Fu Yuan Foodstuff Manufacturer Pte Ltd v Methodist Welfare Services [2009] SGCA 23

Case Number : CA 169/2008

Decision Date : 02 June 2009

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : S Magintharan and Liew Boon Kwee (S Magin & Co) for the appellant; Ang Cheng Ann Alfonso (A Ang, Seah & Hoe) for the respondent

Parties : Fu Yuan Foodstuff Manufacturer Pte Ltd — Methodist Welfare Services

Contract – Breach – Caterer using foreign workers employed by different entity – Whether breach of clause requiring compliance with Singapore's employment laws

Contract – Discharge – Breach – Termination clause in catering contract permitting termination without notice upon breach of certain contractual clauses – Whether breach required to be repudiatory before termination clause might be relied on

2 June 2009

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

1 This appeal centred on whether the respondent, Methodist Welfare Services, was entitled to terminate the services of the appellant caterer without notice under a termination clause in the contract made between the parties on the ground that the appellant had breached the employment laws of Singapore by unlawfully deploying six Chinese nationals to work at the respondent's nursing home. The trial judge ("the Judge") found in favour of the respondent in *Fu Yuan Foodstuff Manufacturer Pte Ltd v Methodist Welfare Services* [2008] SGHC 179 ("the Judgment"). We dismissed the appeal against the Judge's decision and now give the detailed grounds for our decision.

Factual background

2 The appellant is a food catering company whose directors and shareholders comprised Mr Tay Ann Siang ("Mr Tay") and his wife, Mdm Sally Lai Guek Ling ("Mdm Lai"). Mr Tay was also the sole proprietor of another food-related business registered on 12 November 2006 known as "Ann Siang".

3 The respondent is a society established in 1981 to undertake social work for the Methodist Church in Singapore. It, *inter alia*, ran Bethany Methodist Nursing Home ("the Home"), which caters for the destitute and persons of very low income who are in need of long-term nursing care. These persons are, in the main, elderly folk who suffer from chronic illnesses, many of whom have special dietary needs.

4 After an open tender exercise conducted in August 2006, the respondent awarded the appellant a contract to provide in-house catering services at the Home from 1 December 2006 to 30 November 2008. This was followed by a formal agreement dated 22 November 2006 setting out the terms of the contract ("the Agreement"). Prior to the provision of the in-house catering services by the appellant, the catering at the Home had been undertaken by the Methodist Co-operative Society ("MCS"). MCS had also taken part in the August 2006 tender but its pricing was higher than the appellant's.

5 The relevant part of the termination clause of the Agreement provided that:[note: 1]

> 3.1 [The respondent] may terminate [the] Agreement at anytime by giving the [appellant] two (2) month's notice in writing.
>
> 3.2 [The respondent] may terminate [the] Agreement without notice should the [appellant] breach any item under Clauses 1.4, 2.3 and 2.7[.]

6 Clauses 1.4 and 2.7, which are also relevant to this appeal, provided as follows:[note: 2]

> 1.4 The [appellant] shall not transfer or assign [the Agreement] directly or indirectly to any person whatsoever.
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> 2.7 Licensing Compliance
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> > 2.7.1 The [appellant] shall obtain the necessary licenses for operations and submit copies to the Director for reference.
> >
> > 2.7.2 The [appellant] shall comply with all Singapore laws and regulations, especially with regard to food establishments and employment of staff.

7 Soon after the appellant commenced providing services at the Home, numerous complaints were made by the respondent's staff to Mdm Lai concerning various unhygienic practices of the appellant's staff as well as the quality of the food being served. However, these complaints were not sufficient, even if established, to have entitled the respondent to terminate the Agreement.

8 The appellant began deploying foreign workers at the Home from 1 March 2007, when two Chinese nationals began work as assistant cooks. On 15 June 2007, another Chinese national commenced work at the Home as a kitchen helper. Finally, on 6 August 2007, three more Chinese nationals commenced work at the Home as assistant cook, kitchen helper and dish-washer respectively. Of these six foreign workers, three were employed by Ann Siang ("Ann Siang workers"), and three were employed by the appellant.

9 The appellant maintained in the court below that the respondent was fully informed and aware of the legal status of all six foreign workers and that it had been required to (and did) submit copies of all the workers' passports, work permits and employment passes to the respondent. On the other hand, Ms Cindy Loh ("Ms Loh"), a senior administrative assistant at the Home, testified on behalf of the respondent that she had to chase Mdm Lai for copies of the work permits and employment passes of the foreign workers and even then they were submitted in a piecemeal fashion.

10 In any event, it was apparent that the respondent was confused as to the precise status of the foreign workers. It initially made enquiries with the Ministry of Manpower ("MOM") on 22 August 2007 on the basis that all six workers held only long-term social passes and had no work permits or employment passes. However, subsequent consultations with MOM revealed that this was not the case – five of the workers had employment passes and one had a work permit. According to the respondent, it was informed by MOM on 24 August 2007 that all six of the foreign workers could not work at the Home because their designated workplace was 36 Regent Street.

11 Subsequently, on 27 August 2007, the respondent wrote to the appellant stating that all six foreign workers were not allowed to work in the Home and instructed that they be removed from the Home immediately. Later that same day, Ms Yip Moh Han ("Ms Yip"), the executive director of the

Home, also wrote to MOM's director of the foreign workforce policy department inquiring about the employment status of the six foreign workers and explaining the sequence of events from the Home's perspective. Ms Yip received MOM's written reply on 29 August 2007 stating that the six foreign workers should not be deployed at any address except that stated on their work permit cards, *ie*, 36 Regent Street. Additionally, MOM wrote that three of the foreign workers were not allowed to work at the Home because they were employed by Ann Siang and were not the appellant's authorised employees.

12 In the meantime, the respondent had been in talks with MCS. On 29 August 2007, MCS wrote to the Home, agreeing to take over the catering contract at the Home.

13 On 30 August 2007, the respondent issued a letter of termination to the appellant. The ground given for the termination of the Agreement was the "illegal deployment of 6 foreign workers in the kitchen at [the Home]".[note: 3] The letter also stated that the appellant had failed to comply with cl 2.7.2 of the Agreement and that the Agreement would be terminated with immediate effect under cl 3.2. That very evening, MCS took over the kitchen at the Home.

14 Dissatisfied, the appellant sued the respondent for wrongful termination of the Agreement, arguing that the respondent was in repudiatory breach of the Agreement because it had evinced an intention no longer to be bound by it, having, *inter alia*, awarded the catering contract to MCS even before it had terminated the Agreement.

The decision of the court below

15 The Judge held that the appellant had breached cl 2.7.2 of the Agreement. She found that the appellant had failed to furnish the respondent with full documentation relating to its workers, thus causing the respondent to believe that the workers were not entitled to work in Singapore at all (at [34] of the Judgment). Although the three foreign workers employed by the appellant were legally permitted to work in the Home because their employment passes did not specify any particular location at which they had to work, the three Ann Siang workers were not entitled to work for any one other than Ann Siang (at [35]–[36]). The Judge did not accept the argument that Ann Siang and the appellant were in a joint venture or any other legal relationship which permitted Ann Siang's foreign workers to work in the Home without being in breach of the conditions of their employment passes requiring them to work only for their stated employer (at [39]–[40]).

16 As to whether this breach justified immediate termination of the Agreement, the Judge held that, based on the English Court of Appeal decision in *Rice v Great Yarmouth Borough Council* [2003] TCLR 1 ("*Rice*"), cl 3.2 of the Agreement could not be applied literally to permit the respondent to terminate the Agreement without notice on any and every breach of cll 1.4, 2.3 and 2.7. Rather, the breach by the appellant had to be repudiatory in nature before the respondent had a right to terminate the Agreement (at [53] of the Judgment). On the facts, the Judge found (at [55]) that the breach of cl 2.7.2, which required the appellant to comply with the laws of Singapore relating to employment of workers, "was so important to the Home" that it "must be considered a repudiatory breach".

The issues

17 The key issues for the purposes of the present appeal are:

(a) whether the use of Ann Siang workers in the Home breached cl 2.7.2 of the Agreement; and

(b) whether such a breach entitled the respondent to terminate the Agreement with immediate effect.

Our decision

18 Although we ultimately agreed with the Judge's decision, we arrived at the same conclusion on the second issue on a different basis. Let us now consider each of the issues *seriatim*.

Whether the use of Ann Siang workers in the Home breached clause 2.7.2 of the Agreement

19 The appellant objected to the Judge's finding that the use of Ann Siang workers in the home breached cl 2.7.2 of the Agreement on a procedural as well as on a substantive basis.

20 Taking the procedural point first, the appellant argued that the respondent had failed to plead that cl 2.7.2 of the Agreement had been breached because Ann Siang workers were not permitted to work in the Home (as the Judge eventually found). Rather, the respondent only pleaded that five of the six foreign workers in the Home held long term social passes. We disagreed with the appellant. In our view, the respondent had sufficiently pleaded its case and the appellant was not taken by surprise.

21 The material portion of the respondent's pleaded case stated as follows:[note: 4]

> 5. The [respondent] aver[s] that the [respondent was] entitled to summarily terminate the Agreement as the [appellant was] in breach of the Agreement.
>
> PARTICULARS OF BREACHES
>
> a) The [appellant] had breached Clause 2.7 of the Agreement in that [it] had *failed to comply with the law of Singapore governing the employment of staff*. Sometime on or about the 21 August 2007 the [appellant] [*sic*] inspected the kitchen and discovered that there were 6 Chinese nationals working in the Nursing Home's kitchen. Of the 6 Chinese nationals, 5 held long term social passes and 1 on work permit. *It was subsequently ascertained with [MOM] that the Chinese workers were not permitted to work in the … Home's kitchen as they did not have the relevant work permit[s]*.
>
> [emphasis added]

22 These pleadings sufficiently particularise the material facts of the breach. The main thrust of the respondent's case was that the appellant had failed to comply with Singapore's laws concerning the employment of staff, not only because the respondent believed that five foreign workers had only social passes but, more importantly, because MOM had determined that the foreign workers *were not permitted to work in the Home as they did not have the relevant work permits*. It was obvious that the respondent intended to rely on its consultations with MOM, which were disclosed to the appellant, to establish a breach of cl 2.7.2.

23 We also did not think that the appellant had been taken by surprise. The appellant had displayed awareness that the use of Ann Siang workers in the Home was an issue during its cross-examination of Ms Loh when counsel for the appellant had asked Ms Loh about her understanding of the relationship between Ann Siang and the appellant as well as Ann Siang's role in the Home. Furthermore, the appellant addressed this issue in its closing submissions.

24 Moving on to the substantive merits of the appellant's case, we observe at the outset that Singapore's employment laws indisputably forbade the appellant from using Ann Siang's foreign workers. Unless the respondent permitted Ann Siang to provide catering services in the Home jointly with the appellant, the use of Ann Siang workers in the Home would contravene cl 2.7.2 of the Agreement. Bearing in mind that an appellate court will not reverse a trial judge's findings of fact unless they were plainly wrong or against the weight of the evidence (see *eg Alagappa Subramanian v Chidambaram s/o Alagappa* [2003] SGCA 20 at [13]), we saw no reason to interfere with the Judge's finding that there was no legal relationship between Ann Siang and the appellant known to (and acquiesced in by) the respondent that would allow Ann Siang workers to work in the Home.

25 The appellant sought to challenge the Judge's finding based on: (a) the evidence of Ms Loh during cross-examination; (b) the fact that the first invoice to the respondent had been issued by Ann Siang; (c) the appellant's case of an intended novation of the Agreement to Ann Siang; and (d) the continued presence of Ann Siang workers in the Home working alongside the appellant's workers. All these matters were addressed by the Judge at [40] of the Judgment. In our view, the Judge correctly gave little weight to the evidence of Ms Loh because she was apparently unaware of the contractual arrangements between the appellant, Ann Siang and the respondent. Ms Loh seemed to have treated Ann Siang and the appellant as the same entity merely because Mdm Lai was involved in both businesses. We note that Ms Yip, who was Ms Loh's superior and who was personally involved in the awarding of the tender to the appellant, was not asked any similar questions. The Judge further considered other pieces of objective evidence, including the subsequent invoices and correspondence between the appellant and the respondent as well as cl 1.4 of the Agreement which prohibited any *direct or indirect* transfer or assignment of the Agreement. Clause 1.4 would not only preclude any novation of the Agreement to Ann Siang, it would also preclude any joint-contracting since this would likewise involve a third party assuming obligations under the Agreement. Finally, the continued presence of three Ann Siang workers in the Home was not sufficient to show that they were entitled to work at the Home, unless it could also be established that the respondent knew that they were Ann Siang workers and not the appellant's workers. There was no evidence of this apart from the appellant's assertions.

26 We therefore agreed with the Judge that the appellant had breached cl 2.7.2 of the Agreement by using Ann Siang workers in the Home.

Whether a breach of clause 2.7.2 entitled the respondent to terminate the Agreement with immediate effect

27 We also agreed with the Judge, albeit for different reasons, that a breach of cl 2.7.2 of the Agreement would entitle the respondent to terminate the Agreement with immediate effect pursuant to cl 3.2.

28 In our view, this case fell squarely within "Situation 1" in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 ("*RDC Concrete*") at [91], *ie*, a situation where the contract clearly and unambiguously states that, should a certain event or events occur, the innocent party will be entitled to terminate the contract. Clause 3.2 of the Agreement expressly stipulated that the respondent would have the right to immediately terminate "should the [appellant] breach any item under [cl] … 2.7". Since there was, as we had earlier found, a breach of cl 2.7.2 of the Agreement, the right to terminate the Agreement immediately arose pursuant to cl 3.2.

29 Contrary to the appellant's arguments as well as the approach adopted by the Judge, *Rice* ([16] *supra*) was not applicable to the present factual matrix. *Rice* concerned a contract between a local borough authority ("the Council") and a contractor to maintain and manage the sports facilities,

parks, gardens and playgrounds of the borough for a period of four years. The contractor had been awarded the contract pursuant to a tender process, in which the Council's own Direct Services Organisation ("DSO") had also taken part. The termination clause in that contract provided as follows:

> 23.2 If the contractor:
>
> 23.2.1 commits a breach of any of its obligations under the Contract; ...
>
> ... the Council may, without prejudice to any accrued rights or remedies under the Contract, terminate the Contractor's employment under the Contract by notice in writing having immediate effect.

30 The Council invoked this clause seven months into the contract and had DSO take over from the contractor. The contractor sued for wrongful termination of the contract. Hale LJ (with whom Peter Gibson and May LJJ agreed) affirmed the decision of the judge at first instance that, in the context of a contract intended to last four years and involving both substantial investment or at least substantial undertaking of financial obligations by one party as well as a myriad of obligations of differing importance and varying frequency, a common-sense (as opposed to a strict literal) interpretation should be adopted. Thus, as a *precondition* to termination of the contract pursuant to the termination clause, a repudiatory breach or an accumulation of breaches that as a whole could properly be described as repudiatory was required. Hale LJ also considered that the termination clause in question did not characterise any particular term as a condition or indicate which terms were to be considered so important that any breach (whether material or trivial) would justify termination.

3 1 *Unlike* the approach adopted in *Rice*, we gave full effect to the termination clause concerned (here, cl 3.2 read with cl 2.7.2) as it in fact reflected the parties' intentions. Indeed, if a termination clause is *clearly* drafted, its *literal* language *ought to accurately reflect the intentions of the parties*. This is precisely the situation here. Let us elaborate.

32 The respondent in this appeal is a charitable organisation. It is therefore understandable that it would not wish to be implicated in any impropriety or criminal offence. Further, as the Judge correctly observed (at [54] of the Judgment), it is well known that there are, in the Singapore context, strict rules governing the employment of foreigners and that it is an offence for a foreign worker to work for any employer other than that permitted by his documentation. The Judge further found that the appellant "must also have been aware that the employment law relating to foreign workers would be a major concern of the Home as it would hardly want to be an accessory to the breach of Singapore's labour laws" (*ibid*). In the circumstances, giving effect to the literal language of cl 3.2 of the Agreement (to the effect that *any* breach of cl 2.7 of the same would justify termination of the Agreement) is wholly consistent with the intentions of the parties as ascertained from the *context* concerned. In other words, the *literal* language of cl 3.2 (in particular the words "breach any item under [cl] ... 2.7") *accurately reflected the intentions of the parties* (but contrast this with *Rice* where it was held that a literal interpretation of the termination clause flouted business common sense).

33 As we observed in this court's decision in *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] SGCA 22 at [53], a termination clause which is effective pursuant to Situation 1 in *RDC Concrete* (see above at [28]) "may *not necessarily* involve a breach of contract *but nevertheless has the legal effect (in substance) of a condition* (pursuant to the condition-warranty approach)" [emphasis in original]. Likewise, in this appeal, cl 3.2 (whilst not, strictly speaking, a "condition" pursuant to the condition-warranty approach set out in *RDC Concrete*) has *the legal effect (in substance)* of a condition (*cf* also the observations of the Judge at [55] of the Judgment, who,

however, applied the relevant common law principles instead of giving literal effect to cl 3.2).

34 Where, in fact, a term is classified as a condition under the condition-warranty approach, the innocent party is entitled to terminate the contract in the event of a breach, *regardless of the consequences of that particular breach*. It will be seen immediately that this is precisely what cl 3.2 also achieves in accordance with the construction we have given to it (at [32] above). We pause to observe that such an approach, whilst still dissimilar from that adopted in *Rice* where the court (in effect) *equated* the termination clause concerned with the common law position, does (to this extent) still have some links at least to the position at common law.

35 We should add that the construction we have adopted of cl 3.2 is also consistent with the general structure of cl 3 as a whole. In particular, cl 3.2 ought to be read alongside cl 3.1, which permitted the respondent to terminate the Agreement "at anytime" (*ie*, *without* cause) by giving the appellant just two months' notice in writing. The relatively simpler route to rescission afforded by our construction of cl 3.2 (which relates to termination *with cause*) is consistent, in tenor and spirit, with cl 3.1 (which, as we have just noted, also affords a relatively simple route to rescission, albeit with respect to termination *without* cause). It should, however, be reiterated that the ostensibly simpler route pursuant to cl 3.2 is also undergirded by a substantive rationale (especially in so far as the employment of staff is concerned).

36 In the circumstances, therefore, there is no need (as was the situation in *Rice*) to "read down" cl 3.2. The process of "reading down" the scope of a termination clause is, of course, one of the legal mechanisms utilised by the courts in order to control termination clauses. Such an approach was, as we have seen, utilised in *Rice*. However, as we have explained above, there is no need to adopt this approach in the present appeal as, unlike the situation in *Rice*, the termination clause here was consistent with the commercial reality between the parties which centred on their desire to comply with the employment laws of Singapore. Indeed, each termination clause must be analysed by reference to the precise language utilised by the parties in the context in which they entered into the contract, bearing in mind the fact that the ultimate aim of the court is to give effect to the intentions of the parties as embodied within the wording of the termination clause in question.

Conclusion

37 For the foregoing reasons, we dismissed the appeal with costs and with the usual consequential orders.

[note: 1]Appellant's Core Bundle ("ACB") at p 314.

[note: 2]ACB at pp 310, 312 and 314.

[note: 3]ACB at p 306.

[note: 4]ACB at p 43.