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

[2024] SGHC 248

Originating Claim No 216 of 2023

Between

Royal & Sons Organisation Pte Ltd

… *Claimant*

And

Hotel Calmo Chinatown Pte Ltd

… *Defendant*

JUDGMENT

[Landlord and Tenant] — [Covenants] — [Breach of tenant's covenants]
[Landlord and Tenant] — [Termination of leases] — [Forfeiture] — [Prohibition against assignment, subletting, parting with and sharing of possession and use of demised premises] — [s 18(8) of the Conveyancing and Law of Property Act]
[Landlord and Tenant] — [Termination of leases] — [Forfeiture] — [Requirements under s 18(1) of the Conveyancing and Law of Property Act]
[Landlord and Tenant] — [Termination of leases] — [Forfeiture] — [Repudiatory breach of the tenancy agreement]
[Landlord and Tenant] — [Recovery of possession] — [Holding over] — [Double rent chargeable for duration of holding over]

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Royal & Sons Organisation Pte Ltd
v
Hotel Calmo Chinatown Pte Ltd

[2024] SGHC 248

General Division of the High Court — Originating Claim No 216 of 2023
Kwek Mean Luck J
2–5, 9, 16 September 2024

30 September 2024 Judgment reserved.

Kwek Mean Luck J:

Introduction

1 The Claimant, Royal & Sons Organisation Pte Ltd ("Royal"), is a company incorporated in Singapore. It is in the business of property investment. Royal is the owner of the premises known as #01-01 & #01-12, 25 Trengganu Street, Singapore 058476 (the "Premises"). The Defendant, Hotel Calmo Chinatown Pte. Ltd. ("Calmo"), is a company incorporated in Singapore. It is in the business of operating hotels. Calmo was formerly known as K Hotel Advisors Pte. Ltd. On 8 June 2021, K Hotel Advisors Pte. Ltd. changed its name to Hotel Calmo Chinatown Pte. Ltd. The Defendant will be referred to as "Calmo", including at times when its name was K Hotel Advisors Pte. Ltd.

2 In OC 216 of 2023 ("OC 216"), Royal seeks the forfeiture of its lease with Calmo and for double rent from Calmo pursuant to s 28(4) of the Civil Law Act 1909 (2020 Rev Ed) ("CLA").

Background Facts

3 Sometime in or around May 2021, Royal and Calmo entered into negotiations in relation to the lease for the Premises. On 6 May 2021, Calmo's Chief Executive Officer, Mr Cai Wenchao ("Ken"), sent Royal's Head of Business Development, Ms Tan Lian Hwa ("Ivy"), a brochure about the Hotels under Calmo ("K Hotel Brochure").[1]

4 On 11 May 2021, Royal and Calmo entered into an Agreement to Lease in respect of the Premises (the "Agreement to Lease").[2] On 31 May 2021, Royal and Calmo entered into a Tenancy Agreement in respect of the Premises (the "Tenancy Agreement"), under which Royal leased to Calmo the Premises for a term of six years.[3]

5 On 12 October 2022, Ivy visited the Premises on an impromptu basis. She testified that she was shocked by the condition of the Premises.[4] On 13 October 2022, Mr Ang You Wen ("Josh"), the Property Manager of Royal, conducted a walk around at the Premises on his own ("Walkaround").[5] On 17 October 2022, representatives of Royal and Calmo met. At the meeting, Royal

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1 Agreed Core Bundle of Documents dated 30 August 2024 ("ACB") at pp 721-733.

2 ACB at pp 97–98.

3 ACB at pp 99–117.

4 Affidavit of Evidence-in-Chief of Tan Lian Hwa dated 1 July 2024 ("Ivy's AEIC") at paras 34–36.

5 Affidavit of Evidence-in-Chief of Ang You Wen dated 1 July 2024 at para 10.

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handed Calmo a document containing the photographs taken at the Walkaround.[6]

6 On 21 October 2022, Royal wrote to Calmo, to give Calmo notice ("Cure Notice")[7] that pursuant to s 18 of the Conveyancing and Law of Property Act 1886 (2020 Rev Ed) ("CLPA"), Royal was giving Calmo the opportunity to remedy the defects which Royal discovered at the Walkaround, within 30 calendar days from the date of Calmo's receipt of the notice.

7 On 2 November 2022, Foo & Quek ("F&Q") wrote to Royal to say that Calmo had "rectified" the "defects highlighted in the photographs" which Josh took at the Walkaround ("F&Q 2 Nov 2022").[8]

8 By DSC's letter dated 9 December 2022 ("DSC 9 Dec 2022") to F&Q,[9] Royal gave Calmo notice that under cl 4(1) of the Tenancy Agreement, Royal was entitled to re-enter the Premises and thereupon the Tenancy Agreement shall cease. Royal gave Calmo notice to vacate the Premises by 23 December 2022. By F&Q's letter dated 30 December 2022, Calmo denied that it breached the Agreement to Lease and Tenancy Agreement.[10]

9 On 3 February 2023, Royal discovered that between 3 November 2022 and 3 February 2023, Calmo allowed an entity known as MoNo Foods ("MoNo") to occupy and use the Premises for the storage and sale of food items

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6 Affidavit of Evidence-in-Chief of Rushdee Muhammad Hosany dated 1 July 2024 ("Rushdee's AEIC") at paras 14–16.

7 Rushdee's AEIC at pp 86-88.

8 Rushdee's AEIC at pp 92–117.

9 Rushdee's AEIC at pp 300–310.

10 Rushdee's AEIC at pp 375–453.

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("MoNo activity").[11] Royal's prior consent was not sought.[12] The MoNo activity was facilitated by Calmo's sub-tenant, Reiwa Pte Ltd ("Reiwa"), who occupied unit #01-12 of the Premises to operate a food and beverage ("F&B") business.[13] By DSC's letter dated 9 March 2023,[14] Royal gave Calmo notice of the MoNo activity and stated that it accepted Calmo's wrongful repudiation of the Agreement to Lease and Tenancy Agreement. Therefore, the Agreement to Lease and Tenancy Agreement were terminated on 9 March 2023.

10 On 16 March 2023 F&Q replied,[15] stating among other things, that MoNo did not inform or seek Calmo's consent for its activities at the Premises, that Calmo took immediate steps to demand that MoNo cease its activities after Calmo's discovery on 26 January 2023 and that Calmo had since terminated Reiwa's sub-tenancy at the Premises.

11 On 6 April 2023, Royal commenced OC 216, seeking forfeiture of the lease and double rent.[16]

12 On 12 January 2024, pursuant to the Court's directions, Royal and Calmo conducted a joint inspection of the Premises (the "12 January 2024 Inspection").[17] To date, Calmo remains in possession of the Premises.

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11 Rushdee's AEIC at paras 41–44.

12 Rushdee's AEIC at para 47.

13 Affidavit of Evidence-in-Chief of Cai Wenchao dated 1 July 2024 ("Ken's AEIC") at paras 65–67.

14 Rushdee's AEIC at pp 916–919.

15 Ken's AEIC at pp 432–434.

16 Originating Claim dated 6 April 2023.

17 Minute Sheet (22 November 2023).

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Royal's grounds for forfeiture

13 Royal submits that it is entitled to forfeit the lease under the Agreement to Lease and Tenancy Agreement, on the basis of 3 alternative grounds:

(a) first, breach of cl 2(22) of the Tenancy Agreement, which prohibits Calmo from subletting the Premises or any part thereof, except for unit #01-12 for use of F&B;

(b) second, breaches identified in the Cure Notice, which have not been rectified to the satisfaction of Royal; and

(c) third, repudiatory breach of the Tenancy Agreement by Calmo, taking into account Calmo's aggregate conduct in:

(i) not giving notice of damage as required under cl 2(11) of the Tenancy Agreement;

(ii) failing to conduct business in the Premises in a reputable manner in line with the understanding that Calmo would operate a high quality boutique, in breach of cl 2(17)(ii) of the Tenancy Agreement;

(iii) failing to satisfactorily rectify defects identified in the Cure Notice and at the 12 January 2024 Inspection; and

(iv) breaching cl 2(22) of the Tenancy Agreement by allowing MoNo to use the lobby of the Premises.

14 I will consider the parties' detailed cases on each ground below.

Forfeiture arising from MoNo's use of the Premises

15 I begin with Royal's first ground for forfeiture of the lease.

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Royal's case

16 Royal submits that it is entitled to forfeiture arising from Calmo's breach of cl 2(22) of the Tenancy Agreement.[18] This states that Calmo covenants with Royal:[19]

> [n]ot to assign, sublet, license, share or part with the actual or legal possession or the use of the demised premises or any part thereof, except the unit #01-12 for the use of F&B.

17 Section 18(8) of the CLPA does not extend to "a covenant or condition against the assigning, under-letting, parting with the possession or disposing of the land leased". Hence, the notice requirement of s 18(1) of the CLPA does not apply to a breach of cl 2(22) of the Tenancy Agreement.

18 It is Royal's case that between 3 November 2022 and 3 February 2023, Calmo wrongfully allowed MoNo to occupy and use the Premises for the storage and sale of food items.[20] MoNo's Instagram account shows that by 3 November 2022 at the latest, MoNo had started using the Premises for the storage and sale of food items.[21] Calmo did not inform Royal or seek its consent before allowing MoNo to use the Premises.[22] Royal discovered MoNo's use of the Premises only on 3 February 2023, when this was reported in a Channel News Asia article ("CNA article").[23]

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18 Statement of Claim (Amendment No. 1) dated 21 February 2024 ("SOC") at paras 49–53.

19 ACB at p 106.

20 SOC at para 49.

21 Rushdee's AEIC pp 906–908.

22 Rushdee's AEIC at para 47.

23 Agreed Bundle of Documents (Vol 3) dated 28 August 2024 ("ABOD Vol 3") at pp 182-189.

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Calmo's defence

19 Calmo's main defence is that Reiwa did not inform or seek Calmo's consent prior to MoNo using the lobby of the Premises for the storage and sale of food items.[24] William Xue ("William"), Calmo's Manager, and Ken did not know of this until 25 January 2023, when William discovered MoNo's activities. They did not visit the Premises from 3 November 2023 to 25 January 2023. While William and Ken accepted that Calmo's receptionists or cleaners would have seen MoNo's use of the lobby prior to that date, they testified that such staff would not have known that the arrangement with MoNo was not allowed, and hence did not inform William or Ken of the same.

20 Following William's discovery on 25 January 2023, Calmo informed Reiwa by way of a WhatsApp ("WA") message on 26 January 2023 that its storage and food sale activities were a breach of the sub-tenancy agreement and requested Reiwa to cease MoNo's activities immediately. On 3 February 2023, through the CNA article, Calmo became aware that these activities had not ceased. Calmo informed Reiwa by an email dated 3 February 2023, to cease the activities immediately.[25] On 14 March 2023, Calmo terminated Reiwa's sub-tenancy.[26]

21 After the trial, Calmo submitted that if even the Court finds that Calmo had authorised MoNo to use the lobby of the Premises, Calmo was not in breach of cl 2(22) as it did not part with possession of the lobby nor did it share

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24 Defence and Counterclaim (Amendment No. 2) dated 11 July 2024 ("DCC") at para 100(b).

25 DCC at para 100(c).

26 DCC at para 102.

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possession of the lobby with MoNo.[27] It relied on *Akici v LR Butlin Ltd* [2005] EWCA Civ 1296 ("*Akici*"), which involved a covenant against parting with or sharing possession of any part of the premises. There, the English Court of Appeal held that "nothing short of a complete exclusion of [the lessee] from legal possession for all purposes amounts to a parting of possession". The lessee in *Akici* had not "effectively ceded possession" to a company called Deka Ltd ("Deka"), who had retained a key to the premises. The landlord in *Akici* also visited the premises minimally every two weeks. In this case, Calmo submits that since it retained unrestricted access to the lobby, there was thus no parting with possession. The court in *Akici* did hold that there was *sharing* of possession on the facts, as Deka enjoyed a degree of control over the premises, with: (a) at least one of Deka's employees having keys to the premises for routine locking up, and (b) Deka paying rent for the premises. Calmo sought to distinguish the case of *Akici* in this respect, arguing that MoNo had no control over access to the lobby – if Calmo closed the Premises, MoNo would not be able to access the lobby. MoNo also did not pay rent to Calmo for the use of the lobby.[28]

Royal's response

22 First, Royal submits that Calmo knew of and authorised MoNo's activities, prior to 25 January 2023.[29] The WA messages between Calmo and Reiwa show that on 18 October 2022, a Calmo staff sent a Reiwa staff a message saying that Calmo had "received multiple complaints regarding Hotel Lobby like a warehouse [*sic*]."[30] This was followed by WA exchanges between

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27 Defendant's Supplementary Aide Memoire for Oral Closing Submissions for Trial dated 16 September 2024 ("Defendant's Supplementary Aide Memoire") at para 8.

28 Defendant's Supplementary Aide Memoire at paras 11–12 and 22–24.

29 16 September Transcript at p 146 lines 9–14.

30 Agreed Bundle of Documents (Vol 2) dated 28 August 2024 ("ABOD Vol 2") at p 145.

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William, and Reiwa staff "Ana" on 19 October 2022, on the setting up of a retail space within the lobby area and the movement of carton boxes.[31] In that exchange, Ana informed William that:[32]

> we're setting up a retail space for our sustainability project within the lobby area. So please be patient while we are moving a lot of carton boxes around, and bringing in quite a bit more products while making the are [*sic*] look more presentable.

23 Ana then asked if the products should be brought in through the "main hotel entrance" or the one "faceing [*sic*] Smith Street". William replied,"[p]ls moving the boxes by the Smith Street entrance".[33]

24 MoNo's Instagram shows that by 3 November 2022, MoNo had started using the lobby of the Premises for the storage and sale of food items.[34] It is unbelievable that Calmo, as the occupier of the Premises and operator of a Hotel on the Premises, would only have discovered MoNo's use of the lobby, close to 3 months later, on 25 January 2023.[35]

25 Second, it was never part of Calmo's pleaded case that there was no breach of cl 2(22) of the Tenancy Agreement even if Calmo had authorised MoNo's activities, because there was no parting with or sharing of possession.[36] It is clear from the Defence and Counterclaim ("DCC") that Calmo rested its case on there being no knowledge or authorisation by Calmo of the MoNo

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31 ABOD Vol 3 at p 198.

32 ABOD Vol 3 at p 198.

33 ABOD Vol 3 at p 198.

34 ACB at pp 468–469.

35 16 September Transcript at p 77 line 19 to p 80 line 6.

36 Claimant's Aide Memoire for Oral Closing Submissions dated 13 September 2024 ("Claimant's Aide Memoire") at p 3.

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activities until 26 January 2023, after which Calmo rectified the breach by terminating Reiwa's sub-tenancy. In any event, *Akici* does not assist Calmo. The parts of *Akici* cited by Calmo relate to a covenant against parting with or sharing of possession. Clause 2(22) of the Tenancy Agreement contains a prohibition against "the *use* of the demised premises or any part thereof, except the unit #01-12 for the use of F&B". The material covenant in *Akici* did not contain a covenant against the use of the demised premises.[37]

26 Third, Calmo's claim that Reiwa did not seek consent for MoNo's usage is irrelevant. It is undisputed that Mono occupied and used the lobby of the Premises. Clause 2(22) of the Tenancy Agreement only allows Calmo to sublease unit #01-12; Reiwa only sub-leased unit #01-12 from Calmo. The lobby of the Premises was not part of the scope of Reiwa's sub-tenancy agreement. There is hence no basis for Calmo to suggest that Reiwa was the one that allowed Mono to occupy the lobby in breach of its sub-tenancy.[38]

27 Fourth, even if Reiwa was the one that allowed MoNo to use the lobby of the Premises, and Calmo somehow did not know or had no control over Reiwa's conduct, Calmo is still liable for Reiwa's conduct. The only way to read cl 2(22) of the Tenancy Agreement, relying on established principles and looking at the text of cl 2(22), is that there is an absolute prohibition against Calmo parting with the use of any part of the Premises.[39]

28 Fifth, in so far as Calmo's defence is rectification of the breach by relying on s 18(1) of CLPA, that does not apply here by virtue of s 18(8) of

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37 16 September Transcript at p 73 line 2 to p 75 line 18

38 Claimant's Aide Memoire at p 4.

39 Claimant's Aide Memoire at p 4.

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CLPA. In any event, it has been held in *Scala House & District Property Co. Ltd. v Forbes and others* [1974] QB 575 ("*Scala House*") that a breach of a covenant not to assign, sublet or part with possession is incapable of remedy. This was recognized in Tang Hang Wu & Kelvin FK Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 4th Ed, 2019) at para17.139.[40]

My decision

29 I find that Calmo has breached cl 2(22) of the Tenancy Agreement.

30 First, it is undisputed that the space used and occupied by MoNo is the lobby of the Premises. The only exception to the prohibitions in cl 2(22) of the Tenancy Agreement is unit #01-12. Following from this, it is not a defence to a breach of cl 2(22) of the Tenancy Agreement to say that Calmo has since terminated Reiwa's subtenancy. This is because Reiwa's subtenancy covers unit #01-12 and is unrelated to the use of the lobby of the Premises.

31 Second, I do not accept William and Ken's evidence and main defence that they did not know of Mono's activities in the lobby and only discovered them around 25 January 2023. It is contrary to the contemporaneous documentary evidence and their AEIC evidence.

32 William's WA exchange with Ana on 19 October 2022, shows that Reiwa informed William that they were setting up a "a retail space for [a] sustainability project within the lobby area".[41] William testified that he understood the meaning of "retail" – that it meant selling things, and that Reiwa

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40 Claimant's Aide Memoire at p 4.

41 ABOD Vol 3 at p 198.

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were setting up space in the lobby of the Premises to sell things.[42] William responded to Ana's WA message by giving instructions for Reiwa's carton boxes to be brought in through the Smith Street entrance.[43]

33 On the stand, William initially testified that he did not know that Reiwa were going to sell things. When it was pointed out that he had testified that he knew the meaning of "retail" and that Ana was telling him that Reiwa were going to sell things in the lobby of the Premises, he then changed his position and said that he "overlooked the message".[44] I find this to be an unbelievable explanation, since William responded directly to Ana's message and gave directions on how to move the boxes into the Premises.

34 When William asked Reiwa to take down the CNA article in February 2023, he clearly regarded the news that MoNo had retail activity in the lobby of the Premises as affecting Calmo's tenancy with Royal. He told Christina of Reiwa in his email of 3 February 2023: "we request you delete the advertisement immediately".[45] He then informed Shinji of Reiwa, via WA message on 3 February 2023: "no advertisement pls ... will get us into troublesome" and "[t]his article is still online ... [t]his may result us into trouble. Tenancy agreement might get yerminatdt".[46] William knew the import of these words and sought to distance himself by claiming on the stand that he conveyed the word "troublesome" to Shinji so that Shinji would take him seriously, and that

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42 5 September Transcript at p 137 line 23 to p 138 lines 10.

43 ABOD Vol 3 at p 198.

44 5 September Transcript at p 139 line 13 to p 140 line 4.

45 ABOD Vol 3 at p 194.

46 ABOD Vol 3 at pp 193 and 195.

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"troublesome" referred to inconvenience caused to hotel guests.[47] However, this again is unbelievable since William's own WA message mentioned "trouble" together with the risk that the Tenancy Agreement might get terminated. William's contrived attempt to worm out of the plain wording of the February 2023 WA messages further undermines his credibility.

35 I find that William: (a) did not overlook Ana's 19 October 2022 WA message since he responded to her; and (b) understood Ana's 19 October 2022 WA message since he admitted that he understands that "retail" means to sell things and gave directions to Ana on how to bring the carton boxes into the Premises.

36 Calmo had submitted that William would not have allowed the MoNo activity from October 2022 onwards, because it would not have made sense for Calmo to do so when it was being threatened by the Cure Notice from Royal around this period. This is speculative. It is unclear why Calmo allowed for this, but it is clear from the 19 October 2022 WA exchange that William knew of and allowed the MoNo activity.

37 I therefore find that the WA exchange shows that by 19 October 2022, William would have known of Reiwa's plans to set up a retail space in the lobby of the Premises.

38 William's weak attempts to try to distance himself from the 19 October 2022 WA message and the February 2023 WA messages, severely undermines his credibility as a witness, and calls into grave question his truthfulness as a witness in court.

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47 5 September Transcript at p 107 line 12 to p 111 line 12.

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39 I find William's credibility to be further undermined by his evidence on whether he was at the Premises, to verify that the alleged defects identified in the Cure Notice were rectified.

40 It will be recalled that the Cure Notice was issued on 21 October 2022. Through F&Q 2 Nov 2022, Calmo informed Royal that the defects identified in the Cure Notice had been rectified, enclosing photographs of the before and after rectification status.

41 Ken testified that William supervised the rectification works. He said that the "rectification works for the Alleged Defects were completed on 20 to 21 October 2022. After completion of the rectification works for the Alleged Defects, *William took photographs of the areas* post the rectification works" [emphasis added].[48] These photographs were provided in F&Q 2 Nov 2022. In his AEIC, William said that in reference to Ken's testimony in his AEIC, William "supervised Hotel Calmo's operations team for the rectification works for the Alleged Defects…" and he "*documented the rectification works by taking photographs* and recording the dates on which the rectification works were completed" [emphasis added].[49]

42 It is plain from both William's and Ken's AEICs, that they testified that William took photographs of the rectification works done. Ken explicitly stated that "William took photographs". This would have meant that William was at the Premises sometime between 21 October 2022 to 2 November 2022. It may not have been as material to the MoNo issue, if this was true, since Royal's case

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48 Ken's AEIC at para 51.

49 Affidavit of Evidence-in-Chief of Xue Zhiqiang dated 1 July 2024 ("William's AEIC") at para 12.

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is that based on MoNo's Instagram account, there were pictures of MoNo's set-up in the lobby of the Premises only from 3 November 2022 onwards.

43 On the stand however, when queried, Wiliam denied that he was at the Premises during this period and said that he did not take the rectification photographs himself. He said that his maintenance team took the photographs and sent them to him.[50] This testimony is problematic for the following reasons: (a) it is contrary to what Ken and William plainly stated in their AEICs; (b) it is hard to believe that as Calmo's Manager charged with supervising the rectification works done in response to Royal's Cure Notice threatening the termination of the lease, William would have simply left the team to do the rectifications without turning up once at the Premises to supervise or verify that the defects were properly rectified; and (c) this is made harder to believe given William's testimony that he was previously a duty manager at Hilton, and was on site every day.[51] Here, his job scope includes overseeing the daily operations of the Premises,[52] and yet his evidence is that he did not need to be on site at the Premises, for over three months, from around 22 October 2022 to 25 January 2023.

44 It may have been that William gave this testimony on the stand, in order to be consistent with what he had earlier said in response to cross-examination questions about whether he was at the Premises around 23 December 2023. Indeed, William had testified in his AEIC that on 23 December 2023, he supervised Calmo's operations to clear the washing machines at certain areas of

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50 5 September Transcript p 128 lines 11-12.

51 5 September Transcript p 134 lines 12-21.

52 William's AEIC at para 5.

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the Premises and the tidying of the VRV system room at the Premises.[53] As Ken had accepted that based on the pictures in the CNA article, anyone walking into the lobby of the Premises would have seen MoNo's set-up there, counsel for Royal had suggested to William that his evidence in his AEIC at paras 80 and 88 meant that he was at the Premises around 23 December 2022 and would have seen the MoNo activity. William denied this and said that in those instances, he supervised his team remotely.

45 I find it hard to believe that William was not at the Premises around 23 December 2022, given what he had plainly stated in his AEIC at paras 80 and 88. He had not suggested in his AEIC that he supervised the rectification works remotely. The veracity of his testimony here is also undermined by his credibility issues identified above (see [38]–[39]). I therefore find that William was on the Premises, at least by 23 December 2022, and would have seen the MoNo activity in the lobby of the Premises then.

46 Ken denied being kept informed by William that MoNo was conducting activities in the lobby. Ken also testified that if William went to the Premises between 3 November 2022 and 26 January 2023, he would have seen MoNo's activities.[54] William testified that he would inform Ken if he saw a serious issue, such as one involving a breach of an obligation in the Tenancy Agreement.[55] Following from the above, I find it difficult to believe that Ken did not know of MoNo's activities prior to 25 January 2023. I find that William having known, would have informed Ken of MoNo's activities, prior to 25 January 2023. For

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53 William's AEIC at paras 80 and 88.

54 4 September Transcript p 93 line 24 to p 94 line 3.

55 5 September Transcript p 96 line 13 to p 98 line 3.

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completeness, counsel for Calmo confirmed that it was not Calmo's defence that William would not have told Ken if he knew.[56]

47 In summary, I find that Calmo knew of and authorized the MoNo's activity in the lobby of the Premises, from around 19 October 2022. I also find that William was at the Premises at least by 23 December 2022 and thus would have seen the MoNo activity in the hotel lobby by then.

48 Third, Calmo is not entitled to rely on the unpleaded defence that even if it authorized MoNo's activities, there is no breach of cl 2(22) of the Tenancy Agreement, because Calmo did not part with or share possession of the lobby. This submission was made after the close of trial, after Calmo's written Aide Memoire for oral closing submissions had been filed ("Aide Memoire"). It was surfaced only on the morning of oral closing submissions. Calmo relied on *Akici* to support this submission.

49 This argument was never part of Calmo's pleaded case or submissions, nor is it supported by evidence from any of Calmo's witnesses.

(a) Calmo's defence to the MoNo issue is set out at paras 100-108 of the DCC. The key points of Calmo's defence are that Reiwa did not inform or seek Calmo's consent for MoNo's use of the premises, and that upon discovery of MoNo's activities on 26 January 2023, Calmo took the immediate step of demanding that Reiwa cease the activities.

(b) Calmo repeated this position in the parties' Scotts Schedule of issues, filed a week before the start of trial. Calmo stated that there was

[56] 16 September Transcript p 127 lines 8-18.

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no breach because it did not wrongfully allow and/or permit the MoNo activity.[57]

(c) Calmo adopted the same position in its Opening Statement, relying on the communications with Reiwa concerning the ceasing of the MoNo activity and the termination of Reiwa's subtenancy.[58]

(d) None of Calmo's witnesses testified that there was no parting with or sharing of possession, nor provided any evidence in relation to this. Consequently, none of Calmo's witnesses were cross-examined by Royal on this.

(e) Calmo did not include this position in its written Aide Memoire. There, Calmo instead raised an unpleaded argument that Royal had granted Calmo a licence;[59] Calmo then abandoned this argument during oral closing submissions.[60] In its written Aide Memoire, Calmo also sought to introduce an unpleaded defence, namely seeking relief from forfeiture arising from the MoNo activity, a point which I will deal with later. As can be seen, Calmo changed its position on the MoNo issue several times after the conclusion of the trial.

50 The absence of the argument on parting with or sharing of possession from any of Calmo's stated positions before and after the trial, is detrimental to Calmo's reliance on this submission. It is trite law that a defence which has not

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57 Scotts Schedule (Parties Legal and Evidential Positions) dated 27 August 2024 at pp 24–27.

58 Defendant's Opening Statement dated 28 August 2024 at para 82.

59 Defendant's Aide Memoire for Oral Closing Submissions for Trial dated 13 September 2024 ("Defendant's Aide Memoire") at para 17.

60 16 September Transcript at p 133 lines 9–12.

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been pleaded, cannot be relied upon. Parties are expected to keep to their pleadings because it is only *fair and just* that they do so – to permit otherwise is to have a trial by ambush (*V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*V Nithia*") at [37]–[38]). A narrow exception exists. The court may permit an unpleaded point to be raised if: (a) no injustice or irreparable prejudice (that cannot be compensated by costs) will be occasioned to the other party; (b) if the evidence given at trial can, where appropriate, overcome defects in the pleadings provided that the other party is not taken by surprise or irreparably prejudiced; or (c) where it would be clearly unjust for the court not to do so (see *V Nithia* at [40], *Ser Kim Koi v GTMS Construction Pte Ltd and others and another appeal* [2023] 1 SLR 1097 ("*Ser Kim Koi*") at [307]). In this case however, as I elaborate below, there is no evidence given at trial by Calmo which can overcome the defects in the pleadings. It will also cause irreparable injustice to Royal which cannot be compensated by costs. Royal was not given the opportunity to engage in an evidential inquiry on this point, whether through discovery or cross-examination. It may have chosen to run its case differently if Calmo had framed its defence in this manner.

51 Additionally, as pointed out by the court in *Akici* (at [47]), the Privy Council in *Lam Kee Ying Sdn Bhd v Lam Shes Tong* [1975] AC 247 ("*Lam Kee Ying*") emphasized that the question of whether there has been a parting with possession in any particular case "must depend on all the facts and circumstances" of that case (at 256F). However, the facts and circumstances relevant to this factual inquiry were not canvassed at the trial. Moreover, the judge hearing the case below in *Akici* found the following facts to be relevant to finding that the landlord had not parted with possession: (a) that business

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invoices in relation to stock and provision of utility services were addressed to the landlord and not the tenant; (b) the landlord retained a key and visited the premises for a minimum of at least every two weeks to oversee the business (at [40]). However, Ken and William's evidence is that they only became aware of MoNo's activities on 25 January 2023 and that they did not visit the Premises for about three months prior to this. On this basis, they would not have received business invoices relating to MoNo's stock, and they clearly would not have visited the premises every two weeks to oversee the MoNo activity.

52 With regards to Calmo's submission about sharing of possession, Calmo did not lead any evidence at trial to show that MoNo did not enjoy a degree of control over the lobby (albeit non-exclusive). Ken's and William's evidence about their lack of awareness and lack of any visit to the Premises before 25 January 2023, suggests that they ceded at least some degree of control to MoNo. Thus, the facts which were found to be relevant in *Akici* to finding that there was no parting with or sharing of possession, do not appear to be in Calmo's favour, even as the evidence stands.

53 I therefore find Calmo's late submission that if the court finds that Calmo authorized MoNo's activities, that there was no breach of cl 2(22) of the Tenancy Agreement because there was no parting with or sharing of possession, to be a non-starter. In view of this, it is not necessary to go into the substantive merits of this submission.

54 Fourth, for completeness, while both parties had disputed whether cl 2(22) is an absolute covenant, they agreed that the issue does not arise if the Court finds that Calmo authorised the use of the lobby by MoNo, which is my finding.

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55 Fifth, the issue of whether the breach of cl 2(22) of the Tenancy Agreement is remediable does not arise given my factual findings above. Calmo's case is that they rectified the breach as soon as they discovered it in January 2023. As found above, Calmo authorized the MoNo activity as early as 19 October 2022. Far from remedying the breach, they sought to deny that they had breached cl 2(22) of the Tenancy Agreement then. In any event, I note that *Scala House* has held that a breach of a covenant not to assign or part with possession is incapable of remedy (at 591E). The legal approach in *Scala House* is consistent with the statutory framework of s 18 of the CLPA. While s 18(1) of the CLPA requires the landlord to give notice to the tenant of the alleged breaches and provide an opportunity to remedy the breaches, s 18(8) of the CLPA excludes covenants against assigning or parting with the possession of the land leased from the requirements of s 18(1) of the CLPA.

56 Clause 4(1) of the Tenancy Agreement provides that if any covenant is not performed on Calmo's part, it shall be lawful for Royal to forfeit the security deposit and re-enter the Premises, and thereupon the lease term will cease. As cl 2(22) of the Tenancy Agreement has been breached, I find that Royal is entitled to forfeit the security deposit and the lease pursuant to cl 4(1) of the Tenancy Agreement, and to re-enter the Premises. As Royal informed Calmo of its reliance on such a breach by way of DSC's 9 March 2023 letter, I find that Royal's forfeiture of the lease is effective from 10 March 2023.

57 In light of this, Royal does not need to rely on its other 2 alternative grounds for forfeiture. I will, nevertheless, deal with them for completeness.

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Cure Notice

58 Royal's second ground for forfeiture, is that the breaches identified in the Cure Notice were not remedied.

Whether the Cure Notice provides sufficient particulars

59 Calmo submits that the Cure Notice does not satisfy the requirements of s 18(1) CLPA as it does not provide sufficient particulars of the alleged breaches. The provision states:

> **Restrictions on and relief against forfeiture of leases**
>
> **18.**—(1) A right of re-entry or forfeiture under any provision or stipulation in a lease, for a breach of any covenant or condition in a lease, shall not be enforceable, by action or otherwise, unless the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

60 The Cure Notice stated that:[61]

> Hotel Calmo Chinatown Pte. Ltd is currently in breach of Clauses 2(10) (Tenantable repair), 2(10A) (Damage to Property), 2(11) (Notice of damage), 2(12) (Advertisements & Signs), 2(16) Nuisance, and Clauses 2(14A) and 2(25) (Compliance of Statues).
>
> …
>
> Based on the evidence of the abovementioned breaches that we have provided to Hotel Calmo Chinatown Pte. Ltd. and in accordance with Section 18 of the Conveyancing and Law of Property Act ("**Cure Notice**"), by the present, we are extending the opportunity to Hotel Calmo Chinatown Pte. Ltd. to remedy to the abovenamed breaches and hereby extends a 30 calendar days' cure period from the date of receipt of this letter.

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[61] Rushdee's AEIC at pp 86–87.

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[emphasis in original]

61 Ivy testified that at the 17 October 2022 meeting with Calmo, which she attended, she handed over to Calmo's Mr Kevin Cai ("Kevin") (Hotel Calmo's Chief Operating Officer) and William, a document containing the photographs of the Premises taken by Josh during his Walkaround ("Cure Notice Photos"), which contained captions.[62] On the stand, she testified that she also handed over a set of broadly similar photos[63] which did not contain captions, on the request of Calmo ("Set B Photos").[64] William's evidence is that he only received the Set B Photos.[65]

62 Calmo submits that there were insufficient particulars in the Cure Notice and that the handover of two sets of photographs shows this. I do not accept this submission.

63 First, Royal's position is that the breaches are based on the evidence as contained in the photographs handed over to Calmo. This would have narrowed the ambit of the breaches to those contained in the photographs.

64 Second, there are only a few more photographs in the Set B Photos compared to the Cure Notice Photos. Some appear to be photographs of similar defects identified in the Cure Notice Photos, but from a different angle. The alleged defect in each of the Set B Photos, are either apparent on the face of the

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62 Affidavit of Evidence-in-Chief of Tan Lian Hwa dated 1 July 2024 ("Ivy's AEIC") at para 52 and at Tab 10 pp 119–126.

63 Agreed Bundle of Documents (Vol 4) dated 28 August 2024 ("ABOD Vol 4") at pp 567–588.

64 3 September Transcript at p 191 line 24 to p 192 line 8.

65 ABOD Vol 4 at pp 567–588.

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photographs, have been identified by the use of a green circle or are identified from the captioned words contained in the Cure Notice Photos.

65 Third, it does not appear from the contemporaneous correspondence, that Calmo actually found that the particulars of the alleged breaches in the Cure Notice were insufficient. In F&Q 2 Nov 2022,[66] Calmo stated that it has since rectified the defects highlighted in the photographs taken by Royal during the Walkaround. A document was enclosed, comparing the Cure Notice Photos with photographs showing the rectified defects ("Rectification Photos").[67] Calmo continued to maintain in its reply through F&Q's letter dated 30 December 2022, that it "as of 2 November 2022 has fully rectified the alleged defects".[68] There was no suggestion that Calmo did not know what Royal was complaining about. Notably, Calmo only raised the point about insufficient particulars of the Cure Notice on 5 June 2024, more than one and a half years after Royal issued the Cure Notice and more than a year after Royal commenced OC 216.

66 The Cure Notice refers to breaches based on the evidence provided to Calmo. By Ivy's evidence, this relates to the Cure Notice Photos and the Set B Photos. I find no reason not to believe her. The alleged defects can be clearly identified from the photographs and the captions. Calmo was able to respond to them, through the Rectification Photos. I therefore find that there was sufficient notice of the particulars of the alleged breaches in the Cure Notice.

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66 Rushdee's AEIC at pp 92–117.

67 ACB at pp 479–500.

68 ACB at p 610.

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Whether Calmo rectified the breaches

67 Royal maintains that the defects in the Cure Notice have not been satisfactorily rectified. To the extent that Royal's Head of Hospitality, Mr Rushdee Muhammad Hosany ("Rushdee") based this on defects that were not explicitly identified in the Cure Notice, I find that they do not affect the satisfactory remedy of the Cure Notice defects.

68 For example, the Cure Notice Photos contains a photo with the caption: "[s]torage of miscellaneous items at the hotel atrium".[69] To prove rectification, Calmo provided a picture of the miscellaneous items removed from the hotel atrium.[70] Rushdee testified that this did not constitute evidence of rectification, as there may be damage to the floor. However, there is no mention of damage to the floor as a defect to be rectified in the Cure Notice Photos.

69 Rushdee also suggested on the stand that Royal does not have evidence to refute the Rectification Photos, because Royal was denied inspection of the Premises by Calmo. However, Rushdee could not point to any correspondence where Royal asked for an inspection before proceeding to inform Calmo that it had determined the Tenancy Agreement.[71] Indeed, Royal's position as set out in DSC's letter dated 9 December 2022 is that it did not accept Calmo's claim that the defects had been rectified.[72] Royal stated that it was hence entitled to determine the Tenancy Agreement.[73] It did not ask for a further inspection then.

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69 Ivy's AEIC at p 121.

70 ACB at pp 482-483.

71 3 September Transcript at p 95 lines 1-9.

72 ACB at pp 535–536 (paras 27–30).

73 ACB at p 539 (para 56).

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70 In any event, there was an opportunity for Royal's building survey expert, Mr Yeoh Cheng Yow ("Cheng Yow") to verify that the Cure Notice defects had been rectified, when he attended the 12 January 2024 Inspection. However, Cheng Yow did not provide any evidence that the defects identified in the Cure Notice remained unremedied. While Rushdee testified that Cheng Yow was instructed to check the Cure Notice defects, Cheng Yow testified that this was not part of his instructions from Royal.[74]

71 In contrast, Calmo's building survey expert, Mr Eddie Loke June Wei ("Eddie"), provided evidence confirming that the defects identified in the Cure Notice had been rectified.[75] He also testified that visual inspections together with physical examinations (such as touching a surface to see if it was damp) were sufficient to verify the rectification of the Cure Notice defects, and that the method statements or rectification plans that Cheng Yow had mentioned were not necessary for such purpose. Eddie explained that in his view, method statements or rectification plans were not compulsory in all cases of defects, and that they were only required in more complex cases where multiple steps were needed for rectification.[76] As Cheng Yow did not inspect the status of the Cure Notice rectifications despite being at the Premises, there was no contrary evidence from Royal's expert on this. I accept Eddie's evidence that the Cure Notice defects were not complex, and that it was sufficient for him to do a visual and physical inspection to verify the rectification.

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74 2 September Transcript at p 103 lines 5–12; 9 September Transcript at p 52 lines 10–25.

75 Affidavit of Evidence-in-Chief of Eddie Loke June Wei dated 27 June 2024 ("Loke's AEIC") at p 9.

76 9 September Transcript at p 43 lines 13–18 and p 142 lines 7–18.

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72 Nine of the photos in the Cure Notice Photos relate to tidiness. These are not defects. In any event, the Rectification Photos show that the areas have been tidied up. Josh also accepted that there was no basis for two other alleged defects, in relation to an opening in the false ceiling[77] and the allegation that there were no maintenance contracts for the escalators.[78] As for the other defects:

(a) Where a crack in the partition on level two was identified, there is a photo showing that the crack has been fixed.[79] Eddie also testified that there were no cracks observed during the 12 January 2024 Inspection and that he physically examined the partition.[80]

(b) Where a suspected water leakage at a level three toilet was identified, a photo shows that the water stains on the false ceiling have been removed. Eddie testified that in respect of water leaks identified in the Cure Notice, no water stains were observed during the 12 January 2024 Inspection. He also physically verified that the false ceiling was not damp.[81]

73 On the evidence before the Court, I find that the defects identified in the Cure Notice have been satisfactorily remedied. I therefore find that Royal is not entitled to forfeit the lease on the basis of the Cure Notice.

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77 4 September Transcript at p 28 lines 10–25.

78 4 September Transcript at p 36 line 7 to p 42 line 1.

79 ACB at p 492.

80 ABOD Vol 4 at pp 250–251.

81 ABOD Vol 4 at p 294; 9 September Transcript at p 143 lines 7–15.

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Repudiation of the Tenancy Agreement

74 Third, Royal submits, in the alternative, that it is entitled to forfeit the lease because the aggregate conduct of Calmo showed a repudiatory breach of the Tenancy Agreement, in Calmo:

(a) not giving notice to Royal of damage as required under cl 2(11) of the Tenancy Agreement;

(b) failing to conduct business in the Premises in a reputable manner in line with the understanding that Calmo would operate a high quality boutique, in breach of cl 2(17)(ii) of the Tenancy Agreement;

(c) failing to satisfactorily rectify defects identified in the Cure Notice and at the 12 January 2024 Inspection; and

(d) breaching the Tenancy Agreement by allowing MoNo to use the Premises.

75 Royal submits that out of the three scenarios identified in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another* appeal [2007] 4 SLR(R) 413 (CA) ("*RDC Concrete*") where there is a repudiatory breach of a contract, two scenarios are satisfied here: (a) Scenario 1: Where the party in breach clearly conveys to the innocent party that it will not perform its contractual obligations at all, this amounts to a repudiation of the contract (*RDC Concrete* at [93]); and (b) Scenario 2: Where the party in breach breaches a condition of the agreement that parties contemplated to be so important, that any breach would give rise to a right of termination (*RDC Concrete at* [97]).

76 I will first examine if evidentially, there have been breaches as alleged by Royal.

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Failure to give notice of damage

77 I will deal first with Royal's contention that Calmo failed to give notice of damage on the Premises to Royal, which it was obliged to under cl 2(11) of the Tenancy Agreement. The clause imposes an obligation on Calmo to:[82]

> … give notice to the Landlord of any damage that may occur to the demised premises and of any accident to or defects in the water pipes, gas pipes, electrical wiring, air-conditioning ducts or any other fittings, fixtures or other facility provided by the Landlord.

78 Royal relies on two incidents. First, on 21 August 2022, Royal informed Calmo that there was water leakage at the Premises which was affecting the tenant at units #01-10/11. Second, on 14 September 2022, the tenant at unit #01-07 complained of water leakage which was caused by a choked wastewater pipe at the Premises. Royal engaged contractors to rectify both issues.[83]

79 Calmo points out that for both incidents, the affected tenants had directly informed Royal of the water leakage before Calmo was made aware of the water leakage. Calmo's notification of the water leakage to Royal was therefore superfluous. Royal did not challenge Ken's evidence on this during cross-examination.[84]

80 I find that there was no breach of cl 2(11) of the Tenancy Agreement. The obligation imposed by cl 2(11) for Calmo to give notice to Royal must necessarily relate to matters that Calmo is apprised of and for which Royal is not yet aware. In the two incidents, it was Royal that was first made aware, and Royal was the party that informed Calmo.

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82 Rushdee's AEIC at p 70.

83 SOC at para 27.

84 Defendant's Aide Memoire at para 15.

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Whether Calmo breached cl 2(17)(ii) of the Tenancy Agreement

81 Royal also submits that Calmo breached cl 2(17)(ii) of the Tenancy Agreement, which is to conduct business on the Premises in good faith and in a reputable manner, read with the understanding that Calmo would operate a high quality boutique hotel befitting of Royal's reputation.[85] As evidence of the breach, Royal relies on reviews from hotel users. Rushdee provided a sample of such reviews in his AEIC.[86] Royal also referred to an article was published on 12 November 2022 on Insider and reproduced on Yahoo News ("Insider Article").[87] The article was titled "I spent a night in Singapore's worst-rated hotel for $96 to see if it's really as bad as the reviews say. I was in for a night of surprises".[88] The article made various negative comments about the reviewer's one night stay at the Premises.[89]

82 Royal submits that cl 2(17)(ii) should be read as they have submitted, because of the statements made in the K Hotel Brochure, which Ken conveyed to Ivy, when they met to negotiate prior to entering into the Tenancy Agreement.

83 When Ivy asked Ken which brand from the K Hotel group he would be bringing to the Premises, he told her he would be bringing the Calmo brand. The K Hotel Brochure indicates that K Hotel Group had three tiers of hotels under it, Boutique Hotel, Budget Hotel and Backpacker Hostel.[90] One of its

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85 SOC at paras 34–36.

86 Rushdee's AEIC at pp 150-295.

87 ACB at pp 501 and 519.

88 ACB at p 501.

89 ACB at pp 501–518.

90 ACB at p 722.

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hotels is Hotel Calmo Bugis, which the brochure indicates as a boutique hotel.[91] Royal submits that the K Hotel Brochure thus shows that it was contemplated and/or understood and/or intended as between Calmo and Royal, that Calmo would operate at the Premises a clean, tidy, properly furnished, reputable and/or high quality boutique hotel and/or a boutique hotel that is befitting of Royal's reputation for attracting reputable and/or high quality tenants.[92]

84 I do not find that the K Hotel Brochure or the negotiations indicate that there was such an understanding between Royal and Calmo.

85 First, all that the K Hotel Brochure indicates, is that the K Hotel Group regards Hotel Calmo Bugis as a boutique hotel. In and of itself, the brochure makes no promises nor provides any context to how the Premises would be operated as a boutique hotel. There are also elements that appear inconsistent with Royal's claim. The brochure states that Hotel Calmo Bugis provides"[f]ree Wifi … [h]ousekeeping is available on request, chargeable"[93]. It is questionable if chargeable housekeeping is acceptable for a "high quality boutique hotel" or a hotel befitting Royal's reputation. Ivy accepted on the stand that reading these lines, she would not have acquired the idea that Calmo would operate a reputable high quality boutique hotel at the Premises.[94]

86 Second, Ivy testified that during the negotiations with Ken, they discussed mainly the rental price and lease period. She did ask Ken which brand from the K Hotel Group he intended to bring, and Ken replied that he would

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91 ACB at p 734.

92 Claimant's Aide Memoire at p 10.

93 ACB at p 736.

94 3 September Transcript at p 179 lines 14–25.

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bring the Calmo brand. However, there was no discussion about whether the Premises would operate at the same standard as Hotel Calmo Bugis, or what those standards involved. Ivy did not ask any questions about how Hotel Calmo Bugis operated, nor did she share any information or discuss Royal's reputation for attracting reputable and/or high quality tenants. There was no discussion or negotiation about whether Hotel Calmo Chinatown would operate as a boutique hotel, and what that meant in terms of quality, service or reputation. Nor was there any discussion about Royal's reputation in attracting certain types of tenants. This was confirmed by counsel for Royal.[95]

87 I therefore find that Royal has not established that there is an obligation under cl 2(17)(ii) of the Tenancy Agreement, for Calmo to conduct business on the Premises in good faith and in a reputable manner, read with the understanding that Calmo would operate at the Premises a high quality boutique hotel and/or a boutique hotel befitting Royal's reputation for attracting reputable and/or high quality tenants.

88 I also find that cl 2(17)(ii) of the Tenancy Agreement, read on its plain language, has not been breached.

89 Royal submits that the reviews it relies on are not hearsay evidence, because Royal is not seeking to prove the truth of the reviews, but instead relies on the reviews to show the perception of hotel users, of Calmo. However, as acknowledged by counsel for Royal, since Royal does not seek to prove the truth of such reviews and has not done so, this consequently affects the weight to be given to the perceptions conveyed in the reviews. Royal submits that consideration should nevertheless be given to the number and nature of such

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95 16 September Transcript at p 96 lines 11–20.

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reviews.[96] However, the number or consistency of unverified allegations does not make them any more reliable.

90 In any event, the reviews cited by Royal only show that there were customers who were unhappy with certain aspects of their stay at Calmo. The Insider Article, which Royal relies on, sets out the downsides (*ie*, stained sheets, mattress on floor, limited amenities), but also the upsides (*ie*, location, no pests, relative cleanliness) of Hotel Calmo. It concludes that it is not the worst hotel the reviewer has stayed in, although it is over-priced.[97]

91 Clause 2(17)(ii) of the Tenancy Agreement requires Calmo to conduct business on the Premises in good faith and in a reputable manner. The reviews do not show that Calmo conducted their business in bad faith and in a disreputable manner. I therefore find that Calmo has not breached cl 2(17)(ii) of the Tenancy Agreement.

Whether Calmo failed to rectify breaches identified in the 12 January 2024 inspection

92 I have found above that Calmo has satisfactorily rectified the alleged defects identified in the Cure Notice. I now turn to the alleged defects identified at the 12 January 2024 Inspection.

93 Royal submits that the 12 January 2024 Inspection identified further breaches by Calmo. Royal called Cheng Yow as its expert on whether the alleged breaches identified by Royal have been remedied. Calmo called Eddie

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96 16 September Transcript at p 94 lines 23–25 to p 96 lines 1–3.

97 ACB at p 518.

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to provide expert evidence on these issues. Both attended the 12 January 2024 Inspection.

94 The main difference between the two experts is in their views on the sufficiency of the evidence provided by Calmo to prove rectification. Eddie's report sets out the before and after photographs of the affected areas, with his explanation of the rectifications that were carried out.[98] His position is that the breaches have been remedied, based on the photos provided by Calmo and by his visual and physical verification at the Premises.[99] Cheng Yow's view is that it is not possible to tell from the photographs provided if the breaches have been remedied. This is mainly because there is no explanation of the method statement and the rectification plans stating the steps taken to remedy the defect.[100] Cheng Yow identified further concerns which Calmo's rectification photographs do not address. He accepted that such concerns were not conveyed to Calmo or Eddie at any point during or after the 12 January 2024 Inspection.[101] He was, however, of the view that information about such concerns should nevertheless have been provided by Calmo to support their claim that the defects were rectified.[102] Eddie disagreed, and expressed the view that method statements and rectification plans were only required where there were more

98 Loke's AEIC at pp 15–93.

99 Loke's AEIC at p 9.

100 Affidavit of Evidence-in-Chief of Yeoh Cheng Yow dated 1 July 2024 at p 15.

101 9 September Transcript at p 86 lines 7–13.

102 9 September Transcript at p 86 lines 21–23.

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complex defects which require multiple steps in rectification, and that the defects identified at the 12 January 2024 Inspection were not of such nature.[103]

95 In choosing between conflicting expert evidence, the court will have regard to their consistency, logic and coherence, with a powerful focus on the objective evidence (see *Armstrong, Carol Ann (executrix of the estate of Peter Traynor, deceased, and on behalf of the dependents of Peter Traynor, deceased) v Quest Laboratories Pte Ltd and another and other appeals* [2020] 1 SLR 133 at [92]).

96 After assessing the testimony of both experts, I accept Eddie's view that method statements and rectification plans are not needed in all situations of defects and that they would be needed for more complex defects where multiple steps are required. In my view, this accords more with logic and common sense, particularly when the type of defects identified by Royal at the 12 January 2024 Inspection are considered. These include things such as the replacement of anti-mosquito floor traps, anchoring of previously dislodged alternating current ("AC") cable trays, replacement of loose adhesive tape on wiring insulation, the replacement of cover lids for Distribution Board ("DB") boxes, and inconsistent finishes on walls and ceilings in a room. These are issues where it would be possible to verify rectification from pictures as well as visual and physical inspection, even in the absence of method statements and rectification plans.

97 I also find Cheng Yow's views on the adequacy of rectifications, to be less coherent on the whole than Eddie's. For example, Cheng Yow was not satisfied that the anchoring of the AC cable tray was sufficiently strong or if the replacement tape was properly applied to the wiring insulation, if the

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[103] 9 September Transcript at p 142 lines 7–18.

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replacement cover lid for the DB box was the right fit, or if the surfaces of the finishes in the room were flushed. Such matters would be easily addressed by a visual and physical check from Cheng Yow, more so than by the provision of a method statement and rectification plan from Calmo. For example, a visual and physical examination would easily tell if a cable tray was strong enough, if adhesive tape had been properly applied to wire insulation, if the DB box cover lid was the right fit or if the finishes in a room were consistent. However, Cheng Yow did not make another inspection to verify the rectifications, nor did Royal apply for one. Neither did he request for the further information he stated in court as missing from Calmo or Eddie. Cheng Yow accepted that it would be important for him to revisit the Premises to establish whether the defects identified in the January 2024 Inspection had been rectified. He said that he did not have a good response to why he did not do so. In addition, he also accepted that it was a fair statement to say that he because he did not revisit the Premises, he did not have any evidence to offer to the court on whether the identified defects had been rectified.[104]

98 In addition, I find some of Cheng Yow's answers to be less objective. For example, when Cheng Yow was referred to the electrical installation licences that had been approved by Energy Market Authority for the Premises, he disagreed that they sufficiently showed that the Premises was safe for the operation of electrical devices. He accepted that the Licensed Electrical Worker ("LEW") could and should have appointed parties to check on every electrical point, but nevertheless took the view that the LEW may not have done a thorough job.[105] There is however, no evidential basis for Cheng Yow to question the thoroughness of the LEW that did the inspection for the approval

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104 9 September Transcript at p 67 line 19 to p 68 line 16.

105 9 September Transcript at p 132 lines 20–25.

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of the electrical installation licence. As another example, when it was pointed out that his report stated that certain matters were a fundamental breach of the Tenancy Agreement and that such matters were not for building surveying experts to say, Cheng Yow declined to answer the question and replied that he had no comment. He also said he had no comments when asked why he declined to answer.[106] In contrast, Eddie readily accepted that although he had stated in his report that certain matters were a fundamental breach of the Tenancy Agreement, this was not for him but for the court to determine.[107]

99 I therefore find Eddie's evidence to be more logical and coherent than Cheng Yow's. He was also relatively more objective in some respects. I accept Eddie's expert evidence over Cheng Yow's. Consequently, I find that Royal has not shown that Calmo is in breach of the Tenancy Agreement by failing to satisfactorily rectify the defects identified at the 12 January 2024 Inspection.

100 In summary, I find that with the exception of the MoNo issue, Royal has not established as a threshold, the aggregate conduct based on the other alleged breaches by Calmo, on which Royal relies on to assert that there is repudiatory breach from Calmo. I therefore find that Royal is not entitled to forfeiture of the lease, on the basis of the repudiatory breach it has alleged.

Whether the breaches were waived by the rental payments received

101 I have found above that Royal is entitled to forfeiture because of Calmo's breach of cl 2(22) of the Tenancy Agreement arising from the MoNo issue (see [56] above).

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106 9 September Transcript at p 93 lines 5–18.

107 9 September Transcript at p 41 lines 11–25 to p 42 lines 1–4.

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102 The question that next arises is whether the rental payment received by Royal on 1 April 2023 constitutes a waiver of the breach of cl 2(22) of the Tenancy Agreement. While there were payments made before this date, they occurred before Royal took steps to terminate the Tenancy Agreement on the basis of a breach of cl 2(22) of the Tenancy Agreement, through DSC's letter dated 9 March 2023. Hence, only payments after this date would be material.

103 While there were rental payments made after 1 April 2023, Royal served OC 216 on Calmo on 6 April 2023. This constitutes Royal's final determination to take advantage of forfeiture, after which the acceptance of rent does not constitute a waiver of the breach (see *Marchmont Pte Ltd v Campbell Hospitality Pte Ltd and others* [2024] SGHC 108 ("*Marchmont*") at [84]. This is undisputed by parties. Thus, only the 1 April 2023 payment is material to this issue.

104 The High Court held in *Fico Sports Inc Pte Ltd v Thong Hup Gardens Pte Ltd* [2011] 1 SLR 40 ("*Fico Sports"*) that the question that has to be answered in each case is whether it was rent that was demanded and paid, or if it was damages for trespass that was demanded and paid. In the case of the latter, there would be no waiver (at [120]–[121]). In *Marchmont*, the High Court accepted the approach of *Fico Sports* (*Marchmont* at [111]).

105 In this case, on 1 April 2023, Calmo paid Royal a sum of $97,200 through bank transfer. Royal received and accepted the payment.[108] Prior to this payment, Royal had informed Calmo, by way of DSC's letter dated 9 March 2023, that Royal would continue to accept payments from Calmo, to account for its liability to Royal for double rent and/or double value and/or damages for

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108 SOC at para 68; DCC at para 140.

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trespass.[109] Through F&Q's letter of 16 March 2023, Calmo stated that by Royal issuing the tax invoices and accepting rental, Royal has waived any breaches of the Tenancy Agreement.[110] Calmo was referring to Royal's invoices issued for January to March 2023, which indicated that it was for rental for those months.[111]

106 By way of DSC's letter dated 4 April 2023 to F&Q, Royal informed Calmo that the 1 April 2023 payment would be accepted to account in part for Calmo's liability for double rent and/or double value and/or damages for trespass. The letter stated that the tax invoice that was enclosed with this letter was issued strictly for compliance with the Goods and Services Tax ("GST"). The invoice stated that it was for payment by Calmo for its liability to Royal for double rent and/or double value and/or damages for trespass. The DSC letter also responded to F&Q's letter dated 16 March 2023 and maintained Calmo's wrongful breaches in relation to MoNo.[112] On 6 April 2023, Royal commenced OC 216.

107 Following correspondence between the parties' solicitors, the parties agreed that the payments received from Calmo from April 2023 onwards are without prejudice to Calmo's position that the payments constitute monthly rent for the Premises and Royal's position that the payments are to account for Calmo's liability to pay double rent.[113]

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109 Rushdee's AEIC at pp 316–319 (paras 14–18).

110 Rushdee's AEIC at pp 961–965 (para 4(c)).

111 ACB at pp 243-245.

112 Rushdee's AEIC at pp 930–932 (paras 5–7).

113 Defendant's Aide Memoire at para 8.

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108 I find that the acceptance of $97,200 by Royal on 1 April 2023 does not constitute a waiver of the breach of cl 2(22) of the Tenancy Agreement, for the following reasons.

(a) First, in F&Q's 16 March 2023 letter, Calmo stated that since Royal's earlier invoices referred to rental, Royal was waiving any breaches of the Tenancy Agreement. However, the invoice for the 1 April 2023 payment stated that this was for GST compliance purposes and that the payment by Calmo was for its liability for double rent / double value / damages for trespass. There was no reference to rental in the invoice for the 1 April 2023 payment.[114]

(b) Second, Royal maintained its earlier position that Calmo was in breach from the MoNo incident, in DSC's 4 April 2023 letter, enclosing the invoice.

(c) Third and importantly, very shortly after Royal accepted payment on 1 April 2023, within 5 days, on 6 April 2023, Royal commenced OC 216 seeking amongst other things, forfeiture and double rent. I consider Royal's step, in commencing action very shortly after receipt of the 1 April 2023 payment, to be clear evidence that there was no intention to waive the MoNo breach.

Permission to amend Defence to include relief against forfeiture

109 After the close of trial, when the Aide Memoires for oral closing submissions were due to be filed and on the doorstep of oral closing submissions, Calmo filed a request for permission to amend DCC to include:

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[114] Rushdee's AEIC at p 232.

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(a) pleadings relating to William's evidence regarding the 19 October 2022 WA message exchange between him and Reiwa's Ana; and (b) to seek equitable relief against forfeiture.[115]

110 Calmo subsequently accepted that it could not satisfy the threshold of a "special case" set out in O 9 r 14(3) of the Rules of Court 2021 for its proposed amendments relating to William's evidence. That provision states that the Court must not allow any pleading to be amended less than 14 days before the commencement of the trial except in a "special case".

111 In any event, I declined to give permission for Calmo to make the proposed amendment to its DCC to include equitable relief against forfeiture, as Calmo has not met the threshold of a "special case". *Singapore Civil Procedure 2024 vol 1* (Cavinder Bull *et al* eds) (Sweet & Maxwell, 2023) states that to prove that a "special case" exists during or after the trial, very extenuating and unique circumstances may need to be demonstrated (at para 9/14/1). *Singapore Court Practice* (Jeffrey Pinsler gen ed) (LexisNexis, 2023) states that a "special case" is an "exceptional case"; it is one where it is necessary and just in all the circumstances to permit the amendment (at para 9.14.2).

112 Counsel for Calmo submitted that the standard of "special case" was met because of two pieces of evidence that arose during the trial, which it would not be earlier aware of: (a) Ivy accepted during cross-examination that she could not have gotten the idea that Calmo would operate a boutique hotel at the Premises from the K Hotel Brochure; and (b) Rushdee testified that he had instructed Cheng Yow to inspect the rectifications for the Cure Notice Defects,

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115 Request for Permission to file Application to Amend Defence dated 13 September 2024

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but Cheng Yow said he did not receive such instructions. Calmo submitted that these went towards showing that Royal did not act in good faith, and were hence relevant to a grant for equitable relief from forfeiture.[116]

113 However, it was Calmo's pleaded position that the K Hotel Brochure did not contain the representations that Royal had pleaded.[117] It is also plain from Cheng Yow's expert report that he did not have any evidence regarding the rectifications of the Cure Notice defects. These are issues that Calmo would have been well aware of ahead of the trial, leaving aside the specific evidence that may surface in relation to such issues. It could not be said in any way that they present very extenuating, unique or exceptional circumstances, so as satisfy the requirement of a "special case".

114 Additionally, since these two pieces of evidence are what Calmo relies on to support its request for permission to amend the DCC, Calmo would necessarily be limited to relying on them for its case for equitable relief from forfeiture. However, they are unrelated to the MoNo activity and would not provide any help in considering whether there should be equitable relief for forfeiture arising from the activities.

115 In any event, the factors that Calmo seeks to rely on for a grant of equitable relief from forfeiture, as stated in its Aide Memoire,[118] namely, that Calmo rectified the MoNo activity before Royal raised the issue and there is no stigma attached to Royal as a result of the MoNo activity, are matters which

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116 9 September Transcript at p 52 lines 10–25; 16 September Transcript at p 40 lines 24–25 to p 43 lines 1–8.

117 DCC at para 22.

118 Defendant's Aide Memoire at para 21.

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Calmo was apprised of before trial, and did not surface because of unforeseen evidence that arose during trial.

116 I was also of the view that allowing this late amendment would prejudice Royal, who would otherwise have been entitled to pursue a different line of inquiry during discovery and cross-examination, bearing in mind that the grant of equitable relief for forfeiture takes into account the gamut of factual circumstances of the case, including whether there was wilful breach and the gravity of the breach. Royal cited the decision of Federal Court of Australia in *Stradzins, in the matter of DNPW Pty Ltd (subject to DOCA) CAN 107 484 711 v Birch Carroll and Coyle Ltd* [2009] FCA 731 (at [196] and [204]-[210]). I found the reasoning there to be applicable to this situation and agreed with them.

Double rent

117 In relation to MoNo's breach, Royal claims against Calmo for double the rent for the period of holding over, pursuant to s 28(4) of the CLA. This is at the rate of $180,000 per month from 10 March 2023 to 14 August 2024, and at $220,000 per month from 15 August 2024 until possession of the Premises is returned to Royal. As I have found above that the tenancy was determined and Royal entitled to exercise forfeiture of the Premises with effect from 10 March 2023, Calmo is holding over from that date onwards. Royal is thus entitled to double rent from 10 March 2023 at the rates submitted for, until possession of the Premises is returned to Royal.

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Calmo's counterclaim

Parties' cases

118 Calmo counterclaims against Royal for elevator maintenance and repair costs incurred by Calmo, pursuant to cl 4(19) of the Tenancy Agreement, which provides:[119]

> Landlord to be responsible for maintenance and any expense from façade, building exterior, structure, piping, and any lift repairing excess amount exceeding SGD2,000 per year other than monthly normal maintenance expense (if there's any lift).

119 Calmo submits that Royal has refused to pay for escalator invoices in excess of $2,000 for the year 2022, amounting to $75,259.50. Calmo submits that Royal is liable under cl 4(19) of the Tenancy Agreement, as escalators form part of the "structure" of the Premises.[120] In support, Calmo relies on *Chiu Teng Construction Co Pte Ltd v The Hartford Insurance Company (Singapore) Ltd (formerly known as The People's Insurance Co Ltd)* [2001] SGHC 119 ("*Chiu Teng*") (at [54]–[55]) and *Management Corporation Strata Title Plan No 367 v Lee Siew Yuen and another* [2014] 4 SLR 445 ("*Lee Siew Yuen*") (at [37]). Calmo also submits that Ken understood "lift" as "escalators" when he was negotiating with Ivy.[121]

120 Royal does not dispute that the escalators at the Premises required maintenance and repair work in 2022, but submit that it is not liable under cl 4(19). This is because the clause only mentions "lift" repairing but not escalator repairs and "structure" does not include "escalator". It is also not

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119 Rushdee's AEIC at pp 81–82.

120 DCC at paras 144–155.

121 Defendant's Aide Memoire at para 25.

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Calmo's pleaded case, and there is no evidence, that Royal and Calmo had any common intention to include the word "escalators" in cl 4(19) or that there was any mutual mistake.[122]

Decision

121 Under cl 2(14A) of the Tenancy Agreement, Calmo covenanted to observe and comply with all laws, rules, regulations and restrictions imposed on Calmo in operating the Premises in such manner by any authority, statute, law or Act of Parliament. In relation to this, reg 25(1) of the Building Maintenance and Strata Management (Lift, Escalator and Building Maintenance) Regulations 2016 (the "BMSMR") provides that an "owner" of an escalator in operation must engage an escalator service contractor to maintain the escalator. Under reg 2 of the BMSMR, an "owner" of an escalator generally means the owner, lessee or occupier of the building or structure in, or in connection with, which the escalator is used. An escalator is not regarded as part of the "structure" under the BMSMR. I agree with Royal that Calmo, being the lessee and occupier of the Premises, was therefore obliged to engage an escalator service contractor to maintain the escalators under reg 25 of the BMSMR.

122 Neither *Chiu Teng* nor *Lee Siew Yuen*, which Calmo cites, supports its submission that "structure" includes "escalator". *Chiu Teng* finds that "structures would include brick party walls and brick boundary walls" (at [55]). *Lee Siew Yuen* notes that "structure" is defined in the Oxford English Dictionary (Clarendon Press, 2nd Ed, 1989) as "way in which building etc is constructed; supporting framework or essential parts" (at [37]). Indeed, the definition cited

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122 Claimant's Aide Memoire at pp 19–20.

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in *Lee Siew Yuen*, that "structure" refers to support framework or essential parts of a building, suggests that escalators are not structures. Counsel for Calmo accepted that these authorities do not provide any support.[123]

123 There is also no merit to Calmo's argument that Ken understood "lift" to mean "escalator". Calmo has failed to show that there was a common intention to include "escalator" or that it was a mutual mistake to mention "lift" instead of "escalator". Ivy was not cross-examined on this.

124 I therefore find that "structure" in cl 4(19) of the Tenancy Agreement does not cover "escalators". Calmo's counterclaim is consequently dismissed.

Conclusion

125 In conclusion, I allow Royal's claim for forfeiture on the ground that Calmo has breached cl 2(22) of the Tenancy Agreement. Royal is entitled to forfeit the security deposit and possession of the Premises. Pursuant to s 28(4) CLA, Royal is entitled to its claim for double rent, until possession of the Premises is returned to Royal. Calmo's counterclaim is dismissed.

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[123] 16 September Transcript at p 140 lines 1–5.

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126 If parties are unable to agree on the issue of costs, they are to file written submissions on costs, of not more than 10 pages, within a week of this Judgment.

Kwek Mean Luck
Judge of the High Court

Jaikanth Shankar, Waverly Seong Hall Ee, Tan Ruo Yu and Tanmanjit Singh Sidhu s/o Karam Jeet Singh (Davinder Singh Chambers LLC) for the claimant;
Ng Lip Chih, Ho Kin Onn and Tan Jinwen Mark (Chen Jinwen) (Foo & Quek LLC) for the defendant.

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