IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 194

Suit No 864/87

Between

Singapore Airlines Limited

… *Plaintiff*

And

Alliance Securities Pte

… *Defendant*

GROUNDS OF DECISION

Version No 1: 11 Sep 2026 (01:05 hrs)

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Singapore Airlines Limited v Alliance Securities Pte

[1992] SGHC 194

Suit No 864/87
K S Rajah JC
15 July 1992

1 **Judgment:**

2 Coram: K S Rajah JC

3 JUDGMENT

4 The plaintiffs, Singapore Airlines Ltd, claim that by an agreement in writing contained in a letter from the plaintiffs to the defendants dated 26 February 1986 ("agreement"), the plaintiffs agreed to grant a lease of the premises known as units 05-05 and 06-00 SIA Building, Singapore, for a term of 3+ years from 15 March 1986 at the monthly rental of $12,792. No rent was required to be paid for the period 15 March 1986 to 31 August 1986 in lieu of improvements to be provided by the landlord.

5 The plaintiffs say the defendants took possession on 26 April 1986 and commenced renovation works thereafter, and by telex dated 29 September 1986 the defendants have refused to be bound by the agreement. The plaintiffs have suffered loss and damage and their claim is for loss of rent, cost of repairs, interest and costs. It is not pleaded that a lease had come to an end.

6 The defence is that the plaintiffs granted an option to lease subject to the security deposit being forfeited. Alternatively, the plaintiffs had acted in breach of the agreement when the defendants were required to execute a standard tenancy agreement when there was no obligation to do so. Further, there was an implied term that the agreement was conditional upon the parties being able to agree on a formal lease, and finally that the plaintiffs had repudiated the agreement and the defendants were discharged from any obligation under the agreement.

7 The first question is whether the letter of 26 February 1986 is (1) an option to lease, (2) an agreement for a lease, or (3) a lease. But before that is done, it is necessary to set out the facts.

8 **The Facts**

9 The plaintiffs are the owners of SIA Building. The defendants are stockbrokers. Negotiations took place between the plaintiffs and the defendants through Richard Ellis, a firm of estate agents for the lease of the premises.

10 On 26 February 1986, SIA Properties (Pte) Ltd, the plaintiffs' sister company acting as the plaintiffs' agent, wrote a letter dated 26 February 1986 to the defendants. On 28 February 1986, Ong Kah Chye, a director of the defendants, signed and returned the duplicate copy of the letter together with payment of the security deposit of $12,792 confirming acceptance of the space referred to in the letter on the terms and conditions set out in the letter. The letter as acknowledged is in the following terms:

11 Dear Sir

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12 LEASE OF OFFICE SPACE IN SIA BUILDING

13 We refer to your interest to lease office premises at SIA Building. As requested, we append below fresh terms of the proposed lease:-

14 .1 Area : 6,396 sq ft on the 5th & 6th floors (please see attached plans)

15 .2 Rental : $12,792 per month inclusive of service charges and fixed for the first 3+ years

16 .3 Lease Period : 3+ years with option to renewal for a further 3 year term

17 .4 Rent Review : Upon expiry of the 3+ year term

18 .5 Rent free Period: 5+ months with effect from 15 March 1986 (in lieu of the improvements to be provided by the landlord i.e carpeting, replacement of ceiling grids & tiles and repainting)

19 (sic).5 Commencement: 15 March 1986 date of lease

20 .6 Commencement : 1 September 1986 date of rental payment

21 .7 Carparks : 6 lots at $130 per lot per month. Additional lot may be requested and is subject to availability.

22 (sic).7 Security Deposit: $12,792 payable on signing of the option to lease

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23 2 If you are agreeable to the above terms, we would appreciate if you could sign and return the duplicate copy of this letter together with payment of the security deposit of $12,792.

24 Yours faithfully

25 Kathrine Koo (Mrs) KK:cn Senior Property Executive

26 We confirm acceptance of the above space on the terms and conditions stated above.

27 Signed Date 28 Feb 86

28 Katherine Koo, the estates manager, SIA Properties, said the letter of 26 February 1986 contains the main terms. When the signed letter was received by her, there was a binding agreement between the parties. The plaintiffs' practice was to agree on the "main terms" and then to formalise the agreement arrived earlier in the standard tenancy agreement. There would be no variation of the principal terms. No explanation was given for the "main terms" not being worded in the language of the standard tenancy agreement.

29 Plans and drawings were requested by the defendants' internal decorators who were engaged on 28 February 1986. The plaintiffs supplied:

30 (a) the SIA building site plan; and (b) 5th and 6th storeys: Floor layout plans, electrical fitting drawings, airconditioning installation plan that were requested by the defendants' internal decorators engaged on 28 February 1986.

31 On 5 March 1986, SIA Properties wrote to the defendants: "We are enclosing two copies of the standard Tenancy Agreement for your review and

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return to us duly signed for stamping." No reference is made to the agreement in the covering letter or in the standard tenancy agreement, but the names of the parties, the premises to be demised, and some of the particulars agreed are inserted in the standard tenancy agreement.

32 The defendants wrote to SIA Properties on 5 April 1986 (i.e. after the purported date of the commencement of the lease on 15 March 1986) enclosing the defendants' solicitors' comments. The solicitors' comments on the plaintiffs' standard tenancy agreement runs to five pages. Some of the comments are as follows:

33 1. Clause 2(ii) (Re: option for further lease) (cl .3 of agreement)

34 (a) The Option for another 3 years is not a genuine Option because:-

35 (1) It is conditional upon the Landlord not requiring the premises for its own use and occupation. This condition should be deleted.

36 (2) The amount of the base rent "shall be ... determined by the (Landlord)". This means that the Landlord can arbitrarily price the Tenant out.

37 We propose that you ask for the present sub-clause (b) to be deleted and replaced by the following new sub-clause (b), viz:-

38 "The amount of the base rent to be inserted in Item 5 of the Appendix shall be determined by the Lessor according to the prevailing market rate and in the event of dispute as to what constitutes the prevailing market rate the same shall be determined by a licensed valuer (whose appointment shall be jointly made and whose costs shall be equally borne by both the Lessor and the Lessee) whose decision shall be final and binding upon the Lessor and the Lessee."

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39 (b) To exercise the Option the Tenant must give 6 months' notice prior to expiration of the current term. This is too long as the Tenant may not be able to decide so early whether it would want to continue for another 3 years, or, the Tenant's management may not remember so early on about the expiry of the Lease. A period of 3, or, perhaps 4 months would be more practical.

40 2. Clause 9(p) (Re: subletting and assignment) (no restriction against sub-letting in agreement)

41 (a) Before signing the Lease agreement, please ensure that you obtain the Landlord's written consent to sub-let or share possession of the 5th Storey unit with Sinpen. The Landlord may exercise its right not to consent after you have signed the Agreement.

42 (b) Ask for the deletion of the last sentence "For the purposes hereof any change in the principal shareholding altering the effective control of the Lessee (if a Company) shall be deemed an assignment of the lease and require the consent of the Lessor as aforesaid." This is because, as you have given us to understand, you may want to bring in major shareholders to increase the share capital of your company in line with the latest directions of the SES for the industry.

43 3. Clause 10(c) (Re: installation of partions)

44 If you are going to do renovations before you move in, and you prefer to engage contractors and architects of your own choice, please get the Landlord's written consent first, or, alternatively where you do not need the services of an architect, please get the Landlord's written confirmation that the Landlord will not exercise its right to impose an architect on you. Please do so

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before you sign the Agreement because if you raise the issue after, you will be at the mercy of the Landlord.

45 4. Clause 13(1) (In cl .2 of agreement rental is inclusive of service charges and fixed for the first 3+ years)

46 The clause occurring immediately after sub- clause (f) under the heading "Remedying of defaults" which reads "All costs and expenses incurred by the Lessor in carrying out any of the works provided for in one or other of the aforementioned sub-clauses shall, if the Lessor so elects, be borne by the Lessee within seven (7) days of the Lessor notifying the Lessee of the amount thereof." cannot possibly be permitted to be retained without modification.

47 For instance, if in accordance with sub-clause (e) in the event that the premises or even the building is destroyed and the Landlord rebuilds the premises or the building, the Landlord has the power of asking the Tenant to pay all costs and expenses incurred by the Landlord in carrying out such rebuilding.

48 We recommend the deletion altogether of this provision. If the Landlord really feels that it should retain something of this provision, the following clause would be much fairer to the Tenant, namely,

49 "All costs and expenses incurred by the Lessor in carrying out any work to repair amend and make good in a proper and workmanlike manner any defects for which the Lessee is liable and which the Lessee has failed to do despite written notice from the Lessor requiring same shall be borne by the Lessee."

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50 5. Item 5 of Appendix (Re: base rent per annum) (cl .2 Rental includes service charges and is fixed)

51 (b) ... Has it been agreed that the base rent should be the only rent payable by the Tenant at all times during the term and that there should be no increase of service charges at all?

52 6. Clause 4(a)(i) (Re: contributions to outgoings) (no reference to contributions or to outgoings in agreement)

53 ...

54 If the Tenant is liable to pay increased maintenance charges then to be fair to the Tenant the definition of "outgoings of the building" should not include sub-sub-clause (1) which reads "all rates taxes charges and assessments duties impositions and fees at any time or from time to time payable to any government, local government, semi-government or other competent authority in respect of the land or the building."

55 The provision as it stands includes things like property tax or other things which do not benefit the Tenant. The principle should be that the Tenant should be asked to contribute towards only those outgoings which are necessary for the Tenant's enjoyment of the premises. Therefore, at best, if the Landlord insists on having a provision of this kind, it should read:-

56 "all rates taxes charges and assessments duties impositions and fees in respect of the services in the building provided either directly or indirectly for the benefit of the Tenant and other occupants of the building as shall be imposed

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at any time and from time to time by any government, local government, semi-government or other competent authority."

57 On 25 April 1986, before the plaintiffs had responded to the defendants' letter of 5 April 1986, the defendants' Alvin Lee collected two keys to the premises from the plaintiffs' security guard. The interior decorator, geomancer and Alvin Lee inspected the premises. On 29 May 1986, SIA Properties replied to the defendants' letter of 5 April 1986 agreeing to some of the defendants' solicitors' proposed amendments and disagreeing with the others.

58 The plaintiffs wanted the following clauses in the standard tenancy agreement to remain:

59 (a) Clause 2(ii) - the "main term" on options, although it is different from the clause on options in the agreement. (b) Clause 9(p) - the written consent of the landlord to sub-let. (c) Clause 13(1) - the additional rights of the lessor entry by person to repair, remedying of defaults, re- entry, closing the outer doors of building, and the making of rules etc.

60 and said: "If all the above are acceptable, we would arrange to incorporate the amendments by a separate side letter to the standard agreement." The defendants did not accept the changes and there was a meeting.

61 The defendants subsequently wrote a letter dated 3 July 1986 to SIA Properties to the attention of Mrs Katherine Koo.

62 The letter, inter alia, reads:

63 1) Proposed Renovation Plans

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64 Our Interior Consultant had approached the Fire Safety Bureau with regards (sic) to our renovation plans and it has been advised that the plans will not be approved unless additional improvements which are enumerated below are done so as to conform to present fire codes:

65 a) To instal a new +-hour fire resisting door along fire escape passage 1 to create a smoke free lobby;

66 b) To replace the existing aluminium close door leading to the fire escape passage 2 with fire resisting door;

67 c) To instal a new fire resisting door along fire escape passage 2 to create a smoke free lobby.

68 d) To instal heat detector system within the premises.

69 The above additional improvements are necessary as the existing facilities provided by your building are deemed inadequate to meet present day fire codes. We are of the opinion that any improvements to confirm (sic) to present day fire codes and any building requirements by D&BCD should be done by the landlord.

70 2) 3 Months Renovation Free Period - (Clause .5 of agreement)

71 We would like to request that the three months renovation free period to commence upon obtaining the approval from the Fire Safety Bureau and D&BCD. We believe you are aware that the time it takes to obtain the approval is definitely beyond our control. Further, our renovation involves laying numerous telephone lines and instalments of many computers. The schedule for these are also beyond our control.

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72 3) Air Conditioning We have been informed by our Interior Consultant that the present preasurised (sic) air conditioning system is definitely inadequate for our nature of business. Kindly let us know whether you have any objections to our plan to instal a multi-split air conditioning unit or package unit within our premises. As we have to work beyond normal working hours, we would be pleased if you could let us know the hourly charges if we request you to switch on the air conditioning provided by your building beyond the normal working hours.

73 4) Car Parking Lots

74 As stated in your letter of offer, you have agreed to let us have 6 parking lots. We require a minimum of 10 car parking lots. Kindly let us know whether you are able to provide the additional 4 car parking lots within the building, if not, you would secure for us the additional car parking lots in the nearby buildings.

75 We would appreciate your early reply as we would like to commence our renovation works soonest possible.

76 The plaintiffs replied on 12 August 1986 stating that the rent-free period would commence "from date of lease on 15 March 1986" but gave an additional concession of one month rent-free to fix the heat detectors and fire door required by the Fire Safety Bureau ("FSB"). Rental for the leased units would commence from 1 October 1986. The senior property executive concluded his letter by asking the defendants to reply to their letter of 29 May 1986 "so that we could attend to execution of the lease agreement". The parties clearly intended to execute a lease and with that in mind negotiated the terms of the lease.

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77 The defendants wrote to the plaintiffs on 18 August 1986. The defendants wanted:

78 (a) Monthly rental to be a fixed sum for a period of 3+ years. (b) Monthly rental to include maintenance and service charges and all outgoings. (a) and (b) would be consistent with cl .2 of the agreement. (c) Clauses 4 and 5 on contribution to outgoings and clearing of the standard tenancy agreement to be deleted as they are contrary to (a) and (b) above. (d) Option to renew the premises for a further three years should not be made subject to the landlord not requiring the premises for its own use and occupation to be consistent with cl .3 in the agreement. (e) Rental for the extended period should be the prevailing market rent as at the date of exercise of the option. This was negotiable. The rental to include maintenance, service charges and outgoings would be consistent with cl .2 of the agreement. (f) Any dispute over the prevailing market rent to be determined by a third party. (g) Landlord not to be excluded from the duty of care owed to the tenant and third parties for injury, loss or damage. (h) Defendants to decide on how the premises should be partitioned and outfitted as proviso to cl 10(c) gives the plaintiffs the power to decide how the defendants' office should be partitioned and furnished. (i) Plaintiffs to bear all outgoings charged upon the land and building except what the lessee had agreed to pay. (j) Lessor to maintain repair, amend, renew, cleanse, repaint and redecorate and keep in good and suitable condition the structure, roofs, foundations of the building, excluding walls, windows etc within the demised premises. (k) Lessor to maintain lifts, staircases etc called the common parts and so on. (j) The defendants insisted that the landlord should carry out the safety measures required by the FSB. The nature of the requirements of the parties as set out above is a sufficient sample of the positions taken by the parties for purposes of

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determining the reasonableness of the parties and the approach taken on matters arising from the agreement of 26 February 1986.

79 The defendants' letter of 18 August 1986 ends as follows: We would like to have the lease concluded as soon as possible for until the terms of the lease are agreed to, what we have got is only an option to lease and we are certain that you do appreciate that we will not dare to carry out any renovation works. Your delay in replying to our questions has taken up all the time allocated for renovation. We must insist now that the parties meet face to face and try to resolve the lease agreement and the deadline for reaching an agreement must be by the Monday of next week and if we cannot resolve our differences or reach an agreement, we will have no choice but to decline to exercise the option to lease.

80 As time is short, please contact us by telephone to arrange a mutually convenient date for the meeting.

81 < Emphasis added. >

82 The plaintiffs' response in the telex was: "... since u hv taken possession of the premises pls submit yr renovation plans for our approval so as not to delay the wks further n also to take full advantage of the rent free period granted by the landlord ...", but added that the defendants' letter of 18 August 1986 had been sent to their legal department for review.

83 The defendants denied having taken possession of the premises explaining that the key was taken by the interior designer to take measurements for his drawings of the renovation plans and that the defendants deemed it

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important that they should have a lease agreement on terms and conditions that have been agreed before the renovation plans are submitted.

84 The defendants maintained that FSB requirements should be made good by the landlord and not the tenant, and hoped a reply would be forthcoming on the terms and conditions set out in the defendants' reply of 18 August 1986 within a week.

85 On 11 September 1986, the plaintiffs' senior property executive wrote to the defendants stating that when the keys were handed over at the request of the defendants, possession of the premises was also given. The agreement of 26 February 1986 did not require the parties to formalise the contract before the defendants embarked on renovations and that the rent-free period was given to enable renovations to be carried out after the commencement of the lease on 15 March 1986. It was the defendants' responsibility to obtain approval of the plans. The reply of the plaintiffs' solicitors to the amendments proposed was attached. The solicitors' amendments made reference to no less than fifteen clauses.

86 The penultimate paragraph reads: "We will be sending to you the final copy of the tenancy agreement (incorporating all amendments agreed by the landlord) for your signature." and the plaintiffs hoped the clarifications are to the satisfaction of the defendants.

87 The comments of the plaintiffs' solicitors to the amendments to clauses in the standard tenancy agreement that went to the root of the agreement were:

88 Clause 2(ii) - (Dealing with the option to renew lease.)

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89 The plaintiffs wanted the condition that the lease be renewed subject to the lessor not requiring the premises for its own use and occupation to remain.

90 Clause 3(i) - (Dealing with the payment of base rent.)

91 The plaintiffs wanted the defendant to pay base rent in the manner set out in cl 3(i) and item 5 of Appendix which reads:

92 (a) The reference to Clause 3 is we think a typographical error and should read Clause 5.

93 (b) We are not very sure about the significance of the words "if any" intended by both the Tenant and the Landlord. Has it been agreed that the base rent should be the only rent payable by the Tenant at all times during the term and that there should be no increase of service charges at all?

94 If the understanding is that the Landlord should have no right to increase service charges we propose that this be made absolutely clear by the addition of the following words:- "For the avoidance of doubt (if any) it is hereby agreed that Clause 4(a)(ii), 4(b) to (d) (inclusive) and Clause 5 shall not apply to the Lessee herein."

95 The existing proviso to clause 12 - (Dealing with failure of services.)

96 The plaintiffs wanted the proviso entitling the defendants the right to terminate the lease or claim compensation to remain.

97 Clause 16 - (Dealing with liability for damages and injury.)

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98 The plaintiffs wanted to be under no greater liability than the defendants for accidents etc in the building.

99 On 25 September 1986, the defendants' representatives with their solicitor went to the 6th floor of the premises. The defendants were unable to open the locks with the keys they had been given earlier. The plaintiffs' maintenance crew opened the locks for the defendants and locked the premises after them. A meeting took place. On 27 September 1986, the defendants' interior decorator returned the two keys to the plaintiffs.

100 On 29 September 1986, before the extended rental payment date came into force on 1 October 1986, the defendants sent a telex to SIA Properties saying that they were unable to accept the tenancy arrangements and the defendants would not exercise the option to take up the tenancy. A new proposal to rent the whole of the 6th floor and part of the 5th floor was sent on 3 October 1986. The letter made it clear that the terms and conditions of any lease agreement would have to be agreed by the parties and that fire safety measures would have to be done by the plaintiffs. If the proposal was acceptable, the solicitors were to thrash out the terms of the lease agreement.

101 The plaintiffs' response was: "Your acceptance of our letter of offer dated 26 February 1986 constitutes a valid and binding contract." Rental for the months of September and October for $25,584 was demanded.

102 Option To Lease Or Agreement To Lease It is common ground that the agreement contains the principal terms of the agreement entered into by the parties. The plaintiffs, however, say the $12,792 paid by the defendants is valid consideration for the binding agreement. The plaintiffs concede that the letter of 26 February 1986 ("agreement") does not expressly provide that there is to

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be a lengthy complex tenancy agreement and that by virtue of s 53 of the Conveyancing and Law of Property Act (Cap 61), the agreement, being for a period of more than three years and not by way of a deed, is void at law as a lease. The plaintiffs, however, say that as equity holds done which ought to be done the agreement to enter a lease must be deemed to be a contract enforceable by way of specific performance, or, in the alternative, damages. If there is a wrongful breach, the remedies of the innocent party are either a claim for damages or an action for specific performance.

103 The plaintiffs essentially rely on the fact that the defendants had taken the keys and kept the keys until 27 September 1986 to establish possession besides saying that the locks had been changed. The plaintiffs say that there has been no re-entry of the premises on 25 September 1986.

104 The defendants say the true meaning and effect of the letter is that the plaintiffs had granted an option to the defendants. In consideration of the payment of $12,792, the plaintiffs had bound themselves to grant a lease of the premises upon the terms and conditions set out in the letter to the defendants, but the defendants had the right to decide whether or not to take the lease, subject only to their forfeiting the sum of $12,792 to the plaintiffs if they should decide to exercise their right not to take the lease. The right to decline to take the lease was exercised. Apart from forfeiting $12,792, the defendants are not liable to the plaintiffs for any of the alleged loss and damage as claimed. This is the first question.

105 The court must construe the written agreement in the normal way, ignoring the statutory consequences (see Shell Mex and BP Ltd v Manchester Garages Ltd < 1970 S No 5287 > 1 WLR 612, 619), but the court must also be quick to detect terms which are not genuine but pretences that may deceive or

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mislead (see Street v Mountford < 1985 > AC 809 HL), unless the circumstances fall within one of the exceptions discussed by Lord Templeman in Street v Mountford.

106 The defendants rely on: (a) The use of the word "option" in cl .3 of the "agreement" where the word "option" is used in the sense that there is a right not to ask for a renewal for a further three-year term. (b) The use of the words "option to lease" in cl .7 "Security Deposit" - $12,792 payable on signing of the option to lease. (c) The lease period for 3+ years and the need for a deed. (d) The defendants' witnesses' understanding of the word "option" in cl .7 and in cl .3 of the letter as having the same meaning. (e) The objective meaning of the word "option" in cl .7 as it would be understood by a reasonable man must be that of an option to lease and not an agreement to lease, still less, a lease. (f) The payment of $12,792 was consistent with the notion that if a person wants to obtain an option binding on the grantor, then consideration has to be furnished for it and it is invariably the payment of a sum of money as an option fee. (g) The plaintiffs' request for a lengthy and complex tenancy agreement. (h) The fact that it was a commercial lease to be followed by a tenancy agreement in due course. (i) It is argued all the above are consistent with the conduct and intention of persons who want to obtain an option binding on the grantor. It was submitted that the court would be re-writing the document if the word "option" in its ordinary sense was ignored and the document treated as an agreement. The document being an option to lease, the matter came to an end when the defendants exercised the option.

107 Whether a transaction is an option or an agreement to lease depends upon its substance and not upon the label or formal language of the document. I must therefore look at the nature of the transaction itself and see whether the

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plaintiffs made a unilateral promise, in which case it is an option or whether there is a bilateral contract.

108 The agreement is entitled "Lease of Office Space in SIA Building" and makes reference to "terms of the proposed lease" besides the words "option" and "option to lease". By cl .1, the plaintiffs agree to provide an area of 6,396 sq ft on the 5th and 6th floors of SIA Building. By cl .2, the rent is to be $12,792 pm inclusive of service charges and is fixed for the first 3+ years. By cl .3, the lease period is for 3+ years with option to renew for a further three-year term. By cl .4, upon expiry of the 3+-year term, there is provision made for rent review. By cl .5, a rent-free period of 5+ months with effect from 15 March 1986 (in lieu of improvements to be provided by the landlord, i.e. carpeting, replacement of ceiling grids and tiles and repainting) is promised. By cl .7, a security deposit was requested on signing of the option to lease. The defendants confirmed acceptance of the space on the terms and conditions as set out. In my judgment, the use of the words "option to lease" by the plaintiffs does not make the agreement an option. It is not a unilateral promise on the part of the plaintiffs as the defendants accepted the space on the 5th and 6th floors on the terms set out in the letter. There is a bilateral contract or agreement to lease and I accept Mr Singam's submission on this point.

109 The Standard Tenancy Agreement If the letter dated 26 February 1986 is an agreement, the defendants then say that the plaintiffs were in breach of the agreement when they wanted the defendants to execute a formal tenancy agreement which contained numerous terms and conditions which were not set out in the agreement, which were not accepted and of which the defendants had no prior notice.

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110 Both parties entered into a process of negotiating the terms and conditions with some vigour. There was no final concurrence. Both parties recognised that they would have to execute a tenancy agreement, notwithstanding the fact that there is no mention of an obligation on the part of the parties to do so. It cannot be said that the plaintiffs had repudiated the agreement of 26 February 1986 by asking the defendants to sign a tenancy agreement which the parties intended to do and made efforts to do so. The defendants were not accordingly discharged from their contractual obligations by the plaintiffs requiring the defendants to execute a tenancy agreement.

111 The defendants further plead that it was also agreed by the plaintiffs and the defendants in the conversations between the representatives of the parties prior to the writing of the letter of 26 February 1986 that it was an implied term of the agreement that such agreement was conditional upon the respective parties being able to agree on a formal lease and by reason of the respective parties being unable so to agree on such a formal lease, the defendants were entitled not to proceed further with the agreement. The sum of $12,792 is accordingly refundable to the defendants.

112 The plaintiffs' agreement refers to "fresh terms of the proposed lease". The covering letter dated 5 March 1986 enclosing two copies of the standard tenancy agreement makes no reference to the "main terms" that were agreed on 26 February 1986. The copies of the standard tenancy agreement were not signed by the plaintiffs although the names of the parties, the place and the appendix to the standard tenancy agreement give the impression that the agreement containing the main terms had been formalised.

113 The plaintiffs had a copy of the standard tenancy agreement ("STA") on 26 February 1986. The main terms in the STA could have very early been

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reproduced in their letter of 26 February 1986. This was not done. The "main terms" were worded very differently.

114 The agreement was for a commercial lease for the period of 3+ years. The formal lease was sent to the defendants by the plaintiffs and both parties entered into negotiations with the advice of solicitors. The advice given by the solicitors to the parties were exchanged.

115 In deciding whether to imply a term the courts are guided by policy considerations affecting the type of contract and it is only to that extent considerations of reasonableness and fairness enter into the implication of the terms.

116 In my judgment there was an implied term as pleaded by the defence. The question is whether the plaintiffs should be ordered to refund the sum of $12,792 paid by the defendants to the plaintiffs.

117 The security deposit of $12,792 was paid "on signing of the option to lease". The plaintiffs chose to describe the $12,792 which the defendants in fact paid as "being security deposit and payment of rental for the office space in SIA Building for September 1986". If the sum of $12,972 had not been paid by mistake, all that would be stated in the receipt would be that the $12,792 is a "security deposit ...". The money was paid prior to the commencement of the tenancy for the plaintiffs to hold until the end of the tenancy.

118 The Security Deposit There are no regulations governing security deposits. The money was not paid and received where the relationship of landlord and tenant existed. Under the agreement, it is a debt due from the plaintiffs to the defendants. See Hua Chiao Commercial Bank Ltd v Chiap Hua

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Industries Ltd < 1987 > 1 AER 1110 (PC), and the judgment of Thean J in United Malayan Banking Corporation Berhad v Goodhope Realty (Pte) Ltd & Ors < 1989 > 2 MLJ 93, where Thean J held that the tenant's payment of a security is different from that of a payment of purchase money by a purchaser for the land agreed to be purchased. In this case the main terms had been agreed. The parties were obliged to negotiate the formal lease reasonably and fairly. The money was not paid as rent, but as a security deposit, so that the plaintiffs were assured that the defendants would go about agreeing on the formal lease fairly and reasonably.

119 Possession And Renovation The defendants deny taking possession of the premises and carrying out any renovation works and say that on 26 April 1986 the keys were handed over to enable the defendants' representative, interior decorator and geomancer to enter the premises for the inspection. The keys, however, were not returned to the plaintiffs until 27 September 1986 because it was agreed between the parties that it would be more convenient for the defendants to keep the keys to enable the defendants to gain access to the premises to enable the defendants' interior designer to enter the premises to take measurements and prepare for renovation works to be carried out without having to make prior arrangements with the plaintiffs on every such occasion. Occupation of the premises, the defendants say, never took place. On 25 September 1986, when the defendants wanted to inspect the premises, their representatives found the door to the premises had been double-locked. The defendants using only the keys that they had been given could not unlock the doors. The plaintiffs' security and maintenance officer unlocked the door for the defendants on that day. The defendants therefore say they were never permitted to occupy the premises to the exclusion of the plaintiffs.

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120 The defendants further plead that if the defendants are found to have taken possession and thereby commenced the tenancy with the plaintiffs, the defendants' obligation to pay rent was limited to pay rent under such tenancy to the plaintiffs and the defendants' liability as tenant to pay rent came to an end when the plaintiffs forfeited the tenancy by their re-entry into the premises upon or before 25 September 1986 when the plaintiffs double-locked the premsies or when the tenancy was surrendered on 27 September 1986 and the keys were returned to the plaintiffs and the plaintiffs unconditionally accepted the keys.

121 The expression "exclusive possession" is generally used in two distinct senses by the courts: see Heslop v Burns < 1974 > 1 WLR 1241 at 1247 CA:

122 (a) Exclusive or legal possession of the premises, entitling the grantee to exclude everyone else including the grantor. Exclusive possession in this sense amounts to an interest in the land itself and is inconsistent with occupation under, e.g. a mere licence. If exclusive possession has been granted under this head, a tenancy has been created. (b) Exclusive possession meaning no more than "exclusive occupation", i.e. the right to sole occupation. In this sense, exclusive possession is referred to as exclusive occupation. It raises a presumption of a tenancy, but is not necessarily inconsistent with occupation under, e.g. a mere licence.

123 The plaintiffs rely on the taking of "keys" and renovation works besides the commencement date to establish possession. The defendants rely, inter alia, on the fact that the plaintiffs had the "keys" had locked the defendants out to deny possession of the premises and the failure to agree on a formal lease.

124 The fact that the plaintiffs retained or the defendants held a key to the premises does not necessarily preclude the grant of exclusive occupation or

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possession by the defendants. The purpose for which the key was retained must be considered.

125 In Family Housing Association v Jones Westminster City Council (Third Party) 1 WLR 779, 789 Balcombe LJ said:

126 The retention of a key by itself cannot be decisive; a landlord under an undoubted tenancy may retain a key to enable him to exercise a right reserved to him by the tenancy to enter the demised premises to inspect the state of repair. As Lord Donaldson of Lymington MR said in Aslan v Murphy < 1990 > 1 WLR 776 there is a spectrum ranging from tenant at the one end to lodger at the other. Whilst the rights retained by the housing association in the present case may be slightly greater than those usually retained by a landlord under a lease, I entertain no doubt that they fall at the "tenant" end of the spectrum, not the "lodger" end.

127 I find as a fact that the defendants' interior decorator had the keys to enable him to get on with his work while the defendants were applying their minds to the standard tenancy agreement. The defendants did not move into the premises or occupy the premises. The defendants' solicitors' letter of 2 April 1986 put the defendants on guard. The defendants were not prepared to and did not take possession. A lease had to be signed before the defendants were prepared to start renovation works or go beyond inspecting the premises. The plaintiffs were aware of this fact and received the keys from the decorator.

128 Repudiation It was also the defence case that the plaintiffs had repudiated the agreement so that the defendants were discharged from obligations they might have had to perform. A contract to enter into a lease is subject to the doctrines of repudiation and anticipatory breach. See Sweet &

Maxwell Ltd v Universal News Services Ltd < 1964 > 2 QB 699 (no repudiation on facts) and Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) 166 CLR 623 (repudiation on facts). Upon the grant of the lease, however, an interest in the land arises and the existence of this interest prevents the purely contractual doctrines of repudiation and anticipatory breach from applying.

129 Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd was a case of not mere delay in performing a vital obligation but of refusal to perform a vital obligation until the lessors chose to do so. It was the appellant's case that the lessor's failure to produce a lease in registrable form showed that it was prepared to carry out its part of the agreement only as and when it suited it. The lessee was thus entitled to treat the agreement as ended.

130 The question before the court was whether the appellant (Laurinda) was entitled to terminate for breaching an agreement for lease between itself as intending lessee and (Capalaba) as intending lessor.

131 Brennan J at p.641 of his judgment said:

132 A right in one party to rescind a contract will arise when the other party repudiates a contract generally, but it may also arise when the other party repudiates a term of the contract. A right to rescind depends on the importance of the term repudiated.

133 The option in the agreement was an unfettered one in the nature of a unilateral promise. The defendants would have had to incur considerable expense installing equipment that goes with the business of stockbroking and establishing their business at the plaintiffs' premises. The promise that there was an option to renew for a further three-year term at the instance of the defendant

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would have been taken into account both financially and commercially. It as a term at the heart of the agreement in the sense that it was a promise of such importance to the promisee that it would not have entered into the contract unless it had been assured of substantial performance and this ought to have been apparent to the promisor. It answered the criterion of an essential promise in the sense that an outright repudiation of the promise would have entitled the defendants to rescind.

134 A right to rescind, however, is one thing, fairness in the exercise of that right is another as equity in some circumstances asserts a jurisdiction to restrain the exercise of a right to rescind. It is therefore necessary for equity's purposes for the court to be satisfied that it is fair for the innocent party to exercise that right.

135 Repudiation is not ascertained by an inquiry into the subjective state of mind of the party in default; it is to be found in the conduct, whether verbal or other, of the party in default which conveys to the other party the defaulting party's inability to perform the contract or promise or his intention not to perform it or to fulfil it only in a manner substantially inconsistent with his obligations and not in any other way. In Freeth v Burr (1874) LR 9 CP 208 at p.213, Lord Coleridge CJ spoke of acts or conduct which "do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract" or of acts and conduct which "evince an intention no longer to be bound by the contract". This was followed by the Earl of Selborne LC in Mersey Steel and Iron Co v Naylor, Benzon & Co (1884) 9 App Cas 434, at pp 438-439:

136 I am content to take the rule as stated by Lord Coleridge in Freeth v Burr, which is in substance, as I understand it, that you must look at the actual

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circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part.

137 And in Carswell v Collard (1893) 20 R (HL) 47, at p.48, Lord Herschell LC stated the question precisely:

138 Of course, the question was not what actually influenced the defender, but what effect the conduct of the pursuer would be reasonably calculated to have upon a reasonable person.

139 The question is "Would a reasonable person in the shoes of the innocent party clearly infer that the other party would not be bound by the contract or would fulfill it only in a manner substantially inconsistent with the party's obligations and in no other way?"

140 The defendants were advised that the option for another three years as set out in the standard tenancy agreement was not a genuine one. A comparison of the clauses on the option in the agreement and in the standard tenancy agreement shows that if the clause in the agreement is cheese, the clause in the standard tenancy agreement is chalk. The defendants wanted to bring in major shareholders to increase the share capital of the defendants' company in line with the latest directions of the SES for the stockbroking industry in a matter concerning their "business efficacy". The plaintiffs' response was "SIA must be informed of any change in the effective control of the Lessee company".

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141 The defendants took objections to cl 13(1) which reads: "All costs and expenses incurred by the Lessor in carrying out any of the works provided for in one or other of the aforementioned sub-clauses shall, if the Lessor so elects, be borne by the Lessee within seven (7) days of the Lessor notifying the Lessee of the amount thereof.". The defendants were advised that the above clause could not possibly be permitted to be retained without modification because according to sub-clause (e) in the event that the premises or even the building is destroyed and the landlord rebuilds the premises or the building, the landlord has the power of asking the tenant to pay all costs and expenses incurred by the landlord in carrying out such rebuilding.

142 The defendants were also advised that if the tenant is liable to pay increased maintenance charges, then to be fair to the tenant, the definition of "outgoings of the building" should not include sub sub-clause (1) which reads: "all rates taxes charges and assessments duties impositions and fees at any time or from time to time payable to any government, local government, semi-government or other competent authority in respect of the land or the building." because the provision as it stood would include property tax and other things which would not benefit the tenant when the proper principle should be for the tenant to contribute only to those outgoings which are necessary for the tenant's enjoyment of the premises.

143 The existing facilities provided by the building did not measure up to the prevailing fire codes. The FSB made it clear that renovation plans would not be approved unless additional improvements to the building were done. It was not unreasonable on the part of the defendants to ask the plaintiffs to ensure that the building requirements requested by the Development and Building Control Division should be undertaken by them. The plaintiffs were not prepared to address the defendants' legitimate requirements.

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144 Clause .5 expressly states that the 5+ months' rent-free period is "in lieu of the improvements to be provided by the landlord, i.e. carpeting, replacement of ceiling grids and tiles and repainting", but the senior property executive on 11 September 1986 wrote:

145 We agreed to a 5+ months ... rent free period to enable you to carry out your renovation works after the commencement of the lease on 15 March 1986.

146 A tenant may assign or sublet freely unless a covenant restricting the right to do so is expressly inserted in the lease. The agreement prima facie places no restriction on subletting, but the plaintiffs wanted to restrict the defendants from subletting after the defendants had made known their intention to do so and were led to believe they could do so by the agreement.

147 Clause .2 on rental is clear. There is no reference to contributions to outgoings but to a rent inclusive of service charges and fixed for 3+ years. The rent-free period for practical purposes had ceased to exist on 29 September 1986 when the defendants wrote:

148 29 Sept 86

149 To/ SIA Properties

150 Attn/ Mr Tan Zing Yan

151 Fm/ Alliance Securities (Pte)

152 We refer to your letter dated 11th Sept86 (sic) and our subsequent meeting on 25 Sept86 (sic).

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153 We regret that we are not able to accept the terms of the tenancy arrangements.

154 Therefore we hereby advise that our company will not exercise the option to take up the tenancy.

155 Regards

156 Kang Seow Kiam Managing Director

157 The plaintiffs' conduct up to and including the acceptance of the keys on 26 September 1986 was such as to constitute repudiation of the contract. Repudiation of a contract is a serious matter not to be lightly found or inferred, but an allegation of repudiation does not involve an assertion that the alleged repudiator subjectively intended to repudiate his obligations. It is therefore not necessary to identify reasons why the plaintiffs were unlikely to have subjectively desired to repudiate its agreement to grant a lease. "Repudiation turns upon objective acts and omissions and not upon uncommunicated intention." See Laurinda's case p.658.

158 The defence denied knowledge of the plaintiffs' claim for $6,564 and Mr Dennis Singam has properly not pressed the claim after all the evidence was adduced.

159 Even if I am wrong of the implied term, the defendants were entitled to accept the repudiatory breach as a discharge from the contract which they did. There will accordingly be judgment in favour of the defendants with costs. The plaintiffs must pay the security deposit of $12,972 to the defendants.

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K S Rajah JC

Dennis Singam (Rodyk & Davidson) for the plaintiffs
Gan Hiang Chye (Allen & Gledhill) for the defendants

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