MK Distripark Pte Ltd *v* Pedder Warehousing & Logistics (S) Pte Ltd [2013] SGHC 84

Case Number : Suit No 844 of 2011

Decision Date : 22 April 2013

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : William J M Ricquier and Alvin Ong (Incisive Law LLC)for the plaintiff; Tan Yew Fai (Y F Tan & Co) for the defendant.

Parties : MK Distripark Pte Ltd — Pedder Warehousing & Logistics (S) Pte Ltd

Contract – Contractual Terms – Express Terms

Contract – Breach

Contract – Remedies – Damages – Loss of Chance

22 April 2013 Judgment reserved.

Andrew Ang J:

1 This claim and counterclaim originated from a sub-lease agreement ("the Sub-lease") between the plaintiff, MK Distripark Pte Ltd ("MKD") and the defendant, Pedder Warehousing & Logistics (S) Pte Ltd ("Pedder") in respect of 3A Jalan Terusan, MK Distripark, Singapore 619302 ("the Premises"). As the Premises were owned by the Jurong Town Corporation ("JTC"), the continuation of the Sub-lease to the full term of 49 months was subject to MKD's procurement of JTC's approval for an extension of the initial approval for the Sub-lease of 12 months. Any such extension of initial approval was to be on terms "no less favourable" than those contained in the Sub-lease. Pedder refused a novation arrangement MKD proposed whereby Pedder would take over from MKD the lease which the latter had of the Premises on the ground that the terms procured for this arrangement were less favourable to Pedder than those under the Sub-lease. Following such refusal, MKD brought action against Pedder for breach of the Sub-lease and this led to MKD treating the Sub-lease as forfeited.

2 I decided as a preliminary point that there was no merit to the main claim and proceeded to hear the counterclaim. I now give the grounds for my decision in the main claim (which is the subject of an appeal by MKD in CA 20 of 2013) and judgment for the counterclaim.

Factual background

3 The Premises were, at all material times, the subject of a JTC lease held by HSBC Institutional Trust Services (Singapore) Limited as trustee of Mapletree Logistics Trust ("Mapletree"). Mapletree entered into a lease with MKD on 2 May 2008 to let the Premises for a term of seven years ("the MKD Lease").

4 After about two and a half years, MKD found that it was no longer profitable for it to continue the MKD Lease, and it sought to sublet the Premises for the remainder of the seven year term. Accordingly, MKD began negotiating with Pedder for the Sub-lease. On 11 January 2011, MKD issued a letter of offer to Pedder for a sub-lease of the Premises for a period of 49 months, from 1 April 2011

to 30 April 2015, subject to the necessary approvals from JTC and all other relevant government authorities. Pedder countersigned the letter of offer on 12 January 2011.

5 The structure of the Sub-lease was not straightforward. As the Premises were owned by JTC, they were subject to strict subletting policies. It was ultimately for Mapletree, as the head tenant, to apply for permission for MKD to sublet the Premises. There were therefore two layers of consent:

(a) Mapletree's consent and decision to apply to JTC; and

(b) JTC's approval allowing the Premises to be sublet to Pedder.

As a result, there was no guarantee that 100% of the Premises could be let for the full term of 49 months. It should be noted at the outset that Mapletree's consent to the continuation of the Sub-lease was not to be unreasonably withheld (see cl 3.19.2 of the MKD Lease) and that there was no serious suggestion throughout the trial that Mapletree had any intention to withhold consent. Both parties had proceeded on the basis that Mapletree's consent was more of a formality and it was only during the hearing of further submissions on the counterclaim that counsel for MKD suggested that Mapletree's consent was an additional wild card to be added to the mix.

6 In-house legal counsel for MKD, Loh How Yee ("Loh"), sent Pedder a draft Sub-lease on 25 January 2011, and Mapletree simultaneously applied to JTC for consent for the Sub-lease. JTC met with both MKD and Mapletree on 4 March 2011 ("the Tripartite Meeting"). JTC indicated during that meeting that a sublet of 100% of the Premises could be approved for a year, but would be subject to review and approval after the first year. After this meeting, MKD and Mapletree began to explore different options to ensure that the full term of the Sub-lease could be secured.

7 To this end, Loh furnished a document labelled "Lease of 3A, Jalan Terusan" to Mapletree on 9 March 2011. This document contained a proposed lease to Pedder, where Pedder would be put into a direct landlord-tenant relationship with Mapletree under a new lease agreement. This document further outlined the salient points of the proposed agreement between Mapletree and MKD as follows:

1. [T]o suspend the Original Lease Agreement.

2. MKD to pick up the difference between Original [*sic*] Lease Agreement and New Lease Agreement.

3. If New Lease Agreement with Pedder is terminated:

   a) To re-activate Original Lease Agreement;

   b) Mapletree to assign to MKD the right of Landlord against Pedder under New Lease Agreement.

4. MKD shall continue to have the option to renew for further 7 years under Clause 6.14 of Original Lease Agreement. [note: 1]

8 Mapletree did not respond to this proposal until 14 March 2011, by which time it had already received informal approval from JTC for 100% subletting to Pedder for a year (from 1 April 2011 to 31 March 2012). Mapletree thus suggested that MKD proceed with the Sub-lease for 49 months, subject to review after the expiration of JTC's consent. JTC's consent was formally given to Mapletree by way of a letter dated 25 March 2011.

9 On 29 March 2011, MKD sent another draft Sub-lease to Pedder which included a new clause, cl 2A which read as follows:

2A. TENURE

First JTC Approval	(a) Pursuant to Letter of Approval from JTC dated 25 March 2011 reference no: JTC(L)6117/32, approval has been given to the subletting period of one year from 1 April 2011 to 31 March 2012 for the entire gross floor area ("GFA") of the Premises.
Subsequent JTC Approval	(b) According to the present JTC handbook on subletting, there will be a 50% subletting cap on GFA with effect from 1 January 2012. The Lessor will use its best endeavour [*sic*] to obtain approval from JTC to continue to lease the 100% GFA of the Demised Premises to Lessee, or as much GFA of the Demises [*sic*] Premises as allowed by JTC.
Other arrangement	(c) In the event Lessor is able to procure the continue [*sic*] lease of the Demised Premises to Lessee on no less favourable terms and conditions than this Lease Agreement, Lessee shall be obliged to lease the entire Demised Premises or as much of the GFA of the Demised Premises as Lessor shall be able to arrange until the end of the Lease on 30 April 2015, and the Lessee hereby undertake [*sic*] to do such acts and sign such documents as may be necessary for such purposes. FOR AVOIDANCE OF DOUBT, the aforesaid arrangement by Lessor shall include but not limited to arranging for Lessee to execute a lease agreement directly with Mapletree or such other party necessary to affect the lease of the Demised Premises to Lessee. [note: 2]

10 Pedder's General Manager and the contact person for Pedder at the material time, Thean Siew Yong ("Pauline"), agreed to the inclusion of cl 2A in an e-mail dated 30 March 2011. [note: 3] The Sub-lease was signed by Pedder's director, Ang Hock Chuan ("Ang"), at 2.30pm at MKD's office premises in Great World City.

11 After the Sub-lease was signed, MKD continued to explore options to ensure the full term of the Sub-lease. On 1 April 2011, a meeting between MKD, Mapletree and JTC took place, where the idea of novating the MKD Lease to Pedder was mooted. Thereafter, Mapletree began to draft a novation agreement. Mapletree sent a draft of the Supplemental Deed for novation ("the Supplemental Deed") to MKD on 31 May 2011.

12 The Supplemental Deed was forwarded to Pauline on 15 June 2011. According to Pauline, this was the first time novation had been mentioned to Pedder. [note: 4] The Supplemental Deed was a tripartite agreement between Pedder, MKD and Mapletree, and provided generally that Pedder take over the rights and obligations of MKD under the MKD Lease.

13 A draft of a further deed between MKD and Pedder was prepared ("the First Deed"), in which it was stated at cl 1(a) that MKD "shall be responsible for the balance obligations" [note: 5] under the

MKD Lease. It was later clarified in an e-mail dated 27 August 2011 from Loh to Pedder that those "balance obligations" included "any terms under the [Mapletree–MKD] Lease that is [*sic*] more onerous than the MKD-Pedder Lease". [note: 6] A copy of the MKD Lease was also given to Pedder for their perusal.

14 Pedder took time to discuss the draft Supplemental Deed and First Deed (collectively, "the Novation Agreements") and the MKD Lease with its legal consultant and shareholders. On 26 August 2011, counsel for Pedder, Mr Tan Yew Fai ("Tan"), wrote to MKD to inform MKD that Pedder was "unable to execute the Novation Agreements and/or to proceed with the same" as "[t]he Tenant's obligations under the Main Lease are much more onerous than the same under the Sub-Lease". [note: 7]

15 MKD persevered with trying to obtain Pedder's agreement to the Supplemental Deed and the First Deed. This was ultimately unsuccessful. On 14 September 2011, Pauline wrote:

> … Pedder's position has already been stated in the letters by YF Tan (Pedder's solicitor) to MKD i.e.:
>
> i. Pedder is not signing Novation Agreements; and
>
> ii. MKD to obtain approval from JTC and Mapletree for Pedder's continue [*sic*] occupation under the SUB-LEASE. [note: 8]

16 On 7 October 2011, MKD issued a notice to Pedder pursuant to s 18(1) of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed), alleging breach of cl 2A(c) of the Sub-lease, which obliged Pedder to agree to any arrangement for continued subletting of the Premises to Pedder if the terms and conditions were no less favourable than those set out in the Sub-lease. MKD claimed that, by failing to sign the Novation Agreements, Pedder had breached its obligations under cl 2A(c), and MKD was entitled to treat the Sub-lease as forfeited. A final notice to remedy the alleged breach was issued by MKD on 2 November 2011.

17 On 9 November 2011, MKD returned the rental sum of $173,765.86 paid by Pedder for the month of October, pursuant to its election to treat the Sub-Lease as forfeited.

18 When Pedder still refused to sign the Novation Agreements, MKD issued a letter of demand on 16 November 2011 for $324,796 as damages for the alleged breach and proceeded to file this action on 22 November 2011.

19 Pedder counterclaimed alleging that MKD's failure to apply for an extension of JTC's approval for subletting of the Premises beyond 31 March 2012 was a breach of MKD's obligations under the Sub-lease; this breach made it impossible for the Sub-lease to continue to its full term. The Sub-lease came to an end on 31 March 2012 and Pedder moved out of the Premises on 3 April 2012.

20 MKD claimed damages for Pedder's alleged breach of cl 2A(c) of the Sub-lease. Pedder claimed damages for MKD's failure and/or refusal to apply to JTC for the continued lease of the Premises and for the resultant loss of a chance to continue with the Sub-lease of the Premises.

Issues

21 The issue in MKD's claim was whether Pedder had breached cl 2A(c) of the Sub-lease, thus

entitling MKD to treat the Sub-lease as forfeited. Its resolution depends on whether the Novation Agreements were on terms "no less favourable" than those contained in the Sub-lease.

22 The issue in Pedder's counterclaim was whether MKD had breached cl 2A(b) of the Sub-lease by failing to use its best endeavours to obtain JTC approval for a continuation of the Sub-lease of 100% of the gross floor area ("GFA") or as much thereof as JTC would allow. If there was a breach, what damages would flow from this breach?

My decision

The main claim

23 Clause 2A(c) obliges Pedder to accept the lease of the Premises or part thereof:

> ... in the event Lessor [*sic*] is able to procure the continue [*sic*] lease of the Demised Premises to Lessee on no less favourable terms and conditions than this Lease Agreement. ...

The question is whether the Novation Agreements were on "no less favourable terms and conditions" than the Sub-lease. The answer was a clear no.

24 As a whole, it was not disputed that the MKD Lease was more onerous than the Sub-lease. The whole purpose of the Supplemental Deed was for Pedder to take over the rights *and obligations*, including those more onerous obligations, of the MKD Lease.

25 Clause 4.5 of the Supplemental Deed was also more onerous than the Sub-lease. Clause 4.5 read as follows:

> The Existing Tenant [*ie*, MKD] and the Substitute Tenant [*ie*, Pedder] shall jointly and severally indemnify and hold the Landlord [*ie*, Mapletree] harmless against all liabilities, costs, expenses, claims, obligations, damages and losses arising out of or in connection with the Lease Agreement, the Amended Lease Agreement and/or the Novation [Agreements], whether such liabilities, costs, expenses, claims, obligations, damages and losses arise before, on or after the Effective date [ie, the date when the Supplemental Deed was signed].

26 Clause 4.5 would include "liabilities, costs, expenses, claims, obligations, damages and losses" which had accrued under the MKD Lease before Pedder entered into the Supplemental Deed. Pedder would thus have to take on a much greater scope and degree of risk of liability under the Supplemental Deed than under the Sub-lease. This meant that the Supplemental Deed was on terms and conditions less favourable than those contained in the Sub-lease.

27 Pedder had argued that cl 3.1 of the Supplemental Deed, which provided that the landlord could terminate the lease with three months' notice, was also a term more onerous than the Sub-lease. However, this was incorrect. Clause 9(b) of the Sub-lease stated clearly that if JTC or Mapletree were to terminate the lease of the Premises:

> ... for any reason whatsoever, [MKD] shall be entitled, upon receiving the relevant notice or becoming aware of such intention ... to notify [Pedder] to end the [Sub-lease] without affecting the rights of parties herein for any antecedent breach of the other party in respect of the [Sub-lease], but without any liability on JTC, Mapletree or Lessor for the early termination. [note: 9]

Under both the Supplemental Deed and the Sub-lease, Pedder would have no legal remedy for early

termination by Mapletree.

28 MKD claimed that the effect of these clauses would be moot because the Supplemental Deed could not be read separately from the First Deed (between MKD and Pedder) which accompanied it and provided that MKD would pick up the "balance obligations" which rendered the Supplemental Deed more onerous than the Sub-lease. This addressed the fact that the MKD Lease, in general, was more onerous than the Sub-lease, but did little to ameliorate the effects of cl 4.5.

29 Pedder would be liable to Mapletree under cl 4.5 for the "all liabilities, costs, expenses, claims, obligations, damages and losses" incurred by MKD prior to the date of the Supplemental Deed, notwithstanding the First Deed (to which Mapletree was not a party). That would *prima facie* increase Pedder's risk exposure. Even without the First Deed, Pedder could probably seek a contribution from MKD or join MKD in any claim Mapletree might have against Pedder under cl 4.5. Nevertheless, Pedder would be fully liable should MKD be unable to pay. MKD did not argue that the availability of the legal remedy of seeking a contribution meant that cl 4.5 was "no less favourable" than the Sub-lease; it argued that the First Deed changed the effect of cl 4.5. This proposition was unfounded. Pedder's position vis-à-vis Mapletree was unchanged by the First Deed; the First Deed did not limit Pedder's liability under cl 4.5. If MKD were to default, Pedder would be fully liable to Mapletree under cl 4.5. Pedder would have to make a claim against MKD under a *separate agreement* (*ie*, the First Deed) and would incur additional cost and expense to enforce any claim for a contribution or indemnification from MKD. In theory at least, MKD could even become insolvent.

30 I, therefore, found that the First Deed did not alter the effect of cl 4.5 of the Supplemental Deed, which was more onerous than the terms and conditions under the Sub-lease. To my mind, there was no question that the Novation Agreements were on terms which were less favourable than the Sub-lease. Accordingly, I found that Pedder was not in breach of cl 2A by refusing to agree to the Novation Agreements. When MKD purported to treat the Sub-lease as forfeited and terminated the Sub-lease on 31 March 2012, MKD acted wrongfully. It follows that the Sub-lease was still subsisting as at 9 November 2011 when MKD purported to reject Pedder's payment of the October 2011 rent.

31 In consequence, I found that MKD was entitled to rent arrears for October 2011. Since the Sub-lease was not forfeited, Pedder was entitled to a return of their bank guarantee and deposit. I dismissed MKD's claim and proceeded to hear the counterclaim.

The counterclaim

32 I should preface my analysis by a brief recount of the circumstances surrounding the counterclaim. It is immediately obvious that there was no guarantee that JTC would have consented to an extension of the Sub-lease beyond 31 March 2012. Accordingly, Pedder could not claim a definite loss arising from MKD's alleged breach of cl 2A(b) of the Sub-lease. Pedder's claim was essentially that MKD had not even attempted to seek JTC's approval for an extension of the Sub-lease beyond 31 March 2012 and that they *could have* continued their Sub-lease of the Premises. However, Pedder had not specifically pleaded the loss of a chance to continue the Sub-lease of the Premises. A claim for loss of chance, however, was open to Pedder on the facts which were pleaded. All Pedder would be doing, by amending its pleadings, would be to bring them in line with the evidence adduced. I noted the *dicta* of V K Rajah JC in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 (at [86]):

> In cases where the facts raised in the proposed amendments have been addressed during the evidence and submissions and, particularly, where the opposing side has also had an opportunity to address the very same points, there can hardly ever be any real prejudice. The pleadings, in

such instances, merely formalise what is already before the court. As a matter of fairness, allowing amendments at a late stage should usually go hand in hand with granting leave to the other party to adduce further evidence, if necessary.

I found that this was precisely such a case; MKD was fully aware of the substance of Pedder's case on loss of a chance although it had not been formally pleaded. MKD would suffer no prejudice from my giving leave to amend. In the circumstances, I exercised my power under O 20 r 8 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") and invited Pedder to amend its counterclaim to include loss of a chance. I also gave the parties liberty to apply to adduce further evidence.

MKD's alleged breach of cl 2A(b)

33 Clause 2A(b) of the Sub-lease reads as follows:

> According to the present JTC handbook on subletting, there will be a 50% subletting cap on GFA [*ie*, Gross Floor Area] with effect from 1 January 2012. The Lessor will use its best endeavour [*sic*] to obtain approval from JTC to continue to lease the 100% GFA of the Demised Premises to Lessee, or as much GFA of the Demises [*sic*] Premises as allowed by JTC.

34 The operative words in cl 2A(b), when it comes to MKD's obligations, are "best endeavour to obtain approval from JTC". The question is thus whether MKD used its best endeavours to obtain approval from JTC for as much GFA of the Premises as could be allowed. MKD's argument was that it had used its best endeavours to obtain the necessary approval by proposing the Novation Agreements and entering into negotiations with Mapletree and JTC to permit that novation.

35 Loh admitted, without demur, that MKD (or more accurately, Mapletree) never applied to JTC for permission to continue the Sub-lease. [note: 10] The simple truth was that MKD had never considered applying for approval for the continuation of the Sub-lease in respect of 50% of the GFA of the Premises. As far as MKD was concerned, Novation Agreements were the best deal which could have been made for a continuation of the Sub-Lease. This is clear from MKD's treatment of the Sub-lease as forfeited. The question is not, however, whether MKD had subjectively used its best endeavours to secure the continuation of the Sub-lease, but whether "best endeavour" under cl 2A(b) of the Sub-lease objectively required MKD to apply to JTC, via Mapletree, for permission to continue the Sub-lease.

36 Clause 2A(b) refers generally to "obtain[ing] approval from JTC". A plain reading of this indicates that best endeavours would include an application to JTC for its approval for the continued sub-letting of the Premises. MKD has argued that approval would have to be sought from both Mapletree and JTC. However, as noted at [5] above, Mapletree had supported the continuation of the Sub-lease and, although its consent was required for the continuation of the Sub-lease under cl 3.19.3 of the MKD Lease, this consent was not to be unreasonably withheld. It is further noted that Mapletree had previously agreed to the 49-month Sub-lease and had been keen to proceed on the basis of the Sub-lease rather than a novation in its e-mail to MKD dated 14 March 2011. There is no evidence that Mapletree had any intention to withhold its consent. The major factor for continuation of the Sub-lease was and always had been JTC's, and not Mapletree's, approval. Mapletree's approval appeared to have been taken almost as a given by both parties at all material times until further submissions on the counterclaim. In my view, there was actually a high chance of Mapletree giving its consent so long as JTC was also willing to approve the continuation of the Sub-lease whether in respect of the whole or part of the Premises.

37 In view of the clear language, it would be untenable to interpret cl 2A(b) as applying only to an

attempt to novate the agreement, but not an attempt to get approval from JTC for a continued sub-lease.

38 This natural reading of cl 2A is supported by the context of the agreement. When cl 2A was inserted, the idea of novation had already been birthed. However, this was not known to Pedder. Pedder had not attended any of the meetings in which novation was discussed. There was no mention of novation or any other alternative means of obtaining JTC approval in any of the written correspondence between Pedder and MKD prior to the e-mail of 15 June 2011 forwarding the Supplemental Deed to Pedder. This corroborates Pauline's account that novation had not been mentioned prior to 15 June 2011. [note: 11] The insertion of cl 2A was accompanied by an e-mail from Loh referring to JTC's consent for one year of *subletting*. I also noted the e-mail from Mapletree dated 14 March 2011 (see [8] above), which asked that MKD proceed on the basis of the Sub-lease and not the novation. At the time of insertion of cl 2A, an objective assessment of the agreement reveals that the parties would have had in mind an application to JTC for approval of a continued *sub-lease* and not a lease in another form. Pedder could not have agreed that "best endeavour" would be limited to seeking JTC's approval for novation, as it was not even aware that novation was on the table.

39 I find that cl 2A(b) of the Sub-lease did oblige MKD to make an application to JTC for continued *sub-lease* of the Premises, and that it was not enough for MKD to have sought approval for a novation. It should be noted that cl 2A(c) would have obliged Pedder to continue the Sub-lease at less than 100% GFA if the terms and conditions were no less favourable than the Sub-lease terms and conditions. In fact, cl 2A(b) anticipated this situation by stating that JTC policy from 1 January 2012 was to impose a 50% subletting cap, and adding the proviso that MKD would use its best endeavours to obtain approval for "as much GFA of the Demises [*sic*] Premises as allowed by JTC". Two of Pedder's three directors, Ang and Heng Lye Chun ("Ms Heng"), also testified that Pedder would have continued the Sub-lease at 50% of the GFA of the Premises. [note: 12] At the material time, Tan and Pauline had written to MKD to ask that MKD apply for JTC's approval for the continued *sub-lease* (see [14] and [15] above) despite the fact that they must have been aware from the start that there was a chance they would not have been able to have 100% of the GFA of the Premises. I thus give little weight to MKD's argument that the proposed arrangement via the Novation Agreements was the only "best endeavour" that MKD could have taken at the material time.

40 Accordingly, I find that MKD's failure to apply to JTC for its approval to continue the Sub-lease beyond 31 March 2012 was a breach of cl 2A(b).

Whether MKD's breach resulted in loss to Pedder

41 Both parties accepted that it was extremely unlikely that JTC would have granted approval for continuation of the Sub-lease of 100% of the Premises. The claim for damages proceeded on the basis that there was a chance that 50% of the GFA of the Premises would have been approved and that Pedder would have continued to sublet the Premises on that basis. MKD attempted to argue that Pedder would not have accepted 50% of the GFA and accordingly JTC's approval, even if granted, would not have resulted in the Sub-lease continuing. However, as I have already observed (at [39] above), cl 2A(c) would have obliged Pedder to accept a continuation of the Sub-lease even if approval had been granted for only 50% of the GFA. During cross-examination on the counterclaim, Ang was pressed on whether he would have accepted 50% of the GFA if offered. He was adamant that whichever 50% of the Premises were offered, Pedder would have accepted it. In the circumstances, the real question was whether JTC would have granted approval for 50% of the GFA of the Premises, and *not* whether the procurement of such approval would have resulted in a continuation of the Sub-lease. The problem is that no evidence was adduced as to the likelihood, or otherwise, of JTC's granting such approval.

42 The fact that the loss cannot be easily quantified does not make the existence of such loss uncertain. There is authority that damages may be awarded for loss of a chance. In *Chaplin v Hicks* [1911] 2 KB 786, the defendant breached his contract with the plaintiff by failing to deliver her letter of appointment on time, and refusing her request for another appointment. As a result, the plaintiff lost her chance to be selected for a prize. This was held to be a substantial loss, notwithstanding that the loss was based on the contingency of her being selected as one of the 12 prize winners from a clutch of 50 aspiring actresses. The English Court of Appeal disagreed with the defendant's contention that, since certainty would be incapable of attainment, the damages for breach of contract would be unassessable. Explaining the position of the court, Farwell LJ opined at 798:

> … the defendant has committed a breach of his contract, the damages claimed are a reasonable and probable consequence of that breach, and loss has accrued to the plaintiff at the time of *acti*on. ...

43 In *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 ("*McRae*"), the defendants entered into a contract with the plaintiffs for the sale of an oil tanker and its contents wrecked on a reef some 100 miles north of Samarai. The tanker and its contents were sold "as and where they lie with all faults" without any warranty as to the condition, description, quality or otherwise. After having signed the contract, the plaintiffs were unable to locate the tanker. It was subsequently found that there was no such tanker in the locality at the material time. The plaintiffs sued to recover damages for breach of contract. It was held that they could only recover the cost and expenses incurred in looking for the tanker but not damages for loss of profit, and nominal damages were awarded. Commenting on the basis of awarding damages in *Chaplin v Hicks*, Dixon J and Fullager J in *McRae* opined at 412:

> ... In *Chaplin v Hicks*, if the contract had been performed, the plaintiff would have had a real chance of winning the prize, and it seems proper enough to say that that chance was worth something. It is only in another and quite different sense that it could be said here that, if the contract had been performed, the plaintiffs would have had a chance of making a profit. The broken promise itself in *Chaplin v Hicks* was, in effect, "to give the plaintiff a chance": here the element of chance lay in the nature of the thing contracted for itself. Here we seem to have something which cannot be assessed. If there were nothing more in this case than a promise to deliver a stranded tanker and a failure to deliver a stranded tanker, the plaintiffs would, of course, be entitled to recover the price paid by them, but beyond that, in our opinion, only nominal damages.

44 The *McRae* understanding of *Chaplin v Hicks* limits the principle of awarding damages for a loss of chance to the situation where the chance was the object of the agreement. Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009) ("McGregor") at para 8-039 offered a similar opinion after reviewing a line of cases on loss of chance and, most notably, cases on solicitors' negligence:

> The circumstances in which the law is prepared to recognise the loss of a chance as itself an identifiable head of loss, as itself constituting compensatable damage, are when the provision of the chance is the object of the duty that has been breached. This comes out clearly in *Chaplin v Hicks* itself where Fletcher Moulton LJ emphasised that "the very object and scope of the contract were to give the plaintiff the chance of being selected a prize-winner". An alternative formulation is that it can be said that *the essence of the breach of duty is that it deprives the claimant of the chance or opportunity of securing a favourable outcome*. [emphasis added]

4 5 *Chaplin v Hicks* was approved locally in *Straits Engineering Contracting Pte Ltd v Merteks Pte Ltd* [1995] 3 SLR(R) 864 ("*Straits Engineering*"). The plaintiff in *Straits Engineering* contracted with the defendant for the latter to sell all the shares in its wholly owned subsidiary. The defendant subsequently insisted on a sale on the basis of a clean company without trade debtors and trade creditors. The trial judge found that there was no agreement for such a basis and that the defendant had breached the agreement when it refused to sell the shares in question. He went on to find that it was clear to both parties that the object of the plaintiff's acquisition of the shares was for it to expand its business. Accordingly, by its breach, the defendant had deprived the plaintiff of a chance to expand its business. Damages were awarded for the loss of a chance to make profits from an expansion of business. The Court of Appeal upheld the decision of the trial judge to award damages for loss of a chance of making a profit, but reduced the quantum of damages because of the trial judge's omission to take into account certain factors which would have reduced the plaintiff's profit projections.

46 It is unclear whether *Straits Engineering* actually expanded the principle in *Chaplin v Hicks* as understood in *McRae* and McGregor. While the Court of Appeal in *Straits Engineering* distinguished *McRae* after quoting its comments on the limited application of *Chaplin v Hicks* (at [43] above), *McRae* was distinguished only on its facts; the Court of Appeal observed that there was no evidence as to the state, condition, description, quality or otherwise of the object lost in *McRae* and an additional burden of uncertainty existed in *McRae* which was not present in *Straits Engineering*. In *ABC Supermarket Pte Ltd v Kosma Holdings Pte Ltd* [2005] SGHC 44, Kan Ting Chiu J, commenting on *Straits Engineering*, found (at [32]) that the distinction between *McRae* and *Straits Engineering* was not about where the element of chance lay (see [43] above). Instead, the distinction was one between a real chance and a mere chance. In *McRae*, there was only a mere chance of recovering the object lost, whereas in *Straits Engineering*, there was a real chance of doing so. On this view, the Court of Appeal made no comment on the *McRae* interpretation of the *Chaplin v Hicks* principle.

47 The chance to make a profit was not the express object of the agreement in *Straits Engineering*. The object of the agreement was the acquisition of the shares. The chance to make a profit flowed from the loss of the shares contracted for. However, the Court of Appeal looked behind the apparent purpose of the agreement to its true purpose. The Court of Appeal reasoned (at [53]) as follows:

> ... Here, there was a contract for the sale and purchase of all the shares of an operating company having a net worth of some $2.27m and holding a leasehold site with a seafront, which the respondents found would meet their needs commercially. The respondents and their related companies were involved in shipping business and the company with its facilities would probably offer a complementary role to the business of the respondents and their related companies. The trial judge found, and we agree with him, that on acquiring the company the capacity of the respondents to undertake repair jobs would be substantially enhanced and the seafront of the site which the company had would be of great advantage, and that *the appellants knew that the respondents were seeking to acquire the company to expand its business*. ... [emphasis added]

48 While the object of the agreement was not expressly to enable the plaintiff to make a profit from an expansion of business, the Court of Appeal found that "the appellants knew that the respondents were seeking to acquire the company to expand its business". In other words, the Court of Appeal was ready to find that the *true purpose and ultimate object* of the agreement in *Straits Engineering* was the expansion of the plaintiff's business, which was synonymous with the making of profits. Profits were the easiest way to measure the loss of a chance of business expansion. On this reading of *Straits Engineering*, the *McRae* and McGregor understanding of *Chaplin v Hicks* was implicitly adopted, *viz*, that loss of a chance as a compensable head of damage applies where the

object or purpose of the agreement or clause breached is the chance being claimed.

49 A contrary view could also be advanced that the Court of Appeal in *Straits Engineering* in effect extended the principle in *Chaplin v Hicks*, as understood in *McRae*, when it permitted recovery for loss of a chance to make a profit even when the object of the contract was a block of shares in the operating company. It will be recalled that in *McRae*, the court held that apart from wasted costs and expenses incurred in searching for the tanker, the plaintiffs could not recover damages for loss of profit, but only nominal damages.

50 Whether one takes a wide or narrow view of *Straits Engineering*, I find that damages can be awarded for loss of a chance arising from a breach of cl 2A(b) of the Sub-lease. Given that cl 2A(b) was about MK using its best endeavours to secure approval for continued subletting of as much GFA of the Premises as *might be* allowed by JTC (see [36] to [39] above), I find that its object was to give Pedder the chance to remain in the Premises to the maximum GFA which JTC would be willing to allow. In other words, the subject matter of the counterclaim is the very thing which was contracted for under cl 2A(b) of the Sub-lease. It follows that the losses which Pedder can claim in the present case is limited to the value of the chance to continue the Sub-Lease up to the maximum GFA which JTC would have permitted. MKD argued that the object of cl 2A(b) was uncertain as there would be no certainty as to which part of the Premises would be sublet upon renewal of the Sub-lease with only 50% of the GFA of the Premises. I disagree.

51 The object of cl 2A(b) was to give Pedder a chance to renew the Sub-lease. The eventual intricacies of what that would involve, including the drawing up of a new agreement detailing the specific part of the Premises which would form the new demised premises, comes *after* the obligation to seek Mapletree and JTC's approval is discharged and not before. The fact that the exact shape of the agreement for a renewed lease could not be certain if only 50% of the GFA of the Premises was allowed cannot change the clear object of cl 2A(b), which was to allow for a chance to make such an agreement to continue the Sub-lease.

52 In *Chaplin v Hicks*, Vaughan Williams LJ dealt with the question of uncertainty as follows (at 791–792):

> ... It was said that the plaintiff's chance of winning a prize turned on such a number of contingencies that it was impossible for any one, even after arriving at the conclusion that the plaintiff had lost her opportunity by the breach, to say that there was any assessable value of that loss. It is said that in a case which involves so many contingencies it is impossible to say what was the plaintiff's pecuniary loss. I am unable to agree with that contention. I agree that the presence of all the contingencies upon which the gaining of the prize might depend makes the calculation not only difficult but incapable of being carried out with certainty or precision. The proposition is that, whenever the contingencies on which the result depends are numerous and difficult to deal with, it is impossible to recover any damages for the loss of the chance or opportunity of winning the prize. In the present case I understand that there were fifty selected competitors, of whom the plaintiff was one, and twelve prizes so that the average chance of each competitor was about one in four. Then it is said that the questions which might arise in the minds of the judges are so numerous that it is impossible to say that the case is one in which it is possible to apply the doctrine of averages at all. I do not agree with the contention that, if certainty is impossible of attainment, the damages for a breach of contract are unassessable. ...
>
> ...
>
> ... But from first to last there were, as there are now, many cases in which it was difficult to

> apply definite rules. In the case of a breach of a contract for the delivery of goods the damages are usually supplied by the fact of there being a market in which similar goods can be immediately bought, and the difference between the contract price and the price given for the substituted goods in the open market is the measure of damages; that rule has been always recognized. Sometimes, however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market, there are no damages. In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract. ...

53 As the object of the Sub-lease, and in particular cl 2A(b), was not directly or indirectly to ensure profit for Pedder from use of the Premises, Pedder's loss of profits would be too remote to be claimed. In any event, Ms Heng admitted on the stand that it would be impossible to project Pedder's future profits (or losses) as it was a fairly new company and had only been operating effectively for nine months. [note: 13] I, therefore, reject MKD's contention that Pedder's claim in damages for loss of chance should have been the loss of an opportunity to make profits.

54 I now turn to whether the breach of cl 2A(b) led to the loss of a chance claimed. In *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2005] 1 SLR(R) 661 ("*Starwood*"), the Court of Appeal set out (at [139]) a two stage enquiry to determine if there had been a loss of a chance:

> ... At the end of the day, in a case like the present, two questions should be asked and answered. First, did the breach on the part of the defendant cause the plaintiff to lose a chance to acquire an asset or a benefit? Second, was the chance lost a real or substantial one; or putting it another way, was it speculative? ...

55 In *Justlogin Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2007] 1 SLR(R) 425, Tay Yong Kwang J clarified (at [38]) that for cases of loss of a chance, "[w]hat we are concerned with is the loss of a chance of a favourable outcome rather than the favourable outcome itself". In other words, at this stage of the enquiry, it would not matter if Pedder's chance of obtaining JTC's approval were not proven on the balance of probabilities so long as this chance was a "real or substantial one".

56 The first limb of the test is whether the breach of cl 2A(b) of the Sub-lease caused Pedder to lose the chance to acquire the benefit of a continuation of the Sub-lease. MKD's refusal to apply to sublet the Premises for a term beyond 31 March 2012 resulted in Pedder having *no chance* to continue the Sub-lease. Pedder thus lost its chance to remain in the Premises (albeit with a lower GFA) and the first limb of the *Starwood* test is made out.

57 The second limb of the test requires a determination of whether the chance lost was "real or substantial", or merely "speculative". In Starwood, the Court of Appeal stated (at [137]) that "what would constitute a real or substantial chance need not be proved on the balance of probabilities". The Court of Appeal then went on to cite Stuart-Smith LJ in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 at 1611 and 1614:

> ... Mr Jackson submitted that the plaintiffs can only succeed if in fact tha*t chance o*f success can be rated at over 50 per cent ... there is no reason in principle why it should be so.
>
> …
>
> … in my judgment, the plaintiff must prove as a matter of causation that he has *a real or*

substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be.

[emphasis added]

58 In other words, a real or substantial chance could even be rated at or below a 50% chance. However, where the chance is rated at a point so low as to be *speculative*, the loss of a chance claim would be precluded. Accordingly, I reject MKD's contention that Pedder must fail in its counterclaim simply because Pedder could not prove that it *would have* got JTC's approval for a renewal of the Sub-lease. A 100% chance, or chance approximating to 100%, is not required to show that there was a real or substantial chance of a particular occurrence. There is no specific percentage threshold where a chance crosses into the speculative; this is a matter of common sense which I find is resolved in favour of Pedder.

59 The JTC subletting guide, which both parties made reference to, states that a 50% GFA subletting cap is the "permitted sublet area", advertising openly that tenants "may sublet" JTC premises. [note: 14] Clause 2A(b) likewise referred to this 50% GFA subletting cap, implicitly assuming that there was a real chance of the Sub-lease being approved for up to 50% of GFA. The letter dated 25 March 2011 from JTC which granted approval for subletting of the Premises for the initial year also suggested that a renewal of the Sub-lease was a real possibility so long as consent was sought via the updated Online Subletting Application Form. JTC had written to Mapletree:

> 12 Should you wish to increase the Permitted Sublet Area, or renew your subletting upon expiry, you are required to seek our consent by submitting an updated Online Subletting Application Form no later than two weeks before the Subletting Term expires. ... [note: 15]

I find that, as a matter of common sense, there was a real possibility (or a possibility which was more than speculative) of approval for continuation of the Sub-lease for up to 50% of the GFA of the Premises.

60 Accordingly, I find that the loss of chance doctrine applies and that Pedder had lost a chance to continue the Sub-lease for up to 50% of the GFA of the Premises, for which Pedder is entitled to claim damages.

The quantum of damages for Pedder's loss of a chance

61 The standard measure for calculating the general loss of a sub-lease arising from wrongful termination or eviction is the rental value of the premises less the contractual rent which would have fallen to be paid in the future multiplied over the unexpired term (see McGregor at para 23-015).

62 The GFA is stated to be 20,124 square metres which converts to 216,614.73 square feet. The contractual rent is $162,398 per month so that the rent per square foot is $0.7497, rounded up to $0.75 per square foot. The unexpired term is 37 months. The loss of a chance of getting the continued Sub-lease is a function of the general loss of the Sub-lease and may be calculated as a percentage of the standard measure for general loss of the Sub-lease.

63 The rental value of the Premises is taken from the rental which the current lessee, Sagawa Express Singapore Pte Ltd ("Sagawa"), pays, *viz*, $1 per square foot. Pedder claimed that $1 per

square foot is an under-estimation of the true value of the Premises, as the current lessee pays additional fees and charges which were not borne by Pedder in the Sub-lease. These include outgoings, quit rent, conservancy charges, and property tax (cl 3.24). The payment of property tax and JTC land rent by the new sub-tenant Sagawa is an additional charge not present in the Sub-lease between Pedder and MKD. I accept Pedder's submission that the true value of the Premises was more than the $1 per square foot Sagawa pays as monthly rent. Property tax paid by MKD from January to September 2012 was $53,000 or $17,000 a month. JTC land rent adds a further $0.08 per square foot charge. In total, property tax and JTC land rent account for $0.16 per square foot. The true rental value of the Premises was therefore $1.16 per square foot.

64 The calculation of quantum is more complicated in this case than in *Chaplin v Hicks* and *Straits Engineering*. It is undisputed that JTC's approval would have to be sought year on year. Both parties have agreed to proceed on the basis of the loss of chance to acquire 50% of the demised premises.

65 There is no evidence of the percentage probability of JTC granting permission for the subletting of 50% of the demised premises. This is not, however, a bar to the calculation of quantum of damages. This is not a case where loss is not proven. Where there is not enough evidence to enable the loss to be precisely quantified, the court may assess the damages as best as it can based on the available evidence. As stated by *Chitty on Contracts*, vol 1 (Sweet & Maxwell, 31st Ed, 2012) at para 26-015:

> The fact that damages are difficult to assess does not disentitle the claimant to compensation for loss resulting from the defendant's breach of contract. Where it is clear that the claimant has suffered substantial loss, but the evidence does not enable it to be precisely quantified, *the court will assess damages as best it can on the available evidence*. ... [emphasis added]

66 This approach was endorsed in *Raffles Town Club Pte Ltd v Tan Chin Seng* [2005] 4 SLR(R) 351. In that case, the court had concerns over the reliability of the evidence provided for the purposes of assessment of damages. The chief evidence provided was the club index (or sales data), but there was no evidence as to whether the value of transacted memberships were correctly reported or any proof of a statistical trend because of the low volume of recorded transactions. The court held that "the sales data [were] nevertheless the best thing we have got" and calculated the loss based on the sales data, notwithstanding concerns as to reliability.

67 Particularly in a case of loss of chance, the damages which are awarded would not reach the same level of precision as other assessments for which there are no contingencies. As opined by L P Thean JA on behalf of the Court of Appeal in *Straits Engineering* at [43]:

> Under this head of damages the amount awarded is unavoidably a lump sum which, in the opinion of a trial judge, is fair and reasonable, after taking into account various contingencies. ...

68 I accept Pedder's submission that the chances of getting JTC's approval for 50% of the GFA of the Premises were more than fair. I have already observed (at [59] above) that the JTC subletting guide and the letter dated 25 March 2011 granting formal approval for 100% of the GFA of the Premises indicate that there was a reasonable prospect of approval being granted for 50% of the GFA of the Premises or less. There is nothing in these documents, however, to suggest that approval for 50% of the Premises was a foregone conclusion. I was therefore unable to accept Pedder's submission that the chance of JTC approval should notionally be 100%. While I agree that it would be difficult to assign a value to the chance of JTC's approval, I find that such an endeavour must be made, given that we are in the realm of chance and the assignment of a 100% chance as a proxy for a "more than good" chance would make rubbish of the notion of chance. I have also found at [36] above that there

was a high chance that Mapleree would give its consent so long as JTC was also willing to approve the continuation of the Sub-lease. I find that a 60% chance in the round of MKD getting JTC's approval and Mapletree's consent for the continuation of the Sub-lease is a fair and reasonable probability. This approval would have to be sought year on year, and each time there would be a 60% chance of success. The final month's extension may be ignored as it would seem unlikely that either party would consider such an extension worth the effort of an application.

69 The value of damages for loss of chance to obtain 50% GFA of the Premises for the first year of extension is the annual value of the rent less the contractual value of the rent multiplied over the 50% GFA over a 12-month period, with a discount for the fact that there is only a 60% chance of success. It is calculated as follows:

60% chance x 50% (GFA) x (true rental value – contractual value) x 12 months

= value of the loss of chance to rent 50% of the demised premises for an additional year

0.6 x 0.5 (216,614.73) x ($1.16 – $0.75) x 12 = **$319,723.33**

70 The value of damages for loss of chance to obtain 50% GFA of the Premises for the second year will be calculated in the same way. The only difference is that approval for the second year is contingent on approval for the first year, and thus the percentage chance must be compounded to take into account the contingent probability. The following calculation would apply:

60% chance x 60% chance x 50% (GFA) x (true rental value – contractual value) x 12 months

= value of the loss of chance to rent 50% of the demised premises for an additional year

71 $(0.6)^2$ x 0.5 (216,614.73) x ($1.16 – $0.75) x 12 = **$191,833.99** The value of damages for loss of chance to obtain 50% GFA of the Premises for the third year must similarly take into account the contingent probability of approval in the first and second years. The following calculation would apply:

60% chance x 60% chance x 60% chance x 50% (GFA) x (rental value – contractual value) x 12 months

= value of the loss of chance to rent 50% of the demised premises for an additional year

72 $(0.6)^3$ x 0.5 (216,614.73) x ($1.16 – $0.75) x 12 = **$115,100.39**. The cumulative damages for this loss of a chance is calculated as follows:

Value of damages for first year + value of damages for second year + value of damages for third year

= total cumulative damages

$319,723.33 + $191,833.99 + $115,100.39 = **$626,657.71**

73 Pedder also claimed "apportioned wasted expenses for moving in and out" of the Premises. There is no basis for the recovery of such claim. If Pedder recovers for the loss of the bargain, it would be inconsistent that it should, in addition, recover for expenses of moving into the Premises which were necessarily incurred by Pedder for its attainment. Likewise, the expenses of moving out were inevitable in any event as the Sub-lease had to come to an end eventually even if it lasted all of

49 months. Pedder's claim for recovery of such expenses is therefore denied.

Conclusion

74 For the reasons given above, I dismissed the main claim for forfeiture of the Sub-lease and now allow the counterclaim for damages for breach of cl 2A(b) of the Sub-lease resulting in the loss of a chance to continue the Sub-lease at 50% of the GFA of the Premises.

75 In consequence, I awarded MKD $173,765.86 in rent arrears owed to it for the month of October 2011 while the Sub-lease was still subsisting, and directed that MKD return Pedder's banker's guarantee and deposit for the Sub-lease. I now award $626,657.71 in damages to Pedder for loss of a chance to continue the Sub-lease at 50% of the GFA of the Premises arising from MKD's breach of cl 2A(b) of the Sub-lease.

76 I will hear the parties on costs.

[note: 1] 1AEIC Tab 1, p 118 (Bundle of Affidavits of Evidence-in-chief, vol 1) (Lau Tien Hong's AEIC).

[note: 2] 1AB.117 (Agreed Bundle of Documents, vol 1).

[note: 3] 1AB.266–269.

[note: 4] 2AEIC Tab 4, p 5 at [12] (Pauline's AEIC).

[note: 5] 1AEIC Tab 2, p 228 (Loh's AEIC).

[note: 6] *Ibid*, p 243.

[note: 7] *Ibid*, p 242.

[note: 8] *Ibid*, p 246.

[note: 9] 1AB.126

[note: 10] CT: 28 Jan 2013, p 111 (Certified Transcript).

[note: 11] 2AEIC Tab 4, p 5 at [12] (Pauline's AEIC).

[note: 12] CT: 29 Jan 2013, pp 68 and 79.

[note: 13] CT: 29 Jan 2013, p 73.

[note: 14] 1AEIC Tab 2, pp 167-168 (Loh's AEIC).

[note: 15] *Ibid*, p 160.