Defu Furniture Pte Ltd *v* RBC Properties Pte Ltd
[2014] SGHC 1

Case Number : Suit No 726 of 2011

Decision Date : 02 January 2014

Tribunal/Court : High Court

Coram : Vinodh Coomaraswamy JC (as he then was)

Counsel Name(s) : Mr Kirindeep Singh, Ms June Hong and Mr Ravin Periasamy (Rodyk & Davidson LLP) for the plaintiff; Mr Nicholas Narayanan (Nicholas & Tan Partnership LLP) for the defendant.

Parties : Defu Furniture Pte Ltd — RBC Properties Pte Ltd

Contract – Misrepresentation – Misrepresentation Act

Contract – Misrepresentation – Rescission

Contract – Breach – Repudiatory Breach

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 19 of 2014 was allowed in part by the Court of Appeal on 17 December 2014. See [2014] SGCA 62.]

2 January 2014 Judgment reserved.

Vinodh Coomaraswamy J:

1 In these proceedings, the plaintiff lessee seeks rescission of a lease it entered into with the defendant lessor for misrepresentation or common mistake in equity. The defendant counterclaims damages, saying that the plaintiff has breached the lease by wrongfully purporting to rescind it.

2 The defendant is the sub-lessee of a building. It was looking for a sub-tenant to rent the ground floor of that building ("the Premises"). It advertised the Premises as a "warehouse showroom". The plaintiff, a furniture company, was looking for a showroom to rent. The plaintiff viewed the Premises twice, signed a letter of offer, paid a deposit, and eventually signed a lease for the Premises.

3 After the plaintiff commenced fitting out works but before it could complete those works and move in to the Premises, the defendant's lessor – who held the State lease on the building – gave notice that the Premises could not be used as a showroom unless it was paid a substantial premium. The defendant attempted to pass this premium on to the plaintiff. As a result, the parties' agreement fell through. The plaintiff stopped its fitting out works, reinstated the Premises and returned possession of them to the defendant. The plaintiff never moved in to the Premises and so never got to use them as its showroom.

4 The plaintiff now seeks a refund from the defendant of the security deposit and advance rent it paid the defendant under the sub-lease. The plaintiff also seeks damages equivalent to the sums it paid third parties in anticipation of using the Premises as its showroom under the sub-lease. These sums include stamp duty, utilities charges, its wasted fitting out costs, its reinstatement costs and interest on a bank loan it took out to finance the fitting out works. The defendant rejects the

plaintiff's claim entirely. Instead, the defendant says that the plaintiff has breached the sub-lease and counterclaims damages for the loss it has suffered as a result.

5 For the reasons which follow, I find that the defendant made a misrepresentation to the plaintiff which induced it to enter into the sub-lease. The plaintiff was therefore entitled to rescind the sub-lease and did so when it returned the keys to the reinstated Premises to the defendant on 9 January 2012. Rescission entitles the plaintiff to recover the sums it paid to the defendant under the sub-lease. Further, I find that the defendant is unable to prove that its representation was not made negligently within the meaning of s 2(1) of the Misrepresentation Act 1967 (c 7) (UK) ("the Act"), which has direct application in Singapore. The plaintiff is therefore entitled under that section to recover damages from the defendant for the loss it suffered because of the misrepresentation. The measure of the damages made available by that subsection is the same measure applicable to the recovery of loss caused by a fraudulent misrepresentation.

6 The necessary consequence of these findings is that the defendant's counterclaim fails in its entirety. The plaintiff's rescission of the sub-lease means that it was never subject to any contractual obligations to the defendant under the sub-lease, including the obligation to pay rent.

Background facts

The Building Agreement

7 Pursuant to a building agreement dated 16 August 2006 ("the Building Agreement"), a company known as RLG Development Pte Ltd ("RLG") took the land at 11 Bedok North Avenue 4, Singapore 489949 under a 30-year lease [note: 1] from the President of the Republic of Singapore. RLG erected upon that land a building now known as Richland Business Centre ("RBC"). The Premises comprise the whole ground floor of RBC.

8 The planning regulation then in force was the Master Plan Written Statement 2003 ("the Master Plan"), issued under the Planning Act (Cap 232, 1998 Rev Ed) ("the Planning Act"). The Urban Redevelopment Authority ("URA") is the competent authority designated to administer the Planning Act. Under the Master Plan, the URA zoned this land for Business 2, or B2, use. This meant that this land could be used only for clean industry, light industry, general industry, warehouse, public utilities and telecommunication uses and other public installations. But the URA also permitted not more than 40% of this land to be used for uses which are not B2 uses but which it views as uses *ancillary* to B2 use. These approved ancillary uses support the predominantly industrial B2 zoning in force for this land. Where the URA permits part of land which is subject to B2 zoning to be used as a *showroom* which supports the underlying B2 use, that part of the land is said to be used as an "ancillary showroom".

9 According to URA guidelines, an ancillary showroom must have a minimum unit size of 150 square metres and may not be used as for pure retail activities, including cash and carry transactions. It may be used only to display bulky items to be delivered separately. That restriction presumably establishes the link with the underlying B2 use of the land. A showroom which is not subject to the restrictions imposed on an ancillary showroom is known as a "commercial showroom".

10 Before RLG commenced construction of RBC, it submitted to the URA for approval its plans to erect RBC as a "5-storey single-user light industrial development *comprising showroom at 1st storey* and warehouse from 2nd to 4th storey and ancillary office at 5th storey" [note: 2] [emphasis added]. Although RLG did not specify that the 1st storey was to be an *ancillary* showroom, that was the clear intention given the underlying B2 use of the land. RLG's 1st storey plan therefore amounted to seeking

the URA's permission to build and use the Premises as an ancillary showroom. [note: 3] On 24 April 2007, the URA granted RLG planning permission under s 14(4) of the Planning Act to erect RBC based on RLG's plans as submitted. This meant that the URA approved use of the 1st storey as an ancillary showroom. RLG thereafter commenced construction of RBC and completed it in 2008.

The State lease

11 On 22 August 2008, RLG executed lease number 26784 with the President of the Republic of Singapore ("the State Lease") pursuant to s 4(1) of the State Lands Act (Cap 314, 1996 Rev Ed) ("the State Lands Act"). Under s 2 of the State Lands Act, the Singapore Land Authority ("SLA") was the caretaker and approving authority for the State Lease. If RLG or any of RLG's tenants wished to seek approval under a provision in the State Lease or to depart from any of its provisions, it was the SLA who would have to agree on behalf of the President. The SLA was therefore the *de facto* lessor under the State Lease. I will therefore refer to it as such.

12 Clause 2(i) of the State Lease expressly provides that RBC can be used only for ". . . uses that may be permitted by the [URA] under the Planning Act (Cap 232) for a 'Business 2' zoning in accordance with the Master Plan Written Statement". The SLA's view is that this provision of the State Lease permits RBC to be used only for *pure* B2 use and not for any purpose *ancillary* to B2 use, even if the ancillary use is approved by the URA. The State Lease further permits SLA to charge a differential premium if, during the currency of the State Lease, there is an approved change of use of RBC which enhanced the value of the land. [note: 4] This reflects the fact that the SLA set the premium and ground rent under the State Lease by reference to B2 use. If RBC or any part of it is put to more lucrative use which goes beyond B2 use, then SLA reserves to itself the right to draw some of that enhanced economic benefit upwards by imposing a differential premium. The differential premium is a contractual payment to SLA representing, in essence, the net present value of a share to the lessor under the State Lease of the additional economic benefit accruing from the enhanced use of RBC.

The Head Lease

13 RLG and the defendant are both subsidiaries of Ramba Energy Limited ("Ramba"). The defendant is therefore RLG's sister company.

14 On 24 April 2008, RLG granted the defendant a lease ("the Head Lease") of RBC for a term of 10 years and 4 months. The Head Lease is subject to the obligations of RLG under both the Building Agreement and the State Lease. Clause D18 of the Head Lease obliges the defendant to ensure that all of its sub-tenants observe and comply with all the terms and conditions of the Building Agreement and of the State Lease. [note: 5]

15 On 16 September 2008, RLG assigned its interest in RBC to Prologis Changi South 1 Pte Ltd ("Prologis"). Prologis therefore stepped into the shoes of RLG. It became the SLA's lessee under the State Lease and the defendant's lessor under the Head Lease.

The defendant looks for a new tenant

16 In early 2010, the defendant decided to market the Premises for letting. Letting the Premises as a showroom commands higher rent than letting it as a warehouse. So the defendant wanted to let the Premises as a showroom. To make sure that it could do so, the defendant's commercial executive, Mr Siebren Kamphorst ("Mr Kamphorst"), wrote to the URA on 8 April 2010 to ask whether the

Premises were approved for use as a warehouse showroom. Mr Kamphorst, who gave evidence, did not elaborate in his testimony on what the URA's answer was or, indeed, whether the URA gave any answer at all. But the response must have been favourable because the defendant indeed held the Premises out in its advertisements as a "warehouse showroom" to let.

The defendant finds a potential tenant but it falls through

17 In April 2010, a company known as Furniture and Furnishings Pte Ltd ("F&F") expressed interest in leasing the Premises from the defendant as a furniture showroom. In June 2010, F&F paid a booking fee of $54,600 and began negotiating the terms of a sub-lease of the Premises for 5 years from 1 August 2010 for use as a "showroom for furniture and furniture accessories". [note: 6] The defendant wrote to Prologis to seek its permission under the Head Lease to sub-let the Premises as a showroom. Prologis responded that it had no objections in principle to F&F using the Premises as a showroom provided that the defendant obtained "any approval from authorities [that] are required". [note: 7]

18 F&F and the defendant negotiated the terms of the sub-lease well into August 2010 but could not agree on a number of issues. Mr Kamphorst testified that the issues they could not resolve included issues relating to insurance and advertising. [note: 8] Crucially, F&F's ability to use the Premises as a showroom was not one of the sticking points. F&F did not in the end take a sub-lease of the Premises. The defendant put the Premises back on the letting market in late 2010.

The plaintiff seeks alternative premises

19 In 2010, the plaintiff operated out of a showroom at Ang Mo Kio Avenue 6. But it knew it would have to move out of that showroom by April 2011. The plaintiff's director, Mr Allen Lim ("Mr Lim Jr") and his father, Mr Lim Thiam Soon ("Mr Lim Sr"), intended to look for a new showroom to lease after the Lunar New Year in 2011.

20 A real estate broker, Mr Ronald Chew ("Mr Chew"), got wind of the plaintiff's situation. He knew Mr Lim Sr from previous property transactions. He had also acted as F&F's broker in its failed negotiations to lease the Premises from the defendant earlier in 2010. He approached the plaintiff towards the end of 2010 and showed Mr Lim Sr an advertisement holding the Premises out to let as a "warehouse showroom".

The first viewing

21 So it was that in January 2011, the plaintiff viewed the Premises for the first time. The defendant's facilities manager, Mr Marc Imran ("Mr Imran"), Mr Kamphorst, Mr Chew, Mr Lim Jr and Mr Lim Sr were present at this viewing.

22 According to Mr Lim Jr, he asked Mr Kamphorst whether there were any restrictions on using the Premises as a showroom. [note: 9] Mr Lim Jr and Mr Lim Sr attached particular importance to this because they were aware of other furniture companies which had run into difficulties for using premises as showrooms without approval. Mr Lim Sr testified that he therefore pressed Mr Kamphorst on whether the Premises could definitely be used as a showroom, to which the latter answered unequivocally "yes" or "confirm[ed]". [note: 10]

23 The plaintiff avers that Mr Kamphorst assured it that the Premises were an ancillary showroom which could be used to display furniture. Mr Kamphorst pointed to the floor to ceiling glass panels around the Premises and said that those had been installed specifically because the Premises were

designed and approved as a showroom.

24 Mr Kamphorst and Mr Imran recollected the first viewing differently. In his version, Mr Kamphorst told Mr Lim Jr that the URA had approved the Premises for use as an ancillary showroom and that that placed certain restrictions on its use. [note: 11] Mr Lim Jr's response, according to Mr Kamphorst, was to say that he had experience in dealing with such restrictions and knew how to "work around" them. [note: 12] Mr Lim Jr denies making such a statement.

25 The plaintiff followed up on the first viewing with a letter to the defendant dated 25 January 2011. By this letter, the plaintiff proposed to take a lease of the Premises as a showroom at a monthly rent of $1.80 per square foot for a term of 5 years, with an option to renew for 2 years. [note: 13] The plaintiff referred expressly to the Premises as a "showroom" in the title to the letter as well as in the letter's first paragraph.

26 The defendant responded by giving the plaintiff a draft letter of offer ("the Letter of Offer") on 27 January 2011. Although drafted by the defendant, the Letter of Offer was couched as an offer to lease the Premises issued by the plaintiff to the defendant. Clause 1.3 of the Letter of Offer set out the permitted use of the Premises as "Ancillary Showroom for furniture and furniture accessories (Subject to URA and NEA and any other relevant authorities' approval)". [note: 14]

The second viewing

27 In early February 2011, Mr Lim Jr and Mr Lim Sr returned to the Premises for a second viewing with Mr Kamphorst. They asked again whether the Premises could be used as a showroom. Mr Kamphorst gave them the following assurances:

(a) The Premises could be used as an ancillary showroom. This meant that the plaintiff could display its furniture and take orders for later delivery of furniture, but were prohibited from carrying out cash and carry transactions at the Premises;

(b) Negotiations with F&F fell through because they could not agree on the terms of the lease and not because there were any other restrictions on using the Premises as a showroom;

(c) 100% of the Premises could be used as a showroom; and

(d) Mr Kamphorst had sought clarification with the URA on several occasions to confirm that this was the case. [note: 15]

Mr Kamphorst pointed to a schematic plan of the Premises displayed near the lift landing at RBC which identified the Premises as an "ancillary showroom". [note: 16] He also gave the plaintiff a copy of the URA's grant of planning permission (see [10] above) designating the Premises as a showroom. [note: 17]

28 The plaintiff and defendant diverge about what was said at the second viewing about obtaining *further* approvals. Mr Kamphorst avers that he told the plaintiff that he was "not sure if there were any other government and/or regulatory approvals needed for the Plaintiff's intended use of the Premises as a furniture showroom". [note: 18] Mr Lim Jr, on the other hand, claims that Mr Kamphorst specifically told him that the URA was responsible for giving approval and that no other approval for change of use was necessary. [note: 19]

The Letter of Offer

29 After the second viewing, the plaintiff reviewed the defendant's draft Letter of Offer (see [26] above). The plaintiff signed it without amendment and returned it to the defendant on 16 February 2011, accompanied by a booking fee of $69,125 (being the equivalent of one month's rent, before GST). Clause 14.1 of the Letter of Offer made the offer irrevocable and open for acceptance until thirty days from 16 February 2011. The defendant accepted the Letter of Offer and the booking fee on 18 February 2011.

30 Once the defendant accepted the plaintiff's offer set out in the Letter of Offer, therefore, there came into existence a legally binding agreement on those terms. Some of the terms of the Letter of Offer were incorporated into Schedule 5 of the sub-lease which the parties eventually executed.

31 The Letter of Offer allowed the plaintiff a rent-free fitting out period of up to two months from 1 April 2011. To save time, the plaintiff started immediately looking for designers to design the fitting out of the Premises as a showroom. It was important for the plaintiff to start early because the plaintiff needed to get the necessary approvals from the defendant and any other relevant authorities for its fitting out works in place by the time the fitting out period commenced on 1 April 2011. If the relevant authorities did not approve its fitting-out plans by 1 April 2011, the plaintiff would be entitled to a refund of the booking fee and to void the Letter of Offer. The plaintiff claims that this was the effect of cl 1.3 (see [26] above) read with cl 6.3 of the Letter of Offer. Clause 6.3 reads as follows:

> The Lessee shall be entitled to a refund of the Booking Fee, immediately without demand from the lessor, free from interest, charges, compensation, etc in the event of the following occurrence: -
>
> (i) The Lessee cannot obtain approval for the Intended Use of the premises as referred to in Clause 1.3, within One (1) month from 1 March 2011 of the initial submission plans ("Approval Period").
>
> In such event, this Letter of Offer shall be deemed null and void, and neither party shall have any claim(s) against each other arising out of or in respect of this Letter of Offer. [note: 20]

32 The defendant reads cll 1.3 and 6.3 differently. It claims that cll 1.3 and 6.3 have nothing to do with approval of the fitting-out plans but are to do with approvals for *use of* the Premises *as a showroom*. It contends that the effect of these clauses is to provide expressly that it was the *plaintiff* who was to be responsible for obtaining all approvals to use the Premises as a showroom.

33 The Letter of Offer made no mention of the Head Lease, the State Lease, Prologis or the SLA.

34 Mr Lim Jr deposed that he asked Mr Kamphorst about cll 1.3 and 6.3 of the Letter of Offer when he signed it at the defendant's office. His evidence is that Mr Kamphorst assured him that (1) there was no need to obtain any other approvals because the Premises had already been approved as an ancillary showroom; and (2) it was, in any event, the *defendant's* responsibility to obtain any approvals necessary to use the Premises as a showroom. [note: 21] The plaintiff contends that Mr Kamphorst's parting assurance was that he would "double check" with the authorities. The contents of this conversation did not lead to any change to the wording or content of the Letter of Offer.

The Sub-Lease

35 On 25 February 2011, the defendant sent a draft sub-lease to the plaintiff. In the email which

accompanied the draft sub-lease, Mr Kamphorst set a timeline of 14 days from 25 February 2011 for the parties to execute the sub-lease. A copy of the first page of the Head Lease and a copy of the Consent Letter from Prologis were annexed to the draft. Both parties were legally advised at the material time. The plaintiff's case is that Mr Kamphorst followed up on this email with a telephone call. During this call, Mr Lim Jr says, Mr Kamphorst informed him that the defendant had obtained all necessary approvals to lease the Premises to the plaintiff as a showroom.

36 After reviewing the draft, the plaintiff wrote back on 7 and 8 March 2011 with queries on specific clauses and with proposed amendments. Thus began the process of negotiating specific terms of a sub-lease for the Premises. The defendant included a clause in the draft sub-lease obliging the plaintiff to observe the terms of the Head Lease. But the defendant did not show either the Head Lease (apart from a copy of the first page) or the State Lease to the plaintiff. The plaintiff was concerned about its exposure under this clause. Eventually, the defendant agreed to remove it.

37 On 11 March 2011, the plaintiff and the defendant executed a sub-lease for the Premises ("the Sub-Lease") for a period of sixty months commencing on 1 June 2011. The Sub-Lease granted the plaintiff the right to use the Premises only as its furniture showroom. Amongst other provisions, the Sub-Lease included the following clauses governing the plaintiff':

(a) Clause 3.14.2 reads as follows:

> Not to use or permit the use of the Demised Premises or any part thereof:-
>
> (a) otherwise than for the purpose(s) and in accordance with the provisions of Schedule 4;
>
> (b) for any purpose otherwise than in accordance with the permitted use approved by the relevant government authorities; and
>
> (c) for the purpose(s) specified in Schedule 4, until and unless all necessary approvals consents, licences and permits shall have been obtained by the Tenant from the relevant government authorities and such approvals, consents, licences and permits remain valid and subsisting. [note: 22]

(b) Schedule 4 reads as follows:

> The Demised Premises shall not be used for any purpose other than as a Showroom for furniture and furniture accessories under the trade name of Defu Furniture Pte Ltd only or such name as may be approved by the Landlord and in accordance with the guidelines of all other relevant authorities. [note: 23]

(c) Clause 3.14.3(e) reads as follows:

> To be responsible at its own expense for obtaining and keeping in force all approvals, consents, licences and permits necessary for the conduct of its business at the Demised Premises and for ensuring that the terms and conditions of such approvals, consents, licences and permits are strictly adhered to and to indemnify the Landlord against any consequences or proceedings arising from the Tenant's default in complying with the provisions of this sub-clause. [note: 24]

(d) Clause 3.19(c) reads as follows:

> The Tenant shall occupy, use and keep the Demised Premises at the risk of the Tenant and shall indemnify and hold harmless the Landlord from and against all actions, claims, demands, losses, costs and expenses for which the Landlord shall or may suffer or become liable for in connection with:
>
> …
>
> (c) any breach or non-compliance with any provision of this Lease by the Tenant. [note: 25]

38 The defendant relies on these clauses in its defence. Its case is that the plaintiff is bound by these clauses and that these clauses oblige the plaintiff – and not the defendant – to seek and obtain approval for the permitted use of the Premises. The defendant argues that this includes seeking approval from the SLA under the State Lease to use the Premises as a showroom.

39 The plaintiff submits that these clauses are not susceptible to such an interpretation. In any event, the plaintiff avers that immediately before signing the Sub-Lease, Mr Lim Jr once again asked Mr Kamphorst whether the Premises were approved for use as a showroom. Mr Kamphorst replied in the affirmative. Mr Lim Jr said that he agreed to pay the security deposit of $69,125 and sign the Sub-Lease only because he relied on Mr Kamphorst's assurance.

The plaintiff starts fitting out the Premises as its showroom

40 About the same time that the plaintiff signed the Sub-Lease, it appointed a designer to design its showroom. The plaintiff produced a payment voucher dated 15 March 2011, four days after the Sub-Lease was executed, evidencing payment of a deposit for design fees. [note: 26]

41 The plaintiff went into possession of the Premises on 1 April 2011, as agreed in the Letter of Offer and in the Sub-Lease. On the same day, the plaintiff paid the stamp duty of $13,272 on the Sub-Lease and paid a fitting out deposit of $69,125 to the defendant, both payments pursuant to its obligations under the Sub-Lease. The plaintiff obtained a quotation for construction work on the Premises on 10 April 2011. [note: 27] It appointed a renovation contractor for the fitting out works on 14 April 2011. [note: 28] It then submitted its fitting-out plans to the defendant and Prologis for approval.

The SLA learns about the Sub-Lease

42 At about the same time, the Sub-Lease came to the attention of SLA in the following circumstances. The defendant had written to the URA to seek approval for completely unrelated works to be done on the second floor of RBC. These premises were occupied by another of the defendant's sub-tenants: DHL Supply Chain Singapore Pte Ltd ("DHL"). The title of the defendant's letter to the URA was "Proposed 3-tier proprietary racking system at 2nd storey of existing 5-storey single-user industrial building *comprising showroom at 1st storey* and warehouse from 2nd to 4th storey and ancillary office at 5th storey" [emphasis added]. The URA granted written permission for *DHL's* proposed works at the *2nd storey* on 30 March 2011. It appears that the SLA received a copy of this grant of written permission, although it is unclear how. The SLA objected to the proposal to install the racking system because that involved adding 765.31 square metres more of industrial gross floor area to RBC than the State Lease contemplated. Further, although the URA's grant of written permission had nothing to do with a change of use of the Premises under the Planning Act, it appears

that the title of the URA's grant led the SLA to realise that the defendant intended to let the Premises for use as a showroom. As mentioned above (at [12]), the SLA considered use of the Premises even as an *ancillary* showroom to be a breach of Prologis's obligation under the State Lease (assumed from RLG) to use the entirety of RBC only for pure B2 industrial use.

43 SLA therefore wrote to Prologis on 21 April 2011. In this letter, the SLA took the position that Prologis was in breach of the State Lease by installing the proprietary racking system for DHL and also for the "change of use of [the Premises] from industrial use…to commercial showroom use." [note: 29] The SLA went on to say that it was prepared to lift the contractual restriction under the State Lease and permit the proposed changes of use if Prologis were to pay a differential premium of $2,820,935.00 plus processing fees and GST. Prologis did not receive this letter until 26 April 2011.

44 In the meantime, Prologis had received the plaintiff's fitting-out plans and had granted in-principle approval for its fitting-out works on 25 April 2011. [note: 30] On 27 April 2011, the defendant also gave its in-principle approval for the plaintiff's fitting-out works, subject to the Singapore Civil Defence Force's endorsement on the proposed sprinkler plans. [note: 31] At the time the defendant granted its approval, it was not aware of the SLA's 21 April 2011 letter to Prologis. As far as the defendant was concerned, the Premises already had the URA's approval to be used as an ancillary showroom and that, in itself, was sufficient.

45 Prologis took a month to forward the SLA's 21 April 2011 letter to the defendant (see [47] below). By this time, the plaintiff was close to finishing its fitting out work at the Premises and almost ready to start using the Premises, as agreed in the Sub-Lease, as an ancillary showroom for displaying its furniture.

The defendant is told of SLA's objection to using the Premises as the plaintiff's showroom

46 On the morning of 27 May 2011, Prologis's director of asset management, Mr Alan Ling ("Mr Ling"), met representatives of the SLA. He formed the impression from this meeting that the SLA would not require Prologis to pay a differential premium if the Premises were to be used as an *ancillary* showroom but would require a differential premium if the Premises were to be used as a *commercial* showroom. Mr Ling called Mr Kamphorst on the same day. Mr Ling wanted to confirm that the plaintiff's use of the Premises was to be as an *ancillary* showroom and not as a "*commercial* showroom" as characterised in SLA's 21 April 2011 letter. Mr Ling asked Mr Kamphorst to retrieve his correspondence with the URA proving that the Premises were approved as an *ancillary* showroom.

47 On the same day, Mr Kamphorst emailed Mr Ling to ask Mr Ling for a copy of SLA's 21 April 2011 letter. Mr Ling sent Mr Kamphorst a copy of the letter by email. Mr Ling added in the covering email that he thought the letter was a "wrong letter" as it contained references to the works to be carried out on the second floor and the use of the Premises as, in the SLA's words, a "commercial showroom". [note: 32] Both Mr Ling and Mr Kamphorst understood SLA's 21 April 2011 letter to mean that Prologis would have to pay a differential premium only if the Sub-Lease allowed the plaintiff to use the Premises as a *commercial* showroom but not if the Sub-Lease limited the plaintiff's use of the Premises to an *ancillary* showroom. Mr Kamphorst agreed to seek clarification from the URA about what the exact definition of an ancillary showroom was.

48 Mr Kamphorst contacted both the URA and Mr Lim Jr on the same day. Mr Kamphorst's email to the URA was very telling of his understanding (or rather, his misunderstanding) of the SLA's position:

> I wanted to get additional confirmation from URA, that our incoming Tenant, a furniture company,

is permitted to use our level 1 Ancillary Showroom at 11 Bedok North Avenue 4 as a furniture showroom. I want to be very clear that we are not applying for a commercial Showroom (no retail sales) and we haven't started operations yet. Our tenants may also consider using part of the showroom as a warehouse to store their displayed items.

There seems to be some confusion as to whether our incoming tenant are [sic] permitted to do so and in accordance with the approved use.

We need to get some clear definition from URA on this matter urgently. A few months back I had contacted someone at URA and they had told us that we are permitted to have a showroom so long as no cash and carry items take place, please confirm this… [note: 33]

49 It is clear from Mr Kamphorst's email that he believed that the SLA had imposed the differential premium because of a change of use within the meaning of the Planning Act, which was therefore a matter under the purview of the URA. It clearly did not occur to Mr Kamphorst that the SLA was not concerned at all with the permitted use of the Premises under the Planning Act and instead sought to impose the differential premium on Prologis as a matter of contract for a deviation from the permitted use of RBC *under the State Lease*. If he had understood the position correctly, he undoubtedly would not have approached *URA* again on behalf of *the defendant*. Instead he would have told *Prologis* to resolve this issue with its lessor, the *SLA* as it arose under the State Lease.

50 Mr Kamphorst also communicated this understanding to Mr Lim Jr. Mr Lim Jr followed up with an email to the defendant on the same day in which he sought clarification on two issues. The first was whether the remaining 20% of the fitting-out work should continue. The second was whether the start date for the Sub-Lease could be pushed back pending the resolution of the issue. Mr Lim Jr characterised the issue they were then facing as an "issue of compliance with URA". [note: 34] Mr Kamphorst did not correct this characterisation. Indeed, because he originated it and shared it, he reinforced that characterisation by telling Mr Lim Jr: "As you can appreciate we need a conclusive answer from URA on the proposed usage of the premises." [note: 35] Mr Kamphorst also wrote that it "is really unfortunate to have to stop [the plaintiff's] fitting out works". [note: 36] Mr Kamphorst thought that his sentence communicated to the plaintiff clearly that that it should stop its fitting-out works with immediate effect. The use of the present tense perhaps does convey a present intention as a matter of grammar. But Mr Lim Jr's understanding of that sentence was that the defendant was referring to the possibility that it might have to cease its fitting-out works at some point in the future. So the plaintiff continued its fitting out works.

51 URA's response came later that evening. URA confirmed that the Premises were approved for use as a "showroom for display of furniture to prospective customers". The URA expressed its view that there would be no change of use of the Premises as long as they were used as an *ancillary* showroom. [note: 37] That is precisely the use which the plaintiff and defendant had stipulated in the Sub-Lease.

52 Since the problem was in fact with the State Lease and not with the Planning Act, this clarification from the URA could do nothing to resolve Prologis's issue with the SLA. But Mr Ling and Mr Kamphorst got in touch to see how this clarification could be used for that purpose. Their efforts were hampered by the deep confusion both were labouring under about the Premises and about whether the SLA was entitled to impose a differential premium if the defendant let the Premises for use as an ancillary showroom.

53 By contrast, Prologis and the defendant resolved fairly quickly with the SLA the differential

premium for DHL's racking system. DHL eventually agreed to pay the differential premium of $113,529.23. This was not unreasonable as the racking system was an improvement, and one which was to be installed at DHL's request and at its cost.

The plaintiff's fitting-out works are suspended

54 Mr Kamphorst thought that he had asked the plaintiff to stop its fitting-out works, thereby buying some time to resolve issues. But he noticed on 1 June 2011 that the works had not ceased. Mr Kamphorst thus wrote to Mr Lim Jr in the late afternoon of 1 June 2011, asking him to stop the fitting-out works until the "matter" was resolved. Mr Kamphorst did not explain what precisely this "matter" was. More likely than not, Mr Kamphorst had still not realised the true reason for SLA seeking to impose the differential premium for the Premises. So he did nothing in this email to correct his previous misunderstanding, which he had previously conveyed to the plaintiff, that the issue was simply with URA approval under the Planning Act.

55 Mr Lim Jr did not agree to the defendant's request to stop the fitting-out works. As far as the plaintiff was concerned, the rent-free fitting-out period had expired, the term of the Sub-Lease had already started and every day's delay in the fitting-out works meant an additional day that it would be paying rent without generating any revenue from its use of Premises. Mr Lim Jr wanted the defendant's assurance that the rent-free period would continue until the defendant resolved all outstanding issues concerning the use of the Premises as a showroom. Mr Lim Jr also wanted to know when he could expect the Sub-Lease to commence since it had not commenced on the agreed date of 1 June 2011. Mr Lim Jr took the position that it was not fair for the defendant to ask the plaintiff to stop its fitting-out works unless it could provide the plaintiff with the assurances that the plaintiff sought. Until the defendant gave these assurances, Mr Lim Jr said, the plaintiff intended to continue its fitting-out works.

56 Mr Kamphorst responded five days later, on 6 June 2011. He agreed that the plaintiff would not have to pay rent during the period that its fitting-out works were suspended. [note: 38] The plaintiff thus agreed to suspend its fitting-out works. The parties did not know then that the works would eventually have to be abandoned and the Premises ultimately reinstated.

SLA attempts to clarify the issue

57 The SLA and the URA had a joint meeting with Prologis on 9 June 2011. Mr Kamphorst was allowed to attend as the defendant's representative. However, the SLA made clear to Mr Kamphorst that he should liaise with Prologis rather than with the SLA to resolve the defendant's issues. As far as the SLA was concerned, its contractual relationship was with Prologis and not with the defendant. Nothing was resolved at this meeting. Indeed, the misunderstanding persisted. On 20 June 2011, Prologis's lawyers, Lee & Lee, wrote to SLA on Prologis's behalf. The letter stated: "As [Prologis's predecessor in title]...applied for and obtained the URA approvals and constructed the development on the Property in accordance with the URA Approvals and the terms of the Building Agreement dated 16 August 2006 and the Head Lease, our clients do not understand why you have taken the position that there is a change of use of [RBC]". The letter went on to query whether the Premises could be leased as an *ancillary*, rather than a *commercial*, showroom according to the categories stated in the Master Plan. [note: 39] This letter clearly showed that Prologis had failed to grasp the fundamental point that the SLA considered any use of the Premises as a showroom – whether ancillary or commercial – to be outside pure B2 use which was the only use the State Lease permitted.

58 On 21 June 2011, SLA wrote again to Prologis. This letter clarified that SLA had its own way of categorising use for the leases it administered such as the State Lease. The State Lease was a

"Group D" lease. Leases for premises in this group limited the lessee's use to pure B2 use and were granted at a lower premium (see above at [12]). This was reflected in the premium which Prologis (or to be more accurate, RLG, its predecessor in title) had paid for the State Lease. The SLA classified *any* type of showroom use as commercial use falling under "Group A". Leases for premises in this Group were granted at a higher premium. [note: 40] The SLA's reference to a "commercial showroom" in its letter dated 21 April 2011 was a reflection of its view, unlike the URA's view, that use as *any* form of showroom constitutes non-industrial, and therefore commercial, use. The SLA was not drawing the same distinction as the URA did between a showroom ancillary to B2 use (where retail activities are not allowed) and a commercial showroom (which does not any such restrictions). But Mr Ling and Mr Kamphorst assumed that the SLA *was* drawing that distinction. More importantly, it was only with this letter that Mr Ling realised that he had been looking at the wrong document – the Master Plan – when he concluded erroneously that the SLA had made a mistake in its understanding of the Sub-Lease in its letter of warning sent on 21 April 2011.

59 Mr Ling, on behalf of Prologis, was the person in contact with SLA. This was unsurprising since Prologis was the lessor under the State Lease. The SLA had no contractual nexus with the defendant. So Mr Kamphorst was not and could not be a direct point of contact with the SLA. Any information which Mr Kamphorst received about SLA's position and demands came through Prologis. Although Prologis forwarded the 21 June 2011 letter from the SLA to Mr Kamphorst immediately, the defendant alleged that Prologis was often not forthcoming with updates to the defendant. [note: 41] This gave rise to problems later on as the plaintiff continued to press Mr Kamphorst for regular updates throughout July and August 2011. Mr Kamphorst did not always have the information that the plaintiff required.

60 On 28 June 2011, the plaintiff sent a letter through its lawyers, Rodyk & Davidson LLP ("Rodyk"), asking for an update on the situation by 30 June 2011. Prologis had, by then, told Mr Kamphorst of SLA's letter dated 21 June 2011. But this letter did not set out the amount of differential premium which Prologis would have to pay for the change of use of the Premises. It specified only how much differential premium Prologis would have to pay for DHL to install its proprietary racking system on the 2nd storey. A further meeting with the SLA would be necessary to determine exactly how much differential premium Prologis would have to pay for the Premises. The defendant was thus unable to give the plaintiff a satisfactory answer.

61 SLA repeated its clarification via a letter to Prologis on 5 July 2011. In this letter, SLA stated that it expected Prologis to pay a differential premium of $2,852,171.10 (excluding stamp duty) for the Premises. It also stated that the issue was not with the use of the Premises *permitted* under the Planning Act but with the *actual* use of the Premises as a showroom to display the plaintiff's furniture and furniture accessories. [note: 42]

Prologis, the defendant and the plaintiff argue about who should pay the differential premium

62 Eventually, it became clear to Prologis that it was contractually obliged to pay a differential premium under the State Lease. It could not avoid it. The SLA quantified the differential premium as $2,852,171.10, backdating it to the date of the Building Agreement in 2006. Prologis understandably balked. It proposed passing the differential premium on to the defendant under the Head Lease. The defendant balked. The defendant did not then try to pass the differential premium on to the plaintiff. Instead, the defendant told Prologis in three letters dated 8, 11 and 21 July 2011 not only that Prologis should be the one to pay the differential premium but also that Prologis should indemnify the defendant from any claim by the plaintiff for loss or damage. [note: 43]

63 Prologis disagreed with the defendant's position. After consulting its lawyers, Prologis wrote to the defendant on 18 and 26 July 2011 to say that it now thought that the *plaintiff* should pay the differential premium. [note: 44] This was clearly unreasonable. The SLA calculated the differential premium over the entire 30-year term of the State Lease. The plaintiff's Sub-Lease was only for 60 months in the first instance. The defendant stood its ground that the plaintiff should not be responsible for paying the differential premium. It wrote to Prologis on 28 July 2011 again demanding that Prologis pay the differential premium to the SLA and indemnify it against any claim by the plaintiff for loss or damage. [note: 45]

64 Prologis did not reply immediately. Instead, Prologis went back to the SLA to attempt to negotiate a lower differential premium. Prologis convinced the SLA to calculate the differential premium only over the term of the 60 month Sub-Lease. On 14 September 2011, Mr Ling emailed Mr Kamphorst to inform him that SLA had reduced the differential premium by more than 50% from $2,852,171.10 to $1,358,000 (excluding GST, stamp duty and processing fees). [note: 46] But even now, Mr Ling still did not agree that Prologis should pay the differential premium. Instead, he expressly reserved Prologis's rights against the defendant.

65 In his reply dated 15 September 2011, Mr Kamphorst pressed Mr Ling to respond by 23 September 2011 to the defendant's proposal that Prologis pay the differential premium. The defendant's frustration was obvious in this exchange. The defendant's Logistics Director, Mr Colin Moran ("Mr Moran"), added his voice to Mr Kamphorst's on the same day, asking Mr Ling to "help the situation from a commercial basis" as the defendant needed "some direction after 4 very long months". [note: 47] Prologis stood its ground: it would not pay the differential premium. Given that Prologis would not budge, the defendant proposed the following solution to the plaintiff on 21 September 2011: [note: 48]

(a) Prologis would pay the differential premium to the SLA;

(b) Prologis would amortise the differential premium over the term of the Sub-Lease and pass that on every month to the defendant under the Head Lease; and

(c) The defendant would in turn pass this monthly charge on to the plaintiff as a supplement to the monthly rent under the Sub-Lease.

Spread over the 60-month term of the Sub-Lease, this would have worked out to an increase in the plaintiff's rent of approximately $22,633 per month. This was an extra $0.57 per square foot per month over and above the $1.75 per square foot per month agreed in the Sub-Lease. The defendant's proposal was, in effect, to increase the plaintiff's rent by more than 30%.

66 The plaintiff, not surprisingly, refused to pay more rent. It communicated its refusal by email to Mr Kamphorst and formally by a letter sent by Rodyk on the same day. That letter further pointed out that the State Lease placed the burden of paying the outstanding differential premium on the head lessor (*ie*, Prologis). [note: 49]

The plaintiff reinstates and returns the Premises

67 The plaintiff and the defendant had reached an impasse. The plaintiff therefore commenced these proceedings on 14 October 2011. The plaintiff intended to rescind the Sub-Lease. To that end, it decided unilaterally to reinstate the Premises to their original condition as a precursor to handing

the Premises back to the defendant.

68 The reinstatement works commenced and concluded in December 2011. On 31 December 2011, the plaintiff met the defendant's facilities manager, one Mr Tan, on site and tried to deliver to him the keys to the Premises. He refused to accept them. On 6 January 2012, Rodyk wrote to the defendant to give notice that it would deliver the keys to the defendant on 9 January 2012. Rodyk also asked that the defendant confirm by the close of business on 9 January 2012 that it was satisfied with the reinstatement works. [note: 50] The defendant did not reply. Rodyk couriered the keys to the defendant on 9 January 2012.

69 As it turned out, the defendant was not satisfied with the reinstatement works. The defendant refused to accept the keys. The plaintiff tried to arrange a joint inspection but this did not take place until 4.30 pm on 14 February 2012. Mr Kamphorst followed up on 17 February 2012 with a list of nine outstanding items of reinstatement works to be done. Apparently in expectation that the Premises would soon be reinstated to its satisfaction, the defendant put the Premises back onto the letting market with an online advertisement on 25 February 2012. [note: 51]

70 After finishing the list of reinstatement works specified in Mr Kamphorst's 17 February 2012 email, Mr Lim Jr contacted Mr Kamphorst on 27 February 2012. Mr Kamphorst was away on a business trip in Indonesia and was not able to confirm the completion of the reinstatement works until his return. Mr Kamphorst returned and confirmed the completion of the reinstatement works on 12 March 2012. The plaintiff returned possession of the Premises to the defendant, and the defendant accepted the return, on the same day.

71 The defendant then leased the Premises to Gain City Best-Electric Pte Ltd ("Gain City") on 7 May 2012 for two years commencing 7 July 2012. Gain City leased the Premises for use as a warehouse at a rent of $1.50 per square foot for the first two years. This rent is less than the $1.75 per square foot that the plaintiff agreed to pay under the Sub-Lease to use the Premises as a showroom.

The plaintiff's case

72 The plaintiff's case is that the defendant represented to it that it could use the Premises as a *showroom* – albeit subject to the URA's restrictions applicable to an ancillary showroom – without any further approval. It is not the plaintiff's case that the defendant represented to it that it could use the Premises as a *commercial showroom* without any further approval. Further, the SLA's position is that the use of the Premises as *any type* of showroom – whether ancillary or otherwise and whether for furniture or otherwise – was a breach of Prologis's obligation under the State Lease unless it paid the SLA a differential premium. The result is that nothing in my analysis turns on the distinction between an ancillary and a commercial showroom. Nothing turns either on the fact that the plaintiff intended to use the Premises as a *furniture* showroom.

73 The plaintiff's case rests on two representations which it alleges the defendant made. The first representation is that the plaintiff could use the Premises as a showroom. [note: 52] The plaintiff claims that the defendant made the first representation on at least four occasions: (1) at the first viewing, (2) at the second viewing, (3) when the plaintiff signed the Letter of Offer, and (4) when the plaintiff executed the Sub-Lease. The second representation is that the plaintiff did not need to obtain any approvals in order to use the Premises as a showroom. [note: 53] The plaintiff claims that the defendant made the second representation just before the plaintiff signed the Letter of Offer and again just before the plaintiff executed the Sub-Lease. The plaintiff's case is that these two

representations, taken together, were false and, further, were made negligently because the defendant could and should have checked the State Lease to see if the State Lease permitted the Premises to be used as a showroom. The plaintiff avers that it relied on these representations when it entered into the Letter of Offer and the Sub-Lease. The plaintiff thus contends that it was entitled to rescind the Letter of Offer and the Sub-Lease in equity and claim damages for the loss it suffered under s 2(1) of the Act. Its case is that it rescinded the Sub-Lease on 14 October 2011 when it filed and served these proceedings and commenced reinstatement works. The plaintiff therefore seeks a declaration that it validly rescinded the Letter of Offer and Sub-Lease; alternatively an order rescinding the Sub-Lease and the Letter of Offer. The plaintiff also seeks a refund of the following prepayments to the defendant under the Letter of Offer and the Sub-Lease:

(a) The sum of $345,625 being the security deposit;

(b) The sum of $73,963.75 being rent prepaid for June 2011; and

(c) The sum of $69,125 being an inadvertent double payment of rent for June 2011.

74 The plaintiff also seeks to recover the following sums from the defendant as damages for negligent misrepresentation pursuant to s 2(1) of the Act:

(a) The sum of $13,272.00 being the stamp duty paid on the Sub-Lease;

(b) The sum of $885,685.90 being the cost of the fitting-out works;

(c) The sum of $2,700.51 being utilities charges it paid for the months of April and May 2011;

(d) The sum of $78,216.88 being interest charges which it incurred on a bank loan to finance the fitting-out works; and

(e) The sum of $85,056.00 being the reinstatement costs.

75 The plaintiff argues in the alternative that if the defendant's misrepresentation was innocent rather than negligent, the plaintiff is still entitled to relief, namely rescission coupled with an indemnity in equity in respect of all its losses to achieve true *restitutio in integrum*.

76 Alternatively, the plaintiff claims that the defendant was in repudiatory breach of the Letter of Offer and Sub-Lease by failing to respond to the plaintiff's repeated requests to resume the fitting-out works after they were suspended on 4 June 2011. This showed that the defendant no longer intended to be bound by the Letter of Offer and the Sub-Lease. The plaintiff says it accepted the repudiation by filing and serving the writ of action in this suit. The plaintiff thus claims the loss and damage arising from the defendant's breach of contract.

77 The plaintiff's third alternative cause of action lies in unjust enrichment. The plaintiff says that it conferred certain benefits on the defendant under the abortive Sub-Lease and the defendant, in these circumstances, would be unjustly enriched if it were allowed to retain those benefits. The unjust factor triggering restitution, the plaintiff says, is total failure of consideration.

78 Finally, the plaintiff also argues that the Sub-Lease and Letter of Offer are voidable for mistake. The argument is that both parties thought that the Premises, the subject-matter of the Sub-Lease, could be used as a showroom when in fact they could not. The plaintiff does not rely on the doctrine of common mistake which renders a contract void *ab initio* at common law (*Bell v Lever Brothers*

[1932] AC 161) but instead relies on the equitable doctrine (from *Solle v Butcher* [1950] 1 KB 671 and *Grist v Bailey* [1967] Ch 532) which permits equity to intervene to relieve a mistaken party from its contractual obligations even though the mistake is not sufficiently fundamental to warrant relief at common law.

The defence and counter-claim

79 The defendant denies that it made any representation to the effect that the plaintiff alleges. As mentioned above (at [32] and [38]), it relies on cll 1.3 and 6.3 of the Letter of Offer and cll 3.14.2, 3.14.3(e), 3.19(c) and Schedule 4 of the Sub-Lease as placing responsibility on the plaintiff to seek any necessary approvals for using the Premises as a showroom. The defendant argues that these clauses would not be there if Mr Kamphorst represented to the plaintiff that no further approvals were necessary. In any event, the defendant argues that Mr Kamphorst did check with the URA whether the necessary approval had been given to use the Premises as an ancillary showroom. He clarified with the URA what the restrictions for use as an ancillary showroom were. He even communicated these restrictions to the plaintiff. So he was not negligent.

80 Alternatively, the defendant argues that even if it did make the alleged misrepresentation, the plaintiff did not rely on it, at least not reasonably. The defendant claims that the plaintiff was run by an experienced businessman who dealt with the defendant at arm's length. The plaintiff had no reason to trust what Mr Kamphorst said and was therefore reasonably obliged to check for itself with the authorities before it signed the Sub-Lease.

81 The defendant also relies in any event on cl 6.9 of the Sub-Lease (the text of which is found below at [127]) which it says excludes liability for any misrepresentation it may have made in the run up to the Sub-Lease. [note: 54]

82 Accordingly, the defendant avers that there was no legal basis for the plaintiff to rescind the Sub-Lease. The Sub-Lease therefore subsisted at the time the plaintiff filed this suit. The plaintiff's decision to file the present suit and to reinstate the Premises was a repudiatory breach of the Sub-Lease and the Letter of Offer.

83 The defendant therefore counter-claims damages for the loss it incurred as a result of the plaintiff's repudiation of the Sub-Lease. The defendant claims that the plaintiff breached cll 3.14(2)(b), 3.14(2)(c), 3.14(3)(e), 3.17(1) and 3.17(2)(a) of the Sub-Lease and that these breaches give rise to a claim for the following:

(a) The sum of $51,286.32 being the loss of rental from 21 September 2011 (when the plaintiff rejected the defendant's proposal to pass on the differential premium to the plaintiff as an increase in the monthly rent under the Sub-Lease) to 13 October 2011 (one day before this suit was filed, the date the plaintiff repudiated the Sub-Lease);

(b) The sum of $336,705.84 being the loss of rental from 14 October 2011 (the date the plaintiff allegedly repudiated the Sub-Lease) to 12 March 2012 (the date the plaintiff yielded up the Premises to the defendant);

(c) The sum of $258,661.44 being the loss of rental from 13 March 2012 (the day after the plaintiff yielded up the Premises to the defendant) to 6 July 2012 (the day before the defendant entered into the lease with Gain City started);

(d) The sum of $232,860.05 being the difference in the monthly rental between the Sub-Lease

and the new lease with Gain City calculated over the initial two year period of the lease to Gain City;

(e) The sum of $62,212.50 being the difference in the monthly rental between the Sub-Lease and the new lease with Gain City calculated over the six months of the lease to Gain City following the initial two year period;

(f) Damages to be assessed for the 2.5 years which would have remained on the Sub-Lease after the lease with Gain City expires;

(g) The sum of $53,887.88 being the agent's commission paid by the defendant for securing a replacement tenant for the Premises; and

(h) The sum of $1,010,117.52 being triple rent from 14 October 2011 (the date of repudiation) to 12 March 2012 (the date on which the plaintiff yielded up the Premises to the defendant) which the defendant was entitled to charge the plaintiff pursuant to cl 6.13 of the Sub-Lease.

84 The defendant also seeks an indemnity from the plaintiff for the differential premium payable to the SLA, and a full indemnity for its legal costs and expenses pursuant to cl 6.5(b) of the Sub-Lease.

The issues for determination

85 The issues which arise for determination on the plaintiff's claim are:

(a) Did the defendant make a misrepresentation to the plaintiff?

(b) If so, did the misrepresentation induce the plaintiff to enter into the Letter of Offer and the Sub-Lease?

(c) If so, did the plaintiff reasonably rely on the misrepresentation?

(d) If so, was the defendant's misrepresentation also negligent? In other words, can the defendant discharge its burden under s 2(1) of the Act of showing that it had reasonable ground to believe and did believe up to the time the parties entered into the Sub-Lease that its representation was true?

(e) If the defendant can discharge the burden under (d), is the plaintiff nevertheless entitled to relief for the defendant's innocent misrepresentation, namely rescission of the Letter of Offer and Sub-Lease, coupled with an indemnity in equity?

(f) If the defendant cannot discharge the burden under (d): to what relief is the plaintiff entitled and on what measure?

(g) Alternatively, did the defendant commit a repudiatory breach of the Sub-Lease and Letter of Offer by failing to respond to the plaintiff's request to resume fitting-out works from June to August 2011 and if so, what losses flowed from that breach?

(h) Alternatively, is the defendant unjustly enriched if it were to retain the plaintiff's payments under the Letter of Offer and Sub-Lease?

86 The issues on the defendant's counterclaim are:

(a) Did the plaintiff commit a repudiatory breach of the Sub-Lease by breaching cll 3.14(2)(b), 3.14(2)(c), 3.14(3)(e), 3.17(1) and 3.17(2)(a) of the Sub-Lease?

(b) If so, what losses flowed from that breach?

(c) Is the defendant is entitled to a full indemnity for the costs and expenses of defending the plaintiff's claim and bringing its own counterclaim?

The witnesses

87 I preface my analysis of these questions with brief comments on the witnesses who gave evidence at trial.

88 The principal witnesses for the plaintiff were Mr Lim Jr and Mr Lim Sr. Although their evidence was not entirely without difficulty, it was largely consistent with the contemporaneous documents and aligned with the inherent probabilities to which they gave rise. Where the plaintiff's and defendant's witnesses' accounts conflicted and there was no contemporaneous independent evidence to test the conflicting evidence against, I prefer the evidence of the plaintiff's witnesses.

89 The principal witnesses for the defendant were Mr Moran and Mr Kamphorst. I found Mr Moran to be a thoroughly unreliable witness. He gave self-serving oral evidence on material facts which was inconsistent with the contemporaneous evidence. For example, referring to his correspondence with Prologis on 8, 11 and 21 July 2011 (see [62] above), Mr Moran testified that he was not sure at that time whether or not the differential premium was contractually due under the State Lease. [note: 55] Mr Moran's testimony on the first two days he took the stand was that Prologis had no right to pass the differential premium on to the defendant because the SLA was wrong in imposing the differential premium, *ie*, it was not contractually due. If this was indeed what he thought at the time, Mr Moran should not have asked Prologis to pay the differential premium at all. But that was not what Mr Moran's letters said. Mr Moran's letters asserted that Prologis was obliged to pay the differential premium and that the defendant was not obliged to reimburse it. For example, at paragraph 2 of the 8 July 2011 letter, Mr Moran wrote that "there still remains an outstanding differential premium sum". [note: 56] Mr Moran's testimony then shifted gears again. He said that it was only in the process of preparing for trial and upon receiving copies of the correspondence between SLA and Prologis that he realised that the SLA was wrongly imposing the differential premium. [note: 57] Further, Mr Moran's oral evidence changed from day to day. If Mr Moran truly believed that the SLA was wrongly imposing the differential premium and that Prologis was wrong to try to pass it on to the defendant, then the *defendant* would have been quite wrong to seek to pass the differential premium on to the plaintiff, as it did. Mr Moran realised this overnight. The next day, on his final day on the stand, his position underwent a self-serving 180 degree change. He said that the differential premium was *not* wrongly imposed by the SLA. He said that he had new information which caused him to change his evidence. When I asked him what new information that was, he feigned ignorance of my question and could not answer. He eventually told me that he had reached a "new understanding" of a letter dated 22 August 2011 from the SLA. When he was pressed on what this new understanding was and how it came to be that Mr Moran had arrived at that new understanding only that morning, Mr Moran's position changed within a matter of minutes as he attempted to 'refine' that understanding in the witness stand. When it was pointed out to him that his position changed from one day of trial to another, he attempted to gloss over it by saying that he could "see that it appears inconsistent" but was not in fact inconsistent with those facts on which his case rested. [note: 58]

90 Mr Kamphorst fared slightly better on the stand. His evidence was largely consistent, both

internally and with the documents. It suffered from a lack of clarity as to what exactly he had said at the time of the first and second viewings but was for the large part consistent with the plaintiff's witnesses' evidence.

The claim in misrepresentation

Did the defendant make a misrepresentation to the plaintiff

91 The plaintiff's case is that the defendant, on several occasions, represented that: (1) the plaintiff could use the Premises as a showroom; and (2) no further approvals were needed to use the Premises as a showroom. Although the plaintiff's pleadings cast this as two representations, the gist of it was in fact a single representation about the existing state of the Premises: that it had all necessary approvals for use as a showroom. I find that the defendant did make that representation on these occasions: (1) at the first viewing; (2) at the second viewing; (3) at the signing of the Letter of Offer; and (4) at the signing of the Sub-Lease.

92 I accept the evidence of the plaintiff's witnesses that it was of utmost importance to them that it be able to use the Premises as a showroom because they knew of other furniture companies running into trouble for using premises as showrooms without all necessary approvals. I also accept that that led the plaintiff's representatives to ask Mr Kamphorst whether the plaintiff could use the Premises as a showroom on each of these four occasions.

93 The defendant accepted that it had said certain things in response to the plaintiff's queries. Mr Kamphorst agreed in cross-examination that he was marketing the Premises to the plaintiff as an ancillary showroom for the plaintiff to display its furniture and furniture accessories and for that reason pointed out during the first viewing that the Premises were fitted with full-length glass panels. [note: 59] Mr Kamphorst also accepted that he confirmed, in response to a question from Mr Lim Jr during the first viewing, that the entire floor area of the Premises was available for use as a showroom. [note: 60] It was undisputed that Mr Kamphorst told the plaintiff that the URA had approved the Premises for use as an ancillary showroom and that there were "several restrictions placed on its use as a result." [note: 61] Mr Kamphorst said that this was because it was "approved by URA as a showroom". [note: 62] He also showed Mr Lim Sr a copy of the URA's written permission (see above at [10]) showing that it had approved the Premises for use as an ancillary showroom.

94 It is also not in dispute that this aspect of what Mr Kamphorst represented was true in point of fact. The URA's written permission showed that the URA had indeed approved the Premises for use as an ancillary showroom (see above at [10]). The URA reconfirmed this in subsequent correspondence after the dispute arose. But the URA had no say on the use of the Premises permitted under the *State Lease*, and so had to defer to SLA on this key issue.

95 The critical issue then is whether Mr Kamphorst represented to the plaintiff that no further approvals were needed to use the Premises as a showroom. Mr Kamphorst testified that he told Mr Lim Jr and Mr Lim Sr at the first viewing that he was "not sure if there were any other government and/or regulatory approvals needed." [note: 63] I do not accept his evidence, not least because it was clearly contrary to his state of mind at that time. I prefer Mr Lim Jr's evidence that Mr Kamphorst assured him that all necessary approvals had been given and that no further approvals had to be obtained. [note: 64] Mr Lim Jr's evidence is consistent with and corroborated by the contemporaneous evidence. I say this for three main reasons.

96 First, it makes perfect sense for Mr Kamphorst to have made this representation because that

was what he actually believed: Mr Kamphorst not only believed that the URA had approved the Premises for use as an ancillary showroom, he also believed that *only* URA approval was required for the plaintiff to use the Premises as a showroom.

97 It is clear to me that neither party contemplated when they executed the Letter of Offer and the Sub-Lease that either party would need to obtain approval from anyone other than the URA for the defendant to lease the Premises to the plaintiff as a showroom. It was only on 27 May 2011, when Prologis sent a copy of the SLA's 21 April 2011 letter to the defendant, that the defendant became aware that the terms of the State Lease meant that the plaintiff's intended use under the Sub-Lease required Prologis to secure the SLA's approval under the State Lease. And it was only when, on the same day, the defendant communicated this to the plaintiff that the plaintiff became aware of this. This date, 27 May 2011, was of course long after the Letter of Offer and the Sub-Lease had been signed.

98 Second, even after 27 May 2011, the defendant failed to appreciate that the SLA viewed its approval as an *independent* approval, completely separate from the URA's approval given under the Planning Act in 2006 at RBC's construction phase. Again, this shows that the defendant's view, even after 27 May 2011, remained that it was *only* the URA's approval under the Planning Act which was necessary and that the problem had arisen because the SLA failed properly to understand the scope of the URA's approval.

99 Third, once the defendant discovered that the SLA's view was that it exercised an independent right of approval arising under the State Lease, it behaved with Prologis exactly as one who had made the misrepresentation and who feared the resulting liability would have behaved. The defendant alleges that it did not represent to the plaintiff that no further approvals were needed to use the Premises as a showroom. If that is true, the defendant would have no reason to fear liability to the plaintiff. So, if the defendant's case were correct, it makes no sense for the defendant, upon learning that there was indeed a separate SLA approval required, to insist that Prologis should indemnify the defendant against any liability to the plaintiff. But that is precisely what the defendant did. On 11 July 2011, fearing a claim by the plaintiff, Mr Moran wrote to Prologis to make that very proposal, asserting that the plaintiff's wasted expenditure was Prologis's fault. [note: 65] This was not a one-off. The defendant persisted. It wrote to Prologis on two further occasions in July, on 21 July 2011 and 28 July 2011, [note: 66] to restate its position and insist that Prologis pay the differential premium and indemnify the defendant against liability to the plaintiff. In its letter dated 21 July 2011, Mr Moran even threatened legal action against Prologis to force Prologis to indemnify it against the plaintiff's claims. [note: 67]

100 Against this backdrop, the defendant relies on cll 1.3 and 6.3 of the Letter of Offer. Those clauses read together expressly provide that it is the plaintiff's, and not the defendant's, responsibility to obtain approval from the "URA, NEA and other relevant authorities". The defendant says that this expressly places the burden on the *plaintiff* to secure the SLA's approval under the State Lease for Prologis to lease the Premises (to the plaintiff via the defendant) as a showroom. I cannot accept this submission.

101 First, I do not consider that the SLA comes within the scope of cl 1.3 of the Letter of Offer as a matter of construction. It is true that the SLA is a government authority and therefore might be said to be one of the "relevant authorities" contemplated by cl 1.3. But in the parties' contractual arrangements, the fact that the SLA is a government authority is a mere coincidence. The SLA's approval for the defendant to lease the Premises to the plaintiff as a showroom was not required in the same sense as the URA's approval was required. The URA's right of approval is vested in it in its

capacity as the competent government authority designated to administer the Planning Act. The right of approval which the SLA had was a purely contractual right vested in it in its capacity as the lessor (or more accurately, as the representative of the lessor) under the State Lease, not as an arm or delegate of government charged with regulatory powers under primary or subsidiary legislation. As the source of SLA's right of approval is purely contractual and not statutory, SLA's approval would have been necessary to use the Premises as a showroom even if SLA had been a private entity rather than a government authority. The SLA was thus no more one of the "relevant authorities" for the purposes of cl 1.3 than was Prologis in its capacity as the lessor under the Head Lease and another entity whose approval was required for the defendant to lease the Premises to the plaintiff for use as a showroom. On this ground, I hold that cl 1.3 of the Letter of Offer did not impose any obligation on the plaintiff to seek approval from the SLA under the State Lease to use the Premises as a showroom.

102 Second, the defendant argued that it was the plaintiff's obligation to seek approval from the SLA because cl 6.3 of the Letter of Offer provided that the Letter of Offer was null and void if the plaintiff as lessee could not obtain "approval for the intended use of the Premises as referred to in Clause 1.3, within one (1) month from 1 March 2011 of the initial submissions plans" (see above at [26] and [31]). This is an unhappily worded clause whose meaning I am unable to decipher as a matter of language, let alone as a matter of construction. But it is not necessary to arrive at a conclusion as to its meaning. Cl 6.3 refers to cl 1.3 which in turn depends for its contractual force on the phrase "relevant authorities". So reliance on cl 6.3 does not advance the defendant's case any more than reliance on cl 1.3.

103 Third, as I have mentioned above (at [97]), at the time the parties executed the Letter of Offer and the Sub-Lease, SLA's approval was not even in their contemplation. The Sub-Lease required the plaintiff to seek further approvals only if it wanted to use the Premises for something *other than* a furniture showroom, [note: 68] or to use it in a way which did not follow the "*guidelines* of all other relevant authorities" [note: 69] [emphasis added]. This, again, referred to *regulatory* approval, not approval from SLA. This also implies that all necessary approval to use the Premises as a showroom – as contracted for – had *already been granted* and the tenant was responsible for abiding by the conditions of that approval. This is quite unlike the lease that the defendant later reached with Gain City which expressly refers to the SLA and the conditions under the State Lease. [note: 70]

104 Fourth, Mr Kamphorst communicated with the plaintiff on and after 27 May 2011 in a manner inconsistent with any belief that it was the plaintiff's obligation to obtain approval from the SLA. If Mr Kamphorst believed this, I would have expected him on 27 May 2011 to write to the plaintiff simply to tell it to comply with its obligations and secure the necessary approval from the SLA. That is not what he did. In fact, the defendant made no allegation in any of the written or oral communication between the plaintiff and the defendant on or after 27 May 2011 that it was the *plaintiff* who should resolve the issue which had arisen because it was the *plaintiff* who was responsible for securing SLA's approval. This was the case even after the defendant realised that the SLA took the view that its approval was independent of the URA's approval. It was not until the threat of litigation focused the defendant's mind that the defendant took this position, quite contrary to the contemporaneous documents.

105 So on 27 May 2011, instead of writing an adversarial letter to Mr Lim Jr of the plaintiff telling him to get the necessary approval from the SLA, Mr Kamphorst wrote an essentially defensive email to Mr Ling of Prologis explaining that he had made clear to the plaintiff that the Premises could be used only as an ancillary showroom:

> We have always conveyed to the incoming tenant, [the plaintiff], that the showroom is of the

> Ancillary Showroom status and not to be used as a Commercial Showroom. I'm also in the process of clarifying the exact definition of an Ancillary Showroom from URA. It seems there is also some confusion there. [note: 71]

106 When Mr Kamphorst phoned Mr Lim Jr on the same day to inform him about the differential premium, it does not appear that the conversation was adversarial. In response, Mr Lim Jr wrote to offer the defendant his "help in any way possible". [note: 72] Mr Kamphorst replied that he would find Mr Lim Jr's help "very useful". [note: 73] It is very telling that it was Mr Kamphorst who, without demur, took on the responsibility for clarifying the issue with Prologis. And although Mr Kamphorst accepted Mr Lim Jr's offer of help, this offer was clearly voluntary and ancillary to what Mr Kamphorst saw as his own responsibility.

107 The defendant contends that DHL's agreement to pay the differential premium for the proprietary racking system installed on the 2nd storey of RBC supports their case that it was the plaintiff's obligation to secure the SLA's approval and, if necessary, to pay the differential premium. The defendant argues that both DHL and the plaintiff understood that any financial risk of a further approval which was needed would fall on the tenant instead of the head lessor. I reject this submission. What DHL did or did not do under its sub-lease has little bearing on what the plaintiff was obliged to do under the Sub-Lease. The obvious distinction, of course, is that it was DHL who wanted to install the proprietary racking system for its own use whereas neither the plaintiff nor the defendant appreciated that the Premises were lacking an essential approval from the SLA for the contracted use specified in the Sub-Lease. Further, this position is inconsistent with the defendant's contemporaneous correspondence. Mr Moran wrote to Prologis on 28 July 2011 to, in his words, "categorically deny" that DHL's payment of the differential premium established that the plaintiff would also have to pay the differential premium imposed to use the Premises as a showroom. He described DHL's payment of the differential premium for the lease of the 2nd floor unit of RBC as a "purely… commercial decision in order to avoid any potential disruption to their business". [note: 74]

108 I find that all the evidence points in one direction – that the defendant did represent to the plaintiff that no further approvals were needed to use the Premises as a showroom. That representation was clearly false, as the SLA's approval under the State Lease was in fact required in order to use the Premises as a showroom of any sort.

The misrepresentation induced the plaintiff to sign the Letter of Offer and Sub-Lease

109 It is clear that this misrepresentation induced the plaintiff to enter into the Sub-Lease. I accept the plaintiff's evidence that the issue of whether the Premises could be used as a showroom without further approval was of crucial importance to it. Given that, it is clear to me that the plaintiff would not have signed the Letter of Offer or executed the Sub-Lease if it thought that the defendant did not have in place all necessary approvals to let the Premises for use as a showroom.

The plaintiff reasonably relied on the misrepresentation

110 I find also that the plaintiff's reliance on the defendant's representation was reasonable. The plaintiff made very clear from the beginning that it was anxious to ensure that the Premises had all necessary approvals to be used as a showroom. I have found that it repeatedly sought and repeatedly received such assurances from the defendant. The plaintiff did not simply rely on the defendant's word at face value. The defendant bolstered its word by relying on the URA's planning permission, the schematic plan in the lift lobby, the physical features of the Premises and its own correspondence with the URA. There was nothing to indicate to the plaintiff that it could or should

not rely on the defendant's representation that the Premises needed no further approvals to be used as a showroom. The additional approval which was in fact needed arose under the State Lease. But the plaintiff had no knowledge of the terms of the Head Lease, let alone the terms of the State Lease. The plaintiff did not and could not know what the terms of those leases were or whether those leases required any further approvals. And it was entirely reasonable for the plaintiff to observe the contractual hierarchy and deal only with its lessor, the defendant, rather than approaching Prologis or SLA directly to make its own inquiries. Indeed, a direct approach of that nature would have been wholly unreasonable conduct and I am sure the defendant would have viewed it in that way. The upshot is that the plaintiff cannot be faulted for relying on the defendant for information about what it was offering for lease and for believing the defendant when it represented that the Premises needed no further approval to be used as a showroom. The only approval that the plaintiff had an obligation to secure on its own was approval for its fitting out plans. It duly secured that approval both from the defendant (as its lessor), from Prologis (through the defendant) and from the URA.

111 I accordingly hold that the plaintiff reasonably relied upon the defendant's misrepresentation when it entered into the Letter of Offer and Sub-Lease. The analysis from this point forward diverges depending on whether the misrepresentation is correctly classified as negligent or innocent. I deal with negligent misrepresentation first.

The defendant's misrepresentation was negligent

Types of negligent misrepresentation

112 To establish the defendant's liability for negligent misrepresentation, the plaintiff relies both on s 2(1) of the Act and on common law liability in tort for negligent misrepresentation under the principle in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 ("*Hedley Byrne*") read in the light of the Court of Appeal's synthesis in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 (at [71] and [73]) of the law governing when a duty of care arises in the tort of negligence. The whole of the Act as it stood on 12 November 1993 has direct application in Singapore by virtue of and subject to s 4 of the Application of English Law Act (Cap 7A, 1994 Rev Ed) read with paragraph 8 of Part II of the First Schedule to that Act.

113 Section 2(1) of the Act reads as follows:

> Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be *so liable* notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true. [Emphasis added.]

The requirement of honest and reasonable belief under s 2(1) of the Act

114 The purpose of both s 2(1) of the Act and *Hedley Byrne* was to create an exception to the general rule at common law that an innocent misrepresentation – even if made negligently – does not give rise to liability in damages. The general rule left victims of misrepresentation largely without recourse once the right to rescission was barred. A plaintiff in that position could secure damages for misrepresentation only by discharging the heavy burden of proving fraud or dishonesty.

115 In 1963, the House of Lords created a common law exception to this general rule in its decision in *Hedley Byrne*. In 1967, the English Parliament created a statutory exception to this general rule in s

2(1) of the Act. Both exceptions apply to innocent misrepresentations which are made negligently. But the two exceptions are subject to different criteria. Four of those differences are significant for present purposes. First, statutory liability under section 2(1) of the Act arises only when a misrepresentation leads to a contract. Second, a plaintiff relying on s 2(1) of the Act does not have to establish that the defendant owes him a duty of care. Third, the burden of proof in a claim under s 2(1) of the Act lies on the defendant: he will be liable in damages to the plaintiff "unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true." Finally, a plaintiff who succeeds under s 2(1) of the Act is entitled to damages on the more generous measure of damages applicable to fraudulent misrepresentation (see [147] below). All of this means the plaintiff's rights in this case under the *Hedley Byrne* species of liability in negligence is but a subset of its rights under s 2(1) of the Act. It is therefore not necessary for me to deal separately with the plaintiff's claim for damages under the principle in *Hedley Byrne*.

116 The Act was preceded by the English Law Reform Committee's Tenth Report on Innocent Misrepresentation (Cmnd 1782, 1962) ("the Law Reform Committee Report"). The House of Lords decided *Hedley Byrne* after the Law Reform Committee Report but before the English Parliament enacted the legislation that the Report recommended. Curiously, no attempt was made to reconcile the provisions of the Act with the decision in *Hedley Byrne* before the Act became law.

117 The Law Reform Committee analysed the issues which underlie what became s 2(1) of the Act as follows (at para 17):

> We now turn to the second of the criticisms made against the present law, namely that it does not give a right to compensate for loss resulting from an innocent misrepresentation… It has been suggested to us that a person who has entered into a contract in reliance on a representation which has proved to be false should be able to bring an action for damages independently of any right he may have to rescind the contract. The need for this has been emphasised by the Standing Joint Committee of the motoring organisations, who have drawn our attention to the fact that although there may in many cases be every indication of deliberate misrepresentation and concealment of the truth there is rarely enough evidence to establish fraud, which is notoriously difficult to prove. We agree that the present law does not provide an adequate remedy but we do not think it would be right to give every victim of an innocent misrepresentation the right to claim damages, as the Law Society have suggested. If neither party has culpably misled the other, there is everything to be said for holding the parties to their bargain when the deal can no longer be undone. In such a case, the loss should rest where it falls. On the other hand, we think that where one of the parties was at fault in making the representation, the other ought to be entitled to damages as of right. We also think that the onus should be on the representor to satisfy the court that he was not at fault. He will normally be in a better position to know the true facts than the other party. For instance a vendor should know the likely defects in the articles he sells from his specialised knowledge of the trade. If he was truly innocent of any desire to mislead, he will suffer little hardship by being put to the proof of his innocence but, if he cannot establish this, the loss should fall on him rather than on the other party. [note: 75]

118 From this passage, I discern two points underlying section 2(1) of the Act. First, the policy underlying this provision is that it is just that a representee who has entered into a contract in reliance on a negligent misrepresentation should have a remedy in damages in addition to any right he may retain to rescind the contract. Second, in those circumstances, it is also just that the burden of proof should be reversed and rest on the representor who is responsible for putting the negligent misrepresentation into circulation. The result is essentially an early form of consumer protection

legislation imposing a burden to take reasonable care upon a person who makes an express representation leading to a contract. The basis for doing so is that the representor can be assumed in the typical case to have "specialised knowledge", is usually skilled, can reasonably be taken to know more about the subject-matter of the representation than the representee and is more able to withstand the loss in those marginal cases which turn solely on the incidence of the burden of proof.

119 The Act therefore draws a distinction between an innocent misrepresentation made *without* reasonable grounds for believing it to be true and an innocent misrepresentation made *with* such grounds. Technically, both types of misrepresentation are subsets of innocent misrepresentation, and are therefore distinct from fraudulent misrepresentations. It is however convenient for the analysis which follows to refer to three mutually-exclusive categories of misrepresentation: innocent, negligent and fraudulent. The Act attaches liability in damages for negligent misrepresentation but not for innocent misrepresentation. John Cartwright, *Misrepresentation, Mistake and Non*-Disclosure (Sweet & Maxwell, 3rd Ed, 2012) ("Cartwright") explains (at para 7-16) that the notion of reasonable belief used to distinguish between innocent and negligent misrepresentations is taken by analogy from the legislation which made company directors liable for negligent misstatements in prospectuses, even in the absence of deceit (*Derry v Peek* (1889) 14 App Cas 337). *Cartwright* further points out that the link to the tort of deceit survives in the Act's reference to the fiction of fraud (see the words emphasised in [113] above).

The defendant fails to discharge its burden under s 2(1) of the Act

120 I accept as a fact that the defendant did believe up to the time it executed the Letter of Offer and Sub-Lease that the Premises had been approved by the URA for use as a showroom and needed no further approvals for such use. At the time the defendant made these representations, it did not appreciate that the State Lease required SLA's approval in addition to the URA's approval. Mr Kamphorst testified – and I believed him – that he was "led to believe" [note: 76] that no further approvals would need to be obtained in order for the Premises to be used as a showroom.

121 The question that remains under s 2(1) of the Act, therefore, is whether the defendant discharged its burden of proving that it had reasonable grounds to believe that its representation was true at the material time. I find that the defendant did not. The defendant had in its control and possession the Head Lease and the State Lease. Although the defendant was never of course a party to the State Lease, the defendant had an obligation under the Head Lease to be familiar with the terms and conditions of the State Lease. Further, cl D18 of the Head Lease (see above at [14]) obliged the defendant to "comply with and cause its sub-tenants… to observe and comply… with all terms and conditions of" the State Lease. [note: 77] This obligation meant that the defendant, when sub-letting the Premises, had a legal duty under the Head Lease to check the terms and conditions of the State Lease. The defendant owed this obligation, of course, not to the plaintiff but to Prologis as the counterparty to the Head Lease. But the existence and purpose of this obligation is nevertheless a factor to be weighed in determining the reasonableness or otherwise of the grounds which the defendant had for making the representation to the plaintiff that it did. The purpose of this obligation is to ensure that the defendant does not put Prologis in breach of the terms of the State Lease by the terms of any sub-lease which it extends to a third party. This is exactly what happened in this case: the defendant leased the Premises to the plaintiff for use as a showroom, putting Prologis in breach of its obligations to SLA under the State Lease and thereby putting itself in breach of its obligations to Prologis under the Head Lease. Mr Kamphorst admitted that he had read the Head Lease [note: 78] and would have been alerted to the existence of crucial information which may be contained in the State Lease. I add for good measure that the defendant was not a complete stranger to the State Lease: it was the defendant's sister company RLG which originally entered into it with the

State.

122 In *Howard Marine & Dredging Co Ltd v A Ogden & Sons (Excavation) Ltd* [1978] QB 574 ("*Howard Marine*"), the defendant owned German-built barges with a carrying capacity of 1,055 tonnes. The plaintiff chartered the defendant's barges to transport excavated clay from a building site to be dumped at sea. Before chartering the barges, the plaintiff asked the defendant's marine manager about the carrying capacity of the barges. He represented that the barges had a carrying capacity of 1,600 tonnes. He derived this figure from Lloyd's Register, a public record which is ordinarily highly reliable. But he was aware that the defendant had documents from the barge's German manufacturer which gave the carrying capacity correctly, and straight from the horse's mouth, as 1,055 tonnes. The defendant's marine manager accepted that he had seen the manufacturer's documents and the 1,055 tonne figure at some point in time. The defendant, however, contended that it was reasonable for its marine manager to have relied on Lloyd's Register as it is the 'bible' of the shipping trade. The Court of Appeal (Lord Denning MR dissenting) held that the defendant had failed to discharge its burden of proof under section 2(1) of the Act because it had not shown any objectively reasonable ground to prefer the carrying capacity given in Lloyd's Register, even though it was ordinarily reliable, over the carrying capacity given in the manufacturer's own documents (at 598F).

123 The question in *Howard Marine* was whether the representor could have reasonable grounds for making a misrepresentation when he had or ought to have had special knowledge from the more reliable documents in his possession which would falsify the representation he made. The English Court of Appeal held that he could not. The defendant in the present case can be in no better position because it chose not to read the State Lease. That was a document which was within its possession and it was under an obligation – albeit to Prologis – to be familiar with its contents.

124 Had the defendant checked the State Lease, it would have become aware of cl 2(ii) and 2(iii) of the State Lease, which allowed the lessor to determine the enhanced value of the land with reference to the URA's permission to designate the Premises as an ancillary showroom and to reflect that enhanced value in the form of a differential premium. Even though the permission had been granted before the date of the State Lease, the State Lease incorporated the Building Agreement which pre-dated the permission. The use of the land under the State Lease was thus limited to the primary industrial use permitted in land zoned B2 in the Master Plan. That use did not include the use of the Premises as a showroom.

125 The defendant was not suffering from any handicap in interpreting the State Lease. It was legally advised at the time and could easily have shown its lawyers the State Lease and sought legal advice on the obligations it had under the State Lease and Head Lease. This would have been sufficient to dispel any ambiguity about what cl 2 of the State Lease meant and whether granting the Sub-Lease would put the defendant in breach of its obligations to Prologis.

126 I therefore hold that the defendant did not have reasonable grounds for believing that no other approvals were needed to use the Premises as a showroom.

The defendant did not exclude liability for negligent misrepresentation

127 I also reject the defendant's argument that it excluded its liability for misrepresentation. The defendant relies specifically on cl 6.9 of the Sub-Lease, which reads as follows:

No representations

> The tenant shall accept the Demised Premises "as is where is" on the Handover Date. The Landlord shall not be bound by any representations or promises with respect to the Building and its appurtenances, or in respect of the Demised Premises, except as expressly set forth in this Lease with the object and intention that the whole of the agreement between the Landlord and the Tenant shall be set forth herein (save for any terms or modifications thereof or supplements thereto which may be expressly agreed in writing between the parties), and shall in no way be modified by any discussions which may have preceded the signing of this Lease. The landlord does not expressly or impliedly warrant that the Demised Premises are now or will remain suitable or adequate for all or any of the purposes of the tenant and all warranties (if any) as to suitability and adequacy of the Demised Premises implied by law are hereby expressly negated. [note: 79]

128 There are four parts to cl 6.9 of the Sub-Lease. First, the Premises are let on an "as is where is" basis. Second, there is an express exclusion of liability for any pre-contractual misrepresentation "with respect to the Building and its appurtenances, or in respect of the Demised Premises" which were not expressly included as a term of the Sub-Lease. Third, there is an 'entire agreement' clause which states that the terms which bind the parties are limited to the terms found in the Sub-Lease and do not include any pre-contractual promises or representations. Fourth, there is a negation of liability for any warranty made about the current and future suitability of the Premises for the purpose to which the plaintiff intends to put them.

129 The first part of cl 6.9 which stipulates that the plaintiff takes the Premises "as is where is" can be easily dealt with. The defendant submits that the effect of this clause is that the plaintiff took the Premises under the Sub-Lease with only its existing approvals at the time it signed the Sub-Lease. I reject the defendant's argument. The result of accepting this submission would be to place the risk on the plaintiff for all approvals needed for the Premises, or indeed for RBC, but which the defendant, Prologis or their predecessors in title failed to secure. Mr Moran agreed that taken to its logical conclusion, the defendant's interpretation of the "as is where is" obligation meant that if, unknown to the plaintiff and the defendant, RLG in 2006 failed entirely to get any permission at all to erect RBC, the plaintiff would be responsible by reason of the Sub-Lease for curing that defect in 2011. That is an absurd proposition wholly devoid of any sense of commercial reality.

130 The second part of cl 6.9 expressly excludes liability for any pre-contractual misrepresentation "with respect to the Building and its appurtenances, or in respect of the Demised Premises". The defendant argues that this excludes liability for negligent misrepresentation of the existing state of approval of the Premises. I reject this argument for two reasons.

131 First, I find that the defendant's interpretation of the second part is strained. The natural meaning of this part of cl 6.9 is to exclude liability for representations pertaining "to the Building and its appurtenances, or in respect of the Demised Premises", *ie*, those pertaining to the tangible state of the Premises rather than their intangible attributes. If this second part of cl 6.9 was meant to be read more widely to cover intangible attributes, then there would be no need to include the fourth part of cl 6.9, which excludes liability for any warranty made about the *suitability* of the Premises. The state of the approval of the Premises pertains not to the physical state of the building but to its attribute of being approved for use as a showroom. This is outside the scope of the language used in this part of cl 6.9.

132 Second, exclusion clauses like this part of cl 6.9 are subject to a test of reasonableness. Section 3 of the Act limits a contracting party's ability to exclude liability for negligent misrepresentation through an exclusion clause in the contract. Section 3 reads as follows:

Avoidance of provision excluding liability for misrepresentation

3. If a contract contains a term which would exclude or restrict —

(*a*) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or

(*b*) any remedy available to another party to the contract by reason of such a misrepresentation,

that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act (Cap. 396), and it is for those claiming that the term satisfies that requirement to show that it does.

133 Section 3(b) of the Act imports the test of reasonableness under s 11(1) of the English Unfair Contract Terms Act 1977. The whole of the Act as it stood on 12 November 1993 has direct application in Singapore by virtue of and subject to s 4 of the Application of English Law Act (Cap 7A, 1994 Rev Ed) read with paragraph 9 of Part II of the First Schedule to that Act.

134 Reading section 3 of the Act together with s 11(1) of the Unfair Contract Terms Act 1977, a clause which seeks to exclude liability for misrepresentation is of no effect unless it is a "fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made." The burden is on the defendant to show that the exclusion is reasonable.

135 The defendant has failed to discharge this burden. This part of cl 6.9 is unreasonable insofar as it seeks to exclude liability for pre-contractual representations going to the very root of the Sub-Lease. An exclusion clause of this nature would be reasonable if it were limited to excluding the defendant's liability for misrepresentation about patent defects relating to the physical condition, title or suitability of the Premises. It could also be reasonable if it excluded liability for misrepresentations about incidental features of the Premises, whether patent or latent. The clause is not, however, reasonable if it excludes liability for a misrepresentation as to the state of approvals for the Premises to be used as a showroom. That defect is latent and was a matter uniquely between Prologis and the SLA. Further, use as a showroom was the very basis for the Letter of Offer and the Sub-Lease. The plaintiffs told the defendant how crucial this was as early as the first viewing and they reminded the defendant of the importance repeatedly thereafter. The plaintiff was obliged under the Letter of Offer and Sub-Lease to use the Premises as a showroom for furniture and furniture accessories *and nothing else*. The plaintiff did not simply lease the ground floor of a building in Bedok North; they leased it as a showroom. In doing so, they relied on an express representation that it had all necessary approvals. The Premises had no value to the plaintiff without those approvals. The defendant knew this. I therefore find that cl 6.9 fails to have the effect for which the defendant relies upon it because it would to that extent be unreasonable.

136 The third part of cl 6.9 is an entire agreement clause. This provides that the Sub-Lease contains the full contractual terms of what the parties agreed. Its effect is to denude a collateral warranty (or other agreement) of legal effect or to render inadmissible any extrinsic evidence which reveals terms inconsistent with what is written in the contract (see *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 ("*Lee Chee Wei*") at [36]). I reject the defendant's argument that this part of cl 6.9 is effective to exclude liability for *misrepresentation*.

137 The plaintiff's case is not that the defendant undertook a contractual obligation to the plaintiff

to ensure that the Premises were approved for use as a showroom. The plaintiff's case is that the defendant misrepresented an existing attribute of the Premises, *ie*, that the Premises had *all necessary approvals for use* as a showroom. As the English Court of Appeal observed in *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep 611 ("*Inntrepreneur Pub Co*") at 614, " [a]n entire agreement provision does not preclude a claim in misrepresentation, for the denial of contractual force cannot affect the status of a statement as a misrepresentation". The Court of Appeal in *Lee Chee Wei* cited *Inntrepreneur Pub Co* with apparent approval (at [28]), albeit without commenting on its correctness as that issue did not arise in *Lee Chee Wei*. I agree with the holding of the court in *Inntrepreneur Pub Co*. I therefore hold that the entire agreement clause (the third part of cl 6.9) has no effect on the plaintiff's claim for *misrepresentation* under s 2(1) of the Act.

138 The fourth part of cl 6.9 excludes any pre-contractual warranty made about the current and future suitability of the Premises for the purpose to which the plaintiff intends to put them. I make two observations on this point. First, as I have already mentioned, the plaintiff's claim in this part of the analysis is not for breach of a warranty but for misrepresentation. This fourth part of cl 6.9 does not, therefore, address the head of the plaintiff's claim which I am now considering. Second, I find that this aspect of cl 6.9 is, in any event, unreasonable for the reasons given above at [135]. It therefore fails the test of reasonableness under s 3 of the Act and is to that extent of no effect.

139 I therefore hold that none of the four aspects of cl 6.9 of the Sub-Lease is effective to exclude the defendant's liability for the misrepresentation. That leaves the defendant no defence to the plaintiff's claim under s 2(1) of the Act. I have already held that the defendant failed to discharge its burden under s 2(1) of the Act of showing that it had reasonable ground to believe and did believe up to the time the parties entered into the Sub-Lease that its representation was true. The defendant is thus liable to the plaintiff in damages under s 2(1) of the Act.

What relief is the defendant entitled to for negligent misrepresentation?

The plaintiff is entitled to rescind the Sub-Lease

140 The Act does not cover the entire field of remedies for misrepresentation. The plaintiff's entitlement to rescind is governed by the common law (as opposed to statute law, not as opposed to equity) and arises as a consequence of the misrepresentation. So the plaintiff's entitlement to rescind applies regardless of whether the plaintiff brings itself within s 2(1) of the Act.

141 In order to rescind a contract, the rescinding party must make known to his contractual counterparty by overt and unequivocal words or conduct that he no longer wishes to proceed with the contract. The plaintiff claims to have rescinded the Letter of Offer and the Sub-Lease either by commencing these proceedings or by handing the Premises back to the defendant after reinstating them. The latter is, in my view, the correct analysis. By handing the Premises back to the defendant in their original condition, the plaintiff clearly signified to the plaintiff that it was withdrawing its ostensible assent to the Letter of Offer and the Sub-Lease and that it was taking matters back to the point just before the contract between the parties had been entered into. There can be no clearer indication of an intention to rescind than returning possession of the Premises, or of the indicia of possession, to the defendant after having voluntarily and unilaterally incurred the expense of reinstating the Premises.

142 By contrast, the writ which the plaintiff filed on 14 October 2011 was not in itself an act rescinding the Letter of Offer and Sub-Lease. In its terms, it was framed as a request *to the Court* to rescind the Letter of Offer and the Sub-Lease. [note: 80] It was only in the plaintiff's second amendment filed on 25 April 2012 that the plaintiff added a prayer that the Court declare that the

plaintiff had already rescinded the Letter of Offer and Sub-Lease.

143 I find that the plaintiff rescinded the Letter of Offer and Sub-Lease by reinstating the Premises and handing the indicia of possession back to the defendant on 9 January 2012, when Rodyk couriered the Premises' keys to the defendant. As mentioned in the narrative of the facts, the defendant did not accept the reinstatement works and formally accepted the return of the keys only on 12 March 2012. That does not however, postpone the date of effective rescission to 12 March 2012. An act of rescission is an unequivocal act of election by the *plaintiff*, not the defendant: see *Car and Universal Finance Co. Ltd v Caldwell* [1965] 1 QB 525 at 531. It is not a bilateral act which requires the counterparty to accept the rescission. The defendant's refusal to accept the keys does not change the fact that the plaintiff unequivocally elected to rescind and did so effectively by redelivering the keys to the defendant.

144 The plaintiff, in its closing submissions, also raised common mistake in equity as entitling it to rescind the Sub-Lease and Letter of Offer. I do not need to consider this alternative basis for rescission as it was clear to me that rescission was available for misrepresentation. None of the bars to rescission (affirmation of the contract, lapse of time, intervening third party rights and impossibility of restitution) apply.

145 I therefore hold that the plaintiff validly rescinded the Letter of Offer and Sub-Lease on 9 January 2012. The effect of rescission is to wipe away the contract between the parties *ab inito*. As a consequence of rescission, therefore, the plaintiff is entitled to a return of its deposit and pre-paid rent, *ie*, the following sums:

(a) The sum of $345,625 being the security deposit;

(b) The sum of $73,963.75 being rent prepaid for June 2011; and

(c) The sum of $69,125 being an inadvertent double payment of rent for June 2011.

The measure of damages under s 2(1) of the Act

146 Assessing damages under s 2(1) of the Misrepresentation Act raises two questions. First, are the damages to be awarded on the measure of damages in contract or on the measure in tort? Second, if they are to be awarded on the tort measure, is it the wider measure which applies to fraudulent misrepresentation or the measure which applies to ordinary negligence claims?

147 It has been held that damages under s 2(1) are to be calculated as damages in tort and as though the misrepresentation were fraudulent: *Ng Buay Hock v Tan Keng Huat and another* [1997] 1 SLR(R) 507 at [31] following the decision of the English Court of Appeal in *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297 ("*Royscot Trust*") at 306–307. Explaining why, Balcombe LJ said in *Royscot* (at 304–305):

> … [T]here is now a number of decisions which make it clear that the tortious measure of damages is the true one. Most of these decisions are at first instance and will be found in Chitty on Contracts, 26th ed. (1989), vol. 1, p. 293, para. 439, note 63, and in McGregor on Damages, 15th ed. (1988), pp. 1107-1108, para. 1745. One at least, *Chesneau v. Interhome Ltd.* (1983) 134 N.L.J. 341; Court of Appeal (Civil Division) Transcript No. 238 of 1983, is a decision of this court. The claim was one under section 2(1) of the Act of 1967 and the appeal concerned the assessment of damages. In the course of his judgment Eveleigh L.J. said:

> "[Damages] should be assessed in a case like the present one on the same principles as damages are assessed in tort. The subsection itself says: 'if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable . . .' By 'so liable' I take it to mean liable as he would be if the misrepresentation had been made fraudulently."

In view of the wording of the subsection it is difficult to see how the measure of damages under it could be other than the tortious measure and, despite the initial aberrations referred to above, that is now generally accepted. Indeed counsel before us did not seek to argue the contrary.

The first main issue before us was: accepting that the tortious measure is the right measure, is it the measure where the tort is that of fraudulent misrepresentation, or is it the measure where the tort is negligence at common law? The difference is that in cases of fraud a plaintiff is entitled to any loss which flowed from the defendant's fraud, even if the loss could not have been foreseen: see *Doyle v. Olby (Ironmongers) Ltd.* [1969] 2 Q.B. 158. In my judgment the wording of the subsection is clear: the person making the innocent misrepresentation shall be "so liable," i.e., liable to damages as if the representation had been made fraudulently. This was the conclusion to which Walton J. came in F. & B. Entertainments Ltd. v. Leisure Enterprises Ltd. (1976) 240 E.G. 455 , 461. See also the decision of Sir Douglas Frank Q.C., sitting as a High Court judge, in *McNally v. Welltrade International Ltd.* [1978] I.R.L.R. 497 . In each of these cases the judge held that the basis for the assessment of damages under section 2(1) of the Act of 1967 is that established in *Doyle v. Olby (Ironmongers) Ltd.* This is also the effect of the judgment of Eveleigh L.J. in *Chesneau v. Interhome Ltd.* already cited: "By 'so liable' I take it to mean liable as he would be if the misrepresentation had been made fraudulently."

This was also the original view of the academic writers. In an article, "The Misrepresentation Act 1967 " (1967) 30 M.L.R. 369 by P. S. Atiyah and G. H. Treitel, the authors say, at pp. 373-374:

> "The measure of damages in the statutory action will apparently be that in an action of deceit . . . But more probably the damages recoverable in the new action are the same as those recoverable in an action of deceit . . ."

…

148 This is commonly referred to as the "fiction of fraud". Section 2(1) mandates the fiction of fraud, it seems, even if the evidence shows clearly that the misrepresentation was not in fact made fraudulently, as in this case.

149 It appears that editors of Treitel changed their view between 1967 and 13th revised edition in 2011. At para 9-043 of the 2011 text, they say:

> The fiction of fraud seems to be quite unnecessary; and it may lead the courts to extend to cases within s 2(1) rules which have been developed in the context of fraudulent misrepresentation and which are wholly inappropriate where there is no actual fraud.

150 The House of Lords in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 acknowledged the academic criticism of *Royscot Trust* but expressed no view on the controversy. The view expressed by the current editors of *Treitel on the Law of Contract* (Sweet & Maxwell, 13th Ed, 2011) may be a valid view as to what the law *should* be. Indeed, it does seem clearly arguable that the fiction of fraud may have been introduced in order only to deem an innocent but negligent misrepresentation actionable and therefore to govern only liability

and not quantum. But, to the extent that it matters, I agree with *Royscot* that the plain meaning of the words used in s 2(1) cannot be read as being confined only to the test for liability. Those words clearly also import the wider measure of damages applicable to fraudulent misrepresentation.

151 The plaintiff is therefore entitled to damages assessed as though the defendant had made the misrepresentation fraudulently. This means that the plaintiff is entitled to recover all financial loss it suffered as a result of the misrepresentation whether foreseeable or not: *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158. Causation and remoteness, however, still apply to limit that liability.

152 Applying the measure of damages for fraudulent misrepresentation, I hold that the plaintiff is entitled to recover the following losses from the defendant as damages for negligent misrepresentation under s 2(1) of the Act:

(a) The sum of $13,272.00 being the stamp duty paid on the Sub-Lease;

(b) The sum of $2,700.51 being utilities charges it paid for the months of April and May 2011;

(c) The cost of the fitting-out works; and

(d) The reinstatement costs.

It was clearly foreseeable that if the defendant's representation turned out to be false, all four of these items of expenditure would be wasted. The defendant's misrepresentation was also the proximate cause of these wasted items. The elements and quantum of the plaintiff's claim for its fitting out and reinstatement costs, however, were not explored fully at trial. I will therefore hear the parties on the appropriate order to be made in respect of items (c) and (d).

153 That leaves the plaintiff's claim to recover the sum of $78,216.88 being interest charges it incurred in respect of a loan it took to finance the fitting-out works. I hold that this loss is too remote to be recovered, even applying the wider measure of damages available for fraudulent misrepresentation. There is no evidence that the defendant's misrepresentation was the *proximate* cause of the plaintiff incurring this interest expense. In particular, there was no evidence that the plaintiff's financial circumstances were such that it was compelled to borrow money to finance the fitting out works. If there had been such evidence, it may have been possible to argue that the defendant was obliged to take the plaintiff in the straitened financial circumstances in which it found it. Without such evidence, however, it is impossible for me to say whether it was the defendant's misrepresentation which was the proximate cause of the plaintiff's decision to borrow money and incur interest charges or the plaintiff's deliberate decision as to how most effectively to deploy its capital which caused it to seek financing for its fitting out costs. In my view, therefore, the plaintiff failed to discharge its burden of establishing a right to recover this head of damages.

The plaintiff's alternative claim in innocent misrepresentation

154 If I am correct in the view that the defendant did not have reasonable grounds to believe that its representation was correct, it is not necessary for me to consider the plaintiff's alternative claim in innocent misrepresentation. It suffices for me to observe that under this alternative claim, the only relief available to the plaintiff is rescission. The plaintiff would have no right to damages and would therefore be unable to recover the sums I have held it is entitled to recover under [152] above.

155 The plaintiff, as part of its alternative case in innocent misrepresentation, argues that it can recover all these sums from the defendant by way of an indemnity in equity, granted as a supplement

to an order for rescission in order to achieve true *restitutio in integrum*. The plaintiff relies for this submission on *Forum Development Pte Ltd v Global Accent Trading Pte Ltd and another appeal* [1995] 1 SLR 474. It suffices to point out that such an indemnity is available to indemnify the rescinding party only against losses suffered as a result of performing its *obligations* under the rescinded contract. The plaintiff can therefore recover its losses under [152] under such an indemnity only to the extent that it can prove that it incurred those losses in performing its *obligations* under the Sub-Lease. With respect to the largest of these claims, the fitting out costs, I am not satisfied that that can correctly be characterised as an obligation under the Sub-Lease. Certainly, if the Sub-Lease had not been rescinded and the plaintiff had failed to carry out the fitting out works but continued to pay rent as and when due, I doubt that the defendant would have had any action for breach of contract. That suggests to me that the fitting out works were not an obligation under the Sub-Lease.

156 But, as I have said, I need go no further in this analysis given my holding that the defendant's misrepresentation was negligent and that the plaintiff is therefore entitled to damages under s 2(1) of the Act.

Alternative claim for breach of contract

157 The plaintiff pleaded that the defendant was in repudiatory breach of the Sub-Lease and Letter of Offer when it refused to allow the plaintiff to resume fitting out works and insisted that the plaintiff pay the differential premium.

158 Given that I have already found that the plaintiff rescinded the Letter of Offer and Sub-Lease and given that I have granted the plaintiff damages pursuant to s 2(1) of the Misrepresentation Act, I do not need to analyse separately the plaintiff's claim in breach of contract. This is, in any event, a less advantageous way of framing the plaintiff's case because it proceeds on the basis that the contractual relationship between the parties subsisted until a repudiatory breach was accepted and the contract terminated. That analysis opens the door to the plaintiff being liable on the counterclaim.

Alternative claim in restitution

159 I have found that the defendant is obliged to compensate the plaintiff in damages for its loss arising from the defendant's negligent misrepresentation. It is therefore not necessary for me to address the plaintiff's alternative claim in restitution.

The defendant's counterclaim

160 The defendant asserts in its counterclaim that the plaintiff is in repudiatory breach of the Sub-Lease by reinstating and handing back the Premises. The defendant relies on alleged breaches of cll 3.14(2)(b), 3.14(2)(c), 3.14(3)(e), 3.17(1) and 3.17(2)(a) of the Sub-Lease and claims loss of rental, damages under the Sub-Lease, its agent's commission which it paid to secure a replacement tenant for the Premises, and indemnity costs as provided for by cl 6.5(b) of the Sub-Lease (see above at [83]).

161 Given my finding that the Letter of Offer and the Sub-Lease have been validly rescinded, the contracts are wiped away and there remains no contractual basis on which the defendant can make these claims. The counter-claim therefore fails.

162 Even if there had not been rescission, I find that there was no breach of any of the clauses which the defendant is alleging. The clauses at (a) to (g) of the defendant's counter-claim dealt with

obligations to obtain *regulatory* approvals and thus did not concern obtaining approvals from SLA, which was the requirement in this case. It makes no commercial sense for these clauses to mean that the plaintiff must get *SLA* approval. The plaintiff had no standing to deal with SLA: it was a stranger to the State Lease. These clauses cannot be read in the way that the defendant is submitting, *viz*, that the plaintiff would be in breach of the Sub-Lease if it did not get SLA approval for using the Premises as a showroom. In any event, the plaintiff never actually used the Premises as its showroom because the defendant told them to stop the fitting out works while the defendant worked things out with the SLA. So, there was no actual breach of any clause because the Premises were never actually used for a purpose outside of SLA's approved purposes.

163 As for the defendant's contractual claim for indemnity costs pursuant to cl 6.5(b) of the Sub-Lease, that too falls away with rescission of the Sub-Lease. In any event, as a matter of construction, cl 6.5(b) does not cover the situations such as the present where the plaintiff is compelled to commence legal proceedings to protect its rights and succeeds. Clause 6.5(b) covers the situation where the *defendant* is compelled to commence legal proceedings to vindicate its rights. In this case, I have found that the plaintiff was not in breach of the Sub-Lease.

Conclusion

164 In summary, I hold that the plaintiff validly rescinded the Letter of Offer and Sub-Lease on 9 January 2012 when it couriered the keys to the Premises back to the defendant after reinstating the Premises. I further hold that the plaintiff is entitled to damages for negligent misrepresentation under section 2(1) of the Act.

165 I therefore order that the defendant shall pay the plaintiff the following sums:

(a) The sum of $345,625 being the security deposit;

(b) The sum of $73,963.75 being rent prepaid for June 2011;

(c) The sum of $69,125 being an inadvertent double payment of rent for June 2011;

(d) The sum of $13,272 being the stamp duty the plaintiff paid on the Sub-Lease;

(e) The sum of $2,700.51 being utilities charges the plaintiff paid for the months of April and May 2011.

166 The plaintiff is also entitled to damages in respect of the fitting out works and the reinstatement works that it undertook. I will hear the parties on the appropriate order to be made in this respect.

167 I dismiss the plaintiff's claim for the sum of $78,216.88 being interest charges which it incurred on a bank loan to finance the fitting-out works.

168 I dismiss the defendant's counterclaim.

169 I will hear the parties also on costs.

[note: 1] Agreed Bundle, Vol 1, p 75.

[note: 2] *Ibid.*, p 180.

[note: 3] *Ibid.*, p 183.

[note: 4] *Ibid.*, p 192.

[note: 5] *Ibid.*, pp 201 and 215.

[note: 6] *Ibid.*, p 293.

[note: 7] *Ibid.*, p 391.

[note: 8] Notes of Evidence, 26 March 2013, p 30 lines 2–9.

[note: 9] Allen Lim's Affidavit of Evidence-in-Chief, paras 17 to 19, 21.

[note: 10] Lim Thiam Soon's Affidavit of Evidence-in-Chief, para 15.

[note: 11] Siebren Kamphorst's Affidavit of Evidence-in-Chief, para 18.

[note: 12] *Ibid.*, para 19.

[note: 13] Agreed Bundle, Vol 1, pp 341–342.

[note: 14] Siebren Kamphorst's Affidavit of Evidence-in-Chief, para 25; Agreed Bundle, Vol 1, p 345.

[note: 15] *Ibid.*, para 22.

[note: 16] *Ibid.*, para 24 and Notes of Evidence, 27 March 2013, p 7 line 25 to p 8 line 4.

[note: 17] Allen Lim's Affidavit of Evidence-in-Chief, para 41.

[note: 18] Siebren Kamphorst's Affidavit of Evidence-in-Chief, para 23.

[note: 19] Allen Lim's Affidavit of Evidence-in-Chief, para 37.

[note: 20] *Ibid.*, p 346.

[note: 21] Plaintiff's written submissions, paras 27–28.

[note: 22] Agreed Bundle, Vol 2, p 426.

[note: 23] *Ibid.*, p 450.

[note: 24] *Ibid.*, p 426.

[note: 25] *Ibid.*, p 431.

[note: 26] Agreed Bundle, Vol 2, p 457.

[note: 27] *Ibid.*, pp 482-483.

[note: 28] *Ibid.*, pp 485–486.

[note: 29] *Ibid.*, p 490.

[note: 30] *Ibid.*, p 496.

[note: 31] *Ibid.*, p 497.

[note: 32] *Ibid.*, p 513.

[note: 33] *Ibid.*, p 511.

[note: 34] *Ibid.*, p 519.

[note: 35] *Ibid*.

[note: 36] *Ibid*.

[note: 37] *Ibid.*, p 510.

[note: 38] Agreed Bundle, Vol 2, p 550.

[note: 39] Agreed Bundle, Vol 3, p 50.

[note: 40] Agreed Bundle, Vol 2, p 573.

[note: 41] *Ibid.*, p 596.

[note: 42] Agreed Bundle, Vol 3, pp 67–69.

[note: 43] *Ibid.*, pp 592–593.

[note: 44] *Ibid.*, pp 609–611.

[note: 45] *Ibid.*, pp 614–616.

[note: 46] Agreed Bundle, Vol 2, p 638.

[note: 47] *Ibid.*, p 640.

[note: 48] *Ibid.*, p 688.

[note: 49] *Ibid.*, p 686–687.

[note: 50] *Ibid.*, p 728.

[note: 51] *Ibid.*, p 701.

[note: 52] Statement of Claim (Amendment No. 3) para 7.

[note: 53] Statement of Claim (Amendment No. 3) para 11.

[note: 54] *Ibid.*, p 439.

[note: 55] Notes of Evidence, 25 March 2013, p 110 lines 11–25.

[note: 56] Agreed Bundle, Vol 2, p 592.

[note: 57] Notes of Evidence, 25 March 2013, p 13.

[note: 58] Notes of Evidence, 26 March 2013, p 12 lines 1–22.

[note: 59] Notes of Evidence, 26 March 2013, p 47 lines 14-18.

[note: 60] *Ibid.*, p 56 lines 8-23.

[note: 61] Siebren Kamphorst's Affidavit of Evidence-in-Chief, para 18.

[note: 62] *Ibid.*, p 48 lines 4-11.

[note: 63] Siebren Kamphorst's Affidavit of Evidence-in-Chief, para 23.

[note: 64] Allen Lim's Affidavit of Evidence-in-Chief, paras 17 to 19, 21.

[note: 65] *Ibid.*, p 593.

[note: 66] *Ibid.*, pp 614–616.

[note: 67] *Ibid.*, p 603.

[note: 68] *Ibid.*, p 426.

[note: 69] *Ibid.*, p 450.

[note: 70] Defendant's Bundle of Documents, p 71.

[note: 71] Agreed Bundle, Vol 2, p 513.

[note: 72] *Ibid.*, p 519.

[note: 73] *Ibid.*

[note: 74] *Ibid.*, p 615.

[note: 75] A copy of this report is found as Appendix B to The Honourable Mr Justice K R Handley & George Spencer Bower, *Spencer Bower, Turner and Handley: Actionable Misrepresentation* (LexisNexis Butterworths, London, 4th Ed, 2000).

[note: 76] *Ibid.*, p 66, line 6.

[note: 77] *Ibid.*, p 215.

[note: 78] Notes of Evidence, 27 March 2013, p 95, lines 9–13.

[note: 79] *Ibid.*, p 439.

[note: 80] Writ of Summons filed on 14 October 2011, p 14.