IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1994] SGCA 145

CA 167/1993, 168/1993

Between

Forum Development Pte Ltd

… *Appellant*

And

Global Accent Trading Pte Ltd
and Another Appeal

… *Respondent*

GROUNDS OF DECISION

Contract — Misrepresentation — Innocent

Version No 1: 29 Oct 2026 (23:45 hrs)

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Forum Development Pte Ltd v Global Accent Trading Pte Ltd and Another Appeal

[1994] SGCA 145

CA 167/1993, 168/1993
Karthigesu JA; L P Thean JA; Yong Pung How CJ
30 December 1994

1 Cur Adv Vult

2 Forum Development Pte Ltd, to whom we shall refer as `the landlord`, is the appellant in both these appeals. It owns a shopping complex in Orchard Road called `Forum Galleria`. The respondent in both appeals is Global Accent Trading Pte Ltd, to whom we shall refer as `the tenant`.

3 By a lease dated 27 February 1990, the landlord let to the tenant units B1-45, 46 and 47 of Forum Galleria (the demised premises) for a term of three years from 19 March 1990 to 18 March 1993 at a monthly rent of $14,931 and a monthly service charge of $1,659 for the purpose of a European cafe, to be called Cafe Al Fresco, selling French pastry, Italian ***gelato*** and other cafe items. The tenant duly entered into possession of the demised premises but then commenced proceedings for the rescission of the lease on 1 February 1991 by Suit No 233/91 and eventually left the demised premises altogether on 20 July 1991. However, the tenant paid rent only up to 31 January 1991.

4 In Suit No 233/91, which is the subject matter of CA 167/93, the tenant claimed a rescission of the lease, ab initio, for misrepresentation, and for the return of all rents and service charges and the initial deposit of three months` rent paid to the landlord as well as for other consequential losses including loss of profit and the cost of renovating the demised premises. In Suit No 306/92, which is the subject matter of CA 168/93, the landlord claimed for arrears of rent and damages for wrongful repudiation of the lease. At the trial, the landlord`s claim for arrears of rent and damages for wrongful repudiation of the lease was, by agreement of the parties, treated as a counterclaim in the tenant`s action. The learned judicial commissioner found that the tenant was induced to enter into the lease by the innocent misrepresentation of a material fact, allowed the tenant`s claim for the rescission of the lease, ab initio, and ordered the return to the tenant of the rents and service charges and the deposit paid, together with interest at 6% pa from the date of commencement of the proceedings in Suit No 233/91 but did not allow the tenant`s claim for other consequential losses which included loss of profit and the cost of renovating the demised premises. He dismissed the landlord`s claim for arrears of rent and damages for wrongful repudiation of the lease. Against these orders the landlord has appealed. The tenant, by a respondent`s notice in CA 167/91, claims the additional recompense for consequential losses which were not allowed by the learned judicial commissioner.

5 It was contended by counsel that if the landlord fails in CA 167/93, the landlord should also fail in CA 168/93. This is only partially correct, for in broad terms the principal question to be decided in CA 167/93 is whether the tenant was induced to enter into the lease for the demised premises by the representations made on behalf of the landlord and, if so, whether those representations were false, which in all the circumstances entitled the tenant to

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rescind the lease, ab initio. If this question is answered in the affirmative it must necessarily follow that the landlord would not be entitled to the claim for arrears of rent and damages for wrongful repudiation of the lease. But one question will still remain to be answered in CA 168/93 and that is whether the landlord is entitled to be compensated for the period the tenant remained in occupation of the demised premises after commencing proceedings to rescind the lease, namely, from 1 February 1991 to 20 July 1991.

6 The tenant had from October 1988 operated a European cafe by the name of Cafe Al Fresco in Holland Village, which, it was said, had proved a tremendous success, and desired to open a second Cafe Al Fresco. Thomas Dorn (Dorn) representing the tenant contended that the success of Cafe Al Fresco at Holland Village was due to it being able to attract casual passers-by who chanced upon the cafe. Accordingly, in about October 1989, he instructed property agents Richard Ellis to find premises which would have `lots of pedestrian traffic` passing by, preferably in Orchard Road. In about November 1989 Dorn was shown Forum Galleria and put in touch with the landlord`s leasing manager Evelyn Chan who told him that the demised premises would be available for renting.

7 The demised premises described at the trial as basement units were not in fact basement units. They were on the ground floor of Forum Galleria but the ground floor of Forum Galleria was below the road level of Orchard Road. In fact Forum Galleria was set back and separated from the side walk or pavement of Orchard Road by a `sunken pedestrian mall` which ran between Orchard Road and Forum Galleria, at the same level as the demised premises. The `sunken pedestrian mall` had access from Orchard Road down by a flight of stone steps. However, the view from the side walk or pavement of Orchard Road

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into the demised premises was obstructed by a brick wall extending upwards from the side of the `sunken pedestrian mall` abutting Orchard Road.

8 Dorn saw potential in the demised premises for his intended cafe and accordingly entered into negotiations with Evelyn Chan. They first met on 27 December 1989. Dorn recalled this meeting in his evidence. In particular he recalled that Evelyn Chan had mentioned that Forum Galleria would be upgraded both internally and externally. Of special interest to him was that Evelyn Chan had mentioned that the brick wall which blocked the view of the demised premises from the sidewalk or pavement of Orchard Road would be replaced by glass panels and that this would be done by the end of 1990. Dorn said that he was `relieved` by what Evelyn Chan had told him because, although he desired premises in Orchard Road for the second Cafe Al Fresco, he was disturbed by the presence of the brick wall which he thought would curtail exposure of his intended cafe to the voluminous pedestrian traffic along Orchard Road. To quote his own words -`once wall gone we would have desired exposure to Orchard Road pedestrian traffic.`

9 Evelyn Chan in her evidence confirmed that first meeting with Dorn on 27 December 1989. She also confirmed that she told Dorn that the brick wall in question would be replaced by a glass wall by December 1990 and maintained that she had shown him an isometric projection of the `sunken pedestrian mall` which showed that the brick wall in question would be replaced by a `70mm thk clear glass panel` (the glass wall). Dorn did not recall seeing the isometric projection of the `sunken pedestrian mall` on 27 December 1989 but recalls seeing it at his next meeting with Evelyn Chan on 9 January 1990. Evelyn Chan also confirmed the meeting on 9 January 1990 and that the isometric projection

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of the `sunken pedestrian mall` was discussed and the completion date of `the glass wall` again stated as being `by December 1990`.

10 Dorn`s evidence was that the meeting of 9 January 1990 confirmed his decision to rent the demised premises. This is how he put it - `Confirmed our first opinion business wonderful if wall gone, opened up to Orchard Road. Reconfirmed decision to take unit. May show losses until such time latest 31 December 1990. Look forward to better business than at Holland Village.`

11 On 10 January 1989, the tenant`s property agents, Richard Ellis wrote to Evelyn Chan stating - `Thank you once again for the meeting yesterday ... . After inspecting the site once again yesterday, they would like to confirm that they are definitely keen to lease the spaces and are agreeable to your asking rental of $15 psf per month. Cafe Al Fresco is also willing to lease the premises immediately in spite of the ongoing renovations.`

12 Based on this evidence the learned judicial commissioner found that the landlord had indeed made a representation that the brick wall in question would be replaced by `the glass wall` by December 1990; that the representation was material to the tenant; and that the tenant was induced to enter into the lease by the landlord`s representation. We entirely agree with the learned judicial commissioner`s findings.

13 Indeed it is not seriously contended by the landlord that the representation aforesaid was not made by Evelyn Chan on behalf of the landlord or that the representation was not material to the tenant. The landlord`s case is that when Evelyn Chan made the representation on 9 January 1990 it was true and that it remained true up to the time the lease was entered into. If there was

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any change of intention on the part of the landlord to defer replacing the brick wall in question with `the glass wall` beyond December 1990 such intention was formed after the lease was entered into and could not therefore vitiate the lease on the ground that the representation was no longer true. The case of is cited in support.

14 The landlord contends that the lease was entered into on 2 February 1990 because that was the date on which the tenant had returned the lease to the landlord duly signed for the landlord to complete the formalities and as of that date the representation made by Evelyn Chan on behalf of the landlord that the brick wall would be replaced with a `glass wall` by December 1990 was true. So the landlord contends that if the tenant was induced to enter into the lease as a consequence of the representation made by Evelyn Chan on behalf of the landlord that the brick wall would be replaced by a `glass wall` by December 1990 such representation was true when the tenant entered into the lease on 2 February 1990. However, the learned judicial commissioner found that the lease was entered into on 27 February 1990 and that on the evidence before him `there was no intention on the part of the landlord to complete the wall works before the end of 1990 at the time or immediately before the lease was entered into`. Accordingly he found that the representation made on 9 January 1990 by Evelyn Chan on behalf of the landlord that the brick wall would be replaced by a `glass wall` by December 1990 was false.

15 The learned judicial commissioner did not make an express finding that the representation Evelyn Chan made on behalf of the landlord to the tenant on 9 January 1990 that the brick wall would be replaced by a `glass wall` by December 1990 was true or false. His approach was to evaluate the programmes of works furnished to the landlord by the landlord`s architects for the external

and internal upgrading of Forum Galleria which included the `wall works`, ie the replacement of the brick wall with a `glass wall`. There were four such programmes of works put in evidence. The first, a preliminary construction programme, was dated 20 November 1989 and projected a completion date for all the works undertaken to mid-November 1990; the second, also a preliminary construction programme, was dated 13 December 1989 and projected a completion date for all the works undertaken to mid-December 1990; the third, also a preliminary construction programme, was dated 30 January 1990 and projected a completion date for all the works undertaken to end of March 1991; and the fourth was a letter dated 14 February 1990 referring to a meeting held on 13 February 1990 when it was decided that the external and internal upgrading of Forum Galleria as programmed by the preliminary construction programme dated 30 January 1990 would be undertaken in three phases. This last letter relegated the `wall works` specifically referred to for the first time as `sunken mall proper` and `all external works around sunken mall at Orchard Road level` to the second phase. Based on these programmes of works, the learned judicial commissioner concluded:

> *If there was any intention at any time to complete the wall works by the end of 1990 it would have faded into nothingness by the time the meeting on 13 February 1990 was over [the fourth programme referred to above] if not by 30 January 1990 when the programme at 5DB-34 [the third programme referred to above] was prepared. Alabbar and Foo [the two principals in Forum Galleria] did not testify. The closest to the controlling mind of the landlord was Evelyn Chan`s evidence that the landlord proposed to carry out additions and alterations (including the wall works) from May 1990 and based on the first programme ... prepared in November 1989 (which was a preliminary programme)* ***hopefully*** *to finish by November 1990.*

16 Since the learned judicial commissioner had found that the lease was entered into on 27 February 1990 and, consonant with his finding that the representation made by Evelyn Chan on behalf of the landlord on 9 January

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1990 that the brick wall would be replaced by a `glass wall` by December 1990 had `faded into nothingness` by 13 February 1990 if not by 30 January 1990, found that the representation was false when the lease was entered into and that the tenant had been induced to enter into the lease by that false representation.

17 Although the learned judicial commissioner did not expressly make a finding whether when Evelyn Chan made that representation on 9 January 1990 it was true or false, it is clear to us that the learned judicial commissioner had the gravest doubts whether Evelyn Chan was in any position to make the representation she did based on such tentative programmes of works as the ones dated 20 November 1989 and 13 December 1989.

18 It behoves us to examine more carefully Evelyn Chan`s evidence and the first two programmes of works dated 20 November 1989 and 13 December 1989 which, on her own admission, were the foundation of the representation she made on behalf of the landlord to the tenant on 9 January 1990. Her evidence was this; that at the two meetings she had with Dorn on 27 December 1989 and 9 January 1990 she gave a presentation on the proposed renovations to Forum Galleria and explained the reconfiguration of the second storey, relocation of the escalators, construction of new stairs and link bridges, new lightings, new floor tiles, new railings, widening of corridors, new entrance to Forum Galleria and last but not least the external works of the installation of a new clock tower and `sunken pedestrian mall` which included the replacement of the brick wall referred to with a `glass wall` by reference to an isometric projection which was but an artist`s impression of what the `sunken pedestrian mall` would look like when constructed. She admitted in her evidence that she had no contact at all with the architects employed by Forum Galleria and had got all the information regarding both the internal and external works to Forum Galleria from her

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principal, Alabbar, who had told her that it was ***proposed*** to renovate Forum Galleria from May 1990 and ***hopefully*** to finish by November 1990. This was the state of her knowledge immediately before her first meeting with Dorn on 27 December 1989. She maintained in her evidence that she had been given the two preliminary construction works` programmes dated 20 November 1989 and 13 December 1989 and had them with her at the meetings with Dorn on 27 December 1989 and 9 January 1990 but could not remember when these were given to her. She admitted that she had told Dorn at the second meeting on 9 January 1990 that the major construction works which included replacing the brick wall with a `glass wall` would be completed by December 1990 based not only on what Alabbar had told her previously but also on her own appreciation of the two preliminary construction works` programmes dated 20 November 1989 and 13 December 1989. She admitted that she had not inquired further from Alabbar or from anyone else why the two works` programmes she was given were `preliminary`. It is noted that the programme dated 20 November 1989 is marked `P1 (Prelim)` and the programme dated 13 December 1989 is marked `P2`. She had not bothered to find out whether contractors had been engaged, when they would start work and when the works would be completed. She had believed and relied on what Alabbar had told her that ***hopefully*** the works would be finished by November 1990, which she had noticed by the programme of works dated 13 December 1989 had been extended to December 1990. She had never doubted that the brick wall would be replaced by a `glass wall`.

19 A perusal of the works` programme dated 20 November 1989, which undoubtedly is the first in the series, shows clearly that the contract period indicating the completion date of the major works (end November 1990) is most tentative; as at 20 November 1989 the major works, which have not been

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itemized are shown to be in the planning stage dependent on `client input/review/ confirmation`. The works` programme dated 13 December 1989 is clearly a revision of the first works` programme by adding to it the `M&E programme` which was omitted in the first works` programme resulting in the tentative completion date being extended to mid-December 1990. The major works are still not itemized and are shown as dependent on `client input/review/confirmation`. At best these two works` programmes merely express an expectation that if the works were commenced by the end of May 1990 they could be expected to be completed by mid-December 1990.

20 In our judgment, based on the two works` programmes dated 20 November 1989 and 13 December 1989 and based on what Evelyn Chan had been told previously by Alabbar, the knowledge she had when she made the representation to Dorn on 9 January 1990 that the brick wall would be replaced by a `glass wall` by December 1990 was founded on a tentative expectation. She had no factual basis for representing that the brick wall would be replaced by a `glass wall` by December 1990. Had she taken the trouble to inquire from those who were directly concerned with the planning and programming of the works she would not have represented to Dorn that the brick wall would be replaced by a `glass wall` by December 1990 for although she had every reason to believe that the brick wall would be replaced by a `glass wall` she had no factual basis for saying that that work would be completed by December 1990.

21 It follows from the foregoing that in our view Evelyn Chan had misrepresented to Dorn on 9 January 1990 that the brick wall would be replaced by a `glass wall` by December 1990. The learned judicial commissioner found that this misrepresentation was made innocently. We do not disagree with him. She believed what Alabbar had told her notwithstanding that from the two

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works` programmes she had only projected a tentative expectation as to when the brick wall would be replaced by a `glass wall`. However, it was on the basis and understanding that the brick wall would be replaced by a `glass wall` by December 1990 that the tenant`s property agent confirmed to the landlord that the tenant was `willing to lease the demised premises immediately in spite of the ongoing renovations` as we have already recorded earlier and the lease was signed and returned by the tenant to the landlord on 2 February 1990.

22 It is unnecessary therefore to dwell on the question of when the lease was entered into, for whether it was entered into on 2 February 1990 as the landlord contends or whether it was entered into on 27 February 1990 as the tenant contends is immaterial as the representation was false when it was made on 9 January 1990.

23 Accordingly, we agree with the learned judicial commissioner, albeit for a different reason, that the tenant is entitled to a rescission of the lease and to be indemnified in respect of the obligations under the lease. Accordingly, he ordered that all rents and charges already paid under the lease as well as the deposit paid under the lease be returned to the tenant together with interest at 6% pa from the date of the commencement of proceedings, namely, 1 February 1991.

24 The principle to be applied on a rescission of a contract on the ground of innocent misrepresentation is restitutio in integrum. This was explained by Lord Wright in at p 288 as follows:

> *A case of innocent misrepresentation may be regarded rather as one of misfortune than as one of moral obliquity. There is no deceit or intention to defraud. The court will be less ready to pull a transaction to pieces where the defendant is innocent, whereas in the case of fraud the court will exercise its jurisdiction to the*

> *full in order, if possible, to prevent the defendant from enjoying the benefit of his fraud at the expense of the innocent plaintiff. Restoration, however, is essential to the idea of restitution. To take the simplest case, if a plaintiff who has been defrauded seeks to have the contract annulled and his money or property restored to him, it would be inequitable if he did not also restore what he had got under the contract from the defendant. Though the defendant has been fraudulent, he must not be robbed, nor must the plaintiff be unjustly enriched, as he would be if he both got back what he had parted with and kept what he had received in return.*

25 It is correct therefore that the tenant should account to the landlord the profits made from the use of the demised premises since by the learned judicial commissioner`s order the tenant gets back all the rents and service charges paid as well as the deposit made under the terms of the lease, otherwise it would not only be inequitable but also unconscionable for the tenant not to have to pay rent for the use of the demised premises and yet retain the profits from the use of the demised premises, notwithstanding the landlord`s misrepresentation, albeit innocently made.

26 The tenant rightly concedes the accountability of profits from the use of the demised premises up to 31 January 1991, up to which date the rents and service charges were paid, but contends that only the net profits and not the gross profits for that period are payable to the landlord. This has been calculated by the tenant to be $64,561. The landlord accepted before us the correctness of the basis of the tenant`s calculation.

27 This was a case of innocent misrepresentation. The learned judicial commissioner found it to be so and we agree with him. The proper relief to be granted in the case of innocent misrepresentation is a rescission of the contract and an indemnity of all obligations under the contract. In , Farwell J cited with approval portions of Bowen LJ`s judgment in . Farwell J said:

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> *... the difficulty which I have is that the judgments in the Court of Appeal do not agree, and I have therefore to choose between them. I think Bowen LJ`s is the correct view. At p 592 of 34 Ch D he says:*
>
> *`But when you come to consider what is the exact relief to which a person is entitled in a case of misrepresentation, it seems to me to be this, and nothing more, that he is entitled to have the contract rescinded, and is entitled accordingly to all the incidents and consequences of such rescission. It is said that the injured party is entitled to be placed in* ***statu quo****. It seems to me that when you are dealing with innocent misrepresentation you must understand that proposition that he is to be placed in* ***statu quo*** *with this limitation - that he is not to be placed in exactly the same position in all respects, otherwise he would be entitled to recover damages, but is to be placed in his position so far as regards the rights and obligations which have been created by the contract into which he has been induced to enter. That seems to me to be the true doctrine, and I think it is put in the neatest way in (20 Ch D 1).`*
>
> *That case decided that you cannot recover damages for innocent misrepresentation. And at p 594 the Lord Justice goes on to say:*
>
> *`Speaking only for myself, I should not like to lay down the proposition that a person is to be restored to the position which he held before the misrepresentation was made, nor that the person injured must be indemnified against loss which arises out of the contract, unless you place upon the words `out of the contract` the limited and special meaning which I have endeavoured to shadow forth. Loss arising out of the contract is a term which would be too wide. It would embrace damages at common law, because damages at common law are only given upon the supposition that they are damages which would naturally and reasonably follow from the injury done.`*
>
> *With respect, if I may say so, I agree with every word the Lord Justice has said.*

28 And with respect too, we agree.

29 Applying the above principles we can approach the tenant`s respondents` notice by which the tenant claimed $16,590 as commission paid to the property agent and $160,882 as the expenses incurred in setting up the demised premises for business. In our judgment the commission paid to the

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property agent was not contingent on the tenant`s obligations under the lease but the expenses incurred in setting up the demised premises for business were. The former should not be allowed and the latter should be allowed. However, the landlord contends that the tenant has not sufficiently proved the expenses incurred in setting up the demised premises for business. We are unable to accept the landlord`s contention as it is not disputed that the renovations to the demised premises were in fact carried out to the satisfaction of the landlord and pursuant to the tenant`s obligations under the lease. We are satisfied from Dorn`s evidence and the documentary evidence he produced at the trial that a sum of $160,882 was in fact incurred by the tenant in setting up the demised premises for business.

30 The remaining question is the landlord`s claim for compensation for the tenant`s use and occupation of the demised premises from 1 February 1991 to 20 July 1991 for which no rent was paid. This was claimed in Suit No 306/92 and treated at the trial as a counterclaim in Suit No 233/91 which the learned judicial commissioner dismissed. It is the only `live` issue in CA 168/93. In our judgment and as a matter of `practical justice`, the landlord ought to be compensated for the use of and occupation of the demised premises. A proper measure of the compensation would be a sum equal to the rent and service charges payable under the lease. This works out at $79,605.24.

31 In the result, we confirm the learned judicial commissioner`s decision rescinding the lease for innocent misrepresentation but vary the consequential relief by:

> *allowing the tenant a full indemnity of all obligations under the lease, that is to say, a refund of the deposit paid under the lease and all rents and service charges paid up to 31 January 1991 as well as the sum of $160,882 being the expenses incurred by the*

> *tenant in setting up the demised premises for business against which is to be set off the tenant`s profits for the period up to 31 January 1991 in the sum of $64,561 and the sum of $79,605.24 being the compensation for the tenant`s use and occupation of the demised premises from 1 February 1991 to 20 July 1991. The landlord will pay interest to the tenant on the resulting figure at 6% pa from 1 February 1991 to 2 November 1993, that being the date of the judgment of the High Court.*

32 The landlord has failed in setting aside the learned judicial commissioner`s judgment on the rescission of the lease but has succeeded in getting an award of compensation for the tenant`s use and occupation of the demised premises from 1 February 1991 to 20 July 1991 and the tenant has succeeded in getting reimbursement of the expenses in setting up the demised premises for business. In these circumstances and treating both appeals as one, there should only be one set of costs which should be against the landlord. Accordingly, the landlord will pay one half of the tenant`s taxed costs of the appeal only. The appeal deposits in both appeals will be paid out to the tenant to account of the tenant`s costs.

33 ***Order accordingly.***

Karthigesu JA
L P Thean JA
Yong Pung How CJ

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