lease. [note: 14] In the same letter, OUE demanded that Three Sixty deliver up vacant possession of Level 39 to OUE by 14 September 2011. Again, Three Sixty did not comply with OUE's demand. [note: 15]

OUE's claim

14 Against that background, OUE commenced two actions against Three Sixty. OUE commenced the first action in the Magistrates' Court on 10 June 2011, *before* it terminated the Lease. In the first action, OUE sought payment of the service charge and utilities charges then in arrears. OUE commenced the second action in the District Court on 15 September 2011, *after* it had terminated the Lease. In the second action, OUE sought to recover the further payments then in arrears and possession of Level 39. Both actions were subsequently transferred to the High Court and consolidated.

15 In these consolidated actions, OUE claims the following sums against Three Sixty as being due, payable and unpaid under the Lease:

(a) Base rent of $122,704.84 for the period on and from 23 December 2010 to 8 September 2011 comprising:

(i) $96,300 being base rent of $90,000 for the period on and from 23 June 2011 (being 6 months from 23 December 2010) to 22 August 2011 plus 7% GST thereon of $6,300;

(ii) $26,404.84 being the prorated base rent of $24,677.42 plus 7% GST of $1,727.42 for the 17 days from 23 August 2011 to 8 September 2011 (immediately before OUE terminated the lease). The proration formula is found in paragraph 5 of the Second Schedule of the Lease.

(a) S$74,151.04 being the Service Charge, including GST, for 8 months from 15 January 2011 to 14 September 2011. [note: 16] There is no provision for pro-rating the service charge, which accrued at the beginning of every month;

(b) $3,704 being the Utilities Charges, including 7% GST, for the period from 15 November 2010 to 30 April 2011; [note: 17] and

(c) Interest on these sums at 18% per annum pursuant to clause 6.1 of the Lease.

16 OUE also claims double rent pursuant to clause 16.4 of the Lease on and from 9 September 2011 to the date on which Three Sixty delivers vacant possession of Level 39 to OUE. As explained above, 8 September 2011 is the date on which OUE gave notice to Three Sixty that it was terminating the Lease pursuant to clause 16.1 of the Lease due to Three Sixty's failure to pay sums due under the Lease. [note: 18]

17 OUE claims interest at 18% per annum pursuant to clause 6.2 of the Lease on all monetary sums due to it under the Lease.

18 In respect of the head of claim at [15(a)] above, OUE initially claimed in its statement of claim $144,450 representing the base rent from 23 June 2011 to 22 September 2011. [note: 19] However, in its written closing submissions, OUE accepted that the base rent owing should instead be $122,704.84 for the period from 23 June 2011 to 8 September 2011, [note: 20] with double the prevailing rent payable on and from 9 September 2011.

19 Apart from these sums, OUE also claims damages for Three Sixty's breach of clauses 11.6 and 11.33 of the Lease. [note: 21] Clause 11.6 of the Lease provides that Three Sixty shall commence business at Level 39 not later than the expiry of the fit-out period, *ie*, on or before 22 December 2010. Clause 11.33 of the Lease provides that Three Sixty shall procure the licenses and permits necessary for it to carry on its business at Level 39. OUE says that both these obligations have not been fulfilled to date and that this omission constitutes a breach of the relevant clauses of the Lease. [note: 22]

20 In view of the termination of the Lease and Three Sixty's refusal to relinquish possession of Level 39, OUE also claims an order for possession of Level 39 pursuant to clauses 16.1 and 16.3 of the Lease. [note: 23]

21 Finally, OUE also claims indemnity costs of these proceedings pursuant to clause 16.4 of the Lease.

Three Sixty's counterclaim

22 Three Sixty admits that it is obliged to pay the quantified sums set out at [15]. Three Sixty admits also that it has not paid these sums. But it says that it is not liable to pay these sums because of OUE's breaches of the Lease. [note: 24]

23 First, Three Sixty claims that OUE breached its covenant to permit Three Sixty to have quiet enjoyment of Level 39. [note: 25] The factual basis of this claim is Three Sixty's assertion that Level 39 was not well maintained such that Three Sixty suffered power-cuts and severe water leakage at Level 39 during the fit-out period. Three Sixty also complains of leaking air-conditioning units, defective windows and verbal abuse of its director, Ms Preeti Tiwari, by one of OUE's representatives on 26 January 2011 [note: 26] . Three Sixty also says that OUE, in failing to look into the defects on Level 39 in "a timely manner", caused delay and inconvenience to Three Sixty.

24 Second, Three Sixty claims that OUE breached an implied term in the Lease that Level 39 would be fit for the purpose for which Three Sixty leased it. In particular, Three Sixty claims that OUE should never have offered Level 39 for lease separately from Level 38. [note: 27] Three Sixty relies on the fact that the SCDF treated Level 38 and Level 39 as one compartment for the purposes of fire safety.

25 Finally, Three Sixty claims that OUE breached an implied covenant against derogation from its grant of the lease to Three Sixty because OUE (1) failed to render the necessary assistance to Three Sixty in obtaining the FSC which was required for Three Sixty to commence business at Level 39; and (2) refused to allow Three Sixty the entire 120 person occupancy load imposed by the SCDF for Level 38 and Level 39 taken together. [note: 28]

26 Three Sixty says that as a result of OUE's breaches, it suffered the following losses and was therefore entitled to withhold payments under the Lease to OUE to the extent of these losses and to claim the balance from OUE: [note: 29]

(a) $360,000 in rental;

(b) $500,000 in fit-out costs; and

(c) $175,737.72 in staff costs for more than six months for Level 39.

27 OUE denies these allegations. OUE says that under clause 11.33 of the Lease, the obligation lies on Three Sixty to – at its own cost and expense – obtain and maintain the necessary licenses and approvals from the relevant authorities to carry on its business.

Issues

28 At the conclusion of trial, parties agreed on the following list of issues to be addressed by this Court:

(a) Is Three Sixty in breach of the Lease in failing to pay OUE's invoices for outstanding rental, service charges, and utilities charges? And is Three Sixty liable to pay these sums?

(b) Is OUE entitled to terminate the Lease and to obtain vacant possession of Level 39?

(c) Is OUE entitled to payment of double the prevailing rent for the hold over period on and from 9 September 2011 to the date of delivery of vacant possession of Level 39?

(d) Has OUE breached the covenant to provide quiet enjoyment of Level 39 to Three Sixty?

(e) Has OUE breached its obligation not to derogate from its grant of tenancy to Three Sixty?

(f) Has OUE breached an implied term that Level 39 is fit for its intended purpose?

(g) Is Three Sixty responsible under the Lease for obtaining all licenses (including but limited to the FSC) necessary to carry on its business at Level 39?

(h) Must the FSC and PEL which Three Sixty requires to carry on its business necessarily be without reference to Level 38?

(i) Did OUE provide sufficient documents and information in time for Three Sixty to obtain all licenses (including but not limited to the FSC) necessary to carry on its business at Level 39?

(j) Is Three Sixty entitled to its counterclaim for rental, fit-out costs and staff costs?

29 Before I discuss these issues in detail, I make some preliminary observations about them. First, on the clear language of clause 11.33 of the Lease, the answer to issue (g) must be 'yes'. Second, I will discuss issues (d) and (e) together because, as will be shown later, both covenants employ substantively the same test. Third, it appears to me that issues (h) and (i) are more appropriately dealt with in the discussion of issues (e) and (f). Any failure on OUE's part to assist Three Sixty in obtaining the licenses necessary for it to carry on business at Level 39 could constitute a derogation from OUE's grant to Three Sixty under the Lease of exclusive possession of Level 39. Finally, it appears to me that issue (j), at least on liability, is subsumed within issues (d), (e) and (f). That therefore means that the principal issues I have to discuss are issues (a) to (f).

30 With this, I now move on to the discussion of issues (a) to (f).

Issue (a): Is Three Sixty in breach of the Lease?

31 As stated above at [7] above, clause 4 of the Lease obliges Three Sixty to pay every month the base rent of $45,000 plus GST and the service charge of $9,268.88 including GST. Pursuant to clause 11.9.1 of the Lease, Three Sixty is obliged to indemnify OUE on demand against utilities charges for Level 39. Three Sixty accepts that it has not paid the base rent from 23 June 2011 to 8 September 2011 (or indeed to date), the service charge from 15 January 2011 to 14 September 2011 and the utilities charges from 15 November 2010 to 30 April 2011. [note: 30]

32 In defence of OUE's claim that it is in breach of the Lease, Three Sixty does not advance a positive defence. It does not, for example, assert that the sums claimed are not within its obligations under the Lease, that some contractual condition precedent to Three Sixty's liability to pay these

sums under the Lease has not yet been satisfied or that its contractual duties under the relevant clauses are for some reason unenforceable.

33 Most importantly, it is not Three Sixty's case that OUE's alleged breaches on which Three Sixty relies (see [22]-[25] above) are so serious as to amount to OUE's repudiation of the Lease, which Three Sixty accepted, thereby bringing to an end Three Sixty's primary obligations under the Lease including its obligation to pay rent. There is a faint allegation in Three Sixty's opening statement and closing submissions that OUE repudiated the Lease. [note: 31] But that allegation is not based on anything in Three Sixty's pleadings or in Three Sixty's witnesses' affidavits of evidence in chief. Nor does Three Sixty assert that it at any time accepted this alleged repudiatory breach bringing the Lease and its obligation to pay rent to an end. Quite the contrary: Three Sixty asserts positively that it "has not accepted the repudiatory breach and therefore, the [Lease] is still afoot and [Three Sixty] is entitled to remain in possession of [Level 39]". [note: 32] For all these reasons, I need not analyse repudiatory breach as a defence. Three Sixty's allegation that the Lease had been frustrated [note: 33] is equally faint and equally need not be analysed as a defence.

34 So the only defence which I have to consider is the only pleaded defence: that of set-off. [note: 34] Three Sixty's pleading does not make clear which species of set-off it relies upon. In its closing submissions, Three-Sixty characterises it as equitable set off. [note: 35]

35 The right of equitable set-off is a substantive defence rather than a procedural defence. A valid equitable set-off operates as a self-help remedy. It enables a person lawfully to withhold a payment which is contractually due to his counterparty without the need for legal proceedings to establish the validity of the set-off. The counterparty cannot rely on the withholding of payment to trigger extra-judicial rights and remedies for breach including a right to terminate the contract (see *Pacific Rim Investments Pte Ltd v Lam Seng Tiong and another* [1995] 2 SLR(R) 643 ("*Pacific Rim*") at [18]-[19] and [35]).

36 Equitable set-off is available to a tenant as against a landlord as it is under any other type of contract. A tenant can assert equitable set-off against his landlord if the tenant's cross-claim against the landlord is so closely connected to the landlord's claim for rent as to go to the root of that claim. The tenant can even set up an unliquidated cross-claim for damages by way of equitable set-off. But a clause in a lease which expressly or by clear words prohibits set-off will be effective to do so (see *Batshita International (Pte) Ltd v Lim Eng Hock Peter* [1996] 3 SLR(R) 563; [1996] SGCA 68 at [12]; following *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137 and *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 1 WLR 501).

37 OUE relies on clause 4.1 of the Lease (at [8(a)] above) and clause 6.1 of the Lease (at [8(b) above] to submit that Three Sixty's right to rely on equitable set-off as a substantive defence was excluded by the Lease. These clauses prevent Three Sixty from making deductions from or applying set-off against any sums that Three Sixty is to pay under the Lease. This includes the base rent. Three Sixty argues that because these clauses do not expressly exclude "*equitable* " set-off, these clauses are not sufficiently clear and cannot have that effect. I reject that argument. A provision requiring payment "without any deduction or set off whatsoever" is sufficient to exclude equitable set-off: see *Star Rider Limited v. Inntrepreneur Pub Co* [1998] 1 EGLR 53. That is precisely what clause 4.1 does. But even a reference to "set-off" alone, without the word "whatsoever", is sufficient to exclude all species of set-off, including equitable set-off: see *Altonwood Limited v Crystal Palace F.C. (2000) Limited* [2005] EWHC 292 at [32]. That is precisely what clause 6.1 does.

38 Those reasons are sufficient in themselves, for me to hold that clauses 4.1 and 6.1 are

effective to exclude Three Sixty's right to withhold payments due to OUE under the Lease on grounds of set-off, equitable or otherwise. It is therefore not necessary for me to decide whether the word "deduction" is sufficient by itself to exclude equitable set-off, whether or not coupled with "whatsoever": c f *Norman; in the matter of Forest Enterprises Limited v FEA Plantation Limited* [2011] FCAFC 99 at [199], *obiter*. For the same reason, it is also not necessary for me to decide whether a tenant can assert equitable set-off against a landlord in respect of a cross-claim arising from something other than a breach of the landlord's covenant to repair, the physical condition of the demised premises or the tenant's quality of occupation.

39 Three Sixty submits that a contractual provision which would be effective to exclude equitable set-off arising from the breach of an *express* term of the Lease is not effective to exclude equitable set-off arising from breach of an *implied* term of the Lease, such as the one on which Three Sixty relies for its counterclaim. There is no authority for this proposition. I reject it.

40 Three Sixty therefore had no right to withhold payments under the Lease on and from 23 June 2011. It had, at best, only a cross-claim against OUE.

Issue (b) and (c): Right to terminate the Lease and right to double rent

41 What are the legal consequences of this analysis? The law is set out in the following passage of the Court of Appeal's judgment in *Pacific Rim*, at [27] (quoting *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927 at 973-974):

> . . . [T]ake the case where the contract gives a creditor a right to take the law into his own hands – to take a particular course of action if a sum is not paid – such as to forfeit a lease for non-payment of rent or to withdraw a vessel for non-payment of hire. There the distinction between set-off and cross-claim is crucial. When the debtor has a true set-off it goes in reduction of the sums owing to the creditor. If the creditor does not allow it to be deducted, he is in peril. He will be liable in damages if he exercises his contractual right of withdrawal wrongly. But when the debtor has no set-off or defence properly so called, but only a counterclaim or cross-action, then the creditor need not allow any deduction to be made. He can exercise his contractual right without fear; and leave the debtor to bring an action for damages on his counterclaim.
>
> [Emphasis added]

42 On the facts of this case, the first consequence of the unavailability of equitable set-off is that Three Sixty was in unqualified breach of the Lease by failing to pay base rent on and from 23 June 2011 as well as the other payments which fell due after they went into possession of Level 39. The second consequence is that Three Sixty's breach remained unremedied and triggered OUE's right to terminate the lease under clause 16.1 of the Lease (see [8(e)]). The third consequence is that OUE validly exercised its right to terminate the Lease on 9 September 2011.

43 OUE is therefore entitled to succeed on all its claims in both suits. This includes all of its monetary claims as well as its claim for possession of Level 39. I note in passing that although Three Sixty asserted set-off as a defence to OUE's monetary claims, it has never asserted any form of defence to OUE's claim for possession of the premises. Even assuming that OUE had committed a repudiatory breach and even if, contrary to the facts, Three Sixty had accepted that breach, Three Sixty would still have had to relinquish possession of Level 39 to OUE. Three Sixty's failure to relinquish possession is all the more surprising given that Three Sixty accepts that the Lease [note: 36]

has come to an end. If the Lease has come to an end, so too has Three Sixty's right to possession of Level 39. Three Sixty's continued retention of Level 39 has been a cynical and wholly unlawful attempt to hold on to a bargaining chip in order to exert leverage against OUE. This finding has significance when it comes to the issue of costs.

44 With OUE's claims determined in its favour, all that remains is to consider Three Sixty's cross-claims against OUE which it asserts by counterclaim in these proceedings. If Three Sixty can establish that counterclaim, it will be entitled to recover damages for the breaches. And in the context of these proceedings, Three Sixty can set up the quantum of those damages in diminution or extinction of OUE's right to recover from Three Sixty the monetary sums to which I have found it to be entitled.

45 So it is to Three Sixty's counterclaim which I now turn.

Issue (f): Breach of implied term that Level 39 is fit for intended purpose

46 I deal first with issue (f). Three Sixty argues that OUE breached an implied term in the Lease that Level 39 would be fit for the purpose for which Three Sixty was leasing it, that is for use as a bar/lounge.

47 Three Sixty must be taken to accept the distinction between terms implied in fact and terms implied in law (see *eg*, *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [29], [41] and [42]). Three Sixty submits that there is an implied term *in fact* in the Lease that Level 39 would be fit for the intended purpose of the lease, namely, the operation of a bar/lounge. [note: 37] The argument is that since OUE was well aware that Three Sixty would be using Level 39 for the operation of a bar/lounge, it must have been both parties' intention that Level 39 is in fact fit to be used as a bar/lounge and can actually be used as a bar/lounge.

48 OUE raises a preliminary objection. OUE submits that Three Sixty has not pleaded this allegation in its Defence and Counterclaim and in its Further and Better Particulars. [note: 38] However, parties need not plead matters of law as long the facts giving rise to that claim in law are pleaded. Whether or not a particular term is an implied term in the Lease is a question of law, even if the term sought to be implied is a term implied in fact. Hence, OUE's preliminary objection must fail.

49 OUE next relies on clauses 11.27 and 29.11 of the Lease to support its argument that there can be no such implied term because it would contradict the express terms of the lease. [note: 39] These clauses provide as follows:

> 11.27 Warranties and Representation
>
> [Three Sixty] acknowledges and declares that no promise, representation, warranty or undertaking has been given by or on behalf of [OUE] in respect of the suitability of the Demised Premises or [the Mandarin] for any business to be carried on therein or to the fittings, finishes, condition or state of repair, facilities and amenities of the Demised Premises or the [the Mandarin] or the permitted use to which the Demised Premises may be put pursuant to any requirements of any appropriate authority or as to other businesses to be carried on in the [the Mandarin], or in respect of any access to or from the [the Mandarin] otherwise than in this Agreement contained. [Three Sixty] shall make its own enquiries in relation to the matters noted above and all warranties (if any) as to the suitability or adequacy of the Demised Premises implied by law are hereby expressly negatived.

29.11 Exclusion of Implied Terms, Etc

These covenants, provisions and agreements cover and comprise the whole of the Agreement between the Parties or their appointed agents and the Parties expressly agree and declare that no further or other covenants, agreements, provisions or terms whether in respect of the Demised Premises or otherwise shall be deemed to be implied herein and the existence of any such implication is hereby negatived.

[emphasis added]

50 I agree with OUE. Clause 11.27 of the Lease imposes on Three Sixty the risk of Level 39 not being suitable for any particular purpose for which Three Sixty wished to use it. Three Sixty, by signing the lease, agreed to take on that risk. There is no injustice in this. Three Sixty viewed the premises before entering into the letter of offer and the Lease. The topology of Level 38 and Level 39 was patent. Three Sixty undertook the obligation to secure an FSC under the Lease. Three Sixty had ample opportunity to take its own expert advice on the prospects of securing an FSC before agreeing to undertake that obligation. But either it did not do so or it did so and secured assurance that it could. In either event, that issue is not OUE's concern.

51 Having found that there is no implied term for fitness for purpose *in fact*, for the sake of completeness, I should add that it is well-established by case law that there is generally no term implied *in law* in a lease that the premises will be fit for the purposes for which they are leased (*Southwark London Borough Council v Tanner and others* [2001] 1 AC 1 (HL) ("*Southwark*") at 7-8 *per* Lord Hoffmann, citing with approval *Hart v Windsor* (1843) 12 M & W 68 at 87-88 *per* Baron Parke and *Edler v Auerbach* [1950] 1 KB 359 at 374 *per* Devlin J). The House of Lords in *Southwark* also observed that the prevailing principle is "caveat lessee" (at 12 *per* Lord Hoffmann) and that a tenant "takes the property as he finds it and must put up with the consequences" (at 17 *per* Lord Millett). Lord Hoffmann in *Southwark* also observed (at 8) that:

It is the business of the tenant, if he does not protect himself by an express warranty, to satisfy himself that the premises are fit for the purpose for which he wants to use them, whether that fitness depends upon the state of their structure, the state of the law, or any other relevant circumstances.

Lord Millett in *Southwark* also observed (at 17) that this principle of law:

. . . does not depend on fictions, such as the ability of the tenant to inspect the property before taking the lease. It is simply a consequence of the general rule of English law which accords autonomy to contracting parties. In the absence of statutory intervention, the parties are free to let and take a lease of poorly constructed premises and to allocate the cost of putting them in order between themselves as they see fit.

[emphasis added]

52 Hence, I find that there is no implied term, whether implied in fact or in law, in the Lease that Level 39 would be fit for Three Sixty's purpose. But the absence of such an implied term does not mean that OUE has no obligations with regard to Three Sixty's enjoyment or utility of the demised premises. There is implied in law in every leasehold agreement – unless expressly provided for or expressly excluded – a covenant for quiet enjoyment and a covenant against derogation from grant (*Southwark* at 10 and 23). Three Sixty relies, in the alternative, on these covenants.

Issues (d) and (e): the law

53 I now consider whether OUE breached the covenants for quiet enjoyment and against derogation from grant. Before turning to the facts of this case, I first set out some general principles which apply to the interpretation of leases. I then distinguish – to the extent that it is possible – between the two covenants. I conclude this section on the law by establishing five general principles applicable when determining whether a landlord has breached either of these covenants.

General approach to the interpretation of leases

54 The weight of Singapore and Commonwealth authority is that the ordinary principles of contractual construction apply equally to leases (see *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 29). The modern approach to the construction of commercial contracts is to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract: see *Investors Compensation Scheme Ltd v West Brunswick Building Society* [1998] 1 WLR 896 at 912–913 per Lord Hoffman ("*Investors Compensation Scheme Ltd*"). The Court of Appeal endorsed this contextual approach to contractual construction in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [110]-[115] and [125]-[133]) ("*Zurich*"). The *Zurich* variation of the third of Lord Hoffman's principles in *Investors Compensation Scheme Ltd* to permit evidence of the parties' subjective intentions is not relevant on the facts of this case. The *Zurich* approach has been applied to the construction of a lease: *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094.

Implied covenant of non-derogation of grant

55 The purpose of the implied covenant against derogation from grant in the context of leases is to ensure that the landlord does not "give with one hand and take away with the other" (*Southwark* at 23 *per* Lord Millett). Put another way, it is a covenant by the landlord that he will not grant a lease of land to a tenant on terms which effectively or substantially negative the utility of the grant (Gray and Gray, *Elements of Land Law*, 5th ed, 2009 at para 4.3.17). Its essence is the protection of the tenant's utility of his lease against substantial interference by the landlord or those claiming under him.

56 The Court of Appeal in *Wee Siew Bock and another v Chan Yuen Yee Alexia Eve and another appeal* [2012] 3 SLR 1053 recently affirmed that the test of whether there is a derogation from the grant of a proprietary right is whether there is "substantial interference" with a grantee's reasonable use of the proprietary right in question (at [96]).

Implied covenant of quiet enjoyment

57 The covenant for quiet enjoyment is a covenant that the tenant's lawful possession of the land will not be substantially interfered with by the acts of the lessor or those lawfully claiming under him (*Southwark* at 10). The essence of this implied covenant too is the protection of the tenant's utility of his lease against substantial interference by the landlord and those claiming under him. The ultimate purpose of these two implied covenants being the same, there is thus considerable overlap between them. It has even been said that there is now little, if any, difference between the implied covenant against non-derogation from grant and the implied covenant of quiet enjoyment (see *Southwark* at 23F per Lord Millett).

58 But there are at least three unique features of the implied covenant of non-derogation from

grant which distinguish it from the implied covenant of quiet enjoyment. First, the doctrine of non-derogation from grant is of general application and is not confined to leases or even to contracts concerning real property (see for example *Creative Technology Ltd v Aztech Systems Pte Ltd* [1996] 3 SLR(R) 673 at [85]). Second, in certain circumstances, the doctrine of non-derogation from grant can give rise to a species of proprietary rights (see *Wheeldon v Burrows* (1878) 12 Ch D 31). Third, where a lessor grants a lease but reserves some rights for himself under that lease, the doctrine of non-derogation can operate in favour of the lessor and against the lessee in connection with his exercise of those reserved rights.

59 On the facts of this case, however, there is no material difference between the protection afforded to Three Sixty by each of the two covenants. Analysing whether OUE has breached either covenant, therefore, requires me to consider OUE's express and implied obligations fairly in order to ascertain what was within the reasonable contemplation of the parties at the time when the lease was entered into in the context of all the surrounding circumstances. Put that way, there is very little difference then between ascertaining the scope of these implied covenants and simply construing the lease contextually in accordance with the guidance of the Court of Appeal in *Zurich*.

Five applicable principles

60 I now set out five principles distilled from the case law which will be of relevance when I come to analyse the facts of this case:

(a) The covenant against non-derogation from grant does not amount to an implied obligation on the landlord to underwrite the profitability of the tenant's business;

(b) A landlord has no obligation to take measures outside the reasonable contemplation of the parties with regard to the demised premises unless those measures were specifically bargained for in the lease;

(c) Even non-physical interference can constitute substantial interference with the ordinary enjoyment of premises in the context of both covenants;

(d) The existing use of adjoining premises is always a material consideration in considering whether either covenant has been breached; and

(e) Both covenants are prospective in nature: the covenants do not apply to acts of the landlord before the grant of the tenancy.

No obligation to underwrite tenant's profitability

61 A lessor will not breach the covenant against derogation from grant if he does something upon adjoining land which, while not otherwise affecting the demised premises or their user in any way, merely makes it more expensive or less profitable than it would otherwise be for the lessee to carry on his business on the demised premises. In *Cold Storage Singapore (1983) Pte Ltd v Management Corporation of Chancery Court and others* [1989] 2 SLR(R) 180 ("*Chancery Court*"), the plaintiff supermarket ("Cold Storage") signed a tenancy agreement with the first defendant ("the MC") to operate a supermarket in the estate managed by the MC. The MC subsequently introduced a paid parking scheme which required all non-resident motorists – including Cold Storage's customers – to pay $1 to enter or park within the estate. Cold Storage pointed out that the MC had let the premises to it *only* for the purpose of operating a supermarket. Cold Storage argued that the MC was therefore obliged under its covenant not to derogate from its grant to allow Cold Storage's customers to have

unrestricted access to the MC's land in order to shop at the supermarket. Otherwise, Cold Storage submitted, it would no longer be able to operate the supermarket at a profit (at [14]).

62 Chan Sek Keong J (as he then was) rejected these arguments. He found that what Cold Storage was asking for amounted to an absolute right for its customers to park on the MC's land free of charge (at [22]). He held that such a right was "neither necessary nor reasonable for [Cold Storage's] business" and that "[i]f the court were to imply such a right, it would in effect be rewriting the terms of the tenancy agreement in favour of the plaintiffs" (at [23]). This was because the MC's scheme did not in any way at all affect customers of Cold Storage who were *non-motorists*; and even in respect of customers who *were* motorists, it did not make it *impossible* for them to park within the estate while shopping at Cold Storage (at [22]). Although the MC's scheme may have caused Cold Storage to take a commercial decision to give a rebate of $1 to each non-resident motorist shopper who made purchases at the supermarket above a certain value, the only effect of that was to make it more expensive or less profitable for Cold Storage to operate the supermarket (at [25]-[27], following *O'Cedar Ltd v Slough Trading Co Ltd* [1927] 2 KB 123). There was therefore no derogation from grant.

63 The reasoning of Chan Sek Keong J was upheld in its entirety by the Court of Appeal (see *Cold Storage Singapore (1983) Pte Ltd v Management Corporation of Chancery Court and others* [1991] 2 SLR(R) 992).

No obligation to take extraordinary measures

64 A landlord has no implied obligation to take measures outside the reasonable contemplation of the parties with regard to the demised premises unless these measures were specifically bargained for in the lease. In *Robinson v Kilvert* (1888) 41 ChD 8 ("*Robinson*"), the English Court of Appeal held that where a landlord demises part of his property for carrying on a particular business, he is subject to an implied obligation to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on. But this implied obligation does not extend to *special* branches of the business which call for *extraordinary* protection unless the tenant has made express provisions in the lease for such protection.

65 The facts of *Robinson* are as follows. A landlord let the ground floor of a house to a tenant to store paper, retaining the cellar immediately below. The landlord afterwards employed heating apparatus in the cellar which raised considerably the temperature at the ground floor. The resulting heat damaged certain kinds of paper which the tenant stored at the ground floor, but not all of the tenant's paper. The landlord did not know at the time of the letting that the tenant was going to store any particular kind of paper at the ground floor which would be damaged by a level of heat which would not hurt paper generally.

66 The English Court of Appeal found the landlord not liable for the tenant's loss. Cotton LJ rejected the plaintiff's argument that there was an implied contract that the landlord would not do anything to interfere with the tenant's trade. He held that the existence of such an implied contract as well as its contents, if it existed, had to be determined by what was known to the landlord when he let the property. While the landlord undoubtedly knew that the tenant rented the premises for the purposes of his business as a paper merchant, there was no evidence that the landlord knew anything as to the tenant's dealing in any particular class of paper. Cotton LJ further noted that the landlord was not a paper merchant and cannot be assumed to have known – as it was not a matter of common knowledge – that the degree of heat which the landlord used in the cellar would injure the tenant's special paper. Further, the tenant had seen the landlord's boiler in the cellar. Cotton LJ therefore held that if the tenant wished to ensure that the landlord would do nothing to raise the

temperature at the ground floor above the ambient temperature, he ought to have bargained for that stipulation in his lease. The tenant's claim therefore failed (at 94-95 *per* Cotton LJ).

67 Lindley LJ approached the matter differently but arrived at the same result. He considered whether there was a breach of the implied covenants of quiet enjoyment and non-derogation from grant. He held that the landlord would have breached the implied covenant for quiet enjoyment if his activities in the cellar had made the ground floor unfit for storing *all kinds* of paper. But the evidence showed only that the landlord's activities had made the ground floor unfit for storing *particular kinds* of paper. If the tenant had wanted extraordinary protection for a particular branch of his trade, he had to bargain for it in his lease (at 96-97).

Even non-physical interference is actionable

68 Even non-physical interference can constitute substantial interference with the ordinary enjoyment of premises in the context of both the covenant for quiet enjoyment and for non-derogation from grant (*Southwark* at 11 and 23). One example of non-physical and indirect interference is acting so as to cause an existing license held by and required by the tenant for his business – being the purpose of the grant of the lease – to be forfeited.

69 In *Harmer v Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200 ("*Harmer*"), a case cited by Chan J in *Chancery Court*, a lessor leased land to a tenant expressly for use as an explosives magazine. The tenant had the necessary licence from the Government to store explosives there. The tenant's licence was liable to be forfeited if there were any buildings within a certain distance of the explosives magazine. A subsequent tenant of adjoining land erected buildings which were within distances prohibited by the plaintiff's licence. That rendered the plaintiff's licence from the Government liable to immediate forfeiture. The tenant sought a mandatory injunction for the removal of the buildings on two grounds, namely, that there was derogation from the lessor's grant to the tenant and that there was a breach of the implied covenant for quiet enjoyment.

70 The defendants argued that the building of structures on their own land was not a "physical" interference with the plaintiff, but only something which caused a third party (the Government) to prohibit the tenant from carrying on its business on its premises. The English Court of Appeal rejected any distinction between "physical" and "non-physical" interference. It found that a derogation from grant can occur by a change in the condition of the demised premises brought about by the fact that it has become illegal to use the premises for the purpose intended by the demise (*per* Lord Sterndale MR at 219 and *per* Warrington LJ at 223-224). In these circumstances, the court found there to be a breach of an implied obligation on the part of the lessor or those claiming under him not to do anything which would result in a violation of the conditions in the tenant's licence.

Existing use of adjoining premises always a material consideration

71 The obligations under both covenants are confined to the subject matter of the grant. In the context of a lease, the subject-matter of both covenants is the demised premises. The covenants cannot be used to enlarge what the landlord has granted to the tenant. They simply give the tenant an additional remedy – an action for damages – if the acts of the landlord or those claiming under him have the result that the tenant cannot get or is substantially deprived of what the landlord has granted him.

72 As Lord Hoffman said in *Southwark*, "the location of the demised premises and the use to which adjoining premises are put at the date of the tenancy agreement, or the use to which they may then reasonably be expected to be put in future, must always be a material consideration" in determining

whether the landlord has breached either covenant (*Southwark* at 24-25).

Covenants are prospective in nature

73 Finally, both covenants are prospective in nature: the covenants do not apply to acts before the grant of the tenancy, even if those acts may have continuing consequences for the tenant (*Southwark* at 11). The landlord's obligation under both covenants is not to do anything *after* the date of the grant which will derogate from the grant or substantially interfere with the grantee's enjoyment of the subject matter of the grant (*Southwark* at 23). What this means for a tenant is that he takes the property not only in the physical condition in which he finds it but also subject to the uses which the parties must have reasonably contemplated would be made of the parts retained by the landlord.

74 Thus, on the facts of *Southwark*, the House of Lords found that the defendant landlords were not liable for breach of the covenant for quiet enjoyment. In *Southwark*, the tenants complained that the landlord's sound insulation between flats was ineffective against the noise generated by the use of adjoining flats. The tenants argued that the noise seriously interfered with their enjoyment of their own flat.

75 The House of Lords noted that it is important to bear in mind that the subject matter of each of the tenancies was not merely a residential flat, but a residential flat in a building constructed or adapted for multiple occupation. Thus, it must have been within the reasonable contemplation of the prospective tenants that the adjoining flats would be let to residential tenants, and that those other tenants would live normally in them. The noise that the tenants complained of was nothing more than the ordinary sound of every day activity of the occupants of those adjoining flats (at 24). Neither the landlord nor any of the occupiers of adjoining properties did or asked to do anything since the tenancy agreements were entered into which was not contemplated by everyone concerned (at 25). The House of Lords therefore found that the landlords were not in breach of their covenants for quiet enjoyment.

Issues (d) and (e): The facts

76 Having set out the principles applicable in determining the scope of the landlord's obligations under the covenants for quiet enjoyment and against derogation from grant, I now move on to consider the facts of this case. Three Sixty submits that OUE breached these two covenants in the following ways:

(a) OUE failed to provide relevant documents in their possession resulting in the SCDF granting a lower occupancy limit for Level 39; [note: 40]

(b) OUE refused to give to Three Sixty the full occupancy load permitted by the SCDF of 120 persons for Level 39; [note: 41] and

(c) There were multiple and recurring serious defects at Level 39 which OUE either delayed in remedying or failed to remedy. [note: 42]

The key question to be answered is whether these alleged breaches happened and, if so, whether they amount to substantial interference with the utility of the Lease bearing in mind what was in the reasonable contemplation of the parties when they entered into the Lease.

Ms Tiwari's evidence

77 Three Sixty's only witness of fact was Ms Preeti Tiwari. Ms Tiwari is a director of Three Sixty and the driving force behind the project at Level 39 for which Three Sixty was incorporated and for which it entered into the Lease. I found Ms Tiwari to be a thoroughly unreliable witness. On several material issues, she gave evidence under cross-examination which was not supported by the contemporaneous documents and which could not be found either in Three Sixty's pleadings or, more importantly, in her own affidavit of evidence in chief. Her allegations on all of these points were quite clearly afterthoughts from the witness box. I was therefore driven to the conclusion that it was not safe to rely on Ms Tiwari's evidence where it conflicted in any material respect on any material issue with the evidence of OUE's witnesses.

78 One example suffices. Mr Henry Ramas was the property agent from DTZ Properties who brokered the Lease. For reasons I explain later (see [85] below), there was a dispute as to whose "agent" Mr Ramas was. It is, in fact, quite inaccurate to call Mr Ramas anybody's "agent". Mr Ramas had no authority of any kind to enter into any contracts of any kind on behalf of either party as his principal. In the compound terms "property agent" or "real estate agent", the word "agent" is not used as a legal term of art. It simply means a broker or, at the very most, a representative. It does not mean "agent" as a legal term of art.

79 In any case, Ms Tiwari's evidence was that Mr Ramas was not Three Sixty's "agent" but was OUE's "agent". [note: 43] However, when she was referred to an email from Mr Ramas in which Mr Ramas referred to Three Sixty as his "clients", [note: 44] Ms Tiwari questioned the provenance of the email. She initially suggested that she did "not know anything about this email". [note: 45] She subsequently went so far as to suggest that the email may have been doctored or tampered with. [note: 46] There was no basis for any such suggestion. It was wholly false.

Three Sixty takes possession of Level 39

80 OUE handed over Level 39 to Three Sixty together with a set of documents pertaining to Level 39 on 15 November 2010. Three Sixty complains that the documents were incomplete or insufficient for Three Sixty's purposes. But there is no allegation that OUE withheld any documents: OUE handed over what it had. Three Sixty (as was its obligation under the Lease) set about securing the necessary approvals from the public authorities to conduct the business of a bar/lounge at Level 39. This included securing the URA's approval under the Planning Act to change the use of Level 39 from its previous use as a restaurant to its proposed use as a bar/lounge. Also included was securing the SCDF's approval from the perspective of fire safety for the same change of use and for an FSC based on the new use.

81 Three Sixty had an obligation to commence business on or before 23 December 2010. However, due to a catalogue of errors, which I find were entirely the responsibility of Three Sixty and its employees or agents (including Ms Tiwari and Three Sixty's professional advisers), the application process for the FSC dragged on in fits and starts until June 2011. Eventually, Three Sixty abandoned the application process altogether and no FSC was issued at all for Level 39.

82 Three Sixty commenced fit-out works at the end of November 2010. However, Three Sixty claimed it encountered numerous problems throughout the fit-out period. Three Sixty says that these problems constituted breaches of the Lease by OUE. It also says that the problems caused delay to the fit-out works and delayed Three Sixty's ability to commence business. These problems included a whole host of alleged defects in Level 39 including power cuts [note: 47] and water leakage said to be

"severe". [note: 48] I reject these allegations also.

83 I will deal with each of the allegations in turn.

The FSC and waiver applications

84 Three Sixty says that around the time the fit-out works commenced, it started the process of applying for the necessary approvals for it to commence business [note: 49] from the URA and the SCDF.

85 On 1 December 2010, the URA approved the change of use for Level 39 from "Restaurant" to "Nightclub cum restaurant". [note: 50] This was different from Three Sixty's proposed use of Level 39 as a "bar/lounge". This misdescription was material. It is likely to have originated from Mr Ramas. He appears to have taken it upon himself to put in the application to the URA. There was a dispute as to who, therefore, was responsible for his misdescription of Three Sixty's proposed use to the URA. It suffices for me to find that OUE was not responsible for the misdescription or for its consequences. Even if Three Sixty was also not responsible for Mr Ramas' misdescription, it was incumbent on Three Sixty immediately to correct it, or at the very least not to perpetuate it in further applications to the SCDF, as they did.

86 On 21 December 2010, Three Sixty engaged [note: 51] a qualified person ("QP") for its FSC application to SCDF. There were a number of things done by Three Sixty or on its behalf in the fiasco followed which even Three Sixty's expert witness said he would have done differently. Curiously, though, Three Sixty did not call its QP or any of its other consultants to explain their thinking. This left an evidential gap on the facts. The gap could not be filled by calling an expert to give an opinion. The gap could not be filled by Ms Tiwari either: she admitted that there were certain issues relating to Three Sixty's FSC applications to the SCDF which she was unable to comment on as they were handled by Three Sixty's consultants and QP. [note: 52]

87 Ms Tiwari's reason for not calling her QP and consultant to give evidence did not make sense. When I informed her that she could have issued a subpoena for them to give evidence if they proved unwilling to give evidence voluntarily, the only reason she could proffer for electing not to do so was that it would be too "time-consuming" for them and that she did not want to compel "friends" by means of a Court order. [note: 53] Three Sixty also failed to call anyone from the SCDF to substantiate Ms Tiwari's allegations of oral representations and directions from the SCDF. This was especially noteworthy since the crucial representations and directions do not find even implied expression in the contemporaneous documentation. I do not believe that Ms Tiwari would have passed up the opportunity to subpoena these important witnesses if their evidence would have assisted Three Sixty's case.

88 In any event, through its QP, Three Sixty submitted a building plan and a fire plan to the SCDF in December 2010 for the purpose of securing a FSC. Both of these plans were titled "Proposed Additions and Alterations (Internal Works) to Existing Bar/Lounge at [Level 39]". [note: 54] The way that Three Sixty chose to title these plans was problematic on two counts. The statement of existing use was factually incorrect. There was no "existing" bar/lounge at Level 39: the existing use approved by URA was as a restaurant. And the proposed use ("bar/lounge") contradicted the change of use which the URA approved on 1 December 2010.

89 The SCDF approved the building plan on 31 December 2010 and the fire plan on 14 January

2011. On the strength of these approvals, Three Sixty applied for and obtained an FSC for Level 39 on 24 January 2011. [note: 55] However, on 28 January 2011, the SCDF raised the following queries arising from Three Sixty's applications:

(a) Three Sixty had not provided the occupant load calculation table for Level 39; and

(b) SCDF had not approved a change of use for Level 39 from its previous use as a "Restaurant" to its proposed use as a "Bar". [note: 56]

90 Ms Tiwari says she quickly forwarded to the SCDF its occupancy load of 140 persons as calculated by Mr Lim. [note: 57] But it appears that Three Sixty did not follow up further with this set of plans or the FSC issued upon it. This is no doubt because the FSC was of no use to Three Sixty, having been issued on the erroneous basis that there had been no change in the use of Level 39.

91 Instead, on or about 29 January 2011, Three Sixty sent to the SCDF two new applications for approval of a new building plan and a new fire plan. This time, the plans were titled "Proposed Change of Use of 39th Storey from Restaurant to *Nightclub cum Restaurant* and Additions and Alterations of Existing Automatic Sprinkler System at Meritus Mandarin Hotel" [note: 58] (emphasis added). Three Sixty accompanied these plans with a second application for a FSC. [note: 59] This time, the title had been changed to reflect the correct previous use of Level 39 as a restaurant. But instead of correcting the change of use approved by the URA from "Nightclub cum restaurant" to "Bar/Lounge", Three Sixty inexplicably chose to perpetuate the misdescription in the URA's approved change of use in its submissions to the SCDF.

92 On 10 February 2011, Three Sixty had a consultation with the SCDF on its second set of applications. At the consultation, SCDF noted that Level 39 had only one protected exit staircase serving it and one internal feature staircase. The SCDF's point was that anything less than two protected staircases required an official waiver. [note: 60] This is a point which Three Sixty's QP should have picked up from the outset. Three Sixty submitted a waiver application on the same day. [note: 61] The SCDF rejected the waiver application on 23 February 2011. [note: 62]

93 On 2 March 2011, Three Sixty belatedly applied to the URA for change of use of Level 39 from "Night Club cum Restaurant" to "Bar/Pub". [note: 63] The URA approved the application on 7 March 2011. [note: 64] This required Three Sixty to resubmit yet again its building plan and fire plan to the SCDF. Another meeting with the SCDF followed on 10 March 2011. The purpose again was to seek a waiver of the SCDF's requirement for a second protected exit staircase serving Level 39 [note: 65] and to appeal against the rejection of the earlier waiver application. [note: 66] Another meeting with the SCDF took place on 31 March 2011. [note: 67] At the meeting, the SCDF agreed to the waiver subject to two conditions: one, the total occupancy load for both Level 38 and Level 39 taken together had to be capped at 120 persons (including staff); and two, an automatic people counter system had to be installed to keep track of the combined number of people occupying Level 38 and Level 39 taken together. [note: 68] The SCDF confirmed these conditions by a letter dated 1 April 2011. [note: 69]

94 Ms Tiwari then approached OUE to apportion the occupancy of 120 persons as between OUE's premises (Level 38) and Three Sixty's premises (Level 39). OUE proposed an apportionment of 90 perosns for Level 39 and 30 persons for Level 38 in emails dated 5 April 2011 [note: 70] and 7 April 2011 [note: 71] and in a formal letter on 8 April 2011. This was based broadly on the floor areas of

both premises. [note: 72] Three Sixty thought this apportionment was grossly unfair given that Level 39 had a floor space of 5,575 square feet and came at a monthly rent (excluding the Service Charge) of $45,000. [note: 73] So Ms Tiwari asked to have the full 120-person occupancy load allocated to Three Sixty for Level 39. [note: 74]

95 Ms Tiwari's evidence was that when Three Sixty entered into the Lease, it proceeded on the basis that Three Sixty would be able to entertain around 250 customers at any given time on Level 39 and therefore be able to afford a monthly rental of $45,000. [note: 75] Ms Tiwari said in her affidavit of evidence in chief that she arrived at the figure of 250 customers based on "the original approved plan" of Level 39, which was confirmed to be a plan of Level 39 she obtained from the Building and Construction Authority. [note: 76] However, under cross-examination, Ms Tiwari conceded that she saw these plans only in *March* 2011, four months *after* signing the Lease. [note: 77] Ms Tiwari also conceded that the figure of 250 persons was derived from her calculations based on a site visit of Level 39 before signing the Lease rather than on any information from or representation by OUE. [note: 78] OUE denies having made any representation to Three Sixty that Three Sixty would be able to entertain more than 200 persons on Level 39 [note: 79]. Its position is that the allocation which OUE proposed to Three Sixty was a fair one based on the respective usable floor areas of Level 38 and Level 39. [note: 80] OUE was also prepared to discuss this issue of capacity allocation with Three Sixty. [note: 81]

96 A final meeting with the SCDF was held on 15 April 2011. [note: 82] The SCDF raised two issues: the installation of a smoke stop lobby and the installation of an automatic people counter system. [note: 83] On or around 30 April 2011, Three Sixty installed the smoke stop lobby. But the people counter system was never installed. [note: 84] Three Sixty submitted a further waiver application to the SCDF on 24 May 2011. [note: 85] The SCDF responded on 27 May 2011 allowing the waiver on the same conditions as those stated in the SCDF's letter of 1 April 2011 (see [93] above). [note: 86]

97 Three Sixty made two subsequent applications for an FSC. The SCDF rejected these applications on 13 June 2011 and 28 June 2011. The SCDF rejected them because Three Sixty had failed to comply with all the pre-requisites for the issuance of an FSC. [note: 87] SCDF stated in the schedule to their rejection letter dated 28 June 2011 that the pre-requisites that Three Sixty had not complied with were the following: [note: 88]

> 1. Project title in application form, CFSW form and project profile is not tally [sic] with the main BP NOA letter.
>
> 2. To submit letter from owner to undertake as stipulated in waiver decision letter WVR/001559/11 dated 27 May 2011.
>
> 3. Project title in both RI [Registered Inspector's] form shall tally with the main BP NOA letter. To reinspect and submit.
>
> 4. Please re-submit as fresh application with all relevant documents. The application submission will consider void [sic].

98 Both OUE and Three Sixty accept that the reference to the "owner" in the second pre-requisite refers to Three Sixty as the "owner" of – or person submitting – the application rather than OUE as

the owner of Level 39. [note: 89] However, Three Sixty says that it was unreasonable to expect it to give any undertaking that the conditions stipulated in the SCDF's letters of 1 April 2011 and 27 May 2011 would be adhered to because Level 38 was not within Three Sixty's control, not being part of the premises demised to Three Sixty under the Lease and being occupied by OUE. [note: 90] In response, OUE says that the failure to comply with these pre-requisites had nothing to do with OUE. I accept that submission. Further, OUE says, it was always open to Three Sixty to reach a commercial agreement with OUE regarding the apportionment of the occupancy load. I accept this submission also. Three Sixty in fact initiated this discussion but did not follow through to fruition [note: 91] even though OUE indicated that it was prepared to discuss the 90:30 apportionment further.

99 Three Sixty also did not respond to the SCDF's letter of 28 June 2011 to resolve the discrepancies raised in it. Instead, it abandoned the process of seeking an FSC from the SCDF. Indeed, it appears that by this point, Three Sixty had taken a decision to abandon entirely its project to run a bar/lounge at Level 39.

100 I accept that OUE cannot be responsible for this fiasco. Three Sixty and its employees or agents are entirely responsible for it. Three Sixty started the process late. Three Sixty's consultants do not appear to have taken the necessary steps with each submission to the SCDF to ensure that the submission had the best chance of success. Three Sixty's consultants also did not attend key meetings with the SCDF. Three Sixty also kept OUE in the dark during significant portions of the application process. When Three Sixty asked OUE for assistance, OUE rendered the assistance to the best of its ability. Three Sixty had the carriage of these applications and bore the burden of making sure that at least one of the many applications it submitted to the SCDF succeeded. In any event, the SCDF's final response though termed a rejection was not a rejection. Even at that late stage, it was within Three Sixty's power to reach a commercial accommodation with OUE and to accede to the conditions imposed by the SCDF. Instead, it abandoned the process altogether, no doubt because it feared that its venture would no longer be profitable.

(1) OUE's failure to provide documents resulting in the grant of a lower occupancy limit

101 Three Sixty complains that OUE failed to provide Three Sixty with the PELs for Level 38. This, it says, substantially interfered with Three Sixty's rights in respect of Level 39. Three Sixty says it could have used Level 38's PELs to persuade the SCDF to grant a higher occupancy load for Level 38 and Level 39 taken together. [note: 92] Three Sixty relies in support of this point on evidence given by Mr Chan Kok Way, OUE's expert witness. Mr Chan is a Registered Inspector for Building Safety Works registered with the SCDF. His evidence was that if Level 38's PELs had been shown to the SCDF during the meeting with SCDF on 31 March 2011, it would "have an impact" on the eventual occupancy load of 120 persons granted. [note: 93]

102 OUE claims that no such PEL for Level 38 exists as the Mandarin did not provide any live entertainment at Level 38 at the material time. [note: 94] But it has in the course of discovery disclosed PELs dated 8 August 2006, 11 May 2007 and 16 May 2008 for two establishments in the Mandarin, known as Triple 3 and Top of the M. OUE says that these PELs relate not to Level 38 but to establishments at level 5 and Level 39. These PELs show that the approved combined occupancy load for both premises is 265 persons. [note: 95] However, Three Sixty says that even if these PELs did not relate to Level 38 of the Mandarin, they still pertained to the occupancy load granted in respect of establishments in the Mandarin and would therefore be relevant to Three Sixty's application for an FSC. [note: 96] In addition, Three Sixty submits that Triple 3 and Top of the M were actually located at Level 38 and Level 39 of the Mandarin as it would be unusual for a combined PEL to be issued for

two establishments located on two levels which were not adjoining. [note: 97] Three Sixty relies on evidence given by Mr Chan that it is likely that Triple 3 and Top of the M were located at Level 38 and Level 39 of the Mandarin. [note: 98]

103 I cannot accept Three Sixty's submission that this failure constitutes a breach of either of the two covenants. First, I find that Three Sixty has not proven on a balance of probabilities that Triple 3 and Top of the M were located on Level 38 and Level 39 of the Mandarin. Although Mr Chan gave evidence that it is likely that Triple 3 and Top of the M were located on Level 38 and Level 39 of the Mandarin, [note: 99] it is clear from the transcript that Mr Chan was not providing an opinion within his area of expertise as he was "not familiar in this area" [note: 100] but was simply venturing a guess without personal knowledge. Mr Chan's evidence is also contrary to the evidence of Mr Abucay that these two establishments were not at the material time located at Level 38 and Level 39 of the Mandarin. [note: 101]

104 Next, even if I accept that the PELs relating to Triple 3 and Top of the M did relate to Level 38 and Level 39 of the Mandarin or are somehow relevant to enhance the prospects of success for Three Sixty's FSC application, I am not satisfied that the production of the PELs for Triple 3 and Top of the M could have caused the SCDF to grant a higher occupancy load for Level 38 and Level 39. Even if OUE's failure to produce the PEL did in fact result in a lower occupancy load granted by the SCDF, Three Sixty has not produced any evidence to show that the SCDF would have granted a *substantially* higher occupancy load had these PELs been shown to SCDF. Three Sixty could have called the SCDF officer handling the FSC and waiver applications at the material time to give evidence on what the occupancy load would have been had these PELs been produced, but they chose not to do so. Three Sixty could have adduced expert evidence on this point. In any event, a lower occupancy load, even if it made Three Sixty's business less profitable, would not prevent or hinder Three Sixty's operation of a bar/lounge on Level 39 (see [62] above). I therefore find that Three Sixty has not proven that OUE's failure to produce the three PELs in relation to Triple 3 and Top of the M constitutes a breach of the covenant of quiet enjoyment or of the covenant against derogation from grant.

(2) OUE's refusal to give to Three Sixty the full occupancy load of 120 persons for Level 39

105 Three Sixty argued also that OUE's refusal to give Three Sixty the full occupancy load of 120 persons for Level 39 in itself constitutes a breach of one or both covenants. Three Sixty says that the Lease relates only to Level 39 and that to force Three Sixty to share the occupancy load assigned by the SCDF for Level 39 with OUE for Level 38 substantially interferes with the grant of the lease and imposes additional responsibilities on Three Sixty. [note: 102] Three Sixty further says that the Lease did not provide for any apportionment of the occupancy load between Level 38 and Level 39. [note: 103] However, as mentioned above, OUE says that the allocation they proposed was a fair one based on the respective usable floor areas of Level 38 and Level 39 (see [94] above). OUE also says that they were prepared to discuss further the apportionment, but Three Sixty did not follow through.

106 I am unable to agree with Three Sixty's submission that OUE's suggestion that it take 30 persons out of the permitted occupancy load of 120 persons amounts to a substantial interference with the utility of the lease granted by OUE. As with OUE's failure to produce the PELs for Triple 3 and Top of the M, OUE's insistence on apportionment of the occupancy load did not prevent Three Sixty from operating a bar/lounge. Further, even if OUE's insistence on apportionment made Three Sixty's business less profitable than it could be, this does not amount to substantial interference with the

utility of the Lease (see [62] above).

107 Ms Tiwari also admitted that she had conducted a site visit of Level 39 prior to the signing of the lease. She must have seen that Level 39 is accessible to the public via the open, internal feature staircase from Level 38. If she was concerned about any interference with Three Sixty's business which might be caused by features of Level 38, for instance, a combined occupancy load for Level 38 and Level 39, she should have asked for express protection in the Lease rather than rely on implied covenants after a dispute arose (see [66]-[67] above). Three Sixty's argument must fail also because Three Sixty took the Lease of Level 39 subject to the uses which OUE put Level 38 at the date of the Lease or the uses which the parties must have contemplated would be made of Level 38 (see [71]-[73] above). Whatever use OUE might or might not put Level 38 to, the parties cannot reasonably have contemplated that OUE's activities would involve Level 38 having a zero occupancy load.

108 I accept OUE's argument that the apportionment which OUE proposed was a broadly fair one based on the respective usable floor area. The situation might have been different if Three Sixty had accepted OUE's apportionment and commenced business but OUE repeatedly permitted more than its apportioned share of patrons on Level 38. That would have brought the facts squarely within those of *Harmer*. Three Sixty would then have had a remedy. But on the actual facts, OUE did nothing to prevent or substantially interfere with Three Sixty operating a bar/lounge on Level 39. All that happened is that it dawned on Three Sixty during its fiasco with the SCDF that it would be less profitable or even commercially unviable for it to do so. OUE was not the insurer of Three Sixty's commercial venture. OUE did nothing to deprive Three Sixty substantially of the utility of the lease granted to it.

(3) Defects at Level 39

109 Finally, Three Sixty says that the utility of the lease was substantially interfered with by the numerous defects at Level 39 with which it had to contend during the fitting-out period. According to Three Sixty, the defects and inconvenience included power-cuts and severe water leakage which OUE's representatives delayed, refused or neglected to remedy in a timely manner. Three Sixty also complains of unsafe window units. Three Sixty further says that on 26 January 2011, one of OUE's representatives, Mr Sulaiman bin Syed Ali ("Mr Sulaiman") verbally abused, threatened and humiliated Three Sixty's Ms Tiwari in the presence of service staff. [note: 104] Mr Sulaiman was the Director of operations and engineering at the Mandarin at the material time.

110 OUE denies this and responds as follows:

(a) A power trip occurred on or around 26 January 2011. OUE promptly attended to and rectified it within half an hour of Three Sixty notifying OUE of the trip; [note: 105]

(b) On or around 18 December 2010, an incident of water dripping from the air-conditioning ducts occurred at Level 39. This was rectified by OUE within an hour of being informed; and

(c) In or around February 2011, there was an incident of water seepage from the roof-top of Level 39. Upon being so informed by Three Sixty, OUE engaged an external contractor to enhance the waterproofing at the rooftop which was completed by the following day. [note: 106]

111 Apart from these incidents, OUE says that it did not receive any other reports of power cuts or water leakage or seepage from Three Sixty in relation to Level 39. [note: 107] I note that while Three Sixty denies that the defects were rectified as quickly as OUE claims they were, it has not produced

any direct or circumstantial evidence to show that the defects persisted after the rectification or were more frequent than mere isolated occurrences. I therefore accept OUE's evidence both as to the extent and nature of the defects and as to the duration of the inconvenience which Three Sixty had to suffer as a result. I therefore find that none of the incidents that Three Sixty complains of substantially interfered with the utility of Three Sixty's lease of Level 39.

112 In relation to the alleged instance of verbal abuse by one of OUE's representatives, OUE says that on various occasions prior to 26 January 2011, an employee of OUE, Mr Sulaiman, orally asked Three Sixty to remove certain furniture from Level 39 as it was unsightly and did not meet the standard required to present Three Sixty's concept for Level 39. [note: 108] Although Three Sixty agreed to do so, it failed to remove the furniture despite numerous reminders by OUE. This led to an incident on 26 January 2011 where Mr Sulaiman raised his voice to Ms Tiwari in a moment of exasperation at having to repeat the request for Three Sixty to remove the furniture. [note: 109] Again, even if Ms Tiwari's account of events is true, it cannot amount to substantial interference with the utility of Three Sixty's lease of Level 39. While it may have hurt Ms Tiwari's feelings, it hardly interfered at all – let alone substantially – with Three Sixty's ability to operate a bar/lounge on Level 39.

113 I therefore find that none of the three limbs on which Three Sixty relies to support its claim for breach of the implied covenants of quiet enjoyment and non-derogation from grant in the Lease constitutes a breach of these covenants.

114 Therefore, Three-Sixty's cross-claim against OUE asserted by way of counterclaim in these proceedings fails entirely. In light of that finding, I do not have to consider the many difficult evidential issues relating to the quantum of Three Sixty's counterclaim.

Termination of the Lease, recovery of possession of Level 39 and double rent

115 I have found that Three Sixty has no defence to OUE's claim. I have also found that its counterclaim fails. Therefore, OUE did have the right to terminate the Lease under clause 16.1 of the Lease. And OUE did have the right to retake vacant possession of Level 39 under clause 16.3 of the Lease. Even on its own case, Three Sixty's refusal to surrender possession of Level 39 – which continues to date – is wholly wrongful. On the facts as I have found them, Three Sixty's conduct is egregiously wrong and wholly inexplicable. OUE also claims under clause 16.4 of the Lease double the prevailing rent, defined as the sum of the monthly base rent and Service Charge. While Three Sixty did not raise this point, I have to consider if clause 16.4 of the Lease is a penalty clause because a penalty clause in a contract is void and not enforceable.

116 The classic principles to guide the court in deciding whether a particular clause for remedies is a penalty clause are found in Lord Dunedin's judgment in *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79 at 86-87 (adopted by the Court of Appeal in *Hong Leong Finance Ltd v Tan Gin Huay and another* [1999] 1 SLR(R) 755 at [18]):

> ...
>
> 3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach (*Public Works Commissioner v Hills* [1906] AC 368 and *Webster v Bosanquet* [1912] AC 394).

4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

(a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in *Clydebank Case* [1905] AC 6.)

(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid (*Kemble v Farren* 6 Bing 141). This though one of the most ancient instances is truly a corollary to the last test.

117 Having considered these guidelines, I find that clause 16.4 of the Lease is not a penalty clause. I note that s 28(4) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("the Act") provides for an analogous remedy of double rent for holding over a tenancy. Section 28(4) of the Act provides as follows:

Double rent or double value on holding over by tenant

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

118 The only difference between the remedy claimable under s 28(4) of the Act and that under clause 16.4 of the Lease is that clause 16.4 permits OUE to recover not just the base rent but also the service charge. I do not find that the inclusion of the service charge in itself makes the total sum "extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach" (see [116] above). The service charge is used for the upkeep and maintenance of the building. OUE incurs these expenses even when a tenant holds over unlawfully. If doubling the base rent is not a penalty, then doubling the service charge and adding it to the base rent does not make clause 16.4 a penalty.

119 Hence, I find that OUE is also entitled to recover double the prevailing rent under clause 16.4 of the Lease on and from 9 September 2011 until Three Sixty actually surrenders vacant possession of Level 39 to OUE.

Conclusion

120 In light of the findings I have reached, I make the following orders:

(a) Three Sixty shall pay to OUE the following sums:

(i) $122,704.84 for outstanding rental;

(ii) $74,151.04 for outstanding Service Charges;

(iii) $3,704.00 for outstanding Utilities Charges; and

(iv) $114,837.76 per month as double rent for holding over pursuant to clause 16.4 of the Lease. This amount is payable for the period on and from 9 September 2011 until Three

Sixty actually surrenders vacant possession of Level 39 to OUE.

For the avoidance of doubt, Three Sixty shall pay to OUE the abovementioned amounts less the sum of $145,000 comprising Three Sixty's security deposit and fit-out deposit;

OUE is entitled to retain the total sum of $270,000 which Three Sixty paid in two tranches, being 6 months rent on and from 23 December 2010 to 22 June 2011.

(b) Three Sixty shall surrender to OUE vacant possession of Level 39 within two weeks from the date of this judgment. This relatively short time frame will cause no real difficulty for Three Sixty. Three Sixty is no longer in occupation of Level 39. In order to comply with this order, Three Sixty will merely need to return to OUE the keys and any other indicia of its occupation of or access to Level 39;

(c) Three Sixty is to pay interest on the sums payable under [120(a)] at 18% per annum from the date on which each payment fell due until OUE receives actual payment. I make this order pursuant to Three Sixty's contractual obligation under clause 6.2 of the Lease; and

(d) Three Sixty shall pay to OUE the costs of these consolidated proceedings – comprising both actions – assessed on the indemnity basis. I make this order pursuant to OUE's right under clause 16.4 of the Lease. I make this order also in the exercise of my general discretion in awarding costs. I am aware that clause 16.4 of the Lease entitles OUE to indemnity costs only of proceedings brought to secure repossession of Level 39 (see [8(h)] above). But given the way in which Three Sixty framed and conducted its defence and counterclaim in these consolidated proceedings, it would be wholly artificial to try and separate the costs of OUE's possession claim in Suit 840 of 2011 and award those costs alone to OUE on the indemnity basis. I also take into account, in the exercise of my general discretion, Three Sixty's wholly ill-advised decision to retain possession of Level 39 to date. That was egregiously wrong and egregiously wrongful, on any view of the facts and on any view of the law. All of this warrants the award of indemnity costs for which OUE prays.

121 Finally, I make no award of damages to OUE for Three Sixty's breach of clauses 11.6 and 11.33 of the Lease. OUE has not shown what damage OUE suffered as a result of these breaches apart from the unpaid rent and Service Charge to which OUE is in any event entitled. Further, the purpose of the double-rent provision in clause 16.4 of the Lease is precisely to compensate OUE for other monetary loss arising from a tenant's breach which cannot – or cannot easily – be quantified.

[note: 1] Preeti Tiwari's Affidavit of Evidence-in-Chief ("AEIC"), para 3.

[note: 2] Para 3 of the Defendant's Defence and Counterclaim ("DCC") in S839 and para 4 of the Plaintiff's Reply and Defence to Counterclaim ("RDCC") (Amendment No 1) in S839.

[note: 3] Para 12 of the DCC in S839 and para 14 of the RDCC in S840.

[note: 4] Para 1 of the Plaintiff's Statement of Claim ("SOC") in Suit 839 of 2011 ("S839").

[note: 5] Para 2 of the DCC in S839, para 3.3 of the RDCC (Amendment No 1) in S839 and para 77 of the Plaintiff's written closing submissions.

[note: 6] Para 2 of the SOC

[note: 7] Para 3 of the SOC

[note: 8] Preeti Tiwari's Supplemental AEIC, at pp 304-350

[note: 9] Para 2 of the DCC in S839, para 3.3 of the RDCC (Amendment No 1) in S839 and para 77 of the Plaintiff's written closing submissions.

[note: 10] Para 4 of the DCC in S839 and para 5 of the RDCC (Amendment No 1) in S839; para 6 of the DCC (Amendment No 1) in Suit 840 of 2011 ("S840") and para 5 of the RDCC in S840.

[note: 11] OUE acknowledges that it has received the six month advance rental, and hence, it is only claiming outstanding rental from 23 June 2011 onwards: see paras 8 and 9 of the SOC in S840.

[note: 12] Para 9 of the SOC in S840 and para 7 of the DCC (Amendment No 1) in S840

[note: 13] Lucas Jr Lim Abucay's AEIC dated 5 July 2012 at pp 608-610

[note: 14] Paras 21-23 of the SOC in S840 and para 26 of the Plaintiff's written closing submissions, and Lucas Jr Lim Abucay's AEIC dated 5 July 2012 at pp 612-613

[note: 15] Paras 23-24 of the SOC in S840.

[note: 16] Para 5.1 of the SOC in S839 and para 12 of the SOC in S840.

[note: 17] Para 5.2 of the SOC in S839.

[note: 18] Para 26 of the SOC in S840.

[note: 19] Para 9 of the SOC in S840.

[note: 20] Paras 2 and 84 of the Plaintiff's written closing submissions.

[note: 21] Paras 14 to 16 of the SOC in S840.

[note: 22] Paras 13 and 15 of the SOC in S840.

[note: 23] Paras 18 to 24 of the SOC in S840.

[note: 24] Para 21 of the DCC in S839 and para 31 of the DCC (Amendment No 1) in S840.

[note: 25] Para 7 of the DCC in S839.

[note: 26] Para 10 of the DCC in S839

[note: 27] Para 18 of the DCC in S839 and paras 66 and 147 of the Defendant's written closing submissions.

[note: 28] Para 18 of the DCC in S839 and paras 171 and 179 of the Defendant's written closing submissions.

[note: 29] Paras 19 to 20 of the DCC in S839 and paras 29 to 30 of the DCC (Amendment No 1) in S840.

[note: 30] Para 9 of the SOC in S840 and para 7 of the DCC (Amendment No 1) in S840; para 12 of the SOC in S840 and para 9 of the DCC (Amendment No 1) in S840; paras 6 and 7 of the SOC in S839 and para 8 of the DCC in S839.

[note: 31] Defendant's Opening Statement at [16]; Defendant's Closing Submissions at [343].

[note: 32] Defendant's Closing Submissions at [396].

[note: 33] Transcript, day 3, page 86 line 8 to 11.

[note: 34] DCC in S839, para 21; DCC in S840, para 31; Defendant's Closing Submissions para 35.

[note: 35] Defendant's Closing Submissions at [36].

[note: 36] Transcript, Day 5, page 116 line 14 to 15; page 117, line 9 to 17; page 118, line 4 to 6; page 120 line 31 to page 121 line 1.

[note: 37] Paras 69-84 of the Defendant's written closing submissions and para 11(2) of the Defendant's Further and Better Particulars (21 March 2012)

[note: 38] Paras 228 to 230 of the Plaintiff's written closing submissions

[note: 39] Para 24 of the RDCC (Amendment No 1) in S839 and para 233 of the Plaintiff's written closing submissions.

[note: 40] Paras 171 to 178 of the Defendant's written closing submissions.

[note: 41] Paras 179 to 188 of the Defendant's written closing submissions.

[note: 42] Paras 195 to 213 of the Defendant's written closing submissions.

[note: 43] See *eg*, paras 5, 8 and 28 of Ms Tiwari's AEIC.

[note: 44] Agreed Bundle ("AB"), vol 1, at p 21.

[note: 45] Transcript, Day 5, p 83 lines 21 to 29.

[note: 46] Transcript, Day 5, p 85 lines 21 to 25.

[note: 47] Para 16 of the Defendant's written closing submissions and para 40 of Ms Tiwari's AEIC).

[note: 48] Para 16 of the Defendant's written closing submissions and para 38 of Ms Tiwari's AEIC).

[note: 49] Para 9 of the Defendant's written closing submissions.

[note: 50] AB, Vol 1, 259

[note: 51] Paras 46 and 48 of Ms Tiwari's AEIC.

[note: 52] Para 60 of the Defendant's written closing submissions.

[note: 53] Transcript, Day 9, p 40 line 25 to p 44 line 19.

[note: 54] Para 73 and pp 358 to 361 of Mr Abucay's AEIC.

[note: 55] Paras 73 to 74 and p 362 of Mr Abucay's AEIC, para 9 of the DCC in S839, para 9 of the RDCC in S839 (Amendment No 1) and para 45 of Ms Tiwari's AEIC.

[note: 56] Para 75 and p 363 of Mr Abucay's AEIC (email from Captain Effendi to Ms Tiwari dated 28 January 2011) and para 47 and p 56 of Ms Tiwari's AEIC.

[note: 57] Paras 46 and 48 of Ms Tiwari's AEIC.

[note: 58] Para 9.10 of the RDCC (Amendment No 1) in S839, para 6.10 of the RDCC in S840 and para 78 and pp 379 and 381 of Mr Abucay's AEIC.

[note: 59] Para 49 of Ms Tiwari's AEIC.

[note: 60] Para 79 and pp 383 to 384 of Mr Abucay's AEIC and para 51 of Ms Tiwari's AEIC.

[note: 61] Pp 367 to 370 of Mr Abucay's AEIC, para 58 of Mr Desmond Chong's AEIC and para 52 of Ms Tiwari's AEIC.

[note: 62] Para 88 and pp 425 of Mr Abucay's AEIC, para 58 of Mr Desmond Chong's AEIC and para 60 of Ms Tiwari's AEIC.

[note: 63] Para 63 of Ms Tiwari's AEIC.

[note: 64] AB, Vol 2, p 598. Paras 6.16 and 6.17 and pp 431-432 of the RDCC in S840, para 89 of Mr Abucay's AEIC, para 62 of Mr Desmond Chong's AEIC and p 103 to 104 of the Defendant's Bundle of Documents ("DBD").

[note: 65] Para 13 of the DCC in S839, para 15 of the RDCC (Amendment No 1) in S839, para 88 of Mr

Abucay's AEIC and paras 64 and 70 of Ms Tiwari's AEIC.

[note: 66] Para 97 of Mr Abucay's AEIC and para 73 and pp 123 to 124 of Ms Tiwari's AEIC.

[note: 67] Para 14 of the DCC in S839 and para 16 of the RDCC (Amendment No 1) in S839, para 98 of Mr Abucay's AEI, para 66 of Mr Desmond Chong's AEIC and para 74 of Ms Tiwari's AEIC.

[note: 68] Para 14 of the DCC in S839 and para 16.4 of the RDCC (Amendment No 1) in S839.

[note: 69] Paras 100 to 101 of Mr Abucay's AEIC, para 67 of Mr Desmond Chong's AEIC and para 78 of Ms Tiwari's AEIC.

[note: 70] 3AB671-672

[note: 71] 3AB689-690

[note: 72] Para 105 of Mr Abucay's AEIC.

[note: 73] Para 79 of Ms Tiwari's AEIC.

[note: 74] Para 81 of Ms Tiwari's AEIC.

[note: 75] Paras 80 and 83 of Ms Tiwari's AEIC.

[note: 76] Transcript, Day 7, p 148 line 30 to p 149 line 9.

[note: 77] Transcript, Day 7, p 149 line 28 to p 151 line 1.

[note: 78] Transcript, Day 7, p 151 lines 4 to 22 and p 153 line 23 to p 154 line 24.

[note: 79] Para 104 of Mr Abucay's AEIC, para 69 of Mr Desmond Chong's AEIC.

[note: 80] Para 16.12 of the RDCC (Amendment No 1) in S839 and para 13.12 of the RDCC in S840.

[note: 81] Paras 13.12 and 17 of the RDCC in S840.

[note: 82] Para 16.5 of the RDCC (Amendment No 1) in S839 and para 13.5 of the RDCC in S840.

[note: 83] Paras 16.6 and 18 of the RDCC (Amendment No 1) in S839, paras 13.6 and 15 of the RDCC in S840, para 116 of Mr Abucay's AEIC, para 76 of Mr Desmond Chong's AEIC and para 91 of Ms Tiwari's AEIC.

[note: 84] Para 16.8 of the RDCC (Amendment No 1) in S839 and para 13.8 of the RDCC in S840.

[note: 85] Paras 122 to 123 and pp 529 to 534 of Mr Abucay's AEIC and para 102 of Ms Tiwari's AEIC.

[note: 86] Par 126 of Mr Abucay's AEIC and para 103 of Ms Tiwari's AEIC.

[note: 87] Paras 128 to 129 of Mr Abucay's AEIC and paras 105, 108 and 112 of Ms Tiwari's AEIC.

[note: 88] P 545 of Mr Abucay's AEIC and p 505 of Ms Tiwari's AEIC.

[note: 89] Transcript, Day 3, p 82 line 23 to p 83 line 1

[note: 90] Para 112 of Ms Tiwari's AEIC.

[note: 91] Transcript, Day 3, p 83 lines 22 to 32.

[note: 92] Para 171 of the Defendant's written closing submissions.

[note: 93] Paras 163 to 164 of the Defendant's written closing submissions and Transcript, Day 4, p 48 lines 3 to 8.

[note: 94] Para 146 of Mr Abucay's AEIC.

[note: 95] Para 158 of the Defendant's written closing submissions and AB at 4, 15 and 19.

[note: 96] Para 159 of the Defendant's written closing submissions.

[note: 97] Paras 160 to 161 of the Defendant's written closing submissions.

[note: 98] Transcript, Day 4, p 48 line 24 to p 49 line 20.

[note: 99] Transcript, Day 4, p 49 line 14.

[note: 100] Transcript, Day 4, p 48 lines 24 to 31.

[note: 101] Transcript, Day 2, p 40 lines 21 to 27.

[note: 102] Para 181 of the Defendant's written closing submissions.

[note: 103] Para 183 of the Defendant's written closing submissions.

[note: 104] Para 10 of the DCC in S839 and para 15 of the DCC (Amendment No 1) in S840.

[note: 105] See also para 33 of Mr Sulaiman's AEIC.

[note: 106] See also paras 34 to 35 of Mr Sulaiman's AEIC.

[note: 107] Para 10 of the RDCC in S839 and para 7 of the RDCC (Amendment No 1) in S840.

[note: 108] Para 39 of Mr Sulaiman's AEIC.

[note: 109] Para 11 of the RDCC (Amendment No 1) in S839 and para 8 of the RDCC in S840 and paras 40 to 42 of Mr Sulaiman's AEIC.