IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 123

Suit 1621/1996

Between

Maresse Collections Inc

… *Plaintiff*

And

Trademart Singapore Pte Ltd

… *Defendant*

GROUNDS OF DECISION

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Maresse Collections Inc v Trademart Singapore Pte Ltd

[1999] SGHC 123

Suit 1621/1996
Judith Prakash J
11 May 1999

Judgment:

Cur Adv Vult

1. The plaintiff company carries on business as a wholesaler of fashion handbags, accessories and dresses, mainly in Los Angeles, California. It is incorporated in one of the states of the United States of America but its main shareholder is a lady of Filipino extraction, one Ms Remie Catabas Encinas. The defendants are a company incorporated in Singapore and they are the owners and developers of a commercial building at 60 Martin Road, Singapore which they have named 'TradeMart Singapore' ('the building'). This action relates to the proposed rental by the plaintiffs of one of the showrooms in the building.

Background

2. In early 1993, the defendants' representatives visited the complex called CaliforniaMart, in which the plaintiffs then had three showrooms, for the purposes of promoting the building as a fashion centre. This sparked the plaintiffs' interest and in May 1993, Ms Encinas wrote a letter to the defendants

indicating that the plaintiffs were considering doing business in Singapore and renting premises in the building. Two months later, Ms Encinas came to Singapore and met and negotiated with the defendants for the lease of a unit in the building to be used as a showroom for her fashion handbags. The building was then in the final stages of construction.

3. This action arises out of the document which the plaintiffs and the defendants signed on 19 July 1993. It was an agreement to lease whereby the defendants undertook to grant to the plaintiffs (and the plaintiffs agreed to take) a lease of the premises identified as 60B, B21 (#04-30), TradeMart Singapore, Martin Road ('the unit'), which had an area of approximately 969 square feet. The rental was fixed at $3.50 per square foot per month for the period 1 January 1994 to 31 December 1996, making a total rental of $3,391.50 per month. Under the agreement, the plaintiffs had to pay $3,391.50 to the defendants immediately as security for the plaintiffs' due performance of the contractual terms. It was also agreed that the defendants would, prior to the commencement of the term of the lease, serve written notice on the plaintiffs to execute the lease proper and the plaintiffs would then have 21 days in which to do this. Further, if the defendants were not able to obtain the temporary occupation permit in respect of the unit by 1 January 1994, then the agreement would terminate and the security deposit would have to be repaid by the defendants.

4. On 21 July 1993, the plaintiffs gave the defendants a cheque drawn on their bank, one of the Los Angeles branches of the Bank of America, in payment of the security deposit. This cheque was not honoured when it was first presented for payment but, at the plaintiffs' request, the defendants represented it and it was paid on the second presentation. Between August and December 1993, various letters passed between the plaintiffs and the defendants relating to the unit. Much of the correspondence dealt with the plans and physical

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specifications of the unit as the plaintiffs needed information in order to fit it out. The defendants also asked Ms Encinas when she would be in Singapore again in order to finalise the lease. On 1 November 1993, Ms Encinas replied that she would be here in early January 1994.

5. In the meantime, the defendants had obtained the temporary occupation permit for the building in August 1993 and by October 1993, some tenants had started to move into their units. The defendants did not, however, send the plaintiffs the lease for signature as provided for under cl 4 of the agreement. Although on 28 December 1993, they informed the plaintiffs that it was imperative that the latter conclude the lease during Ms Encinas' proposed visit in January 1994, when Ms Encinas did not arrive that month, no steps were taken to send the documentation to her.

6. Ms Encinas and her assistant Ms Jacqueline Macapagal arrived in Singapore on 6 March 1994. They met various representatives of the defendants between 7 and 11 March and also went to the unit several times. The purpose of the visit was to complete the documentation for the unit and to pay the defendants the sum of $6,783 representing two months' rental as a further security deposit for the lease. Under the terms of the lease, the plaintiffs were required to pay the equivalent of three months rental as security for their performance of the lease.

7. There is a dispute as to exactly what happened during the March 1994 visit. The main persons who dealt with Ms Encinas on behalf of the defendants were Mr Kay Kok Yong, their marketing manager, and Ms Jessica Lee Sook Lan, a marketing executive. The main affidavit filed on behalf of the defendants was, however, made by Mr Yeo See Kiat, their general manager. In it, he stated that on 10 March 1994, Mr Kay and Ms Lee met with Ms Encinas and Ms Macapagal to finalise negotiations before the execution of the lease. At this meeting, Ms

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Encinas was told by the defendants' representatives that she had to incorporate a local company to enter into the lease. It was the defendants' company policy to enter into leases with local companies. This condition was stressed to Ms Encinas and she agreed to it. She was also told that she had to make payment of the balance of the three months deposit which was required under the lease. Ms Encinas agreed to this as well. During the meeting she requested that the lease commence on 1 May 1994. This was agreed to by the defendants.

8. Mr Yeo went on to state that on 11 March 1994, the defendants' representatives, Mr Kay and Mr Richard Norfolk, the defendants' director of marketing, met up with Ms Encinas to collect payment of the balance rental deposit and to sign the lease. At this meeting, their representatives informed Ms Encinas that she had to comply with three requirements before the lease would be granted to her. These were:

> (a) that she incorporate a local company within two weeks and advise the defendants of its name and registration number within that period;
>
> (b) that the rental deposit received by the defendants on that day had to be cleared within two weeks from 11 March 1994 failing which the offer of the unit would lapse;
>
> (c) that if the lease was not completed within 11 March 1994, the rental deposit paid would be forfeited and the offer of the unit would lapse.

These requirements were also set out in a letter of the same date which was handed to Ms Encinas by Mr Kay at the meeting.

9. According to Mr Yeo, having been told of these requirements Ms Encinas requested that the cheque for the two months deposit be made payable at a later date and not on 11 March 1994. She specifically requested that the cheque be dated 22 March and this date was then typed on the cheque by one of the defendants' employees. Ms Encinas proceeded to sign the lease which had been

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amended to reflect the name of the intended tenant, Maresse Collections Pte Ltd. I should note here that the documents which Ms Encinas signed were produced in court and they purported to be two copies of the lease relating to unit #04-30 on the fourth storey, 60 Martin Road, Singapore between TradeMart Singapore Pte Ltd as landlord and Maresse Collections Pte Ltd as tenant. It was, however, clear from both documents that when originally prepared, the name of the tenant had been typed in as 'Maresse Collections Inc' that is the name of the plaintiffs herein and that this name had been amended wherever it appeared by the deletion of the word 'Inc' and its replacement by the words 'Pte Ltd'. The documents are undated and have not been signed by or on behalf of the defendants.

10. The account given by Ms Encinas was somewhat different. She said that she executed the lease in the defendants' office on 11 March 1994. Then, in order to pay the two months' security deposit, she gave the defendants a Bank of America cheque-leaf and they typed the details of the payment including the date of the cheque which was 22 March 1994. The cheque was thereafter signed by her and returned to the defendants.

11. Following this event, Ms Encinas was told by the defendants that the plaintiffs would have to register a business in Singapore if they were to commence the lease in May 1994. She was surprised that such important information was only imparted to her at the eleventh hour as she was due to leave Singapore on 12 March 1994. Nevertheless, she made an immediate trip to the Registry of Companies and Businesses and was told that it would take her more than a week to register a company. She was then advised to register a business first which she did the next day under the name and style of Maresse Collections. She then rushed to the defendants' office to give them full particulars of that business including the registration number. I note here that

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the documents adduced by the plaintiffs show that on 11 March 1994 Ms Encinas made an application at the Registry of Companies and Businesses for the registration of a business to be called Maresse Collections and that this business was registered on 12 March 1994.

12. Ms Encinas said that she then flew back to Los Angeles via the Philippines and arrived in Los Angeles on 24 March 1994. Upon her return she saw the defendants' letter dated 11 March 1994 for the first time. This had been sent to the plaintiffs' office in California by post. To her shock and surprise, the letter contained new terms which the plaintiffs had to meet and failing the same, the lease offer was to lapse. She said that such terms were never discussed nor were the plaintiffs made aware of them at any time when they were negotiating the agreement to lease or the lease itself and as such the terms were unilaterally added by the defendants and should not be binding upon the plaintiffs.

13. What happened next is not disputed. On 26 March 1994, the defendants sent a letter to the plaintiffs informing them that the cheque issued and dated 22 March 1994 had not been cleared as of that date (ie 26 March) and therefore their offer to the plaintiffs for the lease of the unit had lapsed. Ms Encinas was shocked. She checked the position with her bank and on 28 March she wrote to the defendants stating that she would have appreciated knowing that the plaintiffs' cheque had not cleared before being informed that the lease had been cancelled. She stated that she was more than willing to wire transfer the funds as suggested by her bankers and attached a letter, also dated 28 March 1994, from the Bank of America in which the bank stated that the cheque issued by the plaintiffs had not been received by Bank of America for payment verification but that, as of that date, the plaintiffs had enough funds in their account to cover the cheque. The letter also suggested that the funds be wired

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to the defendants' account so that there would be no delay in receiving the money.

14. The defendants replied the next day, 29 March. They did not accept the proposal that the funds be wired to them although they confirmed that they had received a copy of the letter from Bank of America. They then reiterated that the plaintiffs had failed to comply with item 2 of the defendants' letter dated 11 March 1994 as the two months' deposit had not been credited to the defendants' account by 25 March 1994 and, as such, their offer in respect of the unit had lapsed.

15. This action was commenced by the plaintiffs in August 1996. They claimed that as a result of the defendants' breach of contract in refusing to proceed with the lease of the unit to them, they had sustained damages amounting to US$239,309.23 in respect of expenses incurred in relation to the unit and the proposed business to be carried on in it. In the affidavit of evidence-in-chief later filed by Ms Encinas, she corrected this figure to US$207,154.23.

16. Exactly what the defendants were contending did not appear very clearly from the defence filed. Their stand can be understood better from their opening statement. In this, they stated that the vital meeting had been held on 7 March 1994 (and not 10 March 1994) and that fresh negotiations had taken place between the parties on the terms of the lease that was to be entered into. By then the terms of the agreement to lease of 19 July 1993 had lapsed in view of the plaintiffs' failure to enter into a lease for a term commencing from 1 January 1994.

17. The defendants went on to say that it was clear that the parties had re-negotiated the agreement whereby the defendants agreed to grant a lease of the

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unit to a Singapore incorporated entity to commence from 1 May 1994. This company was to be known as Maresse Collections Pte Ltd. Under the terms of the proposed tenancy agreement the intended tenant would have to pay a deposit equivalent to three months of the rental of the unit. As the plaintiffs had paid a deposit equivalent to one month's rental previously, the defendants agreed to accept a two months' rental deposit from Ms Encinas and to use the one month rental paid previously towards the deposit for the lease on condition that the same cleared within two weeks of 11 March 1994 failing which the offer to rent the unit to Maresse Collections Pte Ltd would lapse. As the cheque for the two months' deposit did not clear within that time, the offer of the defendants to enter into a tenancy agreement lapsed. The defendants were therefore not liable to the plaintiffs either for breach of the agreement to lease or for breach of the actual lease.

Issues

18. At the close of the hearing, the defendants submitted that three issues arose:

> (1) whether there was a breach of the agreement to lease on the part of the defendants;
>
> (2) whether there was a breach of the intended lease agreement on the part of the defendants; and
>
> (3) whether the plaintiffs were entitled to claim the damages amounting to US$207,154.23 as itemised in Ms Encinas' affidavit.

The plaintiffs agreed that the above issues had to be addressed but added that there were two further issues for the court to consider viz:

> (4) whether the plaintiffs had agreed to the additional terms set out in the defendants' letter dated 11 March 1994; and
>
> (5) whether there was any consideration given to the plaintiffs to entitle the defendants to enforce the terms of that letter.

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19. In my view, on the facts disclosed, it would be more appropriate to frame the issues on liability as follows:

> (1) what was the legal status of the agreement to lease as at 6 March 1994?
>
> (2) what legal effect did the events that occurred between 7 and 11 March 1994 have? This issue would determine whether the defendants were entitled to rely on the non-clearance of the plaintiffs' cheque by 25 March 1994 as a ground for rescinding their obligation to lease the unit to the plaintiffs/the plaintiffs' Singapore company.

(i) Legal status of the agreement to lease

20. It is common ground between the parties that an agreement to lease being a contract for the disposition of an interest in immovable property must be evidenced by a memorandum or agreement in writing in order to be legally enforceable. See s 6A(d) of the Civil Law Act, Cap 43. Such written document must contain the following ingredients viz the names of the parties, the identity of the property involved, the term and its commencement, and the rent payable, in order to be valid. See *Harvey v Pratt* [1965] 1 WLR 1025.

21. In the present case, the document which the parties signed on 19 July 1993 clearly identified the proposed landlord and tenant as well as the property involved. The material clause was cl 1 which stated that the Landlord (the defendants) agreed to grant and the Tenant (the plaintiffs) agreed to take 'a lease of the premises more particularly delineated in red on the plan annexed hereto marked as APPENDIX A for the term and at the rent more particularly set out in APPENDIX B and upon the terms and conditions set out in the annexed Lease in APPENDIX C'. Appendix B contained five items entitled 'Premises', 'Floor Area', 'Rent', 'Security Deposit' and 'Term'. Against each of these items appeared an appropriate description except for the last item 'Term'. On the other

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hand, the description appearing against the item 'Rent' was '01.01.94 to 31.12.96 = S$3,391.50 per month (S$3.50 psf)'.

22. The defendants contended that all four essential ingredients were contained in the agreement and that it was therefore a valid one. They said that it was clear from the agreement that the proposed lease would be for a term of three years commencing from 1 January 1994. The plaintiffs, on the other hand, agreed that the term of the lease was for three years as could be gathered from the item 'Rent' in Appendix B but contended that the commencement date was not 1 January 1994 but April 1994. This contention was based on the statement in the second recital to the agreement to the effect that upon completion of the alteration works to the building and the issue of the temporary occupation permit, the Landlord would grant a lease of the unit to the Tenant, as well as on certain internal correspondence of the defendants which indicated that they were looking at an April 1994 commencement date.

23. The position taken by the plaintiffs is one which undermines the validity of the agreement to lease. They are saying that the agreement itself did not specify the commencement date and that this date has to be drawn from subsequent documentary evidence. If that was in fact the case, then the agreement for lease would not be binding as *Harvey v Pratt* and other authorities establish that where no date for the commencement of the term is stipulated there is no valid agreement. Neither does the court cure the invalidity by implying a term that the lease is to commence at a reasonable time or at the date of the agreement. See *Hill & Redman's Law of Landlord and Tenant* (18th ed) at para A 541.

24. In this case, however, I agree with the defendants' contention that the agreement to lease clearly set out the commencement date of the term by the statement next to the item 'Rent' in Appendix B that the rent would be $3,391.50

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per month for the period 1 January 1994 to 31 December 1996. I do not think one can argue that this statement only dealt with the amount of rent payable and the duration of the lease (ie three years). Clearly it also specified the commencement date and it was because all necessary details were included in the item entitled 'Rent' that the item entitled 'Term' was left uncompleted. Quite apart from the grammatical construction of the item 'Rent', as is stated in para A571 (3) of *Hill & Redman*, if the date of commencement is not expressly fixed, but the rent is made payable from a certain date, the law would treat that date as the date for commencement of the term.

25. Accordingly, I am satisfied that the agreement to lease contained all the vital ingredients which the law requires for the validity of such a document and that it was legally binding on both parties as from 19 July 1993. The question is whether it continued to be so binding after 1 January 1994 and up to 6 March 1994 when the plaintiffs' representatives arrived in Singapore to execute the lease and pay the balance of the security deposit.

26. The defendants submitted that after 1 January 1994, there was no binding agreement between the parties wherein the defendants were obliged to grant the plaintiffs a lease. The basis of this submission seems to be that the plaintiffs themselves were not willing to accept 1 January 1994 as the commencement date of the lease and thus were not able to show that they were ready to take up and sign the lease itself on the premise that it would start on 1 January 1994. I find it difficult to accept this submission. Once the agreement to lease came into effect it bound the plaintiffs even if they were confused about the commencement date and would have preferred the actual lease to start in April 1994.

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27. If the defendants had, prior to 1 January 1994, in accordance with cl 4 of the agreement served written notice on the plaintiffs to execute the lease, the plaintiffs would have been legally obliged to do so. If the plaintiffs had failed to comply with that notice, they would have been in breach of the agreement and the defendants would then have had the option to either accept the plaintiffs' breach and terminate the agreement without prejudice to their right to sue the plaintiffs for any damages sustained thereby or to sue the plaintiffs for specific performance of the agreement. The defendants, however, did not at any time either prior to 1 January 1994 or even thereafter serve a written notice to that effect on the plaintiffs. Neither did the defendants tell the plaintiffs that they were ready to deliver vacant possession of the unit on 1 January 1994 and call on them to take possession from that date in accordance with the proposed lease. The plaintiffs were therefore not in breach of any obligation under the agreement and the defendants would have had no ground to assert such a breach. The plaintiffs themselves would have been entitled under the agreement to have called on the defendants to deliver vacant possession of the unit to them on 1 January 1994. As events turned out, neither party gave the other any notice under the agreement.

28. In these circumstances, I do not find any legal basis for the proposition that the agreement came to an end on 1 January 1994. It could only have terminated then by reason of a breach by either party which breach was accepted by the other as a termination or by a mutual agreement to discharge it. Neither of these events took place.

29. I find that the agreement was in full force and effect on 6 March 1994. When Ms Encinas arrived the next day, the defendants could have told the plaintiffs that they were ready to give them vacant possession and that they should immediately sign the lease the term of which would run up to 31 December

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1996. The plaintiffs would have been legally obliged to comply with this request. I do not think, however, the defendants could have recovered rent for the period from 1 January 1994 up to the date of Ms Encinas' arrival in Singapore as their conduct prior to Ms Encinas' arrival would have constituted a waiver of their right to insist on the term commencing 1 January 1994 and on rental being paid from that date.

(ii) The events of 7 to 11 March 1994

30. The documents adduced by the defendants indicate that there was some discussion within the defendant company in relation to the legal entity which should take up the lease of the unit. It appears that the defendants would have preferred to lease the unit to a Singapore company. I find, however, that this preference of the defendants was not communicated to the plaintiffs prior to 6 March 1994. Not only is there no correspondence in the file to that effect but the agreement to lease itself obligated the defendants to lease the unit to the plaintiffs, a foreign company, since it clearly identified the plaintiffs as the proposed tenant and did not contain any term requiring the plaintiffs to take up the actual lease through a Singapore subsidiary or business.

31. There is also some doubt as to the extent to which it was a settled corporate policy of the defendants that their tenants should be Singaporean entities. The evidence given was not conclusive. It appears to me that the defendants preferred to deal with local tenants but they were not absolutely insistent on this. Further, they were rather confused as to what would constitute a local tenant. While one witness thought that a local tenant could only be a locally incorporated company, another witness on behalf of the defendants was prepared to accept as a local tenant a business that was a partnership between a local and a foreigner or a local business in the sense of a sole proprietorship

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which was registered with the Registry of Companies and Businesses but where the sole proprietor was in fact a foreign company. Since the defendants themselves were unclear of their corporate policy, they are unlikely to have verbally informed the plaintiffs during Ms Encinas' visit to Singapore in July 1993 or in the telephone conversations that took place thereafter that the plaintiffs needed to have a Singaporean company in order to lease the unit.

32. I therefore accept the plaintiffs' evidence that it was a complete surprise to them when Ms Encinas was told by the defendants' representatives that the lease could only be taken up by a local company. She would have been within her rights to refuse to comply with this requirement and to insist that the lease itself be issued directly to the plaintiffs. She did not do so. In court, Ms Encinas' evidence was that she was not told of the requirement to incorporate a company locally. What she had been told was that she would have to register the plaintiffs' business here before they could start operations and she accepted this as she was aware that in order to operate a business in any country, some sort of registration with the local government would be needed. Having considered her evidence as a whole, however, I find that she was informed that the defendants wanted to deal with a locally incorporated company and that she accepted this variation to the agreement to lease. This is substantiated by her evidence that she rushed down to the Registry of Companies and Businesses and made enquiries about incorporating a company here and it was only when she was told that it would take more than a week to do so that she then explored and accepted the alternative of registering a sole proprietorship. There is also the fact that she signed the lease itself after the name of the tenant had been amended from 'Maresse Collections Inc' to 'Maresse Collections Pte Ltd'. Ms Encinas appeared to me to be an experienced and shrewd businesswoman and I think that she must have understood what she was doing when she agreed to this

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change. It was not as if the name of the tenant was changed in only one place in the document. In fact the name of the tenant appears in no fewer than three separate places and in each of these places the name has been amended and Ms Encinas has initialled against such amendment. In my view, by doing so she accepted, on behalf of the plaintiffs, a variation to the agreement to lease to the effect that the plaintiffs would take up the lease in the name of a locally incorporated subsidiary company. I note that since to be valid the agreement to lease had to be evidenced in writing, a variation of such an agreement must also be in writing. In this case, such writing is constituted by the defendants' letter of 11 March 1994 and the signature by Ms Encinas on the amendments to the plaintiffs' name in the lease itself.

33. The defendants' closing submission was that what happened during the meetings on 7 and 11 March 1994 was that fresh negotiations took place between the parties on the terms of the lease that was to be entered. The upshot of these negotiations is that it was agreed that a lease of the unit would be granted to a Singapore incorporated company known as Maresse Collections Pte Ltd and that such lease would commence from 1 May 1994. It was a term of the defendants' offer to lease the unit to Maresse Collections Pte Ltd that the cheque which Ms Encinas gave in payment of the two months' deposit would be cleared within two weeks of 11 March 1994. The terms of the defendants' fresh offer were set out in their letter of the same date.

34. The defendants' stand has as its premise that in March 1994, there was no existing agreement between the parties and therefore the negotiations led to a fresh offer by the defendants to lease premises to a new entity to be formed. I have found that there was a subsisting contract. Thus legally there could be no fresh offer unless this subsisting contract was terminated. Without such termination, there could only be a variation of the existing agreement. Further,

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neither the oral evidence given by the defendants or the letter itself supports their arguments that substantial negotiations were conducted on the basis that the existing arrangement had terminated.

35. The main affidavit evidence on the meetings was given by Mr Yeo who did not participate in them. His evidence was therefore hearsay. Ms Lee and Mr Kay who did attend the meetings filed brief affidavits confirming Mr Yeo's account. When they came to court, however, neither of them said expressly that the meetings that took place were for the purpose of coming to a fresh contract. Ms Lee's evidence was that the meeting of 7 March 1994 was the first time she had personal knowledge of the defendants informing the plaintiffs that they needed to incorporate a local company to take up the lease. She stated that during this meeting, Mr Kay asked Ms Encinas to incorporate a local company. Ms Encinas then agreed to do this and asked for the name of a local lawyer to help her incorporate the company. Ms Lee could not recall whether Ms Encinas was given any time frame within which to incorporate the company but they told her to do it as soon as possible. As far as Ms Lee could remember, the defendants had been expecting to collect the balance deposit at the meeting of 7 March as they were expecting Ms Encinas to sign the lease agreement on that day and were only awaiting the name of the local company to complete the documentation. Such an expectation could only have arisen because the defendants took the view that the agreement to lease was still in force albeit Ms Lee expected the tenant to be named in the lease to be a local company formed by the plaintiffs.

36. According to Mr Kay himself what he told Ms Encinas on 7 March was that the defendants could not enter into any lease agreement with the plaintiffs. They could only sign a lease with a locally registered company. Secondly, he told her she would have to pay the rest of the deposit and finally, he said that they should

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try and complete the lease by 11 March. When Ms Encinas turned up for the 11 March meeting, he handed her the defendants' letter of that same date and she said everything was ready and that her company had been registered. She then gave him the cheque and asked him to have it post-dated to 22 March. Ms Encinas told him that the name of the local company was Maresse Collections Pte Ltd and he therefore amended the lease accordingly and after that she signed the lease and countersigned each amendment. Nothing in his evidence suggested that he had told Ms Encinas words to the effect: There is no more agreement to lease, we have to start afresh.

37. Then there was a letter of 11 March itself. It was addressed to Ms Remie Encinas, Maresse Collection Inc, and read as follows:

> 'Further to our several meetings, this is to confirm our understanding as follows:-
>
> 1. You will arrange to have your company registered with the Registry of Companies and advise us of the full name and registration number of this company within two weeks from the date of this letter. 2. The two months' deposit rental received from you today in US dollars is subject to clearance from the bank within two weeks from the date of this letter, failing which our offer shall lapse. 3. Also, if you fail to complete the Tenancy Agreement for the above premises within two weeks from the date of this letter, your rental deposit would be forfeited and our offer shall lapse.
>
> We look forward to your completion soon.'

38. The evidence shows that what the defendants were trying to do was to introduce additional refinements to the existing arrangement with the plaintiffs. They wanted the plaintiffs to take up the lease via a local company and also wanted to ensure that their deposit was paid expeditiously. They did not at any time tell the plaintiffs that there was no longer an obligation to rent out the unit to them because the agreement to lease had lapsed. Neither did they make any effort to change any of the other terms of the proposed lease. Ms Encinas

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testified that the defendants had tried to increase the rent. She had refused to allow them to do so because they had already committed themselves on the rate and they had then backed down. The defendants denied ever having raised the question of a change in the rental during the March meetings. They could have done so had they taken the view that none of the terms negotiated in July 1993 were still binding on them. The fact that they would have me believe that it never crossed their mind to do so indicates that their negotiations were aimed at smoothing out some difficulties they had encountered in the existing arrangement and not at changing the very basis of that arrangement. It is obvious to me that none of the parties came to the table with the idea of having to enter an entirely new relationship.

39. I should state here that I accept Mr Kay's evidence that he handed the letter of 11 March to Ms Encinas personally. Ms Encinas maintained in court that she did not see this letter until she arrived back in Los Angeles some ten days later. Her evidence is difficult to accept since she did not make this same protest in March 1994 itself when the defendants purported to rely on the terms of that letter to cancel the lease. There were also inconsistencies in her account of how the letter got to her. Further, she was not able to produce the faxed copy of the letter which she said had been sent to her in Los Angeles.

40. Where I have more difficulty with the evidence of Mr Kay in relation to the letter is in regard to his insistence that he gave it to Ms Encinas on the morning of 11 March before she handed him the cheque for the deposit and before she signed the lease. The problem is that the letter itself refers to the deposit 'received from you today' which wording indicates that the deposit had already been received at the time the letter was written, and secondly, it is hard to accept that if Ms Encinas had read that letter she would have asked for the cheque to be post-dated to the 22 March knowing that the defendants wanted it cleared by

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25 March. I think it is more probable that the letter was given to Ms Encinas in the afternoon after the cheque had been handed over.

41. In any case, given that there was an existing and valid agreement to lease the unit to the plaintiffs, it was not possible for the defendants to unilaterally impose a condition subsequent on the plaintiffs which they had to fulfil in order to obtain the lease. As I have stated, any variation of the agreement to lease had, in order to be effective and binding, to be in writing. The plaintiffs by signing the proposed lease itself had agreed to the variation relating to the entity which would be the tenant but there is nothing in writing from the plaintiffs indicating their agreement to the inclusion of a term that would allow the defendants to terminate the agreement to lease if their cheque was not cleared by 25 March. Accordingly, the defendants' attempted imposition of such a term had no legal effect.

42. I therefore hold that the defendants were not entitled on 26 March 1994 to cancel the proposed lease with the plaintiffs. As at that date they were obliged to grant a lease of the unit to the Singapore company to be incorporated by the plaintiffs. If no such company had been incorporated by the time the lease was to commence, the defendants could have declared a breach of the agreement to lease and enforced their rights arising from that breach. As at 26 March 1994 that right had not arisen and the defendants took action prematurely. They thereby put themselves in breach of the agreement. They cannot complain now that the plaintiffs did not thereafter incorporate a Singapore company since they had made it quite clear that they were not going to perform their side of the bargain. The plaintiffs were entitled to accept the repudiation of the agreement and to sue for damages as they did. The alternative would have been to incorporate a Singapore company and try to obtain specific performance of the agreement to lease but once the defendants were in default it was the plaintiffs'

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prerogative to choose which remedy to pursue and no complaints in this regard can be made by the defendants.

(iii) What damages have the plaintiffs proved?

43. The plaintiffs claimed a total sum of US$207,154.23 as the damages they had sustained by reason of the defendants' breach of contract. This sum was broken up into several items. I will consider each in turn.

US$4,485 for legal and professional fees

44. This item was made up of a sum of US$1,935 described as 'legal services to pursue case in Singapore'; a sum of US$800 described as 'legal services for Singapore based lawyer (initial consultation fee)'; a sum of US$1,200 described as 'accounting service and compilation of expenses'; and a sum of US$550 described as 'hospital expenses and medical bills incurred in Manila due to stress'.

45. Unfortunately, none of the above items was supported by documents. In regard to the accountant's fee of US$1,200, Ms Encinas testified that this was the amount charged to her by an accountant whom the plaintiffs had engaged to go through the available evidence and summarise the expenses. Whilst it might have been necessary for her to obtain such assistance, she should also have exhibited the accountant's invoice to show that in fact the work was done by an independent accountant rather than somebody who worked within the plaintiffs' organisation. Without such evidence, I am not able to allow this claim. Again, without documentation to support her claim for US$1,935 for fees charged by an American lawyer, the claim cannot be admitted. As for the legal fees charged by her Singapore lawyer, these would have to be recovered as part of her costs

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in this action to the extent allowed under the Rules of Court. I also note here that the documentation in support of the plaintiffs' various claims has been so poorly put together as to lead me to doubt whether the plaintiffs in fact hired a professional for the task. If they did, they did not get their money's worth.

46. The final sum of US$550 related to medical bills incurred by Ms Encinas in Manila after she left Singapore on 12 March 1994. In court, she testified that she had to be admitted to hospital because she collapsed on arrival in Manila due to the stress imposed on her when the defendants insisted that she incorporate a local company to take up the lease. This oral evidence was inconsistent with her statement in para 31 of her affidavit in which she stated that she was physically and mentally distressed and upon receiving the defendants' letters of 26 and 29 March 1994, she collapsed and had to be hospitalised, since that statement implied that the hospitalisation had taken place in Los Angeles. Further, under cross-examination Ms Encinas agreed that her collapse in Manila had nothing to do with her having received the defendants' letters of 26 and 29 March. The defendants were not in breach of contract when Ms Encinas left Singapore on 12 March. The medical expenses that she incurred in Manila thus cannot be attributed to a breach of contract and cannot be recovered by the plaintiffs.

US$17,667.35 being business travel expenses related to the acquisition of a Singapore showroom

47. The first item under this head is the sum of US$6,878.34 being the expenses incurred by the plaintiffs when Ms Encinas made her initial trip to Singapore in July 1993. I agree that these expenses, to the extent proved, are reclaimable as they were wasted by reason of the defendants' subsequent breach of contract. Ms Encinas' airfare for this trip is recoverable. The defendants objected on the

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basis that her ticket allowed her to stop over in Manila both on her way to and on her way back from Singapore. Ms Encinas' evidence was, however, that the ticket would have cost the same even if she had not stopped over in Manila. I accept that.

48. Although Ms Encinas can recover her full airfare, I do not think that it is correct for her to charge the expenses incurred during her stay in Manila to the defendants. This is because the stay was entirely for her own convenience and was unrelated to her business in Singapore. The defendants did not ask her to stop over in Manila and they cannot be made to pay for that visit. This reasoning would also apply to the expenses incurred by Ms Encinas in Manila on her way home from Singapore in March 1994.

49. The documents produced by the plaintiffs do not show exactly what her airfare in July 1993 amounted to. However, they do have documents showing that her ticket to Singapore purchased in February 1994 cost US$1,150.95. I accept that as being the cost of her airfare in July 1993 as well as it is unlikely that there was very much change in the fares between July 1993 and February 1994. In the summary of the plaintiffs' claim, it appears that Ms Encinas was accompanied by two other people. No evidence was, however, given either in her affidavit or in court about these persons. Their tickets were not produced. Further, there was no evidence of the hotel expenses which she incurred while in Singapore in July 1993. I do not even know how many days she stayed here on that first visit. Accordingly, I can only allow Ms Encinas' own airfare under this head.

50. As regards Ms Encinas' second trip to Singapore, she has claimed US$2,377.93 representing the cost of airline tickets and hotel expenses for herself and Ms Macapagal during the period 27 February to 20 March 1994.

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According to the documents, Ms Encinas' own ticket cost US$1,150.95. According to Ms Macapagal's evidence, she did not work with the plaintiffs in Los Angeles prior to that trip. She had simply accompanied Ms Encinas from Manila to Singapore on a temporary basis in order to help the latter set up the showroom here. Her ticket, it would appear from the documents, cost only US$491.05. Ms Encinas also produced a bill from Hotel Grand Central for the period 6 to 12 March 1994. This showed that she incurred S$14 on telephone calls during that time. She did not, however, produce her actual hotel bill for the room charges. Putting these at S$150 per day for the both of them (a reasonable estimate I believe) she would have incurred S$900 as her hotel expenses during that stay.

51. Ms Encinas' third trip to Singapore was made in May 1994 in order to consult lawyers and obtain legal representation to handle the breach of contract claim against the defendants. According to the note of her expenses she travelled with one Leo Loyola as legal adviser. It appears from one of the documents that he must have travelled with her from Los Angeles and that the airfare incurred for him was US$1,925. There was no explanation why his airfare was more than Ms Encinas' own airfare, which from the documents, was again US$1,150.95. I cannot therefore allow more than US$1,150.95 in respect of Mr Loyola's ticket. According to the itinerary produced by her travel agent she arrived in Singapore on 22 May. She stayed at the Hotel Grand Central again and there is a tour voucher showing a sum of S$906.40 being paid in respect of her hotel accommodation. There is also a credit card bill from the Hotel Grand Central for a further sum of S$220.57 and a separate bill S$71 for calls made from the hotel.

52. In consequence, the total amount that I would award the plaintiffs in respect of their expenses on trips to Singapore in connection with the lease would be

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US$5,094.85 in respect of airfare and S$2,111.97 as hotel expenses including phone call charges.

US$182,074 being merchandise purchased/ordered for the Singapore showroom

53. The plaintiffs produced various invoices relating to merchandise which Ms Encinas said had been ordered for the purpose of display in the plaintiffs' Singapore showroom. The cost of these items came up to US$182,074 and after the contract was cancelled, the plaintiffs recovered only US$28,000 from the sale of these items as they only managed to sell them to jobbers and discount wholesale buyers.

54. The defendants submitted that the plaintiffs had failed to show that the damages they claimed in respect of the merchandise ordered related to goods bought for the Singapore business. Starting at page 91 of her affidavit, Ms Encinas had listed her alleged expenditure in respect of the merchandise she had ordered. In cross-examination, she was taken through each of the invoices which she claimed supported the plaintiffs' claim but she was unable to point to any reference in those invoices to show that the items described in them were meant to be shipped to Singapore. Her contention was that the timing of the orders (between August and September 1993) showed that the items were meant for the Singapore showroom which would be opened in 1994. The defendants submitted that in these circumstances, the plaintiffs had failed to meet the burden of proof and that the invoices adduced were no more than a collection of invoices culled from the plaintiffs' normal business.

55. The defendants pointed out that although Ms Encinas had claimed that she had shipped or prepared to ship some of the merchandise to Singapore, under

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cross-examination she was unable to point to any evidence which showed that she had made such arrangements to ship. In court, she stated that she had shipped merchandise to Singapore as early as November 1993 but it was also her evidence that the commencement date of the lease was to be some time in April 1994 or later. The defendants submitted that if that was the case, the plaintiffs would not have chosen to ship the merchandise so early and that Ms Encinas' evidence on shipment was not credible.

56. The plaintiffs' case was made more difficult by the lack of evidence of payment for the goods ordered. None of the documents they produced from the handbag suppliers showed that full payment had been made. Some documents showed that payment was expected to be made on delivery of the orders while one showed a downpayment of ten per cent of the purchase price. Ms Encinas' evidence was that it took about four weeks from the time an order was placed for the goods to be ready and shipped out. However, documents that she produced showed that as late as February and April 1994, some of her suppliers were still awaiting shipping instructions from her on the usual cash on delivery terms. There is no evidence to show that the plaintiffs ever took delivery of any of the goods which they say were ordered for the Singapore showroom. Further, their claim that all these goods were meant for Singapore was difficult to credit given that there was no indication to the supplier of the ultimate destination of the goods nor any evidence of shipping arrangements to Singapore. In addition, Ms Encinas' evidence was that her usual course of business was to display sample items only in her showroom. Her customers were retailers who would place orders on the basis of the samples displayed and she would then place those orders with her suppliers. She testified that the Singapore showroom was meant for the wholesale trade as well. The orders that she placed in August and September 1993 were for substantial quantities of each item. For example the

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order placed with Lovely Handbags of New York was for seven different styles of handbag with 48 pieces in each style and the order placed with New York New York Handbags was for six different types of handbag but for quantities ranging from a minimum of 100 pieces to a maximum of 300 pieces per style. The sizes of the orders were not consistent with items being purchased for display only. It appeared that at least some of the items ordered were for retail sale and probably mainly to satisfy orders placed with the plaintiffs by their own customers although a certain number of each of the items may thereafter have been shipped to Singapore for display in the showroom here.

57. In the premises, the plaintiffs have not proved their claim under this head.

US$6,286.80 being other business expenses

58. The first item under this head is a sum of US$95.80 being transport charges incurred for moving merchandise to storage facilities. The invoices produced in fact totalled US$206.88. They showed that someone called Esteban Encinas contracted with a company called U-Haul for goods to be transported from one location to another. I assume that Esteban Encinas was acting on behalf of the plaintiffs though no evidence was given to this effect. Even if he was, however, that is not sufficient to establish the plaintiffs' right to recover the amount of US$206.88 or even the lesser sum of US$95.80 from the defendants as there is no evidence either written or oral to show that the goods transported had anything to do with the defendants' breach of contract and the unit.

59. The next item under this head is a claim for US$1,677 being storage space rental of US$129 per month from March 1994 to 30 April 1995. There are two defects in this claim. First, no document was produced to substantiate its quantum. Secondly, there was no evidence that the storage space was rented for

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the purpose of storing merchandise intended to be displayed in the unit. The plaintiffs did not prove that such merchandise had been delivered to them or that they had to rent special storage space for it.

60. The third item here is the sum of US$3,500 which is described as being 'crating/ uncrating/freight and moving charge of Singapore furniture, display fixtures and merchandise allocated to Singapore'. The plaintiffs have not substantiated the quantum of this claim with any supporting documentation.

61. The fourth item is a sum of US$959 made up of the purchase price of a fax machine (US$780) and that of a telephone (US$179). No documents were produced to support the purchases. Neither was any evidence given that the items in question were intended for the Singapore office and could not be used for the plaintiffs' operations in California. This item is not recoverable.

62. The last sum under this head is the small amount of US$55 described as 'registration, licences/permit and other local fees'. Documents produced show that Ms Encinas paid the Registry of Companies and Businesses a sum of S$55 to register 'Maresse Collections' as a sole-proprietorship. This payment was wasted as a result of the defendants' breach and the plaintiffs can therefore recover the said amount of S$55.

US$18,143.03 being fixtures and furniture purchased for Singapore

63. This claim is made up of various items. There are only two supporting documents, however. The first is a quotation dated 17 March 1994 from S.E. Distribution, Inc in respect of various fixtures which the plaintiffs had ordered. It is clear from the document itself that these fixtures were meant for the unit because it stated that the various items were to be shipped to TradeMart in

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Singapore. The total cost of the fixtures ordered was US$10,143.03 and although at the top right hand corner of the document the word 'QUOTATION' appears, on the left hand side the words 'SOLD TO' appear followed by the plaintiffs' name and address. There is no other document to support the fact that the plaintiffs actually took delivery of these goods and/or arranged for them to be shipped to Singapore before the contract was cancelled by the defendants on 29 March. However, this endorsement appears at the bottom of the document: '20% handling charge will be charged for all merchandise returned'. It would have been reasonable for the plaintiffs to have mitigated their damages by returning these items if they had not been shipped to Singapore. Accordingly I award them the 20% handling fee which they would have to pay the supplier on return ie the sum of US$2,028.61.

64. The other document under this claim is a cheque dated 12 February 1991 for the sum of US$8,000. In court Ms Encinas explained that she had previously bought furniture for one of the plaintiffs' units in the CaliforniaMart and that this cheque evidenced the payment for the same. She went on to say that when the plaintiffs were supposed to take up the unit, they bought new furniture for their California premises and intended to move the old furniture for use in Singapore. There was, however, no evidence of this. I accept the defendants' submission that there is no connection between the cheque for US$8,000 issued in February 1991 and the prospective lease of the unit. The plaintiffs have no other documents in support of the rest of their claim for furniture purchased for use in the unit and therefore I cannot make any further award in that respect.

US$6,498.05

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65. The above sum represents the showroom rental and security deposit paid by the plaintiffs to the defendants. They are entitled to recover it since the transaction has fallen through.

Conclusion

66. As a result of the foregoing, the plaintiffs have proved their case and are entitled to judgment in the sums of US$13,621.51 and S$2,166.97 together with interest thereon at 6% per annum from the date of writ, and costs.

JUDITH PRAKASH

JUDGE

SINGAPORE

Judith Prakash J

Lim Kim Hong (Mas & Partners) for the plaintiffs
Roy Yeo (Lee & Lee) for the defendants

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