Asirham Investment Pte Ltd v JSI Shipping (S) Pte Ltd
[2007] SGHC 171

Case Number : Suit 522/2006

Decision Date : 04 October 2007

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Daniel Koh and Chen Xinping (Rajah & Tann) for the plaintiff; Tan Yeow Hiang (Kelvin Chia Partnership) for the defendant

Parties : Asirham Investment Pte Ltd — JSI Shipping (S) Pte Ltd

Contract – Breach – Whether demand for return of deposit and threat to commence legal proceedings for failure to return deposit amounting to breach

Landlord and Tenant – Agreements for leases – Material terms – Whether tenancy agreement valid and enforceable – Whether absence of floor plan fatal to validity – Whether unspecified commencement date fatal to validity

Landlord and Tenant – Agreements for leases – Whether lease agreement subject to implied condition precedent – Whether failure to fulfil alleged condition precedent amounting to breach

4 October 2007 Judgment reserved.

Choo Han Teck J:

1 The plaintiff, Asirham Investment Pte Ltd, is a company set up by First Tradegate Co Pte Ltd ("FTG") and Maxz Universal Group ("MDG"), specifically for the purpose of entering into an agreement with the defendant, JSI Shipping (S) Pte Ltd, and carrying out a project under the agreement ("the Project"). FTG is involved in the business of procuring and leasing commercial premises to companies. The defendant is engaged in the business of *inter alia* warehousing, distribution, and provision of freight forwarding services.

2 The facts leading up to the commencement of this action may be recounted briefly in chronological order. In early 2003, Ho Yew Peng ("Michael Ho"), a working director of FTG, initiated discussions with Leong Yew Cheong ("Zac"), who was then the defendant's General Manager, regarding procurement of new premises for the defendant's operations. The negotiations culminated in a letter of offer dated 1 November 2004 ("the 1st Letter of Offer"), wherein FTG offered to construct a build-to-lease facility ("the Facility") for the defendant. The 1st Letter of Offer was marked "subject to contract" and signed and accepted by Zac on behalf of the defendant on 30 November 2004.

3 Further discussions ensued and on 29 March 2005, a second letter of offer ("the 2nd Letter of Offer") was issued by FTG. The 2nd Letter of Offer was similarly marked "subject to contract" and set out the various specifications for the Facility. The defendant was also required, upon the signing of the 2nd Letter of Offer, to pay a one-month holding deposit of $112,000. The 2nd Letter of Offer was accepted and signed by Zac on behalf of the defendant and the sum of $112,000 was paid accordingly.

4 On 20 July 2005, the plaintiff was incorporated as a joint venture vehicle to carry out the Project. The joint venture partners were FTG and MDG. Ng Siew Hoon ("Ruth Ng") from FTG and

Seeto Keong ("Seeto") from MDG were registered as the plaintiff's directors.

5 On 18 September 2005, the plaintiff and defendant entered into a tenancy agreement ("the Tenancy Agreement"). Clauses 1 and 1.1 of the Tenancy Agreement stated as follows:

> 1. The Landlord agrees to let and the Tenant agrees to take the premises situated at and known as Changi International Logistic Park North, Plot 3, Singapore for the floor area as edged in red on the attached floor plan of 100,000 Sq Ft (hereinafter called "the premises"). TO HOLD unto the Tenant for the lease term of Seven (7) years from *July, 2006 to June 2013 at a monthly rental of Singapore Dollars One Hundred & Forty Thousand Only (S$140,000.00) with the Goods & Services Tax of Singapore Dollars Seven Thousand Only (S$7,000.00) making a total of Singapore Dollars One Hundred and Forty Seven Thousand Only (S$147,000.00) per month inclusive of maintenance charges for the premises payable in advance on the 1st day of each calendar month. Any future increase of Goods and Services Tax shall by borne by the Tenant.
>
> 1.1 The Landlord agrees to give rental free period from July 2006 to August 2006 to the Tenant for renovation and fittings up works.
>
> [emphasis in original]

It will be seen from the above clauses that the following terms of the tenancy are stipulated:

(a) *Location* — premises situated at Changi International Logistic Park North, Plot 3, Singapore;

(b) *Floor area leased* — 100,000 Sq Ft, floor area etched in red on the "attached floor plan";

(c) *Term of lease* — July 2006 to June 2013; and

(d) *Rental* — monthly rental of $147,000 (inclusive of Goods and Services Tax) payable in advance on the 1st of every calendar month. The tenant is to enjoy a rent free period from July 2006 to August 2006.

The Tenancy Agreement was a detailed document setting out the covenants of both the landlord and the tenant intended by them to be comprehensive. It was signed by Ruth Ng on behalf of the plaintiff as landlord and Zac on behalf of the defendant as tenant. It should be noted that while the Tenancy Agreement referred to an "attached floor plan", the evidence given at the trial by Michael Ho was that there was in fact no floor plan appended to the original Tenancy Agreement.

6 The land on which the Facility was to be built was owned by Jurong Town Corporation ("JTC") and it was not disputed that JTC's approval was required for the proposed development. On 6 October 2005, JTC informed the plaintiff by letter that it was unable to approve the plaintiff's application as the plaintiff had not demonstrated "sound financial capabilities" to undertake the project. After this, the plaintiff's representatives had a meeting with Jess Ong ("Jess"), a JTC representative, and assured Jess of the plaintiff's capability and firm commitment to develop the Facility. According to the plaintiff, Jess said that if MDG submitted an application as the stated developer, JTC would consider the application afresh.

7 Sometime in October 2005, Zac left the employment of the defendant and was replaced by one Yip Kum Yew ("Yip"), who was authorised by the defendant to liaise with the plaintiff regarding the development of the Facility. As the defendant was facing some cash flow problems at that time, the parties started negotiating for variations to the specifications of the Facility. In a letter of

13th October 2005 addressed by Michael Ho to Yip, reference was made to the 2nd Letter of Offer, and the reviewed specifications of the Facility were set out. It was stipulated *inter alia* that the size of the warehouse was now to be 70,000 sq ft. This letter was *not* marked "subject to contract".

8 This was followed by a letter dated 7th November 2005 addressed by Michael Ho to Yip, reference being made once again to the 2nd Letter of Offer. This letter stated that the size of the warehouse was to be 58,000 sq ft. This was *not* accepted or signed by the defendant. A further letter sent on 21st November 2005 by Michael Ho to Yip which varied some of the terms stipulated in the letter of 7th November 2005 was also *not* accepted or signed by the defendant.

9 On 6 March 2006, the defendant, through its solicitors, sent a letter of demand to the plaintiff and sought a refund of $112,000 on the basis that there had been a total failure of consideration as the parties had failed to enter into any formal contract in respect of the construction of the Facility. The plaintiff did not pay the sum demanded and the defendant filed a claim against FTG in DC Suit No 2686 of 2006/X. The plaintiff then filed the present claim for breach of contract on the basis of the defendant's wrongful repudiation of the Tenancy Agreement. The defendant simultaneously filed a counterclaim for breach of contract insofar as the plaintiff was unable to complete the Project by the time stipulated in the Tenancy Agreement. The proceedings in DC Suit No 2686 of 2006 have been stayed pending the outcome of the present suit. In my view, the parties ought to have transferred those proceedings to be joined and consolidated with the present action. However, as they had not done so, my decision will be confined to the present action before me.

10 This case is straightforward in the sense that there are really only two issues for the Court to decide, namely, whether the parties had entered into a valid and binding contract, and if so, whether the defendant had repudiated the contract. On an assessment of all the evidence, I find that the parties entered into a valid and binding tenancy agreement. This is clear from a perusal of the contractual documents. The 1st Letter of Offer and the 2nd Letter of Offer were both marked "subject to contract". It is clear that where an agreement is stipulated as being "subject to contract", no binding and enforceable contract arises between the parties until a formal written document embodying all the terms of their agreement has been executed by them. Thus, even though the defendant had signed and accepted those terms, no binding contract with respect to the development of the Facility had yet arisen at that point in time. The negotiations then culminated in the Tenancy Agreement being entered into on 18 September 2005. This document was *not* marked "subject to contract", and set out all the material terms of the parties' agreement as well as the detailed covenants given by the landlord and tenant. It should be noted that in cases where negotiations have been protracted and there has been a considerable exchange of written correspondence, the court will only have to ascertain whether the parties had reached an agreement on the *material points,* even though there may be slight differences in the documents passing between them: *Projections Pte Ltd v The Tai Ping Insurance Co Ltd* [2001] 2 SLR 399 at [16]. Returning to the facts of the present case, the Project was primarily one in which the defendant would lease specifically construed premises from the plaintiff for a fixed period. In this regard, the material terms that the parties would have to agree upon in relation to the tenancy would be: (a) the names of the parties; (b) the identity of the property to be leased; (c) the term of the lease and its commencement; and (d) the rental to be paid: *Maresse Collections Inc v Trademart Singapore Pte Ltd* [1999] SGHC 123 at [20]. As the Tenancy Agreement dated 18 September 2005 contained all these particulars (see [5] above), I am thus satisfied that the parties had entered into a valid and enforceable tenancy agreement. After 18 September 2005, any changes to the terms of the Tenancy Agreement had to be by way of variation of contract agreed to between the parties and supported by valuable consideration. There had been no variation to the terms in this case as none of the offers

made by the plaintiff, by way of letters sent on 13 October, 7 November and 21 November 2005 (see [7] and [8] above), were signed or accepted by the defendant.

11 The next issue to consider is whether the defendant had breached the contract. A renunciation of contract occurs when one party, by words or conduct, evinces an intention not to perform, or expressly declares that he is or will be unable to perform, his obligations under the contract in some essential respect. I am of the opinion that the defendant had, by its letter sent on 6 March 2006 through its solicitors, effectively renounced its obligations under the contract and was thereby in breach of contract. In the letter, the defendant's solicitors demanded an immediate return of the money paid under the 2nd Letter of Offer and threatened to commence legal proceedings (which it did) where the sum was not paid. In my view, this was an express refusal by the defendant to continue with its obligations under the contract and thereby it had breached the contract. The plaintiff was thus entitled to treat the contract as terminated and institute a claim for damages. I shall now deal briefly with the defences raised by the defendant.

12 The defendant argued that, pursuant to s 52 of the Stamp Duties Act (Cap 312, 2006 Rev Ed), the Tenancy Agreement was inadmissible because the plaintiff had failed to pay the requisite penalty stipulated under s 46(1)(c) of the same Act. In my view, this argument fails for two reasons. First, the defendant had not produced any evidence *at the trial* to show that the penalty had not been fully paid. What had happened was that after the defendant raised this objection, the plaintiff proceeded to stamp the Tenancy Agreement and tendered the original Certificate of Stamp Duty ("the Certificate") at the commencement of the trial. The Certificate was admitted in evidence and according to the Certificate, a sum of $26,880 had been paid as stamp duty and $4,715 had been paid as a penalty. At the trial, the defendant did not raise any objection to the penalty being underpaid. These objections were only raised by the defendant's solicitors *after the trial* by way of letter to the court dated 7 September 2007, wherein the defendant attached a letter from the Commissioner of Stamp Duties ("the Commissioner") stating that the requisite amount of penalty had not been fully paid. In my view, this fresh evidence should not be taken into account and the decision in this case should be based on the evidence before the court at the trial. Given that the trial had already come to a close, the proper procedure would have been for the defendant to make a formal application to adduce the Commissioner's letter. Its failure to do so prevented the court from hearing full submissions from both parties on whether the Commissioner's letter could, or should, be admitted into evidence at this very late stage. I therefore do not take the Commissioner's letter into account in making my decision. I should add that I might have exercised my discretion more liberally had such an application been made before the conclusion of the trial but the fact remains that it was not made and a solicitor's letter to the court could not be considered an application.

13 The second reason why the defendant's argument fails is that, ironically, payment of the stamp duty was an obligation of the defendant under the Tenancy Agreement and, in my view, it should not be allowed to rely on its own omission to avoid liability. Under cl 2.3 of the Tenancy Agreement, the tenant covenanted as follows:

> To pay the stamp duty connected with the execution of this Tenancy Agreement and shall also furnish to the Landlord with a Corporate Guarantee that cover the full lease period of this Agreement.

Regardless of whether the Tenancy Agreement was intended to constitute the full and final agreement between the parties (which I hold to be so), the defendant had accepted and signed the agreement. The obligation lay with the defendant to stamp the agreement and it would be inequitable for the defendant to now rely on its own omission to escape liability.

14 The defendant also argued that the Tenancy Agreement was void for uncertainty for two reasons. Firstly, whilst the Tenancy Agreement made express reference to an attached floor plan, no such floor plan was attached to the original Tenancy Agreement. The defendant reasoned that the area to be leased therefore could not be ascertained objectively and was therefore uncertain. Secondly, the defendant argued that the Agreement was uncertain because it did not specify the date of commencement of the tenancy.

15 In my view, these two arguments should be dismissed. In relation to the floor plan, I am of the opinion that the Tenancy Agreement had identified with sufficient certainty the area to be leased. The plot of land, *viz.,* Plot 3, Changi International Logistic Park North, and the area of the warehouse, *viz.,* 100,000 sq ft, had been expressly identified. The fact that no floor plan was attached was not fatal to the validity of the Tenancy Agreement. As to the defendant's second argument, it is clear that in the case of an agreement for a lease, unless the length of the term and the commencement of the term are defined, the general position is that the agreement is uncertain and therefore not binding on the parties: *Harvey v Pratt* [1965] 1 WLR 1025. However, it is also established that if the date of commencement of the tenancy is not expressly fixed, but the rent is made payable from a certain date, the law would treat that date as the date for commencement of the term. Such a tenancy would be binding: *Maresse Collections Inc v Trademart Singapore Pte Ltd* [1999] SGHC 123 at [24]. On the facts of the present case, even though the Tenancy Agreement did not provide the *specific* date for the commencement of the lease, it was stipulated that the lease term was to be from July 2006. The case of *Harvey v Pratt* is distinguishable because in that case, no date for the commencement of the lease was stipulated at all. Further, in the present case, the date on which the first rental payment was due was plainly set out (*viz.,* $147,000 payable in advance on the 1st day of each calendar month, with free rental from July 2006 to August 2006). The defendant's arguments that the Tenancy Agreement was void for uncertainty are therefore dismissed.

16 Finally, the defendant argued that there was an implied condition precedent in the Tenancy Agreement that JTC's approval would have to be obtained prior to July 2006 before the obligations of the parties under the Tenancy Agreement would arise. As this condition precedent had not been fulfilled, the defendant argued that its obligations under the Tenancy Agreement had not arisen. This argument cannot be accepted primarily because there was scant and insufficient evidence that the parties had intended for JTC approval to be a condition precedent to the formation of the Tenancy Agreement. This was exacerbated by the fact that, for some reason, the defendant did not call Zac as a witness to shed light on the discussions that took place. In my view, the requirement for JTC approval was a mere term in the Tenancy Agreement which, if unfulfilled, would allow the defendant to sue the plaintiff for breach of contract. Had the plaintiff failed, for whatever reason (including the possibility that JTC approval could not be obtained), to deliver up the completed Facility by the date stipulated in the Tenancy Agreement, i.e., July 2006, it was always open to the defendant to sue the plaintiff for breach of contract. Instead, the defendant chose to renounce its obligations under the contract before July 2006 and this entitled the plaintiff to treat the contract as terminated and sue the defendant for damages. In these circumstances, the defendant's counterclaim against the plaintiff for breach of contract cannot be sustained.

17 The plaintiff is therefore entitled to interlocutory judgment with damages to be assessed and the defendant's counterclaim is dismissed. I will hear the question of costs at a later date if parties are unable to agree costs.

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