

**Berjaya Times Square Sdn Bhd v Twingems Sdn Bhd & Anor  
and another action**

HIGH COURT (KUALA LUMPUR) — CIVIL ACTION NOS S-22-550  
OF 2009 AND S-22-482 OF 2005  
ASMABI MOHAMAD JC  
24 JANUARY 2012

*Landlord and Tenant — Determination — Fixed term — Tenant in three-year fixed term tenancy quit demised premises prematurely — Whether tenant liable for monthly rentals and service charges for unexpired term — Whether liability for such payments constituted liquidated damages — Whether landlord had duty to mitigate losses — Whether tenant entered into tenancy agreement based on plaintiff's misrepresentation — Whether defence of misrepresentation an afterthought*

The first defendant ('Twingems'), of which the second defendant ('Ng') was director, entered into a three-year fixed term tenancy agreement with the proprietor of Kuala Lumpur's Berjaya Times Square ('the plaintiff') to rent space in the Square for a food and beverage outlet. However, after only 77 days of operating its business at the demised premises ('the premises'), Twingems closed its business and sought the plaintiff's agreement to a mutual termination of the tenancy agreement. The plaintiff did not agree and requested Twingems to resume its business and also pay all outstanding rentals and payments that were due. Twingems, however, returned the keys to the premises to the plaintiff and abandoned the premises after moving all its belongings out. The plaintiff gave Twingems notice of its liability for unilaterally terminating the agreement and fixed a date for both parties to inspect the premises. However, on the scheduled inspection date, no representative from Twingems turned up. The plaintiff commenced the instant action to recover all amounts due under the tenancy agreement including amounts payable under the unexpired term of the tenancy. It also sued Ng on his letter of guarantee and indemnity whereunder he had guaranteed Twingem's due performance of its obligations under the agreement and had agreed to indemnify the plaintiff for any breach or non-performance by the company. The defendants contended that they entered into the tenancy agreement in reliance upon the false promises and misrepresentations of the plaintiff's agents or servants who had made out the premises to be a good location for the defendants' business. However, as it turned out, most of features promised by the plaintiff to complement the defendants' business were not built or provided resulting in few people frequenting the area where the premises was located. The defendants' business suffered as a result. The defendants, inter alia, claimed that as the plaintiff retook vacant possession of the premises within a short period after the tenancy

A term had commenced, it had a duty to mitigate its losses and could not claim for all payments due under the unexpired term. The defendants counterclaimed for the return of various deposits and other payments it had made to the plaintiff under the agreement saying it was 'unfair and obnoxious' for the plaintiff to forfeit them.

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**Held**, allowing the claim and dismissing the counterclaim with costs:

C (1) The defendants did not call any witnesses to corroborate their allegation that Twingems had entered into the tenancy agreement as a result of the misrepresentations made by the plaintiff's agents or servants (see para 29).

D (2) The issue of misrepresentation was never raised in any of the correspondence or other contemporaneous documents between the parties. The defendants had merely proposed for an early termination of the tenancy agreement and had never cited the alleged misrepresentations as being the core reason for the termination. It was obvious the issue raised was an afterthought and that it ought to be dismissed by the court (see paras 41–42).

E (3) Clause 26 of the tenancy agreement, also known as the 'entire agreement clause' clearly excluded any representations, undertakings and negotiations made prior to the execution of the tenancy agreement. The clause was binding on the defendants and estopped them from denying their obligations under the tenancy agreement and letter of guarantee (see paras 37 & 40).

F (4) The losses suffered by the plaintiff owing to non-performance by Twingems of its obligations under the tenancy agreement were actual losses. Pursuant to cl 10(2) of the agreement, the plaintiff was entitled to claim for the monthly rentals and service charges for the unexpired term of the tenancy as liquidated damages. The plaintiff had no obligation to mitigate its losses and its claim was valid and proper (see paras 51–52).

G (5) As Twingems had unilaterally terminated the tenancy agreement prematurely, the plaintiff was entitled under cll 4(3), 4(7) and 10(2) of the tenancy agreement to forfeit the security and utility deposits that had been paid. The defendants' counterclaim was therefore without merits (see para 61).

**[Bahasa Malaysia summary**

I Defendan pertama ('Twingems'), di mana defendan kedua ('Ng') adalah pengarah, memasuki tiga perjanjian penyewaan tetap tiga tahun dengan tuan punya Berjaya Times Square, Kuala Lumpur ('plaintif') untuk menyewa tempat di Square untuk kedai makanan dan minuman. Walau bagaimanapun selepas hanya 77 hari menjalankan perniagaannya di premis yang disewakan

(‘premis-premis tersebut’), Twingems menutup perniagaannya dan memohon persetujuan plaintif untuk penamatan bersama perjanjian penyewaan tersebut. Plaintif tidak bersetuju dan meminta Twingems menyambung semula perniagaannya dan juga membayar kesemua sewa tertunggak dan bayaran-bayaran yang kena dibayar. Twingems, walau bagaimanapun memulangkan kunci-kunci kepada premis tersebut kepada plaintif dan meninggalkan premis tersebut selepas mengeluarkan kesemua barang-barang kepunyaannya. Plaintif memberi notis kepada Twingems mengenai liabilitinya kerana menamatkan perjanjian secara unilateral dan menetapkan tarikh untuk kedua-dua pihak memeriksa premis tersebut. Walau bagaimanapun, pada tarikh pemeriksaan dijadualkan, tiada wakil daripada Twingems hadir. Plaintif memulakan tindakan ini untuk mendapatkan kesemua wang yang patut diterima di bawah perjanjian penyewaan termasuk jumlah yang patut dibayar di bawah terma penyewaan yang belum tamat. Ia juga menyaman Ng atas surat jaminan dan indemnitinya di mana dia menjamin pelaksanaan sepatutnya oleh Twingem terhadap tanggungjawabnya di bawah perjanjian dan telah bersetuju untuk membayar ganti rugi kepada plaintif bagi apa-apa kemungkiran atau ketidaklaksanaan oleh syarikat. Defendan-defendan berhujah bahawa mereka memasuki perjanjian penyewaan bergantung ke atas perjanjian dan misrepresentasi palsu ejen-ejen atau pembantu-pembantu plaintif-plaintif yang telah menyatakan bahawa premis tersebut adalah lokasi yang baik untuk perniagaan defendan-defendan. Walau bagaimanapun, seperti yang ternyata, kebanyakan kelengkapan-kelengkapan yang dijanjikan oleh plaintif untuk melengkapi perniagaan defendan-defendan tidak dibina atau diperuntukkan mengakibatkan hanya beberapa orang sahaja yang berkunjung di kawasan di mana premis-premis tersebut terletak. Akibatnya perniagaan defendan-defendan terjejas. Defendan-defendan, antara lain, menuntut bahawa memandangkan plaintif mengambil semula milikan kosong premis-premis tersebut dalam tempoh masa yang singkat selepas terma penyewaan bermula, ia mempunyai tanggungjawab untuk mengurangkan kerugiannya dan tidak boleh menuntut untuk kesemua bayaran yang patut diperolehi di bawah terma yang belum tamat. Defendan-defendan menuntut balas untuk pemulangan pelbagai deposit dan bayaran-bayaran lain yang ia buat kepada plaintif di bawah perjanjian dengan menyatakan yang ia adalah ‘unfair and obnoxious’ jika plaintif merampasnya.

**Diputuskan**, membenarkan tuntutan dan menolak tuntutan balas dengan kos:

- (1) Defendan-defendan tidak memanggil mana-mana saksi untuk meyokong dakwaan mereka bahawa Twingems telah memasuki perjanjian penyewaan akibat misrepresentasi yang dibuat oleh ejen-ejen atau pembantu-pembantu plaintif (lihat perenggan 29).
- (2) Isu misrepresentasi tidak pernah dibangkitkan di dalam mana-mana surat-menyurat atau dokumen-dokumen semasa yang lain di antara

- A pihak-pihak. Defendan-defendan hanya mencadangkan untuk penamatan awal perjanjian penyewaan dan tidak pernah merujuk misrepresentasi yang didakwa tersebut sebagai alasan utama untuk penamatan tersebut, adalah jelas isu yang dibangkitkan adalah yang difikirkan kemudian dan bahawa ia patut ditolak oleh mahkamah (lihat perenggan 41–42).
- B
- (3) Klausula 26 perjanjian penyewaan, juga dikenali sebagai ‘entire agreement clause’ jelas mengecualikan apa-apa representasi, aku janji dan perundingan yang dibuat sebelum pelaksanaan perjanjian penyewaan. Klausula mengikat defendan-defendan dan estop mereka daripada menafikan tanggungjawab mereka di bawah perjanjian penyewaan dan surat jaminan (lihat perenggan 37 & 40).
- C
- (4) Kerugian yang dialami oleh plaintif akibat ketidaklaksanaan oleh Twingems terhadap tanggungjawabnya di bawah perjanjian penyewaan adalah kerugian-kerugian sebenar. Berikutan klausula 10(2) perjanjian, plaintif berhak untuk menuntut bagi sewa bulanan dan caj perkhidmatan untuk terma penyewaan yang belum tamat sebagai ganti rugi yang ditetapkan. Plaintif tidak bertanggungjawab untuk mengurangkan kerugiannya dan tuntutan adalah sah dan betul (lihat perenggan 51–52).
- D
- E
- (5) Memandangkan Twingems telah menamatkan secara unilateral perjanjian penyewaan secara pramatang, plaintif berhak di bawah klausula-klausula 4(3), 4(7) dan 10(2) perjanjian penyewaan untuk merampas jaminan dan deposit utiliti yang telah dibayar. Tuntutan balas defendan-defendan oleh itu tanpa merit (lihat perenggan 61).]
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### Notes

For cases on fixed term, see 9 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 802–805.

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### Cases referred to

*Amanah Butler (M) Sdn Bhd v Yike Chee Wah* [1997] 1 MLJ 750; 1997 2 CLJ 79, CA (refd)

H *Bank Kerjasama Rakyat Malaysia Berhad v Sea Oil Mill (1979) Sdn Bhd & Anor* [2010] 2 MLJ 740; [2010] 1 CLJ 793, FC (refd)

*Berjaya Times Square Sdn Bhd v Focus point Vission Care Sdn Bhd & 2 Ors* (Civil Suit No S7–22–1463 of 2007) (refd)

I *Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd* [1997] 1 MLJ 587, CA (refd)

*Johor Coastal Development Sdn Bhd v Constrajaya Sdn bhd* [2009] 3 MLJ 349, CA (refd)

*Keng Huat Film Co v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243, FC (refd)

- Khaw Poh Chuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761, FC (refd) A
- Koh Siak Poo v Perakayan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164, SC (refd)
- Macronet Sdn Bhd v RHB Bank Sdn Bhd* [2002] 3 MLJ 11, HC (refd)
- Ngow Maan v United Orix Leasing Bhd* [1997] MLJU 433; [1997] 4 CLJ Supp 264, HC (refd)
- Palmerstone Holdings Sdn Bhd v Neo Cheng Soon & Anor* [2007] 6 MLJ 281, HC (refd) B
- RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188, FC (refd)
- Ranjit Kaur alp S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1, FC (refd) C
- State Government of Perak v Muniandy* [1986] 1 MLJ 490 (refd)
- Sun Properties Sdn Bhd v Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711, SC (refd)
- Teh Wan Sang & Sons Sdn Bhd v See Teow Chuan* [1984] 1 MLJ 130, FC (refd)
- Tractors Malaysia Bhd v Kumpulan Pembinaan Malaysia Sdn Bhd* [1979] 1 MLJ 129, FC (refd) D
- White and Carter (Councils) Ltd v McGregor* [1962] AC 413, HL (refd)
- Wong Kim Wah v The Government of the State of Pahang & Anor* [2011] 8 MLJ 856, HC (refd)
- Yap Nyo Nyok v Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250, HC (refd) E

#### Legislation referred to

Civil Law Act 1956 s 4(3)

Contracts Act 1950 ss 17, 30, 75, 91

Evidence Act 1950 ss 81, 91, 92 F

*(Thanagaraj & Associates) for the plaintiff.*

*Yiew Voon Li (CH Yeoh & Yiew) for the defendant.*

#### Asmabi Mohamad JC:

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#### INTRODUCTION

[1] The plaintiff had commenced Civil Action No S22–550 of 2009 against the first defendant for breach of a tenancy agreement dated 15 October 2003 (‘the tenancy agreement’) while its claim against the second defendant was for indemnity pursuant to a letter of guarantee and indemnity dated 12 July 2003 executed by the second defendant in favour of the plaintiff where the second defendant had guaranteed to indemnify the plaintiff against any breach or non-performance of the tenancy agreement by the first defendant. H I

[2] Civil Action No S22–482 of 2005 was in relation to the first and second defendants’ counterclaim against the plaintiff for the return of RM84,465.90 which comprised of special damages for three months’ security deposit, deposit

**A** for utilities, water and renovation and post box amounting to RM61,357.80 and also advance rental for one month, stamp duty for tenancy agreement, administrative charges, 5% government service tax, advertisement fund and services charge amounting to RM23,108.10.

**B** [3] As the facts in these two cases arose from the same transaction parties have agreed for these two civil actions to be consolidated and heard together and disposed of herein. The plaintiff had initially commenced Civil Action No 22–282 of 2005 which was subsequently withdrawn leaving only the counterclaim to be dealt with by this court. The plaintiff then refiled its claim against the defendants vide Civil Action No S22–550 of 2009.

**C**

[4] The plaintiff claimed for:

**D** (a) the rent from 18 January 2004 until 17 June 2007, service and advertisement charges from 1 March 2004 until 17 June 2004 and late payment interest allegedly owing from 25 January 2004 till 17 June 2004 and 18 June 2004 until 31 December 2007 respectively (*para 12 of the SOC*); and

**E** (b) the rent and service charges on 1 June 2004–9 November 2006 that was the period the plaintiff had retaken vacant possession of the premises to the date of the alleged expiry of the tenancy and late payment from 18 June 2004–31 December 2007 (*para 13 of the SOC*)

**F** [5] These cases proceeded by way of a full trial and the plaintiff had called two witnesses while the defendant called one witness. After giving full consideration to the evidence, both documentary as well as testimonial, and the submissions by learned counsel for the respective parties I find that the plaintiff had succeeded to prove its case against the first and second defendants on the balance of probabilities. Hence I entered judgment for the plaintiff as prayed in the statement of claim ('SOC') with costs. I had also dismissed the defendants' counterclaim with costs. After a short submission on the issue of costs I ordered the defendants to pay the plaintiff RM30,000 as costs for both these suits.

**G**

**H** [6] The defendants being dissatisfied with the said decisions appealed to the Court of Appeal against the whole of the said decisions.

#### THE DOCUMENTS

**I** [7] At the outset of the trial parties have agreed for the following documents to be used:

Description	Document
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Bundle of Pleadings	'IP'	A
Common Bundle of Document (A)	'A'	
Common Bundle of Document (B)	'B'	
Common Bundle of Document (C)	'C'	
Issues To Be Tried	'D'	B
Statements of Agreed Facts	'E'	
Summary of Case for the Plaintiff	'F'	
Summary of case for the Defendants	'G'	C

#### THE ISSUES TO BE TRIED

**[8]** Both parties to the suit had raised (13) thirteen issues for this court's consideration as shown in document 'D'. I have summarised the broad issues as follows:

- (a) whether the first defendant had entered into the tenancy agreement as a result of the misrepresentation from the plaintiff and or its agent and or its representative;
- (b) whether pursuant to the 'entire agreement clause' stated in 'letter of offer' and in cl 26 of the tenancy agreement the defendant is not entitled to raise the issue of misrepresentation;
- (c) whether the letter of guarantee and indemnity dated 12 July 2003 is void because the name of the first defendant was incorporated without the permission of the second defendant because it was obtained by fraudulent means under s 17 of the Contracts Act 1950;
- (d) whether the tenancy agreement is void for uncertainty under s 30 of the Contracts Act 1950;
- (e) whether the plaintiff was entitled to claim for rental for unexpired term of the tenancy agreement and or whether the plaintiff had a duty to mitigate its losses;
- (f) whether the plaintiff is entitled to commence this action without any notice of reassignment of its rights under the said tenancy from AmMerchant Bank Bhd to the plaintiff which is a mandatory requirement under s 4(3) of the Civil Law Act 1956 to the defendant; and
- (g) whether the plaintiff must return the sum of RM84,465.90 which was paid by the first defendant.

#### CASE FOR THE PLAINTIFF

**[9]** The plaintiff is the proprietor of a complex known as Berjaya Times

**A** Square which address is at No 1, Jalan Imbi, 55100 Kuala Lumpur. Pursuant to a letter of offer dated 18 June 2003 (*pp 5–12 of document B*) the plaintiff had offered to let Lot No 03-87, Third Floor of the Berjaya Times Square at the above mentioned address, measuring 1,362 sq ft ('the premises') to the first defendant for a fixed period of three years commencing from 10 November 2003–9 November 2006 at a monthly rental of RM14,982 per month with a service charge of RM1,362 per month and advertising contribution of RM0.30 per square foot per month.

**C** [10] The tenancy agreement was executed by the plaintiff and the first defendant on 15 October 2003 (*pp 16–84 of document B*). Prior to the execution of the tenancy agreement the first defendant submitted a letter of offer to lease dated 18 June 2003 ('offer to lease') (*p 4 of bundle B*). Vide a letter dated 18 June 2003 the plaintiff offered the said premises for tenancy for the initial period of three years with effect from the date of vacant possession while the payment of rental was to take effect after the expiration of the fitting out period.

**E** [11] On 12 July 2003 the second defendant who was the director of the first plaintiff executed a letter of guarantee and indemnity ('letter of guarantee' *at pp 85–86 of document B*) in favour of the plaintiff whereby the second defendant had guaranteed to jointly and irrevocably guarantee the due performance of all the obligations of the first defendant under the tenancy agreement. Further pursuant to the said letter of guarantee the second defendant had agreed to indemnify the plaintiff against any breach or non-performance of the tenancy agreement by the first defendant

**G** [12] On 3 November 2003 the plaintiff surrendered vacant possession of the said premises (*pp 89–90 of document B*) to the first defendant. After commencing its business at the said premises for about three months, on 27 February 2004 the first defendant had caused a letter to be sent to the plaintiff notifying the plaintiff of its intention to terminate the tenancy agreement earlier than the three years provided under the tenancy agreement (*p 91 of bundle B*). However on 24 March 2004 the plaintiff had issued a notice (*pp 92–94 of document B*) to the first defendant requesting the first defendant to resume its business and pay all outstanding rentals and payments due to the plaintiff.

**I** [13] Instead of adhering to the plaintiff's request to resume its business the first defendant opted to remove all equipments and movable items from the said premises and abandoned the said premises.

[14] Pursuant to a letter dated 24 May 2004 (*pp 95–96 of document B*), the plaintiff notified the first defendant that it had unilaterally terminated the



tenancy agreement and as such the first defendant shall be liable to pay damages pursuant to cl 10(2) of the tenancy agreement. The plaintiff had also notified the first defendant that a joint inspection of the premises would be conducted on 7 June 2004 at 11am. A

[15] Despite being notified of the joint inspection the first defendant did not show up. On 17 June 2004 the plaintiff lodged a police report (*p 4 of document C*). B

[16] The plaintiff then commenced this action against the first defendant as the tenant of the said premises and the second defendant as the guarantor who had guaranteed the due performance of the tenancy agreement by first defendant. In its SOC the plaintiff claimed for the sum of RM111,094.95 the sum owed prior to taking over vacant possession and thereafter the sum of RM669,095.72. The details of the plaintiff's claim covering the period the plaintiff re-took vacant possession on 17 June 2004 until 9th November 2006 are as shown in *exh P3 (p 13 document C)*. C  
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#### CASE FOR THE DEFENDANTS

[17] The second defendant (*DW1*), who was the director of the first defendant had come across an advertisement in the local newspaper that the plaintiff was opened to tenants. *DW1* who was keen to start a F & B business then contacted the plaintiff's marketing officer by the name of Wayne Wong to make inquiries about the plaintiff. The said Wayne Wong who had impressed upon *DW1* of the many virtues of the plaintiff and its prospect as a F & B outlet had then advised *DW1* to write to her to explain the nature of *DW1*'s business if *DW1* was really interested to operate a business since there were only 65 food outlets available for tenancy. In addition to that Wayne Wong had also told *DW1* to declare in the said letter that he was very interested to commence business at the said outlets (*see pp 1-2 of document B*). E  
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[18] Around May 2003 one Abby Choo a marketing and leasing executive of the plaintiff had contacted *DW1* to inform *DW1* that he was one of the lucky persons to have been shortlisted as one of the tenants in the plaintiff. Abby Choo had also impressed upon the first defendant of all the virtues of the development at the plaintiff as had been described earlier by Wayne Wong to *DW1*. H

[19] Later one Amanda Lim, the marketing and leasing manager of the plaintiff had called *DW1* to ask *DW1* to make an offer to lease the premises proposed by Wayne Wong as most of the lots had been snapped up. At the same time *DW1* had been told of all the promising and fascinating features of the plaintiff in that it was a strategically located and an excellent spot for a F & B I

**A** outlet at the plaintiff, DW1 thought it would be a good idea if the first defendant rent the said premises to operate a food outlet. DW1 then faxed the letter of offer to lease the premises to the plaintiff.

**B** [20] This was followed by a letter of offer for the rental of the premises from the plaintiff dated 18 June 2003 at the monthly rental of RM14,982 with service charges of RM1,362 and advertising fund contribution of RM0.30 per square foot per month.

**C** [21] DW1 was still sceptical as to whether to accept the offer. However after being persuaded and reassured by Amanda Lim and after having visited the plaintiff's website, DW1 was convinced of the prospect of the first defendant's investment and that the said premises would be a good and ideal place for first defendant to commence a F & B outlet to be known as 'Saint's Alp Teahouse'.

**D** [22] After being induced by all the representations made by the plaintiff's agents and or it representatives, on 12 July 2003 DW1 sent a confirmation of acceptance using the first defendant's letterhead and tendered a security deposit of RM16,752.60 as well as the first defendant's board resolution and the letter of guarantee and indemnity executed by DW1.

**E** [23] According to DW1 at the time the letter of offer for rental was made by the plaintiff, the plaintiff had not obtained the certificate of fitness for occupation from the relevant authority. The first defendant executed the tenancy agreement on 15 October 2003 after having been assured that all publicly known plans and projections are on target.

**F** [24] However DW1 did not realise about the unfair and obnoxious provisions such as the forfeiture of the deposits in event the first defendant leave the premises before the expiry of the tenancy agreement plus payment of the rentals for the whole duration for the remaining term of tenancy.

**G** [25] The first defendant commenced its business at the plaintiff on 24 December 2003 and at that time most of the features promised by the plaintiff to complement the food outlet had not been built and or provided resulting in the whole area, the premises included, as what, DW1 termed as 'ghost shops'. As a result of the of the ill-equipped facilities around the said premises the first defendant's new business was not well patronised due to low human traffic resulting in loss of the first defendant's investment in the said business. After **H** (77) days of operating the business the first defendant had no choice but to **I** cease operation in order to cut-further loses.

[26] DW1 then held a meeting with Wayne Wong and Abby Choo to confront them on their false promises and misrepresentations. On 27 February

2003 the first defendant sent a letter to the plaintiff to propose for a mutual termination of the of tenancy agreements (*PS 91 of document B*). The plaintiff however had turned down the first defendant's request and directed the first defendant to resume its business (*p 92 of document B*).

A

[27] In order to mitigate its losses the first defendant decided to return possession of the premises to the plaintiff vide a letter dated 19 April 2004 (*p 3 of document C*). The first defendant had not been notified of any reassignment of rights back to the plaintiff from AmMerchant Bank Bhd.

B

[28] The plaintiff was not entitled to claim any rentals and or claimed against the defendants as the tenancy agreement was entered into by way of misrepresentation and therefore voidable. The plaintiff too had returned the premises to the plaintiff and that the plaintiff too had a duty to mitigate its losses.

C

D

#### THE FINDINGS OF THE COURT

##### *Issue (i) and (ii)*

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Whether the first defendant had entered into the tenancy agreement as a result of the misrepresentation from the plaintiff and or its agent and or its representative and

Whether pursuant to the 'entire agreement clause' stated in 'letter of offer' and in cl 26 of the tenancy agreement the defendant is not entitled to raise the issue of misrepresentation

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[29] It was alleged by DW1 that the first defendant had entered into the tenancy agreement as a result of the series of misrepresentation by the plaintiffs agent and or servants namely Wayne Wong, Abby Choo and Amanda Lim. DW1 had elaborated how the first defendant had come about to sign the tenancy agreement. None of these witnesses were called to corroborate DW1's evidence and or to be cross-examined pertaining to the alleged misrepresentation, the defendants were relying on to defeat the plaintiff's claim.

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H

[30] During the cross-examination of DW1 by the plaintiffs' learned counsel, despite his testimony in court that he was influenced and induced to enter into the tenancy agreement after having visited the plaintiff website, DW1 admitted that he had actually printed the page from the plaintiff's website only on 18 June 2005 after the action had been commenced against the defendants. Pertaining to the misrepresentation allegedly made via the alleged

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**A** press release as stated in his written statement to the court (WS-DW1) DW1 told the court during the cross-examination that he did not know the difference between the newspaper release and the newspaper coverage. DW1 had also agreed that pursuant to the letter of offer, the tenancy agreement was to be executed and that payments were supposed to be made. DW1 had also

**B** testified that he had read the tenancy agreement and understood the contents of the tenancy agreement before he signed it. DW1 also agreed with learned counsel for the plaintiff that cl 2 of the tenancy agreement was subject to the issuance of the certificate of fitness for occupation.

**C** [31] It was in evidence that the first defendant had entered into the tenancy agreement with the plaintiff where the first defendant had agreed to accept the tenancy and to abide by the terms and conditions stipulated in the said tenancy agreement. DW1 admitted in cross-examination by learned counsel for the plaintiff that he had signed the tenancy agreement on behalf of the first

**D** defendant and that he had also executed the letter of guarantee and indemnity in favour of the plaintiff where he had agreed to indemnify the plaintiff in event of any default in the due performance of the first defendant's obligations under the tenancy agreement.

**E** [32] With the above evidence before me and having assessed DW1's proficiency in the English language I am satisfied that DW1 knew and understood the tenancy agreement that he executed on behalf of the first defendant and DW1 also knew and understood the words in the letter of

**F** guarantee that he had executed to guarantee the due performance of the first defendant's obligations under the tenancy agreement.

**G** [33] By entering into the said tenancy agreement the first defendant and the plaintiff were therefore strictly bound by the terms of the tenancy agreement. Parties to the tenancy agreement could not vary the terms of the tenancy agreement and or import words into it. Once a contract had been reduced into writing parties must only look at the language and the words of the tenancy agreement as it is the final agreement which recorded the consensus and any evidence of negotiations between parties.

**H** [34] It is trite that parties are bound by the terms of the written agreement entered into between them and shall not introduce and or bring extrinsic evidence to vary or contract the clear terms of the agreement. Section 91 of the Contracts Act 1950 provides that when the term of the contract are reduced into writing by consent of the parties, no evidence shall be given in proof of the

**I** terms of the contract except the document itself.

[35] 'Where the contract was couched in unambiguous language, the Court must give effect to it ...' (see *Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd* [1997] 1 MLJ 587).

[36] Section 92 of the Evidence Act 1950 had also excluded parol evidence to be admitted to contradict a written document unless in situations where the exceptions to s 92 apply (see the case *Tractors Malaysia Bhd v Kumpulan Pembinaan Malaysia Sdn Bhd* [1979] 1 MLJ 129; *Keng Huat Film Co v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243 at p 243).

A

B

[37] After having perused the the tenancy agreement I am satisfied that the plaintiff in this case can rely on cl 26 of the tenancy agreement also known as 'entire agreement clause' (*p 49 document B*) which clearly excluded any representations, undertakings and negotiations prior to the execution of the tenancy agreement.

C

[38] Further the similar 'entire agreement clause' (*p 8 document B*) was also incorporated in the letter of offer dated 18 June 2003 which was executed prior to the tenancy agreement. By agreeing to this entire agreement clause parties must be presumed to have known of the existence of s 91 and 92 of the Evidence Act 1950 and the exception to the s 92 which would exclude any extrinsic evidence from being adduced for the purpose of contradicting, varying, adding to or subtracting from the terms of the said tenancy agreement.

D

E

[39] Clause 26 of the tenancy agreement and the *entire agreement clause* in the letter of offer excluded all 'the previous contracts, agreements, representations, undertakings and prior negotiations amongst the Parties hereto with respect to the subject matter hereof whether such be written or oral'. Therefore the parties are bound by the terms of the tenancy agreement (see *Macronet Sdn Bhd v RHB Bank Sdn Bhd* [2002] 3 MLJ 11; *Koh Siak Poo v Perakuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164).

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[40] Based on the above I am of the view that the alleged misrepresentation raised by the defendants could not be sustained and shall not have any contractual force. The entire agreement clause was therefore binding on the defendants and further estopped the first and second defendants from denying their obligations under the tenancy agreement and letter of guarantee respectively.

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[41] Upon the assessment of the defendants' evidence I found that the issue of misrepresentation raised by the defendants were merely afterthoughts. Even the defendants' contemporaneous documents made no mention of the alleged misrepresentation being the reason for the premature termination of the tenancy agreement. The defendants merely proposed for an early termination of the tenancy agreement and had not cited the alleged misrepresentation as the core reason for the termination. Even in the first defendant's letter to the plaintiff to convey its intention to terminate the tenancy prior to its expiry there was no mention of the alleged misrepresentation. The first defendants'

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A letter to the plaintiff to hand over the key of the premises dated 9 April 2004 (*exh D6 – p 3 document C*) made no mention of the alleged misrepresentation.

[42] It was obvious that from the substantial body of contemporaneous documents the issue of misrepresentation was never raised in any of the correspondence between the defendants and the plaintiff. Therefore obviously the issue raised was an afterthought and ought to be dismissed by this court.

*Issue (iii)*

C Whether the letter of guarantee and indemnity dated 12 July is void because the name of the first defendant was incorporated without the permission of the second defendant because it was obtained by fraudulent means under s 17 of the Contracts Act 1950

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F [43] The second defendant had denied that he had executed the letter of a guarantee and indemnity to the plaintiff for the indebtedness of the first defendant. The second defendant alleged that the letter of guarantee dated 12 July 2003 which was returned along with the letter of offer was signed leaving the column which was supposed to be filled up with the name of the first defendant, blank (*exh D2*). As the tenancy agreement was signed on 15 October 2003 the second defendant alleged that there was nothing to guarantee as there was no tenancy agreement at the time the letter of guarantee was executed.

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H [44] It could be seen in the letter of offer that the letter of guarantee was executed by the second defendant as the director of the first defendant. It is not in dispute that the second defendant had signed the letter of guarantee in his capacity as the director of the first defendant and had full knowledge of what he was signing. The second defendant was fully aware of his obligations pursuant to the letter of guarantee. The letter of guarantee was attached to the letter of offer and it was obvious to the second defendant as to why there was the necessity to attach the letter of guarantee along with the letter of offer to the plaintiff and the consideration of the letter of guarantee which was to enter into the tenancy agreement (see *cl 1 of the letter of guarantee at p 85 of document B*).

I [45] The second defendant's denial of the letter of guarantee was clearly mischievous with an intention to evade his obligations under the said letter of guarantee by alleging that there was no contractual obligation under the said letter of guarantee. Further pursuant to the letter of guarantee the second defendant's had irrevocably guaranteed the due performance of the obligations of the first defendant under the tenancy agreement. Clauses 3 and 5 of the letter of guarantee stipulated that the second defendant had agreed to guarantee and

indemnify the plaintiff and this indemnity is to be a continuing security. Besides taking on the obligations of the first defendant as the principal debtor under the tenancy agreement the second defendant herein undertook to be responsible for due performance of the obligations of the first defendant of all the terms and conditions of the tenancy agreement.

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[46] By virtue of s 81 of the Evidence Act 1950 the guarantor would be liable upon the default of the first defendant as the principal debtor. The suit against the second defendant is therefore valid and enforceable (see *Bank Kerjasama Rakyat Malaysia Berhad v Sea Oil Mill (1979) Sdn Bhd & Anor* [2010] 2 MLJ 740; [2010] 1 CLJ 793; *Berjaya Times Square Sdn Bhd v Focus Point Vision Care Sdn Bhd & 2 Ors* (Civil Suit No S7-22-1463 of 2007)).

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[47] Based on the abovementioned grounds the issue raised by the second defendant under this head is without any merits and ought to be dismissed by this court.

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*Issue (iv)*

Whether the tenancy agreement is void for uncertainty under s 30 of the Contracts Act 1950.

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[48] The defendants further alleged that the tenancy agreement executed between the parties shall be null and void pursuant to s 30 of the Contracts Act 1950 as there was uncertainty and ambiguity as regards to the date of commencement of the tenancy. Section 2 of the Schedule 2 of the tenancy agreement provided that the tenancy was to commence seven days from the date of the handing over of vacant possession. The joint inspection of the premises was conducted on 3 November 2003 and vacant possession was also handed on 3 November 2003. Therefore the commencement date of the tenancy would be on 10 November 2003 which was seven days after handing over of vacant possession. Again this point of contention is devoid of any merits as the contemporaneous document clearly provided for a clear provision as regards to the commencement date of the tenancy agreement. Based on the above reason this ground of challenge too must fail.

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*Issue (v)*

Whether the plaintiff was entitled to claim for rental for unexpired term of the tenancy agreement and or whether the plaintiff had a duty to mitigate its losses

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[49] The defendants contended that the plaintiff had taken over vacant possession on 18 June 2004 but was seeking for the rental for the entire

**A** remaining period of the tenancy which was until November 2006, late interest payment, service charges and advertising fees amounting to RM780,190.66 as at 31 December 2007. Since the first defendant left the said premises earlier which was, on 17 June 2004 the plaintiff had a duty to mitigate its losses and not to take advantage of the defendants and made an exorbitant claim against

**B** the defendants.

**C** [50] Further the defendants alleged that the plaintiff's claim for rentals for the unexpired term of the tenancy agreement tantamounted to a penalty under s 75 of the Contracts Act 1950 which required proof of actual damage or loss in order to succeed in its claim.

**D** [51] The losses suffered by the plaintiff in this case was actual losses incurred by the plaintiff for the non-performance of the first defendant's obligations under the tenancy agreement. Pursuant to cl 10(2) of the tenancy agreement the plaintiff was entitled to claim for the unexpired term as liquidated damages as a result of the defendants non-fulfilment of its part of the bargain.

**E** [52] Pursuant to cl 10(2) of the tenancy agreement as the tenancy was for a period of three years and the first defendant had prematurely terminated the tenancy and vacated the premises before the expiry of the full term of three years the first defendant is therefore liable to pay the plaintiff these rentals as liquidated damages for the monthly rentals and service charges for the entire duration of the tenancy under the tenancy agreement. The plaintiff therefore

**F** had no obligation to mitigate its losses as claimed by the defendants. The plaintiff's claim was therefore valid and proper and ought to be entertained by this court (see *Teh Wan Sang & Sons Sdn Bhd v See Teow Chuan* [1984] 1 MLJ 130; *White and Carter (Councils) Ltd v McGregor* [1962] AC 413; *Ngow Maan v United Orix Leasing Bhd* [1997] MLJU 433; [1997] 4 CLJ Supp 264;

**G** *Palmerstone Holdings Sdn Bhd v Neo Cheng Soon & Anor* [2007] 6 MLJ 281).

*Issue (vi)*

**H** Whether the plaintiff is entitled to commence this action without any notice of reassignment of its rights under the said tenancy from AmMerchant Bank Bhd to the plaintiff which is a mandatory requirement under s 4(3) of the Civil Law Act 1956 to the defendant

**I** [53] The defendants contended that the plaintiff in this case had assigned their rights under the tenancy agreement to AmMerchant Bank Bhd which was discontinued in 2005 and the plaintiff had now alleged that they have the locus standi to bring this action in 2009 because they have been reassigned their rights under the tenancy agreement pursuant to a deed of reassignment dated



10 August 2006. The plaintiff had failed to give the first defendant notice to the plaintiff of the reassignment of the rights under the tenancy agreement by AmMerchant Bank Bhd. The plaintiff alleged that pursuant to s 4(3) of the Civil Law Act 1956 a notice to the defaulting tenant must be given in writing for the reassignment to take effect before any legal action could be commenced against the said tenant. Despite the fact that the plaintiff was aware of the need to give notice to the tenant the defendants alleged that the same was not complied with thereby infringing s 4(3) of the Civil Law Act 1956.

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[54] Since the plaintiff had failed to give any notice of the reassignment of rights under the tenancy agreement, the defendants contended that the plaintiff lacked the locus standi to commence this action against the defendants and on this ground alone the plaintiff's claim ought to be dismissed.

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[55] The defendant on the other hand had contended that while it is true that there was a deed of assignment dated 15 August 2003 entered into between the plaintiff and AmMerchant Bank Bhd (*p 105 of document B*) but pursuant to a deed of reassignment cum undertaking executed between the plaintiff and AmMerchant Bank Bhd on 10 August 2006 all rights and interest had been reassigned back to the plaintiff by the said AmMerchant Bank Bhd. Pursuant to cl 1 of the deed of reassignment both parties to the deed of reassignment had mutually agreed to reassign all present and future rights, interest, titles and benefit from the relevant tenancy agreements which concerned the defaulted tenants including the rights to commence legal proceedings against defaulted tenants back to the plaintiff.

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[56] The deed of reassignment was executed on 10 August 2006 well after the first defendant had unilaterally terminated the tenancy agreement. It had been held in the case of *Wong Kim Wah v The Government of the State of Pahang & Anor* [2011] 8 MLJ 856 where a deed of assignment was also in issue, Her Ladyship Datuk Heliliah Mohd Yusoff had quoted with approval the Federal Court case of *Khaw Poh Chuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761 which held that compliance with s 4(3) of the Civil Law Act 1950 was not a prerequisite to the validity of an assignment which was to be determined in the usual ways. It was held that even without complying with the provision of s 4(3) of the Civil Law Act the assignment would still have been valid in equity against the assignor. This issue too was without any merits and ought to be dismissed by this court.

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#### ISSUES NOT PLEADED

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[57] The following issues raised by the defendants were not pleaded in their defence and or counterclaim:

- (a) stamping of the tenancy agreement;

- A (b) non-receipt of the tenancy agreement and letter of guarantee; and  
(c) cl 26 of the tenancy agreement superseded and cancelled the letter of offer.
- B [58] It is trite that parties are must confine their case to the four corners of their pleadings and are estopped from raising issues which were not pleaded in their pleadings. All these issues raised but not pleaded were not considered by the court as they were strenuously objected to my the learned Counsel for the plaintiff and these issues were outside the scope of the defendants' pleadings
- C (see *State Government of Perak v Muniandy* [1986] 1 MLJ 490; *Yap Nyo Nyok v Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250; *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188; *Amanah Butler (M) Sdn Bhd v Yike Chee Wah* [1997] 1 MLJ 750; 1997 2 CLJ 79; *Ranjit Kaur alp S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1 at pp 13–14).
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#### THE DEFENDANTS' COUNTERCLAIM

- E *Issue (vii)*  
Whether the plaintiff must return the sum of RM84,465.90 which was paid by the first defendant
- F [59] There is still an outstanding issue left to be decided which was the defendants' counterclaim against the plaintiff for the sum of RM84,465.90. This amount comprised of the special damages for three months security deposit, deposit for utilities, water, renovation and post box amounting to RM61,357.80. In addition to that the defendants are also claiming for an advance rental for one month, stamp duty for the tenancy agreement, administrative charges and 5% government service tax, three months advance payment to the advertisement fund and Service charges respectively amounting to RM23,108.10. The total claim as stated in the counterclaim were RM84,465.90. The particulars of the counterclaim were as stated in para 23 of
- G the counterclaim at p 48 of the bundle of pleadings.
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- I [60] In view of my findings that the first defendant had unilaterally terminated the tenancy agreement and pursuant to cl 10(2) of the tenancy agreement plaintiff was entitled to forfeit the said amount. Clause 4(3) and 4(7) of the tenancy agreement made specific provision on how the security and utilities deposit were to be utilised in situations where there was due performance and observance of the obligations under the tenancy agreements and in situations of any default on the part of the tenant for the due compliance with the terms of the tenancy agreement. In the former scenario these security

and utilities deposit must be refunded free of any interest after the expiry of the tenancy and in the latter scenario for the same to be forfeited absolutely (see pp 28–29 of document B) (see the case of *Sun Properties Sdn Bhd v Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711; *Johor Coastal Development Sdn Bhd v Constrajaya Sdn bhd* [2009] 3 MLJ 349).

[61] Based on the facts before me I am satisfied that the first defendant had unilaterally terminated the tenancy agreement before its expiry and pursuant cl 4(3), 4(7), and 10(2) of the tenancy agreement the plaintiff was entitled to forfeit the security deposit and utilities deposit paid by the first defendant to the plaintiff. The defendants' counterclaim is therefore without my merits and hereby dismissed with costs.

#### CONCLUSION

[62] Based on the reasons stated above I am satisfied that the plaintiff had established its claim against the defendants on the balance of probabilities and hence judgment was entered in favour of the plaintiff as per the terms prayed in the SOC and as the defendants had failed to establish their counterclaim on the balance of probabilities the defendants' counterclaim is dismissed with costs. The costs awarded to the plaintiff in respect of both of these claims are RM30,000 to be paid by the defendants to the plaintiff herein.

*Claim allowed and counterclaim dismissed with costs.*

Reported by Ashok Kumar

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