SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd
[2005] SGHC 58

Case Number : Suit 594/2003

Decision Date : 30 March 2005

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Kannan Ramesh, Ang Wee Tiong and Dawn Chew (Tan Kok Quan Partnership) for the plaintiff; Boo Moh Cheh and Mohamed Ibrahim (Kurup and Boo) for the defendant

Parties : SM Integrated Transware Pte Ltd — Schenker Singapore (Pte) Ltd

Contract – Formalities – Agreement for leases – Plaintiff alleging loss and damage suffered due to defendant's repudiation of lease of plaintiff's warehouse – Defendant arguing negotiations for lease of warehouse never completed – Whether essential terms of contract agreed to unconditionally by parties – Whether concluded contract between parties for lease of warehouse existing

Contract – Formalities – Agreement for leases – Whether requirement under s 6(d) Civil Law Act that agreement be in writing and signed by party to be charged therewith fulfilled – Whether e-mail correspondence between parties constituting sufficient memorandum or note of agreement – Whether e-mails fulfilling "in writing" requirement – Whether signature requirement satisfied – Section 6(d) Civil Law Act (Cap 43, 1994 Rev Ed), s 2 Interpretation Act (Cap 1, 2002 Rev Ed)

Landlord and Tenant – Agreements for leases – Plaintiff alleging loss and damage suffered due to defendant's repudiation of lease of plaintiff's warehouse – Whether lease agreement subject to implied condition precedent – Whether failure of alleged condition precedent to materialise operating to release defendant from performance of obligations under lease agreement

30 March 2005 *Judgment reserved.*

Judith Prakash J:

1 The plaintiff, SM Integrated Transware Pte Ltd ("SMI"), has brought this action against the defendant, Schenker Singapore (Pte) Ltd ("Schenker"), to recover damages it claims it has incurred by reason of Schenker's failure to take up a lease of a warehouse at 7 Kwong Min Road, Singapore ("the warehouse"). Schenker denies that there was any concluded lease for the warehouse so as to render it liable in damages to SMI.

The facts

Events in 2002

2 Both parties to this action are companies incorporated in Singapore who are in the business of providing third party logistics services. The warehouse was built by SMI on land that it had leased from the Jurong Town Corporation ("JTC") and has the capacity to store dangerous goods.

3 In October 2002, the warehouse was occupied by a company called Richland Logistics Pte Ltd ("Richland") but its lease was due to expire shortly. SMI was therefore interested in finding a new occupant for the warehouse. At the same time, Schenker was trying to obtain a contract from a company called Merck Pte Ltd ("Merck") to handle its dangerous goods in Singapore. Schenker's own warehouse did not have enough capacity to receive the Merck goods if the contract was awarded and Schenker was therefore looking to lease some additional warehouse space in Singapore.

4 On 30 October, Mr Daniel Heng Yew Khiang who was then the general manager of SMI, met with Mr Roman Claus Luth, an employee of a company associated with Schenker. At that meeting and in subsequent discussions and correspondence, Mr Luth represented Schenker although he was not directly employed by it. The two men discussed the proposed lease of the warehouse to Schenker as well as the provision by SMI of certain trucking services to Schenker. Mr Heng said that Mr Luth told him that Schenker had already seen the warehouse and was keen to lease it. Mr Heng thought that the warehouse would be used to service various customers of Schenker. According to Mr Heng, Mr Luth did not inform him of who Schenker's customers were or the type of products that would be stored in the warehouse. Mr Luth, on the other hand, said that he told Mr Heng that Schenker was looking for additional warehouse space because Merck was going to appoint Schenker to handle its dangerous goods.

5 The meeting was followed by an exchange of e-mail correspondence. I should note here that throughout the negotiations and their subsequent dealings, the parties contacted each other by telephone and by e-mail. They also had personal meetings. No traditional correspondence in the form of letters was exchanged between them.

6 In Mr Heng's e-mail to Mr Luth of 30 October, he stated that SMI would consider a lease of three years plus an option to renew for a further three years and would look into the cost of installing another cargo lift in the warehouse. He also gave details of other services that SMI could provide. On 1 November, several e-mails were exchanged between Mr Luth and Mr Heng regarding the arrangements for Schenker to view the warehouse and SMI's quotation for trucking of dangerous cargo. Mr Luth asked that the quotation and letter of intent in relation to the lease of the warehouse be provided as soon as possible.

7 Later that same day, Mr Luth, Mr Tan Tian Tye, the general manager of Schenker's logistics division, and some other Schenker staff viewed the warehouse. Mr Heng and Ms Yong Choon Fah, a real estate agent employed by SMI to market the warehouse, discussed the monthly rental and the duration of the lease with them.

8 On 5 November, Mr Heng sent Mr Luth an e-mail with an attached letter of intent marked "Subject to Contract" in relation to the lease of the warehouse. Mr Heng stated in the e-mail that SMI was seeking a monthly rent of $48,000. The letter of intent itself did not go into much detail. It stated only that SMI wished to enter into a service agreement with Schenker for the provision of the warehouse for warehousing and related logistics services and that the commencement date would be 1 January 2003 with other terms and conditions to be discussed. The letter of intent required Schenker to confirm its acceptance by signing and returning the same to SMI within 14 days.

9 Schenker did not sign the letter of intent. On 18 November, Mr Heng telephoned Mr Luth and asked what the position was. According to Mr Luth, he replied that Merck had not as yet come to a decision to appoint Schenker to handle its goods but he expected the decision to be made the same day. Until the decision was made, Schenker would not be able to commit itself to renting the warehouse. Mr Heng agreed to give Schenker an extension of time until close of business that day. Mr Heng's version of this conversation was that Mr Luth had said that Schenker was waiting for its "customers" to revert and that Merck's name was not specifically mentioned.

10 On 25 November, Schenker asked for a further extension of time. In his e-mail to Mr Heng, Mr Tan said that Schenker was eager to make the transaction happen but as its "customer" was then making the final evaluation of Schenker's offer, Schenker could only give a tentative decision on 27 November and a confirmed decision on 29 November in line with its customer's timetable. SMI agreed to extend time till noon on 27 November. That day Mr Tan and Mr Luth went to SMI's office

where they met Mr Heng and Ms Jean Chai, the finance and administration manager of SMI. After the meeting, Mr Heng sent Schenker an e-mail summarising what he thought both parties had agreed to. This was, firstly, that there would be an extension of time up to 29 November for Schenker to confirm that it would lease the warehouse. Secondly, the monthly rental would be $43,000. Thirdly, regarding Schenker's request that the lease commence on 1 January 2003, SMI would, upon Schenker's confirmation that it was taking the warehouse, do its best to persuade Richland to vacate by that date.

11 On 28 November, Mr Tan informed SMI that Schenker had had a good meeting with Merck and Schenker was expecting to get good news from Merck shortly. On the same day, Mr Luth sent a draft logistics service proposal to Mr C K Ho of Merck. On 9 December, Mr Ho sent Schenker an amended copy of its logistics service agreement that set out the various logistics services that Schenker was to provide to Merck and proposed a commencement date of 15 January 2003 for the Merck contract. Ten days later, Mr Tan telephoned Mr Ho and asked him whether Merck was awarding Schenker the contract since Schenker had to confirm the lease of the warehouse. Mr Ho told him that he did not foresee any problem and that Schenker should go ahead with that lease.

12 Later that same afternoon (19 December), Mr Tan called Mr Heng. After repeating what Mr Ho had said, Mr Tan informed Mr Heng that Schenker would therefore like to lease the warehouse from SMI. According to Mr Tan, he also cautioned Mr Heng that, as at that time, he had not received written confirmation from Merck and that Schenker needed the draft lease contract to be vetted and approved by its solicitors. Mr Heng asked for an e-mail to confirm Schenker's intention to take the lease. On 20 December, Mr Tan sent Mr Heng an e-mail stating "This serve [*sic*] to confirm that Schenker will proceed with the leasing of the warehouse as per our discussion. Please arrange to hand over the warehouse to us by 15 Jan 03". Mr Heng then instructed Ms Yong to prepare a draft of the formal agreement.

13 Ms Yong drew up a document entitled "Handling Service Agreement" ("handling agreement"). The handling agreement provided for SMI to provide Schenker, for a period of two years from 1 February 2003 to 31 January 2005, with warehousing and logistics services and also two trucks and such other services as might be required from time to time during the term of the agreement. Schenker was to pay SMI $43,000 per month as rental/handling charges for the exclusive use of the warehouse and, secondly, for any other services provided by SMI, with charges at such rates as the parties might mutually agree from time to time. The draft handling agreement was given to Mr Tan for Schenker's consideration. On 30 December, Mr Tan, having vetted the draft, sent an e-mail to Mr Heng stating that he wanted the handling agreement amended to include various matters including the provision of a one-month rent-free period for the setting up of operations. Mr Heng replied the same day to say that SMI agreed to a two-week rent-free period. The next day, Mr Tan stated that whilst Schenker would try and set up its operations within two weeks of the date of handing over of the warehouse, if it was unable to do so, it would need to get back to SMI to extend the rent-free period to a month.

Events in 2003

14 On 7 January 2003, Mr Tan forwarded the draft handling agreement to Schenker's solicitors for their comments and advice. According to Mr Tan, it was Schenker's usual procedure to send all final drafts of fresh contracts to its solicitors for vetting before agreeing to such contracts. It was also Schenker's practice to heed the comments and follow the solicitors' recommendations very closely.

15 In the meantime, Richland had indicated to SMI that it wished to extend the duration of its

lease. SMI told Richland that this was not possible as the warehouse had been committed to Schenker. Richland was not pleased about having to move out. A meeting was then called for all parties to discuss the date of the handover of the warehouse.

16 The meeting took place on 8 January at SMI's office. Mr Tan attended on behalf of Schenker and one Mr Lim Chwee Kim represented Richland. They discussed the date on which Richland would vacate and hand over the warehouse and the possible dates on which Schenker could be allowed to enter the warehouse to do fitting-out works. Mr Heng found the atmosphere of the meeting to be tense. On the one hand, Schenker was very anxious to carry out its fitting-out works so that it could commence operation soon. It wanted an early handover date. On the other hand, Richland was not happy to vacate the warehouse. Richland wanted to move out by the end of February 2003 but Schenker insisted on an earlier date and the parties eventually agreed on 6 February as the date of the handover.

17 Ms Yong was also present at the meeting. She prepared minutes of the same. These were sent by e-mail to Mr Heng, Mr Tan and Mr Lim. To summarise, the contents of the minutes were as follows. Firstly, it was stated that Richland would vacate on 6 February and that there would be a joint inspection of the warehouse by all three parties at 12.00 noon on that date. Secondly, by 23 January, Richland would clear the warehouse space on the ground floor so as to allow Schenker to do some partitioning and air-conditioning work. Thirdly, Richland would allow Schenker's contractors, subject to prior arrangement, to visit the premises to do planning and testing work. Fourthly, Schenker's contractors would be allowed to commence work on location codes and distribution points on 4 February. Finally, Richland would remove its existing cable network by 6 February.

18 Mr Tan responded on 10 January by sending an e-mail to Ms Yong with copies to Mr Heng and Mr Lim. He said "I accept all the points stated in Choon Wah [*sic*] mail. Please note that no further delay in the handing over would be allowed in view of the tight situation we are facing". Mr Lim also confirmed his acceptance of the matters set out in Ms Yong's e-mail except that he wanted to change the date for clearance of the warehouse space from 23 to 27 January.

19 On 13 January, Schenker had a meeting with Merck. According to the minutes of that meeting, Schenker informed Merck that in order to handle Merck's business, it had leased a warehouse for dangerous goods located at Kwong Min Road and that it would take over this warehouse by 3 February.

20 On 22 January, Schenker's contractors installed some bar codes on the racks in the warehouse and also carried out some network cabling testing work. In the meantime, Schenker's solicitors had sent their client two letters with their comments on the draft handling agreement. They raised various issues including the following:

(a) As the handling agreement was, substantially, a lease, stamp duty would be payable on it and therefore it had to contain a provision as to which party was to bear the stamp duty.

(b) Interest on late payments should be fixed as the average of the prime rates of the three local banks instead of at 10% per annum as suggested by SMI.

(c) There should be a provision providing for the time period in which the deposit payable under the agreement should be refunded and for interest to be paid by SMI for a late refund.

(d) Whether SMI had obtained the permission of JTC to the proposed lease as JTC was the ultimate owner of the warehouse.

(e) Since SMI had mortgaged the warehouse to the United Overseas Bank Ltd ("UOB"), the latter's approval would be required for the proposed lease.

Mr Tan told Mr Heng that Schenker wanted to follow the advice given by its solicitors and sent Mr Heng copies of these letters.

21 On 27 January, a meeting was held to discuss the solicitors' comments. Present at the meeting were Mr Heng, Ms Chai and Mr Tan. According to Mr Tan, during the meeting, he requested Mr Heng to seek JTC's approval for the lease of the warehouse to Schenker. Mr Heng said that there was no necessity to obtain JTC's approval since the handling agreement was only a service agreement and not a tenancy agreement. Mr Tan then told Mr Heng that he had his reservations and would leave it to Schenker's solicitors to look at the point again.

22 Mr Heng's version of what happened at the meeting was that Mr Tan was very eager to proceed with the commencement of the lease and did not appear to be too concerned with the solicitors' comments. Mr Heng said that Mr Tan and he agreed that the provision of other logistics services, such as the trucking services, should be separated from the main lease agreement. Mr Tan told Mr Heng that he would deal with the solicitors' comments directly with the solicitors. As for the issue of JTC's approval, Ms Chai told Mr Tan that since, apart from warehousing facilities, other logistics services were to be provided to Schenker, JTC's approval might not be required. To Mr Heng, Mr Tan did not appear too concerned about JTC's approval.

23 After the meeting, Mr Heng instructed Ms Yong to revise the handling agreement in accordance with what had been discussed. Later that same day, Ms Yong sent Mr Tan, Ms Chai and Mr Heng the revised agreement. This document, re-titled "Logistics Service Agreement" (and which I shall refer to as the "draft LSA"), provided for:

(a) SMI to supply Schenker with warehousing facilities at the warehouse and integrated logistics services for a period of two years (with an option to renew for a further period of one year);

(b) the commencement date to be 1 March 2003;

(c) the monthly rental to be $43,000, payable in advance, within seven days of the receipt of SMI's invoice; and

(d) interest at the rate of 10% per annum to be paid on outstanding amounts.

24 On 4 February, Mr Tan sent an e-mail to Ms Yong and extended copies of it to Mr Heng and Ms Chai. In this e-mail, he said:

Dear CF

We agree to remove the Addendum from the contract to avoid complication with the [lawyer]. The agreement on the new installations will instead be recorded in the form of letter of exchange between Schenker and SM.

For the rest of the contents appear to be OK with me, except Clause 2, the Word "in Advance" should be removed as the sentence contradict to [*sic*] the following one which state Schenker shall pay, within 7 days upon receipt of SM's invoice.

Please send me the amended copy and I will get it clear [*sic*] with my [lawyer].

In his evidence, Mr Tan explained that the references in his e-mail to the lawyer and his lawyer were references to Schenker's solicitors.

25 The next morning, Ms Yong sent the amended draft LSA to Mr Tan. She had removed the addendum from this document and provided for the rental to be paid monthly in advance whereas fees for services had to be paid monthly in arrears. She had also provided for a grace period of seven days to be given for payment before interest would be chargeable. Mr Tan did not respond directly to this e-mail or comment on the amended draft LSA.

26 On 6 February, a handover inspection was held at the warehouse. Present at the inspection were Mr Lim of Richland, Mr Heng and Mr Tan and his colleague, Mr Feisal. The men inspected the premises and identified the defects that SMI had to rectify. A list of these defects was subsequently drawn up and was sent to Mr Tan by Ms Yong on Monday, 10 February. Ms Yong asked whether there were any items that Schenker wanted to add to the list and told him that SMI had employed contractors to do the rectification works and these works were scheduled to be completed that same week. She also asked for Schenker's reply on the draft LSA. Mr Tan thanked Ms Yong for the list and asked her to include cleaning and repainting of the warehouse as items on the list. He did not make any comments on the draft LSA.

27 Then, things took a dramatic turn. On the afternoon of 10 February, Merck sent Schenker an e-mail stating that because it was tied up with certain re-engineering of its own processes, it had to focus its resources on that project and hence its "future outsourcing requirements of the logistics process" had to be put on hold. The next day, Mr Tan informed SMI that Merck had pulled out of the project although Schenker had been given the understanding that Merck would work with it if Schenker secured a warehouse for the storage of dangerous goods. His e-mail also stated that as Schenker had intended to use the warehouse for its project with Merck, Schenker had decided that it was not feasible for it to proceed with its own dangerous goods operations and therefore had decided not to proceed with the lease of the warehouse. Schenker apologised for its decision and requested SMI's understanding on the matter.

28 On 18 February, Mr Tan had a meeting with Mr Heng and Ms Yong. According to Mr Heng, Mr Tan was very apologetic about Schenker's decision not to proceed with the lease. He said that he had not expected Merck to pull out at the last minute. Mr Heng offered to reduce the monthly rental until such time as Schenker could establish its dangerous goods operation but Mr Tan said that although Schenker could make use of the warehouse to service its other customers, the major customer was to have been Merck. Accordingly, Schenker did not find it cost-effective to proceed with the lease. The meeting ended amicably with Mr Tan assuring Mr Heng that he would speak to his management on how Schenker might compensate SMI for not proceeding with the lease.

29 There were further meetings between the parties but no agreement could be reached on compensation. At the end of April 2003, Schenker's solicitors wrote to SMI stating that no contract had been concluded and there was no basis for SMI to claim damages from Schenker. This action was commenced by SMI in June 2003.

The pleadings

30 By para 3 of its Amended Statement of Claim, SMI averred that by an agreement contained in and/or evidenced by and/or inferred from, *inter alia*, various e-mail correspondence between SMI, its agent and Schenker from October 2002 to February 2003 and the draft LSA, SMI had agreed to

provide Schenker with warehousing services at the warehouse for a period of two years from 1 March 2003 with an option to renew for a further year and Schenker had agreed to pay a monthly rental of $43,000 for the warehouse.

31 SMI pleaded[1] that the agreement was made partly orally, partly in writing and partly by conduct. In so far as it was made orally, the agreement was made at meetings between Mr Heng acting on behalf of SMI and Mr Tan and/or Mr Luth acting on behalf of Schenker. In para 7 of the Amended Statement of Claim, SMI stated that in so far as it was made in writing, the lease was contained in or evidenced by the following documents:

(a) an e-mail dated 5 November 2002 from SMI to Schenker;

(b) an e-mail dated 20 December 2002 from Schenker to SMI;

(c) an e-mail dated 23 December 2002 from SMI's agent to Schenker;

(d) an e-mail dated 30 December 2002 from SMI to Schenker;

(e) the minutes of meeting of 8 January 2003;

(f) an e-mail dated 10 January 2003 from Schenker to SMI and SMI's agent;

(g) an e-mail dated 27 January 2003 from SMI's agent to Schenker and SMI;

(h) the draft Logistics Service Agreement;

(i) an e-mail dated 4 February 2003 from Schenker to SMI's agent; and

(j) an e-mail dated 5 February 2003 from SMI's agent to Schenker.

32 According to the Statement of Claim,[2] in so far as the lease was made by conduct, the conduct consisted of or was to be inferred from, *inter alia*, Schenker's commencement of the following fitting out works at the warehouse:

(a) bar code number on racking; and

(b) network cabling works on or about 22 January 2003.

33 SMI averred that by an e-mail dated 11 February 2003 and a further e-mail dated 25 February 2003, Schenker repudiated the lease and refused to be bound any longer by it.[3] In para 13 of the Amended Statement of Claim, SMI set out the steps that it had taken to mitigate its loss after Schenker's repudiation and in para 14, it set out details of the loss and damage it had suffered, totalling $606,350.

34 Schenker denied liability on three main grounds. First, Schenker alleged that whilst it had had negotiations with SMI between October 2002 and February 2003 for a grant of a lease of the warehouse, these negotiations had never been completed and consequently there was no concluded contract between the parties.[4] Schenker gave particulars of the various terms on which it said the parties had not come to agreement. Schenker averred that any oral and/or e-mail agreement reached was to be "subject to contract" and that its solicitors would guide Schenker thereon when all the main terms had been agreed.[5]

35 Schenker's second line of defence was that even if there had been a concluded contract between the parties or one that was evidenced by the exchange of e-mail correspondence and the draft LSA, none of these exchanges complied with the requirements of s 6(d) of the Civil Law Act (Cap 43, 1994 Rev Ed) ("the CLA") in that there was no promise or agreement or a memorandum or note thereof in writing and signed by the party to be bound by the agreement. Further, Schenker did not enter into exclusive possession of the warehouse nor did it pay any rent or deposit to SMI in respect of the renting of the warehouse. Thus, there was no legally enforceable contract.

36 Finally, in paras 12 to 15 of the Re-amended Defence, Schenker set out three conditions precedent to which the alleged contract was subject. These conditions, it said, had not been fulfilled. The first was that SMI had to seek the approval of JTC to lease the whole of the warehouse to Schenker. The second was that Merck had to appoint Schenker to handle, and to provide the third party logistics services for, Merck's dangerous cargo. The final condition precedent was that SMI had to obtain the consent of the UOB before it could rent out the warehouse to Schenker.

37 SMI filed a Re-amended Reply in which it contested the various points raised by Schenker's Re-amended Defence. It is not necessary at this stage for me to set out particulars of that pleading as the issues emerge clearly from the first two pleadings.

The issues

38 The broad issues for decision are:

(a) Was there a concluded contract for the lease of the warehouse and, if so, when was that contract concluded?

(b) Were the requirements of s 6(d) of the CLA met?

(c) Was performance of the contract subject to the fulfilment of any condition precedent?

First main issue: Was there a concluded contract?

39 In order for there to be a concluded contract for a lease, the essential terms of that contract must have been agreed to unconditionally by both the prospective landlord and the prospective tenant. It is clear from *Masa-Katsu Japanese Restaurant Pte Ltd v Amara Hotel Properties Pte Ltd* [1999] 2 SLR 332 and *Halsbury's Laws of England* vol 27(1) (Butterworths, 4th Ed Reissue, 1994) at para 60 that the essential terms of such an agreement are that the premises to be leased and the landlord and tenant must be identified, the commencement and duration of the term must be fixed and the rent and other consideration to be paid (if any) must be agreed. The same paragraph of *Halsbury's* adds that if any other terms are mentioned by one party, these must also be unconditionally accepted by the other in order that there may be a concluded contract. If such additional term has not been unconditionally accepted, the matter, says *Halsbury's*, "rests in negotiation and there is no concluded contract".

40 SMI submitted that by 4 February 2003, the parties had agreed on the essential terms. The premises to be leased and the parties to the lease had been identified. The term of the lease had been fixed at two years with an option to renew for a further year. It had also been agreed that the lease would commence on 1 March 2003 and the rental payable would be $43,000 a month. Thus, the contract was agreed on that date, if not earlier.

41 Schenker, however, submitted that not only had there been no agreement on some of the

essential terms, but also additional terms had been mentioned and the parties had not come to an agreement on those terms on or before 4 February 2003. In particular, there was no agreement as to the date of the commencement of the term. Further, there was no agreement on the following issues: who had to bear stamp duty on the lease document; the types of dangerous goods that Schenker could not store in the warehouse; the payment of interest for outstanding rent; the one-month rent-free period requested by Schenker; and, finally, certain terms relating to the refund of the deposit paid by Schenker.

Were the essential terms agreed?

42 From the evidence, it is clear that on 20 December 2002, when Mr Tan informed Mr Heng by e-mail that "Schenker will proceed with the leasing of the warehouse as per our discussion", two of the essential terms had been agreed: the identity of the premises to be leased and the identities of the prospective landlord and prospective tenant. Additionally, the amount of rental and the duration of the lease were also probably agreed by then since they had been a major part of the ongoing discussions between the parties. Even if not agreed on 20 December, these items were agreed shortly thereafter. They were included in the handling agreement drawn up by Ms Yong and forwarded to Mr Tan on 23 December. After vetting the handling agreement, Mr Tan wrote to Mr Heng on 30 December setting out the further items that needed to be amended or included in the draft. The rent and the duration of the lease were not among these. So by 30 December 2002, in my view, those items were confirmed.

43 The commencement date of the lease had been stated in the handling agreement as being 1 February 2003. Mr Tan had no direct comment on that. He did state, however, that Schenker should be given a one-month rent-free period in order to set up its operations. That statement could be construed as his asking for the commencement date to be a month after Schenker took possession of the premises. In view of that possibility, there is some problem with holding that the commencement date had also been agreed to on 30 December 2002. SMI's position on this point, as stated above, was that all essential terms, including the commencement date, had been agreed to by 4 February 2003. This submission was made on the basis that in cl 3 of the draft LSA, the commencement date of the lease was specified to be 1 March 2003. On 4 February 2003, Mr Tan had confirmed that the contents of the draft LSA were acceptable to him apart from certain wording in cl 2. SMI therefore submitted that on that day, at the latest, Schenker had agreed to 1 March 2003 as the commencement date.

44 Schenker disputed this for four reasons. Firstly, it contended that Mr Tan's e-mail of 4 February 2003 (as quoted in [24] above) had contained only a qualified acceptance of SMI's proposal via the draft LSA that the commencement date be 1 March 2003 and therefore was insufficient to constitute the necessary agreement to an essential term. Secondly, there was no evidence that the parties had agreed at the meeting on 27 January 2003, or at any other time, to 1 March 2003 as the commencement date. Thirdly, the parties had not agreed on the duration of the rent-free period and therefore, since the rent-free period was to run immediately before the lease commenced, the commencement date had not been fixed. Finally, even if the duration of the rent-free period had been agreed to, SMI was unable to give Schenker exclusive possession of the warehouse on a date that would enable Schenker to enjoy the full rent-free period before 1 March 2003.

45 The first reason given by Schenker involves the construction of the e-mail of 4 February 2003 from Mr Tan. Schenker submitted that that e-mail contained only a "qualified acceptance". It did not, however, elaborate the way in which the acceptance was "qualified".

46 Looking at the e-mail itself, the first two paragraphs did not contain any qualification of the main terms of the draft. The request that the words "in advance" be removed from cl 2 was not a major item since all that Mr Tan wanted to clarify was that Schenker would have seven days from receipt of the invoice to make payment of the rent, a matter which was not really in dispute. Therefore, I assume that Schenker is relying on the last paragraph of the e-mail. That reads "Please send me the amended copy and I will get it clear [*sic*] with my [lawyer]." If so, does that sentence really denote a conditional acceptance of the main terms of the lease? I do not think so.

47 Mr Tan testified that by 4 February 2003, save for the point on cl 2 raised in the e-mail, he was satisfied with the draft LSA sent by Ms Yong although he asserted that he had qualified his acceptance by saying that he still had to get the lawyers to comment on the draft. He confirmed in court, too, that he was also satisfied with the commercial terms of the draft and that terms like when the tenancy would start and how long the rent-free period would last, were commercial terms that he had the authority to decide on behalf of Schenker. Schenker did not lead any evidence or explain why any of the commercial terms including the commencement date should be subject to its solicitors' approval. In the e-mail itself, Mr Tan had suggested that the addendum be removed from the draft agreement so as to avoid any difficulty with his solicitors. He also stated in court that the role of Schenker's solicitors was to "go through and approve the draft contract wording" before Schenker would agree to the final wording. From all this evidence, it appears to me that Mr Tan's qualification in the last paragraph of the e-mail was simply that he needed the solicitors' approval as to the language of the written contract before he could authorise its signature. He was not qualifying his acceptance of the essential terms of that agreement in any way.

48 The second reason, *ie*, that the parties did not agree on any other occasion to 1 March 2003 as the commencement date, even if correct, is immaterial once I find that that date was proposed by SMI via the draft LSA (as Mr Tan himself testified) and accepted by Schenker via the e-mail of 4 February 2003. Those are findings I am prepared to make on the evidence. Having said that, I must agree with Schenker's submission that there is no satisfactory evidence that the 1 March 2003 date was agreed to orally by the parties on or prior to 27 January 2003. Ms Yong was the only person who gave evidence to that effect but her evidence was self-contradictory. Under cross-examination, she stated that there was an agreement made during the meeting of 8 January 2003 for the commencement date to be changed from 1 February to 1 March 2003. It was pointed out to her that this consensus was not reflected in her minutes of that meeting. She then explained that she had left it out since the minutes were to be circulated to all three parties and Richland did not need to know the details of the agreement between Schenker and SMI. This was an odd explanation since if the date had been agreed at that meeting, Richland would have become aware of it at the meeting itself. Subsequently, Ms Yong said that the first commencement date of 1 February 2003 was told to her by Mr Heng and that, likewise, he had telephoned her after meeting Schenker at a later stage, and instructed her to change that date to 1 March. It does not seem probable from that evidence that the change in date was discussed during the 8 January meeting. Further, neither Mr Heng nor Ms Chai gave any evidence to support Ms Yong's first assertion about the date being agreed on 8 January and, significantly, neither of them said that the date had been agreed to at any time prior to the despatch of the draft LSA on 27 January 2003.

49 The next two reasons should be considered together. They involve the duration of the rent-free period and the granting of exclusive possession of the warehouse to Schenker. Schenker submitted that it was common ground that the rent-free period was to run immediately before the commencement date of the lease. Further, SMI had alleged that this rent-free period was to be from 7 to 28 February 2003. Thus, the duration of the rent-free period and those specific dates would determine whether the commencement date of 1 March 2003 had been agreed to. The rent-free period would also have involved Schenker taking exclusive possession of the warehouse and therefore

SMI had to adduce sufficient evidence to show that SMI was willing and able to give such exclusive possession to Schenker as at 7 February 2003. This, Schenker submitted, SMI had not been able to do. I will consider the arguments and the evidence.

50 The rent-free fitting-out period was first brought up on 30 December 2002. Mr Tan asked for the handling agreement to be amended to include a one-month rent-free period in which Schenker could set up its operations. Upon receipt of this e-mail, Mr Heng had a conversation with Mr Tan on the matter and according to Mr Heng, they both agreed that Schenker would be allowed a two-week rent-free period. Mr Heng then sent Mr Tan an e-mail confirming this agreement. The next day, Mr Tan wrote to say that Schenker would try to "speed up the set up" and commence its operations within two weeks of the handover of the warehouse but if there were circumstances beyond its control, it might "need to get back to [SMI] to extend the free rental period up to maximum of one month". In court, Mr Tan maintained that this e-mail was not an acceptance of the two-week period but a counter-proposal. There was no other correspondence on the rent-free period. Mr Heng did say that he required management consent in order to extend the rent-free period beyond two weeks.

51 The evidence does not show any other discussion on the rent-free period between 31 December 2002 and 4 February 2003 despite the way in which the situation developed during that period. On 31 December 2002, the proposed commencement date of the lease was 1 February 2003. Schenker was then pressing SMI to hand over the warehouse as soon as possible because it was eager to start operations for Merck. It became clear early in January 2003, however, that Richland was not eager to vacate and that the start date of the lease would depend on when Richland agreed to vacate. So, on 8 January, Schenker, SMI and Richland met to discuss this issue. At the meeting, Schenker pressed for an early handover date as it wanted to start its fitting-out works. Richland wanted to move out at the end of February 2003 but Mr Tan insisted on an earlier date. Eventually all parties agreed on 6 February 2003 as the handover date. In view of Schenker's need to start operations as quickly as possible, Richland agreed to clear space in the warehouse by 23 January to allow Schenker to do certain renovation work.

52 By 10 January when the minutes of the meeting were circulated to all parties, therefore, Schenker was aware that it would only be able to take over the warehouse on 6 February. This position remained unchanged on 27 January when Schenker and SMI met to discuss the points raised by Schenker's lawyers. The handover date was not discussed at that meeting. So, the fixed date remained. It was in those circumstances that Ms Yong sent out the draft LSA proposing 1 March 2003 as the commencement date of the lease. Nothing altered between then and 9.51am on 4 February when Mr Tan sent out his e-mail on the contents of the draft LSA and thereby accepted the commercial terms proposed. As of then, Mr Tan was expecting to take over the warehouse in two days' time. His contractors had been into the warehouse and done certain cabling and bar coding work. Under the arrangement reached with Richland, he could have sent his contractors in by then to do renovation work had he wanted to. Mr Tan must have been aware of how long his fitting-out works would take. If he had then expected to be given a one-month rent-free period, he would have insisted that the lease commencement date be changed to 6 March 2003. He did not do so. He would have known that if Schenker took over the warehouse on 6 March 2003 and the lease commenced on 1 March 2003, it would have been given only three weeks' rent-free occupation. He did not protest against that position nor ask for any change. In my view, he kept quiet because he had asked for four weeks, had originally been given two, and had been willing to accept those two weeks if SMI in turn was willing to be flexible and give a short extension in the event that the fitting-out works could not be completed within that period. The slightly extended period of three weeks was acceptable to him. I therefore find that when Mr Tan agreed to the commercial terms of the draft LSA he knew he was agreeing to a rent-free period of approximately three weeks and he was happy to do so. As such, the duration of the rent-free period as agreed was entirely consistent with the lease proper starting on

1 March 2003.

53 The fourth argument made by Schenker was that the rent-free period would have involved Schenker taking exclusive possession of the warehouse as, otherwise, even if it occupied the warehouse, such period of occupation could not be termed "rent-free". Schenker submitted that SMI had to adduce sufficient evidence to show that as at 7 February 2003, it was willing and able to give exclusive possession of the warehouse to Schenker. It further submitted that SMI was not able to discharge that burden because it had to do extensive rectification works in the warehouse before handing the same over to Schenker. It relied on evidence by Mr Heng to the effect that Schenker had not taken possession of the premises at the joint inspection on 6 February because there were some rectification works to be done and Schenker wanted all these works to be completed before it took over the premises. Mr Heng also confirmed that the rectification works were, in the event, only completed on 21 March 2003.

54 SMI submitted that on this point, Schenker's arguments were misconceived. SMI's case was that a valid and binding agreement for the lease had been reached by 4 February 2003 at the latest with the agreed commencement date being 1 March 2003. It was not SMI's case that the lease itself had commenced on or by 7 February 2003. As such, SMI did not have to prove that it was willing and able to give exclusive possession of the warehouse to Schenker on 7 February. I agree. Since 7 February was not the commencement date of the lease, SMI did not have to show it was in a position to give exclusive possession of the warehouse to Schenker as of that date. On the evidence, Richland had vacated the warehouse on 6 February and as from noon on that date, Schenker was free to enter the warehouse and start its fitting-out operations. In fact, its contractors could have started work on the location codes and distribution points two days earlier had Schenker wanted to send them in then. In early January, when Mr Tan had pressed for an early handover, Mr Lim had accepted, albeit reluctantly, 6 February as that date. It was contemplated then that the premises would be taken over by Schenker immediately upon Richland's vacating them. It was also agreed that there would be a joint inspection on that same day to identify the defects that SMI would have to rectify. It was therefore anticipated that Schenker's fitting-out operations would take place contemporaneously with SMI's rectification works. This was not the usual sort of arrangement but the circumstances were not usual since Schenker was extremely anxious to move into the warehouse and start operations as early as possible.

55 In court, Mr Tan denied that it was expected from the start that Schenker would take over the warehouse with those defects identified on 6 February 2003 subject to the same being subsequently rectified by SMI. At one point of his cross-examination, he asserted that the defects noted on 6 February were critical to the operation. For example, some of the walls were cracked and had to be repaired and the rolling dock area had some defects. The plaster was peeling off due to having been damaged by containers. More than 20 defects were identified and in Mr Tan's view, collectively, these defects were critical. Later in the cross-examination, however, Mr Tan contradicted himself. He admitted that despite these defects, the warehouse was ready to receive and store Merck's dangerous goods. When it was put to him that the rectification of the defects was not critical to Schenker's operation of the warehouse, his answer was "I would say with certain operational constraints that would have to be overcome". This was a grudging concession that the warehouse was usable. Thus Mr Tan was not a consistent witness in relation to the issue of the handover and I do not believe that he was telling me the truth when he maintained that Schenker could not move into the warehouse on 7 February because of the work that SMI had to do to rectify the defects seen during the joint inspection the previous day. On the evidence as a whole, I find that Schenker was prepared to take over the warehouse on 6 February 2003 with the defects that were identified that day. Thus, there was no issue of exclusive possession having to be available on that day.

Were there any other terms that had to be agreed and were not agreed as of 4 February 2003?

56 It would be recalled that in the extract from *Halsbury's* quoted in [39] above, the learned editors state that even if the essential terms of an agreement for lease have been offered and accepted, as long as any other terms are mentioned by one party, these must also be unconditionally accepted by the other party for there to be a concluded contract. Schenker's submission was that even if the essential terms here had been agreed to, there were various other additional terms that had not been unconditionally accepted by both parties. This submission covered two types of terms. The first type comprised comments made by Schenker's solicitors and the second related to the nature of the goods to be stored in the warehouse.

57 On the first area, Schenker's stand was that the parties had not agreed on any of the following matters that had been raised during the negotiations:

(a) whether it was SMI or Schenker who would have to pay the stamp duty on the lease agreement;

(b) that Schenker had to pay interest to SMI on late payments at the rate of 10% per annum;

(c) that the $86,000 security deposit payable by Schenker was to be refunded by SMI to Schenker within seven days of the expiry or early termination of the lease agreement;

(d) Schenker's proposal that SMI pay interest on the security deposit of $86,000 at 6% per annum from the due date to the date of full payment if the same was not refunded to Schenker within seven days of the expiry or earlier termination of the lease; and

(e) whether SMI should seek the approval of JTC and UOB before SMI leased the whole of the warehouse to Schenker.

The matters set out above came from points raised by Schenker's solicitors in their letters of advice dated 13 January 2003 and 17 January 2003. Schenker sent copies of these letters to SMI and on 27 January 2003, the parties had a meeting to discuss the points raised. According to Schenker, no agreement was reached on those points at that meeting.

58 Schenker's evidence is equivocal. Mr Tan said in his Affidavit of Evidence-in-Chief that during the meeting, he asked Mr Heng whether the latter had received copies of Schenker's solicitors' letters. Mr Heng confirmed that he had received those letters. Mr Tan also requested Mr Heng to seek JTC's approval so that SMI could lease the entire warehouse to Schenker. Mr Heng replied that there was no necessity to obtain JTC's approval since the draft agreement was only a service agreement and not a tenancy agreement. Mr Tan then said that he had reservations about that and that he would leave it to Schenker's solicitors to look at this point again. Later that afternoon, Ms Yong sent an e-mail to Mr Tan, Mr Heng and Ms Chai together with the draft LSA and asked all the parties to "please seek your legal advice accordingly and have them vet/amended".

59 Mr Heng's evidence was that at that meeting, Mr Tan was very eager to proceed with the commencement of the lease and did not appear to be too concerned with his solicitors' comments on the handling agreement. He agreed with Mr Heng that the provisions of other logistics services should be separated from the main agreement and said that he himself would deal with the solicitors on their comments. Also, Mr Tan was not too concerned with the issue of JTC's consent and it was understood that SMI would make the necessary application if required. Mr Heng thereafter instructed

Ms Yong to revise the draft agreement in accordance with what had been discussed at the meeting.

60 All that Mr Tan said about the meeting of 27 January in his evidence-in-chief has been paraphrased in [58] above. He did not say that he had insisted that SMI accept the various comments made by his solicitors. The draft LSA which Ms Yong subsequently sent him, a document that Mr Heng said had been revised to cover what had been said at the meeting, did not take up any of the six points which Mr Tan said his lawyers had raised: it did not provide for the payment of stamp duty, the interest for late payment payable by Schenker remained at 10% per annum, there was no provision that Schenker's security deposit was to be refunded within seven days at the end of the lease and no provision for SMI to pay interest on this deposit in the case of a late refund, and there were no stipulations that SMI had to seek the approval of JTC and UOB for the lease. SMI's position from the document appeared to be, therefore, that it did not agree to any of Mr Tan's suggestions and saw no need to specify who would have to pay the stamp duty on the lease. Mr Tan went through the draft LSA. On 4 February, he confirmed that with one exception the contents were all right with him. He did not raise any of the six points again. It appears to me that he was not insisting on any of these points and that he accepted SMI's position on the same. In any case, even if he had reservations on the points, they were not important enough for him to even ask that they be included in the draft LSA. In the circumstances, I hold that as at 4 February 2003, these matters did not prevent the conclusion of an agreement for lease.

61 I now turn to the second contention in this area. Schenker submitted that a vital term had not been agreed on, to wit, there was no agreement on the classes or types of dangerous goods which Schenker was not allowed to bring into or store in the warehouse. Schenker's argument went as follows. The draft LSA sent out on 27 January 2003 included an Appendix 1 containing the "Rules and Regulations" to be observed by Schenker. Paragraph A of this appendix stated:

> Not to store or bring upon the Service Area any article that are listed in the Fire Safety Bureau ("FSB") list of licensed products (Refer to Attachment A).

In fact, however, there was no Attachment A. Further, there was, according to the evidence given by Mr Tan, no Government Department, statutory body, corporation or other organisation known as the "Fire Safety Bureau". In court, Mr Heng adduced a list of chemicals that he stated was the Attachment A mentioned in the draft LSA. This document, marked "P1", did not appear to have been issued by a government agency or by a statutory body or any other organisation. Accordingly, the parties could not have agreed on the classes or types of dangerous cargo that were not to be kept in the warehouse.

62 Schenker's case on this point is not convincing. Firstly, it was Mr Heng's evidence that there was a government body known as the Fire Safety Bureau. In the closing submissions, counsel for SMI drew my attention to the entity known as the Fire Safety & Shelter Bureau that is part of the Singapore Civil Defence Force. That bureau formulates and implements fire safety policies. It also regulates fire safety standards in buildings as stipulated under the Fire Safety Act (Cap 109A, 2000 Rev Ed). As this bureau is a part of a public organisation, I can take judicial notice of its existence and I also accept that when he was referring to the Fire Safety Bureau, Mr Heng meant the Fire Safety & Shelter Bureau.

63 Secondly, Mr Tan conceded during cross-examination that there was no disagreement between the parties on the classes of dangerous goods that could be stored in the warehouse. He said, however, that there was a condition that Schenker needed the approval of the authorities in order to store dangerous cargo in the warehouse. Mr Tan agreed that it was Schenker's responsibility to make the necessary application for approval. His evidence was in fact that this application had

been put in much earlier than 10 February 2003 and that Schenker had received in-principle approval from the authorities subject to its submitting a list of classes of cargo that were to be stored in the warehouse. Mr Tan maintained, however, that until the list was submitted and actual approval had been granted, the condition was not satisfied. It was put to him that he had no reason to believe that the approval would not be forthcoming. His reply was evasive: he said "I would not know. It's up to the authority". Mr Tan's evidence, therefore, did not support the submission that the parties had not agreed on the items that could not be stored in the warehouse. Instead, his testimony established that SMI was quite happy for anything to be stored in the warehouse for which Schenker could get approval from the authorities and that obtaining the approval was entirely within Schenker's domain. If Schenker could not get approval from the authorities for any particular item, then that item could not be put in the warehouse. I am satisfied on the facts that there was no disagreement on the types of goods that could or could not be stored in the warehouse.

Were parties still negotiating on the basis of "subject to contract"?

64 The final submission made by Schenker in respect of the first main issue was that if the court was to find that Schenker and SMI had reached an agreement on the proposed lease before 11 February 2003, then Schenker's case was that the parties were negotiating on a "subject to contract" basis. Accordingly, any agreement reached was only conditional and not binding on the parties as the contract contemplated by such an agreement had not been signed by the parties and exchanged between them.

65 Schenker pointed out that the letter of intent forwarded by SMI to Schenker on 5 November 2002 was marked with the words "Subject to Contract". It was clear therefore that both parties had started negotiations for the proposed lease on a "subject to contract" basis. Schenker submitted that they continued negotiations on the same basis right up to 10 February 2003 because the evidence showed the following:

(a) Schenker's standard procedure was to send all final drafts of proposed contractual wording to its solicitors for vetting, comment and recommendation before it agreed to any contractual terms.

(b) This procedure was followed in the case of the draft handling agreement and the solicitors duly advised on it.

(c) Mr Tan had informed Mr Heng that Schenker wanted to follow the advice of the solicitors on the draft handling agreement and this conversation led to the meeting of 27 January 2003.

(d) When the draft LSA was sent out to Mr Tan, Ms Yong's covering letter mentioned that Schenker should obtain legal advice and Mr Tan replied on 4 February 2003 to say that he would clear the document with Schenker's lawyer.

(e) On 10 February 2003, Ms Yong asked Mr Tan to get the lawyers' comments quickly.

Schenker also submitted that as SMI had a lease from the JTC and had also let out the warehouse previously, it had experience in transactions involving immovable property and therefore must have known about ordinary conveyancing practice. Thus, SMI knew the exact legal implications of using the phrase "subject to contract". Whilst the phrase was only used once, in the draft letter of intent, that draft letter was referred to on two subsequent occasions. Schenker pointed out that in the English High Court case of *Cohen v Nessdale Ltd* [1981] 3 All ER 118, the term "subject to contract", which appeared in correspondence dealing with earlier negotiations which had been broken off (but

not irretrievably), was held by the court to have continued to apply to negotiations when they resumed.

66 As SMI submitted, however, the only document that was marked "subject to contract" was the letter of intent. This was sent out at a very early stage of the negotiations. It went under cover of an e-mail that was not itself marked "subject to contract" and was not signed by SMI. The letter contained few terms. Only the address of the premises, date of commencement and a general range of services were stated. The rental rate and the duration of the lease were not mentioned. That document even if signed could never have constituted a binding agreement for lease since essential terms were missing. It was more in the nature of a letter of comfort required by SMI so that it had some evidence that Schenker was serious about the negotiations. The letter of intent was never signed by either party and the two subsequent references to it were in e-mails sent in November 2002. Those e-mails were not marked "subject to contract" either. These references by Mr Heng were in the nature of prodding Schenker to at least show some sign of seriously wanting to take a lease of the premises. Schenker, however, refused to bite. Until it had a firm commitment from Merck, it was not willing to sign even such an innocuous document as the letter of intent with the heading "subject to contract".

67 By the end of November 2002, nothing had crystallised, not even the intention of Schenker to take the warehouse on lease. Matters only came to some shape in mid-December 2002 when Merck gave Schenker the go-ahead and from then on parties exchanged e-mails and detailed draft documents. None of the
e-mails or the detailed drafts were marked "subject to contract". Schenker gave no sign to SMI that it was negotiating on a "subject to contract" basis though it was concerned to follow its normal procedure of obtaining lawyers' advice on the wording of legal documents. Schenker's attitude *vis-à-vis* its lawyers was, however, clear on the evidence. Whilst such advice had to be taken, Mr Tan was able to confirm commercial terms without referring to his lawyers. There was no evidence that Schenker could not have contractual dealings without its lawyers' consent. The situation here was quite different from that which obtained in *Cohen v Nessdale Ltd*. In that case both parties had, during the first part of their negotiations, used and relied on the phrase "subject to contract" in their letters. Here the phrase "subject to contract" was used in a document at an early stage which document was signed by neither party and totally ignored by them once negotiations really became serious.

68 It is interesting, given its current reliance on the existence of the phrase "subject to contract" in the letter of offer, that, instead of signing that letter in November 2002, Schenker repeatedly asked SMI for an extension of time to execute it. Mr Tan was asked why, if he thought that the letter of intent was not a binding document, he did not sign it in order to secure a holding period for conclusion of the lease instead of asking for extensions of time. He did not give a direct reply to that question. He said that Mr Heng was kept informed of negotiations between Schenker and Merck and that Schenker wanted "to be on this understanding that we are pending Merck's agreement to the contract and we asked them to hold on to the warehouse". Mr Luth testified that the letter of intent was not a contract. He was then asked the same question as to why it was necessary to ask for an extension of time instead of simply signing the letter. He replied that he was not aware if there was any procedure in Schenker allowing it to simply sign a letter of intent. Secondly, to continue negotiating with Merck he wanted to have proof that the warehouse was still available if Schenker confirmed the contract with Merck and that was why he had asked for an extension of time. Finally, it was suggested to Mr Luth that he had asked for an extension of time on 18 November 2002 because he did not want to commit Schenker to an agreement for the use of the warehouse. This time he gave a direct answer and it was "I think, yes".

69 On the evidence, it appears to me that Schenker did not place any reliance on the words "subject to contract" in the letter of intent. I find that its view was that if it had signed the letter of intent, it would have been bound in some way in respect of the lease and that was why it never signed that document. It did not use the words "subject to contract" in the later negotiations or rely on them in any way. Thus, I find that when Mr Tan accepted the terms of the draft LSA on 4 February 2003, his acceptance was not subject to contract. Mr Tan's frame of mind can also be gleaned from his statement in his messages sent after Merck shocked Schenker by pulling out of the agreement. In the e-mail of 11 February 2003, he referred to Schenker having "acquired the DG warehouse" on the assumption that Merck would be its main customer. Obviously, at that time, Mr Tan thought that Schenker already had rights to the warehouse.

Second main issue: Were the requirements of s 6(d) of the Civil Law Act complied with?

70 The second main line of defence put forward by Schenker was that even if there was a concluded contract, this was not enforceable because of the effect of two pieces of legislation, the CLA ([35] *supra*), and the Electronic Transactions Act (Cap 88, 1999 Rev Ed) ("the ETA"). Section 6(d) of the CLA, the modern re-enactment of the UK Statute of Frauds 1677 (c 3), requires, among other things, that for a lease of land to be enforceable there must exist some written memorandum or note evidencing the terms of the agreement and this document must be signed by the person against whom the contract is to be enforced. As for the ETA, Schenker made reference to ss 6 to 9 of this Act which give recognition to and regulate electronic records generally and to ss 11 to 15 of the CLA which give recognition to and regulate electronic contracts. In particular, ss 7 and 8 of the ETA provide that an electronic record or signature satisfies any rule of law requiring writing or signature. It submitted, however, that these sections, by virtue of s 4(1)(d) of the ETA, do not apply to any rule of law requiring writing or signatures for various matters including any contract for the sale or other disposition of immovable property or any interest in such property.

71 In Schenker's submission, the requirements of the CLA had not been satisfied. It pointed to para 7 of the Amended Statement of Claim which had averred that this lease was contained in or evidenced by the ten documents listed in that paragraph (see [31] above). It asserted that those documents did not qualify as notes or memoranda in writing as required by the CLA. All of them were e-mail correspondence exchanged between Schenker and SMI. Further, all written communication between the parties was made via electronic means. No hard copy of any letter or document was ever sent by either one to the other. Schenker contended that the e-mail correspondence was not capable of constituting the written evidence of the lease as required by s 6(d) of the CLA. Whilst s 7 of the ETA provided that where a rule of law required information to be in writing, an electronic record would satisfy that rule of law as long as the information contained therein was accessible so as to be usable for subsequent reference, and s 8 provided for electronic signatures to satisfy a rule of law requiring a signature, those sections did not apply to the lease because of the operation of s 4(1) of the ETA.

72 In order to meet these arguments, SMI had to establish two things: first, that there was a sufficient note or memorandum to satisfy s 6(d) of the CLA and second, that such note or memorandum could be considered to be in writing and signed by Schenker or its representative even though it was in an electronic form. SMI made only cursory submissions on the first point, probably because Schenker did not emphasise it either. The court, however, has to be concerned with it because it is established law that for a memorandum evidencing a lease to satisfy s 6 of the CLA, that memorandum must contend all the material terms of the contract including the identities of the parties, the description of the subject matter, and the nature of the consideration.

Was there a sufficient memorandum?

73 Paragraph 7 of the Amended Statement of Claim specifies ten documents as being the written evidence of the lease. That is a very broad pleading as even a cursory perusal of the list shows that seven of the documents emanated from SMI or Ms Yong and therefore could not, on their own, constitute a memorandum signed by Schenker. Further the contents of most of the documents specified reflected on-going negotiations rather than a concluded agreement. The list even includes Mr Heng's e-mail of 5 November 2002 forwarding the form of the letter of intent to Schenker. Considering that that document was marked "Subject to Contract" there is no way that, even if it had been signed, it could have served as a memorandum of agreement for the purpose of s 6 of the CLA. When it came to submissions, SMI was not more specific. It submitted that all the e-mail correspondence and the attachments to the same, including the draft LSA, when read together, constituted the memorandum. I cannot accept this submission for the reasons given. Luckily for SMI, however, despite their failure to properly identify the documents constituting the memorandum, having looked through all the correspondence, I consider that Ms Yong's e-mail of 27 January 2003 together with its attachment, the draft LSA, and Mr Tan's reply to Ms Yong dated 4 February 2003 accepting the terms of the draft LSA, would together constitute the necessary memorandum. This is because all the agreed terms are reflected in those documents when read together and these include the essential terms for a lease, and also, one of the e-mails is a specific acceptance by Mr Tan on behalf of Schenker of the proposed terms. It is established law that the plaintiff may rely on two or more documents to constitute the necessary memorandum (see *Halsbury's Laws of Singapore*, vol 7 (Butterworths Asia, 2000) at para 80.133).

Can e-mail correspondence be considered to be "in writing"?

74 On this second point, Schenker's argument is founded on s 4(1)(d) of the ETA. That section provides:

> Parts II and IV shall not apply to any rule of law requiring writing or signatures in any of the following matters:
>
> …
>
> (d) any contract for the sale or other disposition of immovable property, or any interest in such property; …

Schenker submitted that since the sections, which provide that an electronic record or signature satisfied any rule of law requiring writing or a signature, appeared in Parts II and IV of the ETA, the intention of the ETA was that it would not permit such electronic record or signature to satisfy the rule requiring a contract for the disposition of an interest in property to be in writing.

75 In response, SMI submitted that the effect of s 4(1)(d) of the ETA is that, in respect of a contract for the sale or other disposition of immovable property, or any interest in such property, one cannot rely on the provisions of the ETA, namely the provisions under Parts II and IV thereof, that enable electronic records and signatures to satisfy legal requirements for writing and signature. This is, however, it contended, different from saying, as Schenker did, that by virtue of s 4(1)(d) of the ETA, the e-mails do not satisfy the requirements for writing and signature under s 6(d) of the CLA. As prescribed by s 3 of the ETA, the ETA should be construed consistently with what is commercially reasonable under the circumstances and to give effect to its main purpose of facilitating electronic commerce. As the ETA was passed to enable reliance on electronic communication in commerce, this statute should not be construed as disabling such reliance.

76 Having looked at the provisions of the ETA, I agree with the submissions made by SMI. Whilst

the statute does make it plain that electronic records will be adequate to satisfy legal rules relating to writing and signature in most commercial matters, its conservative approach in not extending these provisions to contractual matters falling within s 6 of the CLA does not mean that, as a matter of law, electronic means of communication cannot satisfy the requirements of s 6. The ETA does not change the common law position in relation to s 6 of the CLA. Whether an e-mail can satisfy the requirements for writing and signature found in that provision will be decided by construing s 6(d) of the CLA itself and not by blindly relying on s 4(1)(d) of the ETA. This is a view that has supporters. As part of their review of the ETA, on 25 June 2004, the Infocomm Development Authority of Singapore and the Attorney-General's Chambers released a public consultation paper dealing with the exclusions under s 4 of the ETA. Paragraphs 2.1.3 and 2.1.5 of the consultation paper state:

> 2.1.3 The effect of section 4 is that, in such excluded transactions, one cannot rely on the provisions in the ETA that enable electronic records and signatures to satisfy legal requirements for writing and signature. For example, sections 6 and 7 of the Civil Law Act impose legal requirements for writing and signature in the case of certain land transactions and for trusts respectively.
>
> 2.1.5 **Even where legal form requirements apply, exclusion under section 4 of the ETA may not necessarily prevent such transactions from being done electronically**. Electronic records or signatures could still possibly satisfy the legal requirements without reliance on the provisions of the ETA. It would be a matter for legal interpretation whether an electronic form satisfies a particular legal requirement for writing or signature. Some legislative provisions, by reason of their detailed specifications, would clearly exclude the use of electronic means even if the ETA were applicable. ...

77 I now turn to the provisions of s 6(d) of the CLA. In respect of the requirements for writing and signature, this subsection simply states that the "promise or agreement" or a "memorandum or note thereof" must be "in writing" and "signed by the party to be charged therewith". SMI submitted that this language did not mean that the use of electronic forms was excluded. By way of contrast, it pointed to other legislative provisions where the requirements for writing or signature come with certain specifications. For example, in s 6(2) of the Wills Act (Cap 352, 1996 Rev Ed) it is provided that every will has to be signed "at the foot or end thereof" by the testator who has to sign the will in the presence of two or more witnesses who are present at the same time. Secondly, para 17 of the Third Schedule of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed), specifies that an instrument appointing a proxy has to be in writing "under the hand" of the appointer or his attorney and in the case of a company, the instrument has to be under seal or "under the hand" of an officer of the company. The third example cited was the requirement in s 40(2)(b) of the Companies Act (Cap 50, 1994 Rev Ed) that an alteration made in the memorandum or articles of association of the company has to be indicated "in ink" on a printed copy of the memorandum or articles. In these three cases and others like them, the use of electronic forms would, necessarily, be precluded. That, argued SMI, was not the case with s 6(d) of the CLA. It did not require handwriting or a signature in a certain place in the presence of certain people or the writing to be in ink. All it required was for the document concerned to be "in writing".

78 Section 2 of the Interpretation Act (Cap 1, 2002 Rev Ed) provides the following definition of "writing":

> "writing" and expressions referring to writing include printing, lithography, typewriting, photography and other modes of representing or reproducing words or figures in visible form.

Referring to this definition, SMI submitted that it included not only the specific forms of writing

mentioned but also the natural meaning of that term. It argued that the natural meaning should be construed to reflect technological developments since one of the canons of statutory construction is that there is a presumption that "Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act [in this case, the CLA] was initially framed (an updating construction). While it remains law, it is to be treated as always speaking" (see Bennion, *Statutory Interpretation* (Butterworths, 4th Ed, 2002) at p 762). Thus, the definition of "writing" can be extended to include modes that were not in existence at the time the Interpretation Act was enacted but are available at the date of interpretation.

79 In any case, SMI submitted that e-mails can be classified as falling within the meaning of "other modes of representing or reproducing words … in visible form". This is because although in their transmitted/stored form, e-mails are files of binary (digital) information, they also have another form when they are displayed on the monitor screen. At that stage, they are "words in a visible form". The sender of an e-mail is able to see the text that he has created on the screen of his computer monitor before the message is sent. Similarly, the recipient is able to view the message on his own screen. A visible representation of the words which form the message is therefore available to both the sender and the recipient. The same is true of any attachment that is sent, opened and read. Thus while the underlying digital information will not be "writing", the screen display will satisfy the Interpretation Act definition. The sender or the recipient or both may also print out the message and any attachment. This was what happened in the present case, given that the e-mails and the attachments were disclosed in the list of documents filed both by Schenker and SMI in these proceedings. Further, printed copies of the e-mail correspondence were contained in the agreed bundle.

80 I find the above submissions, based on the observations of the UK Law Commission in an advisory paper entitled *Electronic Commerce: Formal Requirements in Commercial Transactions* (December 2001) ("the advisory paper"), to be persuasive. The aim of the Statute of Frauds was to help protect people and their property against fraud and sharp practice by legislating that certain types of contracts could not be enforced unless there was written evidence of their existence and their terms. Recognising electronic correspondence as being "writing" for the purpose of s 6(d) of the CLA, would be entirely consonant with the aim of the CLA and its predecessor, the Statute of Frauds, as long as the existence of the writing can be proved.

81 In this case, the parties readily admitted that they had sent and received each other's e-mail messages. No one argued or testified that the printed copies of the e-mails that appeared in the bundle of documents were not true copies of the e-mails that they had seen on-screen and responded to electronically. Neither Mr Tan nor Mr Luth objected to the contents of the printed copies of their respective e-mail messages. In fact, they confirmed that they had sent out those various messages and attached the printouts as exhibits to their respective affidavits. Mr Tan did not resile from any of his e-mails. He did not deny receiving the e-mail messages and attachments sent by Mr Tan and Ms Yong (in particular he did not deny receiving Ms Yong's e-mail of 27 January 2003 and the draft LSA that was an attachment to that e-mail). He specifically confirmed he had sent out his response in the e-mail of 4 February 2003 and commented in court on the contents of that e-mail.

82 I should also state that counsel for SMI has been able to buttress its arguments by citing the views of foreign law commissions and foreign courts. In the UK, the definition of "writing" as found in the Interpretation Act 1978, Schedule 1 is *in pari materia* with the Singapore definition as cited in [78] above. The UK Law Commission's view, as expressed in the advisory paper, is that e-mails satisfy the definition of "writing" under the Interpretation Act and the functions of writing, although it recognises that there is a lack of consensus on the issue. In particular, the UK Law Commission has commented (at para 3.17):

A number of commentators have expressed the view that the Interpretation Act definition of writing requires there to be some physical memorial, meaning that an electronic communication cannot satisfy a writing requirement. We do not share this view. First, the creation of a physical memorial is just one function of paper-based writing: it is not clear that it is one of the more important functions. Secondly, in practice, both parties will usually be able to store and to print a copy of an electronic communication.

83 In the US, the Court of Appeals of Iowa had to consider in *Wilkens v Iowa Insurance Commissioner* 457 NW 2d 1 (Iowa App 1990) whether an insurer had complied with the requirements of the Iowa Insurance Code § 515.57 which provided that an insurance company had to keep a "written record" of each insurance policy it issued. The insurer concerned had maintained the required information in its computer system. The insurance commissioner considered that the insurer had kept adequate records on the relevant business and that nothing in § 515.57 precluded the keeping of these records in a computer. This determination was challenged before the Court of Appeals. The court held that since the enactment of § 515.57 in 1939, methods of doing business had changed considerably and the advent of the computer age had resulted in businesses making substantial changes in record-keeping procedures. The court noted that the insurance commissioner, who was the person charged with the responsibility of assuring that insurance company procedures complied with statutes, had determined that the records as kept were sufficient for his purposes. The court found no reason to interfere with the commissioner's decision on the issue. Although the court did not say so expressly, it must have considered a computer record to be a "written record".

84 In another American case, this time decided by the District Court for South Carolina, it was held that a computer floppy diskette could constitute "written notice" to an insured's agent under the terms of a statute. Delivering his judgment in *Clyburn v Allstate Insurance Company* 826 F Supp 955 (DSC 1993), Senior District Judge Blatt noted that the information on the floppy diskette could be retrieved and printed as "hard copy" on paper and stated that in today's "paperless" society of computer-generated information, the court was not prepared, in the absence of a legislative provision, to find that a computer floppy diskette would not constitute a "writing" within the meaning of a statute that required written notice of the cancellation of a policy to be given to the insured.

85 I therefore find that the e-mail correspondence which constituted the memorandum of the contract (as specified in [73] above) was "in writing" for the purpose of s 6(d) of the CLA. I am pleased to be able to come to this conclusion which I think is dictated by both justice and common sense since so much business is now negotiated by electronic means rather than by letters written on paper and, in the future, the proportion of business done electronically will only increase. I think that the ordinary man in the street, who not only conducts business via computer but who is being encouraged to use technology in all areas of life and to become more and more technologically proficient, would be amazed to find that the law would not recognise a contract he had made electronically even though all the terms of the contract had been agreed and the parties were perfectly *ad idem*. If parties who negotiate electronically do not wish to be bound until a formal document is signed, they can have recourse to the "subject to contract" endorsement that can easily be added to their e-mail correspondence.

Was Mr Tan's e-mail of 4 February 2003 signed?

86 Schenker drew my attention to the evidence of Mr Tan and Mr Luth that neither of them had ever signed a letter or any document during the period of negotiation with SMI. Mr Heng had also agreed that no "hardcopy" letter or document was ever exchanged between himself and the representatives of Schenker during that period. Thus, Schenker submitted, there was no memorandum that had been signed by someone lawfully authorised to sign on its behalf.

87 SMI's response to this submission was that the common law takes a pragmatic approach as to what will satisfy a signature requirement. The courts look to whether the method of signature used fulfils the function of a signature, *viz* demonstrating an authenticating function, rather than whether the form of signature used is one which is commonly recognised. This approach is reflected in a passage in *Cheshire, Fifoot and Furmston's Law of Contract – Second Singapore and Malaysian Edition* (Butterworths Asia, 1998) by Prof Andrew Phang (at p 368) which states that the word "signature" has been very loosely interpreted: it need not be at the foot of the memorandum and it need not be a signature in the popular sense of the word, a printed slip may suffice if it contains the name of the defendant. SMI submitted that the typed names of Schenker's authorised agents/representatives "Tan Tian Tye" and "Roman Luth" in the e-mails sent by them to SMI's personnel were sufficient to satisfy the signature requirement under s 6(d) of the CLA. This was because the authenticating intention of the "signatories" had been clearly demonstrated.

88 In support of its arguments, SMI cited various authorities in Australia and the US where electronic communications were held to have satisfied the signing requirements. It noted too that the UK Law Commission also held the view that the typing of a name into an e-mail is capable of satisfying a statutory signature requirement (see paras 3.28, 3.29 and 3.34 of the advisory paper). For present purposes, the most relevant cases are two fairly recent decisions from the US.

89 The first one is the Massachusetts case of *Shattuck v Klotzbach* 14 Mass L Rep 360 (2001). In that case, the plaintiff brought an action to enforce a contract for the sale of a dwelling house. The defendant pleaded a statutory provision entitled "the statute of frauds" (Massachusetts General Laws ch 259, § 1) the language of which is very similar to that of s 6(d) of the CLA. This statute also requires a contract for the sale of land to be evidenced by a memorandum "in writing and signed by the party to be charged therein". The negotiations between the plaintiff and the defendant had taken place by e-mail and the defendant contended that the e-mails were not signed and therefore could not satisfy the statute of frauds. The Superior Court of Massachusetts held:

> "A memorandum is signed in accordance with the statute of frauds if it is signed by the person to be charged in his own name, or by his initials … or by a printed, stamped or typewritten signature, if signing in any of these methods he intended to authenticate the paper as his act." … Here, all e-mail correspondences between the parties contained a typewritten signature at the end. Taken as a whole, a reasonable trier of act could conclude that the e-mails sent by the defendant were "signed" with the intent to authenticate the information contained therein as his act.
>
> Moreover, courts have held that a telegram may be a signed writing sufficient to satisfy the statute of frauds … This court believes that the typed name at the end of an e-mail is more indicative of a party's intent to authenticate than that of a telegram as the sender of an e-mail types and sends the message on his own accord and types his own name as he so chooses. In the case at bar, the defendant sent e-mails regarding the sale of the property and intentionally and deliberately typed his name at the end of all such e-mails. A reasonable trier of fact could conclude that the e-mails sent by the defendant regarding the terms of the sale of the property were intended to be authenticated by the defendant's deliberate choice to type his name at the conclusion of all e-mails.

90 In the second case, *Cloud Corporation v Hasbro, Inc* 314 F 3d 289 (2002), which also involved the statute of frauds under the Uniform Commercial Code in relation to a commercial transaction, the US Court of Appeals for the Seventh Circuit held that the e-mails sent by the defendant's representative plus a notation signed by another member of the staff satisfied the requirement that the quantity term in a contract for the sale of goods for more than US$500 had to

be memorialised in a writing signed by the party sought to be held to that term. The court noted that the e-mails contained no signature but stated that like the court in *Shattuck v Klotzbach*, it had concluded that the presence of the sender's name on an e-mail would satisfy the signature requirement of the statute of frauds.

91 I am satisfied that the common law does not require handwritten signatures for the purpose of satisfying the signature requirements of s 6(d) of the CLA. A typewritten or printed form is sufficient. In my view, no real distinction can be drawn between a typewritten form and a signature that has been typed onto an e-mail and forwarded with the e-mail to the intended recipient of that message.

92 One minor difficulty in this case is that Mr Tan did not append his name at the bottom of any of his e-mail messages. All his e-mail messages, however, including the message dated 4 February 2003 and sent to Ms Yong, had, near the start thereof, a line reading "**From**: "Tan Tian Tye" <tian-tye.tan @schenker.com>". Mr Tan confirmed in court that he had sent out those messages. There is no doubt that at the time he sent them out, he intended the recipients of the various messages to know that they had come from him. Despite that, he did not find it necessary to identify himself as the sender by appending his name at the end of any of the e-mails whether the messages were sent to his colleagues or to third parties like Mr Heng. I can only infer that his omission to type in his name was due to his knowledge that his name appeared at the head of every message next to his e-mail address so clearly that there could be no doubt that he was intended to be identified as the sender of such message. Therefore, I hold that the signature requirement of s 6(d) is satisfied by the inscription of Mr Tan's name next to his e-mail address at the top of the e-mail of 4 February 2003.

93 I recognise that one person's e-mail facility can, in some cases, be accessed by a third party who can then send out messages which purport to be authentic messages from the owner of that e-mail address. If that happened, the owner of the address would be entitled to dispute the authenticity of the messages purportedly sent by him. That is not the case here. Further, such dispute would be as to the person who initiated the message and would not be decided on the basis of whether the message bore a signature.

Part performance

94 As an alternative, SMI submitted that there were sufficient acts of part performance such that the lease could nevertheless be enforced even if I were to hold that the requirements of s 6(d) of the CLA had not been complied with. Schenker's response was that SMI was not entitled to make that argument as it had not pleaded part performance in answer to Schenker's plea of non-compliance with the statute. This submission of Schenker is well founded. To rely on the doctrine of part performance, SMI would have had to specifically plead it in answer to Schenker's averment and would also have had to plead particulars of the acts of part performance on which it relied. The reply filed by SMI was a long document containing some 17 paragraphs. None of these paragraphs dealt with part performance or set out the acts of part performance on which SMI relied. Whilst in the Statement of Claim SMI did set out details of certain conduct of the parties, these averments were made in the context of an assertion that such conduct evidenced the making of the contract. There was no assertion that the conduct constituted part performance of a concluded oral contract. In the circumstances, if I had found that the requirements of s 6(d) had not been met, I would have held that the doctrine of part performance was not available to SMI to overcome the defence raised by Schenker.

Third main issue: Was performance of the agreement for lease subject to any condition precedent that was not fulfilled?

Was it a condition precedent to the lease that Merck had to appoint Schenker to handle, and provide third party logistics services for, Merck's dangerous goods?

95 In its Defence, Schenker pleaded that if there was an enforceable contract, then that contract was subject to a condition precedent that Merck had to appoint Schenker to handle, and to provide third party logistics services for, Merck's dangerous cargo. In further and better particulars of the Defence served by Schenker, it elaborated that the condition regarding Merck's appointment of Schenker was not an express term of the contract but was an implied term.

96 The principles which the court has to follow when deciding whether or not any particular term should be implied into a contract are well established. Schenker quoted *Chitty on Contracts* (Sweet & Maxwell, 28th Ed, 1999) at para 13-004 for the proposition that an implication may be made in two situations: "first, where it is necessary to give business efficacy to the contract, and, secondly, where the term implied represents the obvious, but unexpressed, intention of the parties". In a later paragraph (para 13-007), *Chitty* comments that the term will not be implied unless the court is satisfied that both parties would, as reasonable men, have agreed to it had it been suggested to them. To this, I would simply like to add that one must not forget the observation of the Court of Appeal in *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd* [2001] 2 SLR 458 that the touchstone for the implication of terms is necessity and not merely reasonableness, and that a necessary term to be implied must always be equitable and reasonable.

97 The first matter to consider is whether the term to be implied was necessary for the business efficacy of the lease. One can see that from Schenker's point of view, the Merck contract was essential to the commercial sense of the lease. At the end of 2002 and the beginning of 2003, it did not need the warehouse for its usual business. It only needed it for the purpose of servicing the business it believed it would be getting from Merck. That must be why Mr Tan testified that the Merck contract was critical to the execution of the lease. From SMI's point of view, however, it made no difference whose goods were put into the warehouse once it was on lease to Schenker. There was no term in the draft LSA restricting the use of the warehouse to the storage of Merck's goods. SMI would have had no legal basis to prevent Schenker from receiving goods in the warehouse simply because those goods belonged to someone other than Merck. The essential element of a lease from the point of view of the lessee is that it allows that lessee to have undisputed possession and control of the premises leased subject only to certain agreed and specified restrictions. Merck's decision to pull out of its arrangement with Schenker did not in any way lessen the possession and control of the warehouse that Schenker would have obtained had it proceeded with the lease. The efficacy of the lease was not affected by Merck's disengagement, only, possibly, the profitability of the transaction to Schenker.

98 Even if I am wrong on this, however, Schenker faces the difficulty that it cannot establish that it was the intention of both parties that the lease would be subject to Schenker's obtaining the Merck contract and that, accordingly, if SMI had been asked in express terms at the relevant time whether the lease was subject to the Merck contract it would have unhesitatingly given an affirmative reply. The evidence was that in November 2002, SMI was continually pressing Schenker to give a commitment regarding the lease but that Schenker refused to do so until it had firmed up its arrangements with Merck. On 18 November 2002, Mr Heng noted that Schenker was waiting for its customer to revert on the matter and indicated that whilst SMI was willing to give Schenker a short extension of time, if there was no commitment on Schenker's part, SMI would have to offer the warehouse to other interested parties. Another extension, on the same basis, was given to Schenker on 25 November 2002. I note Mr Luth agreed that Schenker was repeatedly holding back on confirming its intention to proceed with the lease of the warehouse until it was certain that it had Merck's business. Then, on 19 December 2002, Mr Tan had a conversation with Mr Ho of Merck and,

immediately thereafter, told Mr Heng that Merck was awarding the contract for handling of its dangerous goods to Schenker and that Schenker would therefore like to lease the warehouse from SMI. Although in his affidavit Mr Tan said that he cautioned Mr Heng that at that time he had not received any written confirmation from Merck, his e-mail to Mr Heng the next day did not contain any such caution. Instead, it said that it served to confirm that Schenker "will proceed with the leasing of the warehouse as per our discussion" and asked for the warehouse to be handed over by 15 January 2003.

99 I am satisfied on the evidence that, from that time right up to 11 February 2003, Schenker was confident that it was getting the Merck business and thus did not impose any condition precedent relating to that business on the proposed lease. Nor did it inform SMI that it considered the lease to be conditional on the Merck contract. Instead, it gave SMI the impression that the Merck contract was secured or as good as secured and therefore it was able to commit itself to the lease once all the terms had been agreed. In these circumstances and given that SMI had always pressed Schenker for a commitment and had never indicated that it was willing to forgo marketing the warehouse to others indefinitely without such a commitment, I find that SMI would not have agreed to make the lease conditional upon Schenker's receipt of the Merck contract.

100 I should also add that it appears to me that Schenker itself was not keen on a conditional contract. It did not sign the letter of intent because it did not want even the slightest possibility of being bound prior to receipt of confirmation from Merck. It could have expressly made the lease conditional on its signing of its contract with Merck but it never even suggested that this be done.

101 In all the circumstances, I am unable to imply that the lease was subject to an implied condition precedent that Schenker would get the contract to handle Merck's dangerous goods.

Was JTC's approval a condition precedent to the lease?

102 In para 12 of the Re-amended Defence, Schenker stated its case that if there was an enforceable contract concluded between SMI and Schenker, that contract was subject to a condition precedent that SMI had to seek the approval of the JTC to lease the whole of the premises to Schenker. The pleaded particulars of this assertion stated, firstly, that the land upon which the warehouse was built belonged to the JTC, secondly, that JTC required SMI to seek its consent before SMI could lease the whole or part of the premises to any tenant, and thirdly, that SMI did not obtain or was not able to obtain the consent of the JTC to lease the whole of the warehouse to Schenker. Schenker subsequently pleaded that this condition precedent was an implied term.

103 In para 9 of its Re-amended Reply, SMI denied that the approval of the JTC was a condition precedent to the lease. It admitted that the JTC owned the premises and also admitted that SMI had to seek JTC's consent before leasing the whole of the premises to any tenant. SMI then said that if Schenker had not repudiated the lease, SMI would have been able to obtain JTC's consent as a matter of course upon payment of the requisite sub-letting fee. SMI further pleaded that Schenker was estopped from denying that it had the title or right to grant the lease. This estoppel argument was not, however, pursued in the closing submissions.

104 In its closing submissions, Schenker did not press the point that JTC's approval was a condition precedent to the commencement of the lease. This was wise as there was no evidence that the parties had agreed to make such approval a condition precedent. At the most, there was an understanding that approval would be applied for if required. In that case, there would be an implied condition subsequent that approval would be obtained if necessary. Schenker's concern at that time to have the premises available as soon as possible must not be forgotten. It therefore did not press

for the inclusion of conditions precedent even in relation to JTC's approval.

105 Schenker concentrated in its submissions on trying to establish that SMI had no intention of applying to JTC for the requisite approval. It asked me to disbelieve the statements of Mr Heng and Ms Chai that if it was necessary to obtain JTC's consent, SMI would have applied for the same. These statements, it said, were afterthoughts and, at the relevant time, SMI had not been willing to seek JTC's approval.

106 Schenker pointed out that the issue of JTC's consent had been raised at the meeting on 27 January 2003 and that no agreement on the issue had been reached then. Ms Chai had given testimony to this effect. Mr Heng's evidence was that at the meeting he had said that there was no necessity to obtain JTC's approval since the handling agreement was only a service agreement and not a tenancy agreement. Ms Chai also testified that at the meeting she had advised Mr Tan that the approval of JTC might not be necessary as SMI was in the business of providing warehouse facilities. Ms Annie Hsieh, an officer from the JTC, gave evidence that Ms Chai had called her in early 2003 to find out whether, if SMI provided third party logistics services to another party, JTC's approval was required. Ms Hsieh had understood third party logistics services to mean warehousing at SMI's warehouse coupled with logistics services for SMI's customers and had told Ms Chai that it was not necessary for JTC to approve such activity. She also said that Ms Chai had not asked her whether JTC's approval was necessary for a sub-letting of the warehouse.

107 SMI submitted that Ms Chai's evidence in court had been taken out of context. That evidence did not reveal that SMI was unwilling to seek JTC's approval. The reason for Ms Chai's answer that there was no agreement at the meeting for SMI to seek JTC's approval was that she had thought this approval was not necessary because SMI was providing not only warehousing facilities but also other third party logistics services. That was why she had consulted Ms Hsieh. SMI noted that it was also Ms Chai's evidence that if JTC's approval was necessary, SMI would have applied for and obtained it and that this evidence had not been challenged by counsel for Schenker. SMI emphasised that Ms Hsieh's evidence was that JTC would have granted approval for the lease to Schenker. She had been asked about a letter which Ms Chai had sent her on 27 June 2003 seeking JTC's consent to the proposed lease to a replacement tenant, OCWS Logistics Pte Ltd. Ms Hsieh had then said that on the assumption that the reasons set out in that letter had been given in relation to an application in January 2003, JTC would have consented to a sub-letting of the whole of the warehouse.

108 Having considered all of the evidence, I find that there is no evidence that SMI was not willing to do what was necessary to obtain JTC's consent. In January 2003, its officers thought that because logistics services were being provided in addition to the leasing of the warehouse, no consent would be required. This was based on their previous experience with the occupation of the warehouse by Richland. Whilst they did not agree specifically at the 27 January 2003 meeting to seek such consent, they did not refuse to ask for it either. I accept the evidence that once it had become clear to SMI that the contract between itself and Schenker required JTC's approval, it would have gone ahead to apply for such approval. It was clear from the conduct of SMI's staff both in January 2003 and subsequently that SMI was concerned about JTC's opinion and was not intent on flouting any of JTC's regulations. I therefore find that if Schenker had not repudiated the lease, SMI would have made the necessary application. I also find that, on the balance of probabilities, SMI would have been able to obtain the requisite consent from JTC had it made the application and would thereby have been able to satisfy any implied condition in the lease as to the obtaining of the superior landlord's consent to the sub-letting.

Was UOB's approval a condition precedent to the lease?

109 Paragraph 14 of the Re-amended Defence stated Schenker's position that if there was an enforceable contract between it and SMI, that contract was subject to the condition precedent that SMI had to seek the consent of UOB before it could rent out the whole of the warehouse to Schenker. The particulars given of this averment were that, firstly, SMI had mortgaged its interest in the warehouse to UOB, secondly, that UOB required a mortgagor to seek its consent before renting out the mortgaged premises, and thirdly, that SMI had failed and/or neglected to seek such consent from UOB. In further and better particulars it was pleaded that there was an implied term in the lease that the consent of UOB would be obtained as a condition precedent.

110 It was common ground that the mortgage document executed by SMI contained a covenant that SMI would not lease, or part with the possession of, the warehouse or any part thereof without UOB's prior written consent. Schenker submitted that there was no evidence that SMI had sought UOB's approval for the lease to Schenker or that consent to such lease had been given by UOB. In her Affidavit of Evidence-in-Chief, Ms Chai had stated that she believed SMI would have, as a matter of course, obtained the requisite consent to the lease. When she was cross-examined, however, she stated that no agreement had been reached at the 27 January 2003 meeting for SMI to seek UOB's approval for the lease.

111 Ms Chai had also testified in her Affidavit of Evidence-in-Chief that there was never any agreement that the lease would be subject to the condition precedent that UOB's approval would have to be obtained. If it had not been for Schenker's repudiation, however, SMI would have sought such consent in due course. She also stated that UOB's policy regarding sub-letting was that if there were no breaches of the mortgage, UOB would grant consent to SMI as a matter of course, subject to SMI assigning the rental proceeds to SMI's account with UOB. Schenker submitted that this statement was not quite correct since, in July 2003, when asked to approve the proposed lease with OCWS Logistics Pte Ltd, UOB imposed the additional condition that JTC's approval had to be obtained prior to the sub-letting. When this was put to Ms Chai in cross-examination, she agreed that the bank's approval was subject to JTC also approving the lease. Schenker further submitted that its request that SMI seek the approval of UOB had been proposed by its solicitors and therefore such approval was a condition precedent to the purported lease.

112 SMI's rejoinder was that it was not a condition precedent to the lease that UOB's approval be given but that it would have obtained such consent in the normal course had it not been for Schenker's early termination.

113 In my view, there was no evidence that it was a condition precedent to the lease that UOB's approval must be obtained. Although this requirement was mentioned in Schenker's solicitors' letter, Mr Tan did not make it a condition precedent when he accepted the terms of the draft LSA. Nor was there any agreement to this effect at the meeting of 27 January 2003. In relation to the issue whether such consent would have been granted in any case, Ms Chai had testified that as a matter of course, SMI would have applied for and obtained UOB's approval if not for the early termination of the lease by Schenker. Schenker did not directly challenge that evidence. It asked me to disbelieve it because of the additional sub-condition that UOB imposed in regard to JTC's consent. That is not a reason for me to disbelieve Ms Chai's unchallenged evidence. She also testified that at the material time, SMI was not in breach of the mortgage with UOB and therefore should have been able to get UOB's consent. The assertion that SMI was not in breach of its mortgage was not challenged either. The evidence showed that when SMI applied for UOB's consent to its lease to OCWS Logistics Pte Ltd, permission was granted subject to the consent of JTC. I have already mentioned JTC's evidence that it would have agreed to the proposed lease to Schenker. That being the case, UOB would have had no reason to withhold its own consent.

114 I therefore find that whilst there was no condition precedent regarding UOB's consent, any implied condition that such consent would be obtained would have been fulfilled had it not been for the premature termination of the lease by Schenker.

Quantum of damages

115 The quantum of SMI's claim as set out in the Amended Statement of Claim is as follows:

(a) Loss of rental from 1 March 2003 to 30 September 2003 ($43,000 x 7 months)	$301,000
(b) Difference in rental from 1 October 2003 to 28 February 2005 (17 months) ($43,000 less $30,000 = $13,000)	$221,000
(c) Agency fee	$ 54,350
Total	$576,350

In the Statement of Claim, the total of the three figures under (a), (b) and (c) is given as $606,350. This, however, is an arithmetical error and the correct total, as stated above, is $576,350.

116 Schenker submitted that SMI was not entitled to recover the full amount claimed. It said that two deductions had to be made. The first deduction, in the sum of $43,000, represented the commission that SMI would have had to pay Ms Yong had the lease to Schenker been successfully completed. It was Ms Yong's evidence that on completion of the lease, SMI would be paying her the equivalent of one month's rental as her commission. Schenker therefore submitted that even if the lease had gone ahead, the net amount received by SMI under the lease would have been reduced by the commission payable to Ms Yong. I agree.

117 SMI made a rather odd submission that because the normal measure of damages for breach of contract is the loss of that which SMI would have received if the contract had been properly performed, whether or not SMI had paid a commission to Ms Yong was of no relevance to the amount of damages which SMI was entitled to claim from Schenker. This argument was not logical. What SMI had lost (and therefore had to be compensated for) was the net amount that it would have received from Schenker after taking into account its expenses in procuring the lease. Those expenses comprised Ms Yong's commission. Thus, in order that SMI did not receive a profit from the breach of contract, that commission had to be deducted from the damages. The only reason not to make that deduction would be if SMI, having succeeded in its claim against Schenker, would then be bound to pay Ms Yong her commission. That, however, was not a submission made by SMI. Nor did Ms Yong assert that the commission would be payable if the suit succeeded.

118 The second submission made in relation to quantum was that SMI was not entitled to recover the agency fee of $54,350 in full. The lease between SMI and Schenker was for the period from 1 March 2003 to 28 February 2005. The lease between SMI and OCWS Logistics Pte Ltd was for a three-year period from 1 October 2003 to 30 September 2006. Schenker submitted that the agency fee paid in respect of the second lease covered the whole period of the replacement tenancy and that since that tenancy extended beyond 28 February 2005 when Schenker's own tenancy would have ended, Schenker should not be liable to pay that portion of the tenancy fee that was attributable to the portion of the replacement tenancy extending beyond 28 February 2005. On the basis that the replacement tenancy was for 36 months, the agency fee for each month would have

been $1,509.72 and since there are only 17 months between 1 October 2003 and 28 February 2005, the pro-rated agency fee for 17 months would be $25,665.24. Accordingly, Schenker should only be liable for that sum as agency fee paid for the replacement lease.

119 This second argument put forward on Schenker's behalf was logical. SMI contended that the whole of the agency fee was an expense reasonably incurred by it in taking steps to mitigate its loss and therefore the whole fee should be recoverable. It also argued that the fee charged could have consisted of advertisement and other expenses and was not solely commission. As far as the first argument is concerned, I cannot accept it as SMI is not entitled to recover the expense of obtaining a tenancy for a period after the lease to Schenker would have expired. As regards the second argument, the invoice from the agent that SMI produced to substantiate the fee paid stated "Being commission due to us for services rendered in connection with the rental of the above property … $54,350". Nothing in that statement indicated that advertisement expenses were being charged to SMI. It was for SMI to prove that the commission included expenses. It did not do so. However, the invoice also made it clear that SMI was charged 4% extra as goods and services tax. Accordingly, the amount payable for the agency fee for the 17-month period should be $25,665.24 + $1,026.61 = $26,691.85.

120 Thus, in total the damages suffered by SMI would be:

(a) Loss of rental from 1 March 2003 to 30 September 2003		$301,000.00
(b) Difference in rental from 1 October 2003 to 28 February 2005		$221,000.00
(c) Agency fee		$ 26,691.85
	Sub-total	$548,691.85
	Less	$ 43,000.00
	Total	$505,691.85

Conclusion

121 I find that SMI has proved its case and that there was a concluded lease between it and Schenker of the warehouse for the period of two years from 1 March 2003 to 28 February 2005. Schenker has failed in its defences. Accordingly, there must be judgment for SMI in the sum of $505,691.85 and costs. I award SMI interest on $258,000 (*ie*, $301,000 minus $43,000) at 6% per annum from 1 October 2003 to date and interest at 6% per annum on $26,691.85 from 1 October 2003 to date. I also award SMI interest at 6% per annum on each month's rental differential of $13,000 from the date on which such sum would otherwise have fallen due, commencing with the rental for October 2003 and ending with the rental for February 2005, until the date of this judgment.

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[1]Para 5 of the Amended Statement of Claim

[2]Para 9 of the Amended Statement of Claim

[3]Para 10 of the Amended Statement of Claim

[4]Paras 3 to 5 of the Re-Amended Defence

[4]Paras 3 to 5 of the Re-Amended Defence

[5]Para 6 of the Re-Amended Defence