Cavenagh Investment Pte Ltd *v* Kaushik Rajiv
[2013] SGHC 45

Case Number : Suit No 566 of 2011/Z

Decision Date : 21 February 2013

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Balasubramaniam Ernest Yogarajah and Jispal Singh (Unilegal LLC) for the plaintiff; Ian Lim and Freddie Lim (TSMP Law Corporation) for the defendant.

Parties : Cavenagh Investment Pte Ltd — Kaushik Rajiv

Agency – Agency by estoppel

Agency – Ratification

Companies – Incorporation of companies – Lifting corporate veil

Damages

Restitution – Change of position

Tort – Negligence – Contributory negligence

Tort – Trespass – Land

21 February 2013 Judgment reserved.

Chan Seng Onn J:

Introduction

1 In this suit, the plaintiff, Cavenagh Investment Pte Ltd ("the Plaintiff"), claims against the defendant, Dr Rajiv Kaushik ("Dr Kaushik"), damages for trespass to land. These claims include a sum amounting to $352,704, being what the Plaintiff says is the market rent of the property for the period of 1 December 2008 to 6 October 2011 while Dr Kaushik was alleged to have wrongfully occupied and trespassed on the property, as well as a sum amounting to $12,000 for what it says is the cost of reinstatement for damage to the property. On the second day of the trial before me, counsel for the Plaintiff, Mr Ernest Balasubramaniam ("Mr Balasubramaniam") said that it was no longer pursuing the second claim.

2 At issue before me is therefore, whether Dr Kaushik had committed the tort of trespass to land, and, if so, whether and to what extent he is liable to pay the Plaintiff damages.

The factual background

3 The background to the present dispute is fairly uncomplicated in so far as the undisputed facts are concerned.

The characters

The characters

4 The main subject matter of the present suit, 132 Tanjong Rhu, #15-10, Pebble Bay, Singapore 436919 ("the Property") is owned by the Plaintiff. The Plaintiff describes itself as an "investment company" and is one of several companies which together form what is loosely known as the Lee Tat group of companies. The Plaintiff, like most of the other companies in the Lee Tat group, has as its sole shareholder and director, Madam Ching Mun Fong ("Madam Ching"). Also like most of the other companies, it has no employees. The Plaintiff's only assets are the Property and another unit also at the same Pebble Bay condominium development ("Pebble Bay"). The properties of the Plaintiff and the other property-holding companies in the Lee Tat group are managed by Lee Tat Property Management Pte Ltd ("Lee Tat Property"), a company run by Madam Ching and several employees.

5 Dr Kaushik is a New Zealand citizen and was at the material time the President and a director of a company known as I^2MS.Net Pte Ltd ("I^2MS.Net"). Pursuant to the terms of his employment with the company, I^2MS.Net provided him and his family with accommodation in Singapore.

6 Another important character to background of the present suit is a man known as Mohamed Razali bin Chichik ("Razali") who was an employee of Lee Tat Property at the material time.

Dr Kaushik's occupation of the Property

The circumstances leading to Dr Kaushik's occupation of the Property

7 In or around September 2008, Dr Kaushik and his wife came across an advertisement in the Straits Times newspaper seeking prospective tenants for the Property. [note: 1] As Dr Kaushik and his family were already staying in Pebble Bay under a lease in a different unit with another landlord, the advertisement piqued his interest. [note: 2] When he called the number listed on the advertisement, Razali answered and proceeded to invite Dr Kaushik and his wife to view the Property. [note: 3] Dr Kaushik's wife attended the first viewing. At the second viewing, Dr Kaushik went with his wife. Dr Kaushik noticed that Razali had all the keys and access cards to the Property, and he seemed to be known to all the security guards at Pebble Bay. [note: 4]

8 Some deliberation and negotiations with Razali over the rent and rectifications to the fittings in the Property (which Razali took care of) then took place. [note: 5] As to these rectifications which involved changing the curtains and doors of the Property, as well as repainting and cleaning, Dr Kaushik testified that Razali tended to them satisfactorily. [note: 6] Dr Kaushik then informed Razali that his employer I^2MS.Net wanted to rent the Property for his family's accommodation. [note: 7] On 23 October 2008, I^2MS.Net received a letter of intent bearing a letter head which read "Cavenagh Investment Pte Ltd" and which was signed by Razali. [note: 8] Dr Kaushik signed this letter on behalf of I^2MS.Net. Razali asked for payment of the monthly rental to him. Finding this unusual, Dr Kaushik insisted on a letter of authority from the Plaintiff. [note: 9] On 31 October 2008, Razali produced a signed letter bearing the letter head of the Plaintiff stating that Razali was authorised to receive the monthly rental. [note: 10] Subsequently on 3 November 2008, Dr Kaushik asked his staff at I^2MS.Net to do due diligence, and found that the Property was owned by the Plaintiff, and that its sole director and shareholder was Madam Ching. [note: 11] As a result, Dr Kaushik requested Razali to obtain the signature of Madam Ching on the tenancy agreement ("the Tenancy Agreement") before I^2MS.Net would finalise the lease. [note: 12] On 1 December 2008, Razali attended at I^2MS.Net's office with a

copy of the Tenancy Agreement bearing a stamp which read "Cavenagh Investment Pte Ltd". It was purportedly signed by Madam Ching. [note: 13] The signature on this Tenancy Agreement was the same as the one on the letter authorising Razali to receive payment. The Tenancy Agreement was signed on behalf of I^{2}MS.Net by its accounts executive, Eileen.

9 I^{2}MS.Net paid a contractual deposit of $18,000 to Razali, and Dr Kaushik and his family moved into the Property after the purported lease commenced on 1 December 2008. [note: 14]

The lease extension

10 In or around September 2010, when the first term of the purported Tenancy Agreement was ending, Dr Kaushik indicated to Razali that I^{2}MS.Net wanted to extend the lease. [note: 15] Razali replied with a letter, again bearing the letter head of the Plaintiff, extending the lease by 2 years from 1 December 2010 to 30 November 2012. [note: 16]

11 For the entire period from December 2008 to March 2011, I^{2}MS.Net paid the monthly rent of $9,000 to Razali. The total sum paid amounted to $270,000 ($252,000 being rent for 28 months and $18,000 being the 2 months' security deposit). [note: 17]

Razali's fraud unravels

12 On 8 March 2011, two employees of Lee Tat Property, one Lim Mui Wah ("Annie") and another known only as Lynn, appeared at the Property and were surprised to find it occupied. [note: 18] According to them, the Property was supposed to be vacant. Lee Tat Property had found out that Razali was operating a fraud when a tenant of a property owned by another company of the group called up Lee Tat Property for clarification after Razali had asked for future rentals to be paid to him directly. [note: 19] The alarm having been raised, Annie and Lynn were sent to inspect the properties managed by Lee Tat Property. [note: 20]

13 As it turns out, Razali had been acting on his own accord and without the authority of the Plaintiff or Lee Tat Property. At trial, it emerged that the signatures on the Tenancy Agreement, the letter renewing the lease, and the letter authorising Razali to receive payment were not Madam Ching's. The stamps on the Tenancy Agreement were also not the stamps of the Plaintiff.

Negotiations between the parties and Dr Kaushik vacating the Property

14 Letters were exchanged between the parties as regards their legal position. [note: 21] Meanwhile, I^{2}MS.Net continued to pay the monthly rent for the period from April 2011 to September 2011 (amounting to $54,000), but paid these monies to the Plaintiff instead. Dr Kaushik and his family moved out of the Property on 3 October 2011, and handed the keys to the Plaintiff on 6 October 2011. [note: 22]

The present suit

15 In the present suit, the Plaintiff claims against Dr Kaushik for damages for trespass to land. The Plaintiff claims the sum of $352,704, being what it claims the Property would have fetched during Dr Kaushik's occupation of the Property. It further claims damages of $12,000 for the cost of reinstatement of the Property. As I have noted at the outset, the Plaintiff decided not to pursue this

latter claim on the second day of the trial.

The issues to be decided

16 The issues to be decided in this present suit may be summarised into the following:

(a) whether there was a valid lease binding on the Plaintiff such that Dr Kaushik's occupation of the Property was not a trespass to land;

(b) whether any of the defences raised by Dr Kaushik apply; and

(c) if there was trespass to land, whether and to what extent Dr Kaushik is liable in damages.

My decision

Whether there was a valid lease binding on the Plaintiff as a result of Razali acting as its agent

17 Dr Kaushik's defence is that there was a valid lease binding on the Plaintiff. Consequently, there can be no trespass to land committed as a result of his occupation of the Property. In advancing this defence, Dr Kaushik makes four main arguments. First, Dr Kaushik relies on the signed Tenancy Agreement. Second, he avers that Razali had the ostensible authority to enter into a lease on behalf of the Plaintiff. Third, Dr Kaushik relies on the principle in the English Court of Appeal decision of *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 ("*First Energy*") to contend that Razali had the ostensible authority to communicate and represent to him the Plaintiff's approval of the lease, thus binding the Plaintiff by doing so. Last, assuming all the above arguments fail, Dr Kaushik then argues that the Plaintiff had ratified the unauthorised acts of Razali, thus binding itself to the purported lease. I will deal with these arguments in turn.

The signed Tenancy Agreement

18 Relying on the signed Tenancy Agreement, Dr Kaushik alleges that there was a valid lease. At the trial, it was not disputed that the signatures on the Tenancy Agreement and the letter extending the lease were forged. While they were purported as having been signed by Madam Ching, it was in fact not so. Likewise, the stamp purporting to be the company stamp of the Plaintiff was a forgery. To this, the Plaintiff referred me to the decision of *Ruben and Another v Great Fingall Consolidated and Others* [1906] 1 AC 439 at 443 for the proposition that a forged document is a "pure nullity" which therefore cannot bind it. I accept that this principle covers the present case. As further explained by Brennan J (at [21] of his judgment) in the High Court of Australia in *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 in respect of cases such as the present, which he calls a "forgery in the strict sense":

> ... A company cannot give authority to fix a false seal and it is difficult to envisage a case in which there would be ostensible authority to write a false signature.

19 Plainly, because an agent cannot have authority, actual or ostensible, to commit forgery, a principal cannot be liable on the basis of such a document. Accordingly, the existence of the forged Tenancy Agreement purportedly signed by Madam Ching does not help Dr Kaushik.

Razali's ostensible authority to enter into the lease on behalf of the Plaintiff

20 Notwithstanding the fact that the signature on the Tenancy Agreement was forged, the

Plaintiff may still be bound by the purported lease if there is evidence that Razali had the ostensible authority to bind it to such a lease. The doctrine of ostensible authority is founded on the notion of a representation by a principal that an agent has authority to do certain things on its behalf which in fact he does not. In the oft-cited case of *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd and Another* [1964] 2 QB 480 ("*Freeman Lockyer*"), Diplock LJ explained (at 503–504):

> An "apparent" or "ostensible" authority ... is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.
>
> ...
>
> The representation which creates "apparent" authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually "actual" authority to enter into.

21 To this end, the submissions of Mr Ian Lim ("Mr Lim"), counsel for Dr Kaushik, on the internal workings of Lee Tat Property, such as, whether the company trusted Razali to do certain things, the extent of Razali's responsibility within the company, and the distribution of duties amongst the employees, [note: 23] were irrelevant to the present enquiry. These might well have been relevant if it was to prove that Razali had actual authority to bind the Plaintiff to the lease. In other words, this would be relevant if Dr Kaushik's position was that the Plaintiff had legitimately entered into the lease through Razali, and is now, for whatever reason, changing its mind. However, whether there was actual authority, as noted in the above quote of Diplock LJ, is irrelevant to the question of ostensible authority. In any event, over the course of the trial, the parties became *ad idem* that Razali was a fraudster. This being so, any suggestion that Razali had actual authority to enter into the lease on behalf of the Plaintiff cannot stand. The pertinent question at hand for the purpose of whether there was ostensible authority, is, whether there was any representation (by conduct or otherwise) by the Plaintiff to Dr Kaushik that Razali had authority to enter into the lease on its behalf.

22 In support of Dr Kaushik's case, Mr Lim relies on two authorities in his submission that there was such ostensible authority in the present case. First, he cites the decision in *Next of kin of Ramu Vanniyar Ravichandran v Fongsoon Enterprises (Pte) Ltd* [2008] 3 SLR(R) 105 ("*Fongsoon Enterprises*"). The Singapore High Court in *Fongsoon Enterprises* found that Meera, a foreman of a site of a port terminal who was given free rein in the running of operations at the site, had the ostensible authority to engage the services of the deceased on the behalf of respondent who operated the site. In coming to that conclusion, Choo Han Teck J cited the above quote from *Freeman Lockyer* and explained that (at [20]):

> ... The respondent, by entrusting Meera with the daily operations and with such great autonomy,

> can be said to have made a representation to others that Meera had the authority to make decisions in regard to the running of the respondent's works at the Terminal (including the hire of extra hands to complete the works), "by permitting the agent to act in some way in the conduct of the principal's business with other persons".

Second, Mr Lim cites the High Court of Australia decision of *Pacific Carriers Limited v BNP Paribas* (2004) 218 CLR 451 ("*Pacific Carriers*"). The court there found that the defendant bank was liable on two letters of indemnity signed by a bank officer, who was not actually authorised to sign letters of indemnity. The decision was made on the basis that the bank officer had the ostensible authority to do so. The court there observed (at [38]):

> A kind of representation that often arises in business dealings is one which flows from equipping an officer of a company with a certain title, status and facilities. ... The holding out might result from permitting a person to act in a certain manner without taking proper safeguards against misrepresentation.

23 Was there any representation in the present case by the Plaintiff to Dr Kaushik? More importantly, was there a representation to the effect that Razali was authorised to enter into the lease on behalf of the Plaintiff? As I have stated, the internal workings of Lee Tat Property are irrelevant – Dr Kaushik was never made aware of them until this suit and so they are not representations to Dr Kaushik capable of supporting the existence of ostensible authority. The only reasonable representation by the Plaintiff to Dr Kaushik in the present case is the equipping of Razali with the keys and access cards to the Property. Mr Lim argued that by doing so, the Plaintiff was representing to the world at large that Razali had the authority to enter into the lease on its behalf.

24 I do not think such an argument succeeds in the present case. Although in *Fongsoon Enterprises* and *Pacific Carriers* it was held that the creation by the principal of a certain state of affairs in respect of an agent amounted to a representation that an agent had authority to do certain acts, thus triggering the operation of the doctrine of ostensible authority, those cases were decided on their facts. Whether or not a state of affairs created by allowing an agent to act in a certain way amounts to a representation sufficient to create ostensible authority is a question which must be decided and determined on the specific facts of each case. I am of the view that equipping an agent with the keys to a property does not amount to a representation that the agent has authority to enter into leases on the landlord's behalf. Landlords in Singapore commonly hand property agents the keys to their properties for the purpose of conducting viewings for prospective tenants and for other ministerial acts. I do not think that in doing so, these agents are therefore clothed with the ostensible authority to enter into leases with third parties on behalf of the landlords. When all is said and done, a reasonable prospective tenant would be satisfied only if the landlord himself gives approval for a lease. Such was in fact the case here. Dr Kaushik was not satisfied with Razali or anyone else signing the lease. He specifically insisted that Madam Ching, whom he had identified as the director of the true landlord, sign the Tenancy Agreement. [note: 24] Dr Kaushik cannot now contend that the equipping of Razali with the keys and access cards to the Property amounts to a representation by the Plaintiff of Razali's authority to enter into the lease on its behalf, as Dr Kaushik himself did not at the relevant time read such a representation to be so.

Razali's ostensible authority to communicate and represent the Plaintiff's approval of the lease

25 *First Energy* is a decision which has drawn much criticism and comment. In particular, it is widely suggested that it goes against the established principle (illustrated by the House of Lords decision in *Armagas Ltd v Mundogas SA* [1986] AC 717 ("*Armagas Ltd*")) that the law of agency does not recognise what may be described as a "self-authorising" agent. Dr Kaushik relies on *First Energy*

for the proposition that even if Razali did not have the actual or ostensible authority to enter into the lease on behalf of the Plaintiff, he had the ostensible authority to convey and represent the Plaintiff's approval of the lease, and in doing so bind it. When the Singapore Court of Appeal in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal* [2011] 3 SLR 540 examined and considered *First Energy*, it suggested (at [58]–[59] and [61]) a possible reading of the case which would not be inconsistent with what it considered the orthodoxy in *Armagas Ltd*. The Court of Appeal suggested that in *First Energy*, there was a specific finding made by the court that the agent had ostensible authority to make the *specific* representation that his principal has approved a transaction. Such ostensible authority was distinguished from the authority to make *general* representations about the transaction. The court recognised that the effect of finding that there was ostensible authority to make the *specific* representation as to a principal's approval is akin to saying that he has authority to so bind the principal. For that reason, in considering whether the principle in *First Energy* applies here, the question is an extremely specific one, *viz* whether Razali had the ostensible authority to make the *specific* representation as to the Plaintiff's approval of the lease.

26 For chiefly the same reasons why I am of the view that Razali did not have the ostensible authority to enter into the lease on behalf of the Plaintiff (see [24] above), I am also of the view that Razali did not have the ostensible authority to specifically communicate and represent the Plaintiff's approval of the lease. This conclusion is again fortified by the evidence that Dr Kaushik specially insisted that Madam Ching sign the Tenancy Agreement, and that he would not have been satisfied simply because Razali told him the Plaintiff had approved it. Dr Kaushik argues that there was such ostensible authority in the present case because it would have been "unreal" to have expected him to have checked directly with Madam Ching. [note: 25] Unreal or not, the fact of the matter is that although Dr Kaushik did not check directly with Madam Ching, he did in fact ask for her signature on the Tenancy Agreement (notwithstanding that it ended up being forged). In the circumstances, I do not find that Razali had the ostensible authority to communicate and represent the Plaintiff's approval of the lease nor do I find that Dr Kaushik had at that time thought or believed that Razali would have any authority to communicate and represent the Plaintiff's approval of the lease. Neither did Dr Kaushik rely on such an ostensible authority, even if the state of affairs then existing allowed its creation.

Whether the Plaintiff had ratified the lease

27 In the alternative to the argument that there was a valid lease as a result of Razali's ostensible authority, Dr Kaushik argues that the Plaintiff by its conduct had ratified the unauthorised acts of Razali, thus binding the Plaintiff to the lease. The effect of ratification by a principal is to make an act of an agent, which would otherwise be invalid for want of authority, valid and effectual as though the original unauthorised act was done with authority. Ratification has thus been described as the retrospective clothing of an agent with authority. A principal would therefore be bound by the terms of any such transaction.

28 In this suit before me, Dr Kaushik seeks to rely on one event to argue that the Plaintiff had ratified the unauthorised acts of Razali. He says that in January 2010, the refrigerator in the Property broke down. He then contacted Razali, and told Razali that he would be buying his own refrigerator and that Razali should remove the one that had broken down. Razali did so. [note: 26] Thereafter, I^{2}MS.Net wrote a letter to inform the Plaintiff that the broken down refrigerator had been collected by Razali and so should be removed from the inventory of items in the Property. This letter, he says, was sent by post to the Plaintiff's registered address and faxed to the Plaintiff's fax number. [note: 27] Relying on this letter, Dr Kaushik argues that the Plaintiff became aware of his purported tenancy with

the Plaintiff. By remaining silent and not acting on such knowledge, he says, the Plaintiff acquiesced to it, thus ratifying Razali's act of letting out the Property.

29 At issue at the trial was whether or not I^{2}MS.Net had sent the letter, and whether the Plaintiff had received this letter. The Plaintiff disputed that this letter and its fax were received because they could not be found in the files kept by the Plaintiff concerning the Property.

30 Even if the Plaintiff did receive the said letter and a copy of it by fax, and then did not act on them, that in itself still may not amount to a ratification of the unauthorised acts of Razali. I do not doubt the proposition that in an appropriate case, silence or inactivity can amount to ratification. In fact this proposition, found in the English High Court decision of *Yona International Ltd and Heftsiba Overseas Works Pte Ltd v La Réunion Française Société Anonyme d'Assurances et de Réassurances* [1996] 2 Lloyd's Rep 84 ("*Yona International*") at 106, was accepted by me in *Eng Gee Seng v Quek Choon Teck and others* [2010] 1 SLR 241 at [35]. Mr Lim for Dr Kaushik cites the following passage from *Yona International* (at 106):

> Ratification can no doubt be inferred without difficulty from silence or inactivity in cases where the principal, by failing to disown the transaction, allows a state of affairs to come about which is inconsistent with treating the transaction as unauthorised.

However, Mr Lim fails to cite the next few lines in the passage:

> That is probably no more than a form of ratification by conduct. Where there is nothing of that kind, however, the position is more difficult since silence or inaction may simply reflect an unwillingness or inability on the part of the principal to commit himself. For that reason it will not usually be sufficient to evidence ratification ...

31 In considering whether silence or inactivity can amount to ratification, one must keep in mind the juridical nature of ratification. In essence, ratification is akin to an assent by the principal to the transaction entered into by the unauthorised agent by adopting the agent's otherwise unauthorised acts. To this end, the principal's inaction must, when interpreted in the context and circumstances, be of a nature which *unequivocally* signifies such an assent. Here, even assuming the Plaintiff had received the letter and the fax, its failure to act may well be attributable to other reasons, be it carelessness, oversight, or otherwise. It would appear that Razali was the person put in charge of handling inventory matters for the properties managed by Lee Tat Property and therefore, that letter and a faxed copy of it, if received might well have been directed to Razali to handle and accordingly, it never came to the attention of Madam Ching herself, or for that matter, any other employee. In any case, it is not required that I decide the reason for such inaction. All that matters is that the silence or inaction in the case at hand is silence or inaction that is of an equivocal nature as to whether there was any assent by the Plaintiff. Accordingly, I do not agree that the Plaintiff could be said to have ratified the unauthorised acts of Razali and consequently bound itself to the terms of the purported lease.

32 In further support of Dr Kaushik's case, Mr Lim also cites the English Court of Appeal case of *Spiro v Lintern and Others* [1973] WLR 1002 ("*Spiro*"). In *Spiro*, the first defendant, Mr Lintern, asked his wife to find a purchaser for his house, but gave her no authority to sell. The wife nevertheless purported to agree to a sale of the house to the claimant. Mr Lintern knew about this and after meeting the claimant, he permitted the claimant to proceed to get an architect and a gardener to work on the building and the garden without telling the claimant that his wife did not have authority to sell. The Court of Appeal held that Mr Lintern could not deny that his wife had authority to sell the house. Mr Lim's reliance on *Spiro* demonstrates how the concepts of ratification and estoppel can

very often be confused. *Spiro* does not stand for the proposition that the silence of the first defendant amounted to a ratification of the unauthorised act of his wife. Instead, the decision of the Court of Appeal was made on the basis of an estoppel. Mr Lintern, in the circumstances, by his silence and inaction, was found to have made a representation by conduct that his wife had the requisite authority. The claimant having relied on the representation thereon and suffering a detriment as a result, Mr Lintern was estopped from denying the authority of his wife and the validity of the contract.

33 The more pertinent issue in this case therefore is whether any estoppel has been raised against the Plaintiff denying the existence of a valid lease. I do not think so. Even if the Plaintiff had received the said letter and the fax and thereafter remained silent and did not act, such that this could amount to a representation, I do not think that there was any reliance thereon by Dr Kaushik. Dr Kaushik was content to carry on living in the Property, because he was at all times under the impression (albeit wrongly) that he had, from the outset, a valid lease with the Plaintiff. As a result, the Plaintiff's silence and inaction upon receipt of the letter cannot be said to have ever played on Dr Kaushik's mind at the relevant time. In contrast, in *Spiro*, before the representations by silence and inaction were made by Mr Lintern, the claimant was labouring under a significant amount of doubt as to whether there was or was not a binding contract for the sale of the house because he had found out that it was Mr Lintern and not Mrs Lintern who owned the house. On those facts, Mr Spiro could be said to have relied on those representations by silence and inaction by Mr Lintern after the two finally met when he then instructed, to his detriment, an architect and a gardener to do the works. An estoppel was thus raised in *Spiro*, but none arises here.

Whether the Plaintiff is bound by any lease

34 Given all of the above, I find that there was no valid lease between the Plaintiff and Dr Kaushik. As a result, I find that Dr Kaushik has committed the tort of trespass to land in wrongfully occupying the Property for the period between 1 December 2008 and 6 October 2011.

Whether the defence of contributory negligence applies to the tort of trespass to land

35 Amongst the various defences raised by Dr Kaushik against the Plaintiff's claim for damages for trespass to land was the defence of contributory negligence as found in s 3(1) of the Contributory Negligence and Personal Injuries Act (Cap 54, 2002 Rev Ed) ("the CNPIA"). To this end, Dr Kaushik contends that the damages in respect of which the Plaintiff is claiming was caused wholly or at least largely by its own negligence. During the conduct of the trial, Mr Lim sought to show that the Plaintiff, Lee Tat Property, and its associated companies were run and managed in an indifferent, lax and careless manner. [note: 28] These included, amongst other things, the failure to keep track of or check on properties, the failure to supervise Razali and the lack of proper control and supervision by Madam Ching and the management of Lee Tat Property over the properties collectively held by the group because of the large number of properties involved.

36 Mr Lim suggested that the defence of contributory negligence was applicable to the tort of trespass to land because the tort is an "unintentional" tort. Mr Lim has misrepresented the tort, and has perhaps misapprehended the meaning of "intentional" or "unintentional" when used in respect of characterising torts as such. Nevertheless, whether or not the defence in s 3(1) of the CNPIA applies to a particular tort does not depend on whether or not the tort can be characterised as "intentional" or "unintentional". Very recently, the English Court of Appeal in *Pritchard v Cooperative Group Ltd* [2012] QB 320 ("*Pritchard*") was asked to determine whether the defence in s 1(1) of the Law Reform (Contributory Negligence) Act 1945 (c 28) (UK) ("the 1945 Act"), which is *in pari materia* with our provision, applies to the torts of assault and battery. The Court of Appeal explained (*per* Aikens LJ at

[61]–[62]) that the purpose of the 1945 Act was to provide relief to claimants whose actions would have previously failed (because the common law incarnation of the defence was a complete defence) by allowing the courts to apportion damages. Its purpose was not to reduce damages which previously before the enactment of the statute would have been awarded. Therefore, if the common law defence did not apply to a tort pre-1945, the statutory defence would also not apply. The Court of Appeal held that because it could find no case before 1945 which applied the defence to the intentional torts of assault and battery, the statutory defence likewise did not apply.

37 Whether or not the statutory defence of contributory negligence applies to the tort of trespass depends on whether or not the common law defence applied to it before the enactment of the CNPIA. Although Mr Lim has taken the wrong approach to determining whether the defence applies, he cites in his submissions the Straits Settlements Supreme Court decision of *Brown v Attorney-General* [1889] KY 4 ("*Brown*") for the proposition that the defence applies to the tort at hand. Unfortunately, Mr Lim's reading of *Brown* is mistaken. In fact, in *Brown*, Wood J did not apply the defence of contributory negligence, saying:

> The exact application however of this principle which is embodied in the known legal maxim *vigilantibus non dormentibus jura subveniunt*, I cannot find to have been held to prevail in a case quite like the present.

Wood J instead held in favour of the defendant there on the basis of a finding of fact that there was no act of trespass. Ultimately, whether or not the defence applies will be a matter of legal archaeology. On the basis of the decision in *Brown*, and the fact that I have not been able to find any other case before the enactment of the CNPIA (or in fact, the 1945 Act) applying the defence to the tort of trespass to land, I am of the view that the defence is not applicable here.

38 I would only add that Dr Kaushik's reliance on the defence of contributory negligence presupposes that the Plaintiff owes him a duty of care, which I am generally doubtful of, given the many common law pronouncements that property owners owe no general duty to look after their own property.

Whether the Plaintiff was vicariously liable for Razali's acts

39 Another limb of Dr Kaushik's defence runs as follows. [note: 29] Razali has committed the tort of deceit against him. The Plaintiff is vicariously liable for the tort of Razali. As a result, Dr Kaushik is entitled to raise a set-off against any damages claimed by the Plaintiff by relying on the damages the Plaintiff is liable to him.

40 Creative as such the argument is, the first obstacle Dr Kaushik faces is the fact that Razali was in fact not an employee of the Plaintiff. Instead, Razali was at all material times an employee of Lee Tat Property. Dr Kaushik acknowledges this difficulty, and therefore goes on to suggest that as between the Plaintiff and Lee Tat Property, the corporate veil should be lifted, such that the Plaintiff can be held liable for Razali's acts. [note: 30] In furtherance of his submission that the corporate veil should be lifted, Dr Kaushik cited the following facts. [note: 31] First, the employees of Lee Tat Property, Annie and Collin Tan were sometimes confused as to who their employers were – Lee Tat Property or the Plaintiff. [note: 32] Second, Razali was at one instance wrongly identified by the Plaintiff's solicitors as an employee of the Plaintiff, even thought he was in fact an employee of Lee Tat Property. [note: 33] Third, during the trial, Collin Tan continued to be confused in wrongly referring to Lee Tat Property when she meant the Plaintiff and *vice versa*. [note: 34] Fourth, apart from Lee Tat Property, the rest of the companies in the Lee Tat group owned by Madam Ching only owned

properties and did not have any employees or their own offices. Fifth, the other companies all shared the same office with Lee Tat Property. Sixth, the administration of all the companies was handled by Lee Tat Property. Seventh, all decisions for companies in the group were made by Madam Ching alone. She is the director of all the companies in the group, some of which are 99% owned by her, others 100%. Last, the Plaintiff's letterhead bore a logo which showed the letters "L-T", which stands for "Lee Tat".

41 I am not convinced that these factors are sufficient for the court to lift the corporate veil. Dr Kaushik submits that the above factors show that the companies were "run as a functional whole with unity of ownership and/or control", such that the corporate veil ought to be lifted. It was surely with specific intent that Madam Ching arranged to have different companies hold different properties, and to have them all managed by a different distinct company. The starting point is that each company within what may be called a "group" remains a separate distinct entity. In *Adams and Others v Cape Industries Plc and Another* [1990] 1 Ch 433 ("*Adams*") , the English Court of Appeal confirmed that it is open for businessmen to structure their operations to insulate one part of a business from another (at 544, *per* Slade LJ):

> It is not suggested that the arrangements involved any actual or potential illegality or were intended to deprive anyone of their existing rights. Whether or not such a course deserves moral approval, there was nothing illegal as such in Cape arranging its affairs (whether by the use of subsidiaries or otherwise) so as to attract the minimum publicity to its involvement in the sale of Cape asbestos in the United States of America. ... [W]e do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law. ...

Slade LJ's statement was approved by the Singapore Court of Appeal in *The "Andres Bonifacio"* [1993] 3 SLR(R) 71. Accordingly, one commentator has noted that "the legitimacy of setting up 'one-ship' companies in order to minimise the risk of sister-ship actions has been repeatedly affirmed in Singapore": *Walter Woon on Company Law* (Tan Cheng Han SC gen ed) (Sweet & Maxwell, 3rd Rev Ed, 2009) at para 2.65.

42 In the present case, Madam Ching was as a matter of law, fully entitled to structure her companies the way they were and have separate companies hold different properties. This was likely done so as to deal with situations such as the present. If Razali was guilty of committing a tort, and his employer Lee Tat Property had to be liable to a claimant, the intention was that the other companies would be insulated from liability. As clearly set out by Slade LJ in *Adams*, there is nothing illegal about such an arrangement. In the absence of compelling reasons such as the existence of fraud or serious abuse of the corporate form (as was the case in *New Line Productions, Inc and another v Aglow Video Pte Ltd and others and other suits* [2005] 3 SLR(R) 660, cited by Dr Kaushik in his submissions), the courts will be slow to treat companies in the same group as one legal entity merely because it would be convenient for a claimant's claim to do so. The Plaintiff is therefore not vicariously liable for the alleged tort committed by Razali. Dr Kaushik's argument on this point fails.

43 If at the conclusion of this suit Dr Kaushik finds that he has suffered some loss and such loss may be attributable to Lee Tat Property under the doctrine of vicarious liability for the acts of Razali, then its proper course is to bring an action against Lee Tat Property. Lee Tat Property is not a party to the present suit, so I will say no more on the issue.

Damages for trespass to land

44 The Plaintiff's claim in damages for trespass to land amounts to a sum of $352,704, being what it says is the market rent for the period Dr Kaushik was in occupation of the Property. Of course, the Plaintiff has clarified through Mr Balasubramaniam that it will give Dr Kaushik credit for the $54,000 already paid to it (see [14] above). The Plaintiff's claim is only for the wrongful occupation, as it had on the second day of the trial dropped its other claim for reinstatement for physical damage to the Property. In any case, the Plaintiff unhelpfully says no more than simply asserting the claim for market rent. The nature of damages for trespass to land must be unpacked to understand what exactly it constitutes.

The juridical nature of damages for trespass to land

45 The right to sue for damages based on the market rental value of a property wrongfully occupied is a principle well established in the law, and one which has been described by Nicholls LJ in *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 3 All ER 394 as the "user principle". In this regard, the English Court of Appeal case of *Swordheath Properties Ltd v Tabet and Others* [1978] 1 WLR 285 is often cited for the proposition that (at 288):

> when [the plaintiff] has established that the defendant has remained on as a trespasser in residential property, [he] is entitled, without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of damages. ...

46 The exact juridical nature of damages for trespass to land lay largely unarticulated for a long time. Lord Denning MR planted the seed for the recognition of the restitutionary analysis for damages for trespass to land in *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359 when he used (at 362) what may be described as "restitutionary language" in a case involving trespass to the claimant's dock:

> The Penarth company would not seem to have suffered any damage so to speak of. They have not had to pay any extra rent to the British Transport Commission. The dock is of no use to them: they would not have made any money out of it. But... in a case of this kind... the test of the measure of damages is not what the plaintiffs have lost, but what ***benefit*** *the defendant has obtained* by having the use of the berth. [emphasis added]

However, it was only later in *Ministry of Defence v Ashman* (1993) 66 P & CR 195 ("*Ashman*") that Hoffmann LJ decided to "call a spade a spade", and declared that a claim for *mesne* profit for trespass to land is a claim for restitution. In doing so, Hoffmann LJ distinguished the compensatory and restitutionary bases of damages for trespass to land (at 200–201):

> A person entitled to possession of land can make a claim against a person who has been in occupation without his consent on two alternative bases. *The first is for the loss which he has suffered in consequence of the defendant's trespass.* This is the normal measure of damages in the law of tort. *The second is the value of the benefit which the occupier has received.* This is a claim for restitution. The *two bases of claim are mutually exclusive* and the plaintiff must elect before judgment which of them he wishes to pursue. [emphasis added]

Admittedly, the judicial opinion on the issue is not unanimous. In *Ashman* itself, Lloyd LJ disagreed,

taking the view that the claim was simply compensatory. The defendant in *Ashman* was a wife of a Royal Air Force officer who had occupied the claimant's premises. Her husband subsequently moved out, leaving her and the children. She refused to move out of the property, instead holding over. The claimant thus claimed damages for trespass to land. The issue which fell for the Court of Appeal to decide was whether these damages should be assessed by reference to the market rent for such premises, or by the subsidised rent which a serviceman would actually pay for the premises, or by some other measure. In taking the view that the damages are restitutionary in nature, Hoffmann LJ held that it was the market rent that was recoverable. In taking the view that the damages were compensatory, Lloyd LJ held that it was the subsidised rent that the claimant could recover. However, in *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713 ("*Inverugie*"), an appeal from the Commonwealth of the Bahamas heard by the Judicial Committee of the Privy Council, Lord Lloyd of Berwick (having been elevated to the position of Lord of Appeal in Ordinary since the decision in *Ashman*), declared (at 718) that the claim for *mesne* profits "need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both".

47 The Singapore High Court in *Yenty Lily (trading as Access International Services) v ACES System Development Pte Ltd* [2013] 1 SLR 577 ("*Yenty Lily*") recently took the opportunity to explore the juridical basis of the user principle in the context of damages for the wrongful detention of goods. After considering a number of authorities on the issue, Judith Prakash J appears to have accepted (at [66]–[69]) the conclusion in *Inverugie* that the user principle comprised of *both* compensatory and restitutionary elements. Prakash J's reticence in adopting a pure restitutionary approach appears (at [66]) to be because it is thought that by adopting such an analysis, a defendant may argue that where he has not made any discernible use of the detained or misappropriated property, he had not derived any benefit and therefore cannot be made to pay the plaintiff the market rent as damages. Prakash J thus preferred to characterise the user principle as being a mix of both compensation and restitution. Accordingly, she held that the recognition that the user principle may also contain elements of restitution does not lead to the conclusion that a plaintiff cannot recover in a situation where the defendant has not made any discernible use of the plaintiff's detained or misappropriated property unless actual damage is proved. What is important, Prakash J opined, may be the fact that, by the detention or misappropriation, the defendant gains the opportunity to use the property concerned whilst simultaneously depriving the owner of such opportunity such that the defendant's failure to exploit such opportunity is irrelevant.

48 In *Inverugie*, the defendant had wrongly ejected the claimant from a hotel complex and excluded them from it for a period of 15 years. Over this period, the occupancy of the hotel was only about 35 to 40 percent. Facing a claim for trespass to land, the defendant conceded that it was liable to pay the claimant reasonable rent. The sole question for the Privy Council was how this should be assessed. The Privy Council held that the defendant had to pay the claimant damages to be assessed by reference to the reasonable rent of all the apartments, and not with reference to only the 35 to 40 percent rate of occupancy. As noted by Professor Graham Virgo ("Professor Virgo") in Graham Virgo*, The Principles of the Law of Restitution* (Oxford University Press, 2nd Ed, 2006) at p 468, the objection to calling the result reached in *Inverugie* as consistent with a restitutionary analysis is that the defendant was required to pay rent for the entire period despite the finding that it had not derived a benefit from the apartments all of the time. This appears to be the very same objection held by Prakash J in her analysis in *Yenty Lily*. However, as Professor Virgo goes on to explain in his text, the defendant's use of the hotel complex throughout the period should be regarded as it having obtained an "objective benefit", that is, the opportunity to obtain income from the apartments. Whether or not in fact the hotel was fully occupied is a matter which raises questions of subjective devaluation (the concept of which is explained below at [54]–[56]), which, on the facts of that case, did not apply. Likewise, in an action for wrongful detention of property, even if a defendant has not made any discernible use of the detained or misappropriated property, he has

obtained an objective benefit, thus entitling the plaintiff to recover damages measured by the market rent. Similar to the case in *Inverugie*, it is arguable that the defendant in *Yenty Lily* should not be permitted to subjectively devalue the benefit received (on the basis of the failure to make discernible use of the goods). When the plaintiff sought to claim ownership over the detained goods, the defendant's response was to deny the same and to refuse to return them. By refusing to return the property, the defendant must be taken to have freely accepted that benefit and is therefore not entitled to subjectively devalue that benefit by saying that it had not made discernible use of the detained property. Seen from this perspective, a purely restitutionary analysis may not be contrary to the user principle.

49 Why should a distinction be made between an award for compensation and an award for restitution in claims such as the present? Different principles and different possibilities will flow from the different characterisations in different cases. The distinction is not purely theoretical. As Professor James Edelman (who has since been appointed to the bench of the Supreme Court of Western Australia) explained in James Edelman, *Gain-based Damages* (Hart Publishing, 2002) ("*Edelman*") at p 66:

> In cases [of wrongs] where the wrongful transfer involves money, the transfer of value might sometimes be equivalent to the loss suffered. But the restitutionary damages award is not concerned with financial loss and opens other possibilities which will be seen below such as subjective devaluation of the award. *Thus, even in cases where the quantum of compensatory and restitutionary damages might be the same, it has been recognised that it is important to keep the two awards distinct*. [emphasis added]

50 I do not see any reason why we ought not to recognise that where a distinction can be made between a compensation-based claim and a restitution-based claim, a claim for *mesne* profit, market rent, under the "user principle", or however one may choose to call the claim, is a claim for a restitutionary remedy.

Is the Plaintiff's claim for compensation or restitution?

51 Although the Plaintiff repeatedly asserts, and is not wrong, that a claimant in an action for trespass to land is entitled to market rent during the period of wrongful occupation by the defendant, as envisaged by the above statement in *Edelman* (see [49] above), it is also necessary in the present case to consider whether the present claim is for compensatory damages or restitutionary damages.

52 The evidence at trial showed that during the period of Dr Kaushik's wrongful occupation of the Property, the Plaintiff was unable and unwilling to lease the Property to anyone else. The evidence was that the Plaintiff (and its controlling mind Madam Ching) was unwilling to let the Property out for anything less than $10,000 because it was "selective" of its tenants, and during the period of Dr Kaushik's wrongful occupation, the Plaintiff did not receive a single offer satisfying the $10,000 minimum. [note: 35] Put simply, the Plaintiff was at all material times very happy to leave the Property unoccupied. There was no indication that because of Dr Kaushik's occupation of the Property, the Plaintiff was prevented from letting the Property to another tenant and as a result had to forego rent it would otherwise have collected. Of course, if this was the case, the Plaintiff would have to elect between the compensatory measure and the restitutionary measure (such election would likely be influenced by which is higher). Likewise, the Plaintiff's claim for reinstatement damages, which has since been dropped, would have been a claim for compensatory damages. If the Plaintiff had had to pay extra taxes because of Dr Kaushik's occupation, that would have been a claim for compensation as well. I would only note that in these latter two examples, because the compensatory claim is not incompatible with the restitutionary claim, the Plaintiff would not need to elect and will be entitled to

recover both. However, in the circumstances, I would not characterise the Plaintiff's present claim of $352,704 as a claim for compensatory damages; it is clearly claiming restitutionary damages in the form of the gain Dr Kaushik enjoyed in occupying the Property.

The Plaintiff's restitutionary claim and the damages it is entitled

53 Having characterised the Plaintiff's claim for damages for trespass to land as a claim for a restitutionary remedy, what are the damages it is entitled? The measure of damages is the benefit enjoyed by Dr Kaushik as a result of the wrongful occupation of the Property. In its pleadings, the Plaintiff asserts that it is entitled to a sum of $352,704. [note: 36] This, it claims, represents the market rent of the Property for the duration of Dr Kaushik's occupation. It claims that this sum is arrived at by multiplying the strata area of the Property by the rate of $4.07 per square foot, this figure being "as per URA data during the last quarter of 2008". Aside from this bare assertion, the Plaintiff adduced no further evidence in support of its contention that the sum it was claiming represented the market rent. I therefore find that the Plaintiff has not shown on a balance of probabilities that the market rent for the period of the wrongful occupation amounted to $352,704. However, given that Dr Kaushik was happy to have paid or to have caused I^2MS.Net to pay the sum of $9,000 every month to Razali as rent for the Property, I am satisfied that at the very least, the amount of $9,000 can be taken to be the market rent of the Property during the period of the wrongful occupation. Mr Lim does not deny this in the submissions for Dr Kaushik. [note: 37] Accordingly, I would accept that the market rent of the Property for the relevant period of 34 months and 5 days (from 1 December 2008 to 6 October 2011) would be $307,451.61 and not $352,704 as claimed by the Plaintiff.

Can Dr Kaushik "subjectively devalue" the benefit he derived?

54 As I have alluded to above, the characterisation of the present claim for trespass to land as restitutionary leads to different possibilities flowing.

55 Dr Kaushik submits that he is entitled to "subjectively devalue" the benefit he derived from the wrongful occupation of the property. The phrase "subjective devaluation" was first used by Professor Peter Birks, and he explains the concept in Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1985) at p 109 as such:

> The critical distinction is between money and benefits in kind. Where the defendant received money, it will be impossible on all ordinary facts for him to argue that he was not enriched. For money is the very measure of enrichment. By contrast benefits in kind are less unequivocally enriching because they are susceptible to an argument which for convenience can be called 'subjective devaluation'. It is an argument based on the presmiss [*sic*] that benefits in kind have a value to a particular individual only so far as he chooses to give them value. What matters is his choice. The fact that there is a market in the good which is in question, or in other words that other people habitually choose to have it and thus create a demand for it, is irrelevant to the case of any one particular individual. He claims the right to dissent from that demand. Market value is not his value. Suppose that without his knowledge his car has been serviced or his roof mended. There is a market in car servicing and roof mending. It is easy to find the market value of work of that kind, what the going rate is between reasonable people. But he says that he had decided to go in for do-it-yourself or to take the risk of disaster by doing nothing. Indeed to make his point he does not even have to say that he had actually decided, let alone prove that he had decided, to dissociate himself from the particular demand. For his point is sufficiently made by saying that he has a continuing liberty to choose how to apply his particular store of

value and that in the case of this car-servicing or roof-mending he simply had not made his choice.

More recently, the concept was put in the following simple terms by Lord Nicholls of Birkenhead in the House of Lords in the case of *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners and another* [2008] 1 AC 561 at [119]:

> Here, as elsewhere, the law of restitution is sufficiently flexible to achieve a just result. To avoid what would otherwise be an unjust outcome the court can, in an appropriate case, depart from the market value approach when assessing the time value of money or, indeed, when assessing the value of any other benefit gained by a defendant. What is ultimately important in restitution is whether, and to what extent, the particular defendant has been benefited: see *Burrows, The Law of Restitution*, 2nd ed (2002), p 18. *A benefit is not always worth its market value to a particular defendant*. When it is not it may be unjust to treat the defendant as having received a benefit possessing the value it has to others. In Professor Birks's language, a benefit received by a defendant may sometimes be subject to "subjective devaluation": *An Introduction to the Law of Restitution* (1985), p 413. An application of this approach is to be found in the Court of Appeal decision in *Ministry of Defence v Ashman* [1993] 2 EGLR 102. ... [emphasis added]

56 The concept of subjective devaluation was applied by Hoffmann LJ in *Ashman*. There, after finding that the claimant was ordinarily entitled to the market rent and not merely the subsidised rent (see above at [46]), Hoffmann LJ went on to hold (at 201) that the defendant could subjectively devalue the benefit derived because the benefit was in fact "worth less to [the particular] defendant". Hoffmann LJ found two circumstances which justified such a conclusion. First, the defendant and her erstwhile husband had been occupying the premises at the subsidised rate. Secondly, the defendant had no choice but to stay in the premises until the local authority could re-house her. These factors led Hoffmann LJ to conclude that the benefit derived by the defendant was only worth the subsidised rate to her.

57 On the basis of the above, Dr Kaushik thus contends that by reason of him (or rather, his company I^{2}MS.Net) having paid the full rent of $9,000 to Razali, he is entitled to rely on the concept of subjective devaluation, and should be taken as valuing the benefit he received as nil. [note: 38] I do not think that Mr Lim fully grasps the concept. Quite the contrary to his submission, the fact that Dr Kaushik had paid (or caused his company I^{2}MS.Net to pay) the sum of $9,000 every month to Razali does not show that he valued the benefit any less. What it in fact does show, is that he *did* value the benefit at $9,000, because if that was not so, he would not have been so willing to part with that sum.

The change of position defence

The applicability of the change of position defence to a claim in trespass to land for restitutionary damages

58 Another corollary flowing from the characterisation of the present claim as restitutionary in nature is the applicability of certain defences. Specifically, the facts of the present case raise the possibility of the defence known as "change of position" being applicable. The defence was formally recognised in the English common law in the speech of Lord Goff of Chieveley in the seminal House of Lords decision in *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 ("*Lipkin Gorman*") at 579E–F:

> ... where an innocent defendant's position is so changed that he will suffer an injustice if called

> upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position. ...

The defence was accepted in Singapore in the case of *Seagate Technology Pte Ltd and another v Goh Han Kim* [1994] 3 SLR(R) 836 ("*Seagate Technology*") and then confirmed in *MCST Plan No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418 ("*De Beers*") at [35] as requiring that: (a) the person enriched had changed his position; (b) the change was *bona fide*; and (c) it would be inequitable to require the person enriched to make restitution or to make restitution in full.

59 I would note that all of the cases cited above are cases where the claim was founded on unjust enrichment. In the realm of restitution for an unjust enrichment, one can today confidently say that the change of position defence has been established as being a central and important defence. In the present case however, the claim is not a claim founded on unjust enrichment, but is a claim for trespass to land in which restitutionary damages are sought, *ie* a case of restitution for a civil wrong. This objection was raised by the Plaintiff in its submissions when it attempted to distinguish *Seagate Technology* by pointing out that the cause of action there was one for money had and received. [note: 39] Whether the defence of change of position applies to a claim in restitution for a civil wrong is an issue which has yet to be thoroughly considered by judicial opinion.

60 Objection to the application of the change of position defence to restitution for wrongs often begins with reference to a statement by Lord Goff in *Lipkin Gorman* (at 580C) that "it is commonly accepted that the defence should not be open to a wrongdoer". From this pithy line spawned the view that the defence is not available to claims for restitution for wrongs, because in such a case the defendant is necessarily a "wrongdoer". Judicial opinion on the question of whether the defence applies to restitution for wrongs is sparse. *Obiter dicta* by Lord Nicholls of Birkenhead in *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at [79] suggests that the defence is applicable to restitution for the tort of conversion, although the pronouncement is far from definitive.

61 Neither is there any unanimity in the academic writings on the issue. On the one hand, the weight of the academic opinion is that there should not be a blanket rule barring the application of the change of position defence to cases of restitution for wrongs. Professor Andrew Burrows ("Professor Burrows") in Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) ("*Burrows*") at p 699 suggests that this is so, and lists the leading writers of the 7thedition of *Goff and Jones on The Law of Restitution*, and others such as Professors Richard Nolan, Virgo and Andrew Tettenborn as holding the view that the defence applies to cases of restitution for wrongs. In essence, the academic opinion on this view starts from the premise that there are wrongs and then there are wrongs; not all wrongs are of the same quality. Where, therefore, the wrong was committed innocently, they do not see any objection to the application of the defence. The statement by Lord Goff was likely intended at wrongdoers who display a certain degree of moral turpitude and therefore are undeserving of the defence, although in such a case the defence would not be available in any case because such a defendant cannot be said to have behaved in good faith. As Professor Andrew Tettenborn explains in Andrew Tettenborn, *The Law of Restitution in England and Ireland* (Cavendish Publishing Limited, 2002) at p 278:

> With respect, [Lord Goff's statement] is a little difficult to understand; and indeed, whether such a blanket exception is either necessary or desirable is rather doubtful. *It is no doubt aimed at such unsympathetic characters as the thief, or the agent who takes a bribe, who later tries to avoid disgorging his ill-gotten gains by saying he has spent them. But such people are unlikely to*

be able to invoke the principle anyway, since however much they may have changed their position, they can hardly claim to have done so in good faith. It is hard to see why he should not have the benefit of the defence if the claimant chooses to waive the tort and sue for money had and received. [emphasis added]

62 On the other hand, Professor Burrows himself disagrees, and holds the view that the defence should not apply to restitution for wrongs (see *Burrows* at p 699–700). Professor Burrows takes the view that the defence of change of position is concerned with ensuring security for receipt. He thus says that this is a consideration relevant to a claim for unjust enrichment, which is a claim for the reversal of a transfer of value. In contrast, because in the case of a wrong the purpose of the law's response is to "remedy" it, the change of position defence cannot operate to counter the response as the rationale for the defence cannot outweigh the policies justifying restitution for a wrong.

63 I do not think that Professor Burrows' strict position is entirely justified. The law should not be so inflexible as to completely exclude the defence. It may be true that there may be certain kinds of wrongs which are of such a nature that the defence ought not to apply even to innocent wrongdoers. In such a case, the rationale of the defence simply cannot outweigh the policy for remedying the wrong. However, this may not necessarily be so for all kinds of wrongs. Professor Elise Bant ("Professor Bant") adopts such a view which can be described as more nuanced. In Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) at p 171, she starts by saying:

> We have seen in cases of defendant-instigated changes of position, the change of position defence operates to protect a defendant from a claim in restitution where he has irreversibly changed his position in reliance of his receipt. It prevents the defendant from being put in a worse (including entirely different) position than he occupied prior to his receipt. In this way, the defence supports and reflects the restricted aims of restitution. Restitution does not aim to impose loss on a defendant, to punish him or to require him to disgorge profits. Its aim is limited to reversing transfers of value so as to restore the parties to the status quo ante. In that context, the defence operates to ensure that, in circumstances where a defendant's position has irreversibly changed, restitution does not operate contrary to its underlying purpose.

Then, applying the nuance Professor Burrows appears to have missed, she says:

> Seen in this light, and *subject to any overriding policy considerations*, there is no reason why the defence should not apply to claims for restitution arising from a strict liability wrong or, for that matter, a claim for restitution made to vindicate a claimant's continuing proprietary interest in a benefit transferred to a defendant. [emphasis added in italics]

What then are these policy considerations and when do they override? As examples, Professor Bant suggests two areas of law (at 210):

> For example, as we saw earlier, allowing the change of position defence in cases where the claimant's action is based on their vested proprietary right to the benefit (such as claims of conversion, or claims to vindicate a pre-existing property right) may be regarded as undermining the law's traditional protection of proprietary rights. Likewise, the overriding need to deter breaches of fiduciary duty may preclude the application of the defence, even where the breaching fiduciary acted with the best of intentions and ignorant of their breach.

She concludes accordingly:

> In the absence of clear evidence of a shift in judicial attitude to the balance of policy interests in

these cases, it would be premature to say that the change of position defence should apply to these kinds of claims. *This conclusion does not mean that the defence can never apply in respect of claims for restitution for wrongs, merely that each category of wrong must be individually examined to determine whether permitting the defence would undermine or stultify the law's prohibition*. [emphasis added]

64 I agree. I do not take the view that there should be a blanket ban on the defence of change of position applying to all cases of restitution for wrongs. Where the wrong involves some moral turpitude, the defence would ordinarily not apply in any case because such a defendant cannot be said to have acted in good faith. Where there is no moral turpitude, but the wrong involved is one which the law has prescribed the remedy for a particular policy reason, then the defence also ought not to apply, but this is a question to be determined when each particular case arises to be decided.

65 In the present case, I do not see why the defence should not apply to a restitutionary claim for trespass to land. If the case is one where the defendant displayed some moral turpitude, such as if he committed the wrongful occupation with knowledge of and blatant disregard for the rights of the proprietor of the land, the defence would ordinarily fail for want of good faith. However, I do not think that there is any overriding policy rationale requiring the remedying of the wrong of trespass to land with the award of restitutionary damages that would be stultified by the application of the defence of change of position to it. I am therefore of the view that the defence of change of position is applicable to a claim in trespass to land where the damages sought are of a restitutionary nature.

Does the defence of change of position apply in the present case?

66 It is not disputed between the parties that during the period of December 2008 to March 2011, I^2MS.Net paid a monthly sum of $9,000 to Razali. This sum amounted to a total of $252,000 being what it thought was rent for 28 months. In addition to this, I^2MS.Net paid to Razali a sum of $18,000 being what it thought constituted security deposit of 2 months' rent. From Dr Kaushik's point of view, he was entitled to have his employer I^2MS.Net pay for the lease of his accommodation in Singapore, such entitlement being his right under his employment contract. Does, therefore, the fact of the payment of these sums amount to a change of position by Dr Kaushik such as to disentitle the Plaintiff to the restitutionary damages it is trying to claim in respect of the wrongful occupation? For convenience, the elements of the defence as set out in *De Beers* are set out as follows:

(a) the person enriched had changed his position;

(b) the change was *bona fide*; and

(c) it would be inequitable to require the person enriched to make restitution or to make restitution in full.

67 Needless to say, there is a requirement of a causative link between the receipt of the gain (or benefit in kind) in question and the change of position. In *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another suit* [2009] 4 SLR(R) 788 at [329] (upheld on appeal to the Court of Appeal), Belinda Ang J held that the causative test is a "but for" test: the defendant needs to satisfy the court that but for the receipt of the benefit, it would not have changed its position. I am satisfied that the causative test is met in this case. The evidence is clear that resulting from the receipt of the benefit in question, that is, the benefit of living in the Property, Dr Kaushik directed his employer I^2MS.Net to pay a sum of $9,000 to Razali each month. Paraphrased, while Dr Kaushik had benefitted from his occupation of the Property,

his position changed when his entitlement to having his accommodation paid for by I^2MS.Net was exhausted. By directing I^2MS.Net to pay the $9,000 monthly rent, albeit to the fraudster Razali, Dr Kaushik can be said to be exhausting his right under his employment contract. If not for the fact that he had enjoyed the benefit of living in the Property, he would not have so directed the company. The causative test is therefore plainly satisfied. In respect of the Plaintiff's claim for damages for trespass to land for Dr Kaushik's wrongful occupation of the Property for the period of December 2008 to March 2011, I find that Dr Kaushik had changed his position by causing his company to pay the sum of $9,000 monthly to Razali.

68 The Plaintiff denies that Dr Kaushik in changing his position had done so in good faith. The Plaintiff pointed me to the *Seagate Technology*, where the Court of Appeal (at [32]–[34]), in considering the meaning of good faith in the context of the present defence, first accepted that knowledge of the facts entitling the plaintiff to restitution would bring the defendant's *bona fides* into question, thus disentitling him from relying on the defence. Then, the Court of Appeal drew reference from the different degrees of knowledge a defendant may have, and adopted Millett J's analysis in *Agip (Africa) Ltd v Jackson* [1990] Ch 265 ("*Agip (Africa)*"), a case on accessory liability for breach of trust, that "the true distinction is between honesty and dishonesty". I agree that dishonesty would be a state of mind which would disqualify a defendant from relying on the change of position defence.

69 However, the meaning of "dishonesty" in the law of accessory liability for breach of trust, or what is now known as dishonest assistance, was a matter of some controversy and turbulence for some time. Following *Agip (Africa)*, the Judicial Committee of the Privy Council decided *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 in which the meaning of dishonesty was explored. Subsequently, in *Twinsectra Ltd v Yardley and Others* [2002] 2 AC 164 ("*Twinsectra*"), the meaning of dishonesty was thrown into further confusion, when Lord Hutton held (at 172) that test for dishonesty was a "combined test" which has both an objective and a subjective element, "and which requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was *dishonest by the ordinary standards of reasonable and honest people* and that *he himself realised that by those standards his conduct was dishonest*" [emphasis added]. Today, the authority for what constitutes bad faith for the purposes of the change of position defence is widely considered to be found in the first instance judgment of Moore-Bick J in *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 1)* [2002] 2 All ER (Comm) 705 ("*Niru Battery*") (upheld on appeal to the Court of Appeal in *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2004] 2 WLR 1415). In *Niru Battery*, the claimants, Bank Sepah Iran and its customer Niru Battery paid the defendant bank Credit Agricole Indosuez US$5.8m under a documentary credit where a false bill of lading had been presented. Moore-Bick J found that the defendant bank's manager, one Mr Francis, must have at least had strong suspicion that the there was a mistake in the money being paid to it. Nevertheless, Mr Francis paid the money away without making any further enquiries. The question thus arose whether the defendant bank had paid the money away in good faith for the purposes of the change of position defence. Counsel for the defendant bank in *Niru Battery* argued that a lack of good faith meant the same as dishonesty, and so the *Twinsectra* test should apply. In other words, the defendant should be entitled to the defence unless he has acted in a way which *he knows* ordinary people would regard as dishonest, *ie* comprising a subjective element. Given the subjective element in the test of dishonesty in *Twinsectra*, Moore-Bick J held that a lack of good faith for the purposes of the change of position defence must encompass more than dishonesty in the *Twinsectra* sense, and explained (at [135]):

> In the light of these observations, and having regard to the nature of the principles underlying the right to restitution in the case of a mistaken payment and the defence of change of position, I do not think that dishonesty in the sense identified in *Twinsectra Ltd v Yardley* is the sole criterion of the right to invoke the defence of change of position. I do not think that it is

desirable to attempt to define the limits of good faith; it is a broad concept, the definition of which, insofar as it is capable of definition at all, will have to be worked out through the cases. *In my view it is capable of embracing a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty itself.* ... Where he knows that the payment he has received was made by mistake, the position is quite straightforward: he must return it. ... Greater difficulty may arise, however, in cases where the payee has grounds for believing that the payment may have been made by mistake, but cannot be sure. In such cases good faith may well dictate that an enquiry be made of the payer. The nature and extent of the enquiry called for will, of course, depend on the circumstances of the case, but *I do not think that a person who has, or thinks he has, good reason to believe that the payment was made by mistake will often be found to have acted in good faith if he pays the money away without first making enquiries of the person from whom he received it*. [emphasis added]

70 Since the decisions in *Twinsectra* and *Niru Battery*, the meaning of dishonesty in the context of liability for dishonest assistance has been clarified by the Judicial Committee of the Privy Council in *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* [2006] 1 All ER 333 ("*Barlow Clowes*"). In particular, Lord Hoffmann made clear that the test was an objective one, and one which does not require the defendant to have "reflections about what [the] normally acceptable standards were". This largely objective test has been accepted by the Singapore Court of Appeal in *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 ("*George Raymond Zage III*") at [22], and the test for dishonesty is simply that "for a defendant to be liable for knowing assistance, he must have such knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them".

71 In light of the clarification in *Barlow Clowes*, I am of the view that the meaning of lack of good faith as elucidated by Moore-Bick J in *Niru Battery* is in fact not inconsistent with the meaning of dishonesty for the purposes of liability for dishonest assistance for breach of trust. For that reason, I will adopt the *Barlow Clowes* definition of dishonesty (as accepted in *George Raymond Zage III*) for the test of good faith for the change of position defence. A defendant will be held to have had a lack of good faith if he acts in a commercially unacceptable way, and such behaviour is made out if he fails to query the irregular shortcomings of the transaction that ordinary honest people would so query.

72 The Plaintiff suggests that Dr Kaushik in causing his company to pay the moneys to Razali had not acted in good faith mainly, because, it says, being a "streetwise and experienced corporate professional", he ought to have done more checks into who Razali really was. I do not accept that Dr Kaushik's conduct in the present case amounted to bad faith so as to disentitle him from relying on the defence. In the present case, it was far from patently obvious that Razali was a fraudster, therefore, Dr Kaushik's failure to do further checks which perhaps would have revealed Razali's fraud cannot be said to fall short of the standards of ordinary honest people. In fact, Dr Kaushik could be said to have met the standards of honest and reasonable men when he performed searches on the Property and insisted that the Tenancy Agreement be signed by Madam Ching herself, notwithstanding that it turned out that Razali forged the signature. Although it is possible to verify the signature by requesting for and checking against documents filed with the Accounting & Corporate Regulatory Authority where directors' signatures would appear, I do not think that that the law expects an honest and reasonable individual consumer such as Dr Kaushik to undertake such an extensive inquiry. Dr Kaushik had also requested a letter of authorisation from the landlord from Razali before agreeing to pay the monthly rent to him. Dr Kaushik honestly believed that he had obtained a valid lease from the Plaintiff. With hindsight, Dr Kaushik perhaps should have visited the Plaintiff at its

registered office and verified the letter of authorisation or he should have called up the Plaintiff's office number to check with another person, who is not Razali, as to whether the lease was a valid lease granted by the Plaintiff. At its highest, all that Dr Kaushik's conduct can be described as is a suggestion that he was negligent. Negligent or careless conduct does not amount to dishonesty, even applying an objective test. I do not think that Dr Kaushik's conduct in the circumstances amounted to bad faith. In any case, the authorities also confirm that a defendant's negligence is generally regarded as irrelevant to the availability of the change of position defence: see *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 at [45].

73 In the result, I am satisfied that Dr Kaushik had changed his position as a result of the benefit he received from occupying the Property for the period of December 2008 to March 2011. He had done so when he caused I^2MS.Net to pay a monthly sum of $9,000 to Razali, such payment being his entitlement under his employment contract with the company. His position changed from being entitled to accommodation under his employment contract to having exhausted that entitlement through the payment of $9,000 for what he thought was a valid lease with the Plaintiff for the Property. He had also done so in good faith. Dr Kaushik was as much a victim of Razali's fraud as the Plaintiff was. Given all the circumstances, I am of the view that it would be inequitable to require Dr Kaushik make restitution to the Plaintiff for the occupation of the Property for the said period. Accordingly, although Dr Kaushik is liable in trespass to land for the wrongful occupation of the Property from December 2008 to March 2011, the Plaintiff is not entitled to any restitutionary damages for this period.

74 As to Dr Kaushik's occupation of the Property from April to September 2011, he is not entitled to rely on the change of position defence. For this period, any monies which were paid were in fact paid to the Plaintiff. In any event, by this time, Dr Kaushik had become aware of the fraud of Razali, and so having such knowledge, even if there was a change of position, it cannot be considered to have been a *bona fide* change of position. Neither can he rely on the $18,000 being the 2 months' deposit he had paid to Razali in December 2008. There was no causative link between the payment of these deposit moneys to Razali in December 2008 and the benefit received in the period of April to September 2011. The defence does not apply. The Plaintiff is entitled to the market rent for Dr Kaushik's wrongful occupation of the Property during this period of 6 months: such market rent amounts to $54,000. However, in respect of this $54,000, Dr Kaushik has already paid this sum to the Plaintiff (see [14] above). As confirmed by Mr Balasubramaniam, the Plaintiff will give Dr Kaushik credit for this payment. Dr Kaushik consequently has already made restitution and does not remain liable to the Plaintiff for anything.

75 There also remains Dr Kaushik's occupation of the Property from 1 October 2011 to 6 October 2011 when he returned the keys to the Plaintiff. For Dr Kaushik's occupation of the Property during this period, being a period of 5 days, he is also not entitled to rely on the defence of change of position. Neither has he already paid any money to the Plaintiff for this period of 5 days for which he should now be given credit. To this extent, Dr Kaushik is liable to the Plaintiff in damages amounting to the market rent (at $9,000 per month) for these 5 days. This amounts to $1,451.61.

Conclusion

76 The tort of trespass to land is a tort which is actionable *per se*; damage need not be proven for the tort to be made out. Accordingly, I find that Dr Kaushik had committed the tort of trespass to land during the entire relevant period. However, for the reasons I have stated, I hold that he is only liable in damages to the Plaintiff in the sum of $1,451.61 and interest thereon. I will hear parties on costs if these cannot be agreed.

[note: 1] Dr Kaushik's AEIC at para 8.

[note: 2] Dr Kaushik's AEIC at para 8.

[note: 3] Dr Kaushik's AEIC at para 9–10.

[note: 4] Dr Kaushik's AEIC at para 10.

[note: 5] Dr Kaushik's AEIC at para 11–12.

[note: 6] Dr Kaushik's AEIC at para 12.

[note: 7] Dr Kaushik's AEIC at para 11.

[note: 8] Dr Kaushik's AEIC at para 13.

[note: 9] NE 6/11/12, 162–163.

[note: 10] Dr Kaushik's AEIC at para 14.

[note: 11] Dr Kaushik's AEIC at para 16.

[note: 12] Dr Kaushik's AEIC at para 17.

[note: 13] Dr Kaushik's AEIC at para 19.

[note: 14] Dr Kaushik's AEIC at para 20.

[note: 15] Dr Kaushik's AEIC at para 24.

[note: 16] Dr Kaushik's AEIC at para 24.

[note: 17] Dr Kaushik's AEIC at para 26.

[note: 18] Dr Kaushik's AEIC at para 29; Annie Lim's AEIC at para 17.

[note: 19] Annie Lim's AEIC at para 13.

[note: 20] Annie Lim's AEIC at para 17.

[note: 21] Dr Kaushik's AEIC at para 32–35.

[note: 22] Dr Kaushik's AEIC at para 39.

[note: 23] Defendant's Closing Submissions at para 89.

[note: 24] Dr Kaushik's AEIC at para 16–17.

[note: 25] Defendant's Closing Submissions at para 101.

[note: 26] Dr Kaushik's AEIC at para 21.

[note: 27] Dr Kaushik's AEIC at para 22.

[note: 28] Defendant's Closing Submissions at para 181.

[note: 29] Defendant's Closing Submissions at para 121.

[note: 30] Defendant's Closing Submissions at para 124, making reference to paras 78–88.

[note: 31] Defendant's Closing Submissions at para 81.

[note: 32] N/E 5/11/12, 38:23–25.

[note: 33] N/E 5/11/12, 76:4–79:5.

[note: 34] N/E 5/11/12, 79:1–5, 92:23, 122:20.

[note: 35] NE 5/11/12, 104, 117–120.

[note: 36] Further and Better Particulars (served pursuant to Order of Court dated 14th November 2011) (30th November 2011) at para 2(a).

[note: 37] Defendant's Closing Submissions at para 171.

[note: 38] Defendant's Closing Submissions at para 167.

[note: 39] Plaintiff's Written Submissions No 2 at para 13–14.

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