HSBC Institutional Trust Services (Singapore) Ltd *v* Elchemi Assets Pte Ltd and another [2010] SGHC 67

Case Number : Suit No 740 of 2009 (Registrar's Appeal No 18 of 2010)

Decision Date : 03 March 2010

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Cheryl Fu (WongPartnership LLP) for the plaintiff/respondent; Peter Ezekiel (Peter Ezekiel & Co) for the defendants/appellants.

Parties : HSBC Institutional Trust Services (Singapore) Ltd — Elchemi Assets Pte Ltd and another

Civil Procedure – summary judgment

3 March 2010

Woo Bih Li J:

Introduction

1 The plaintiff, HSBC Institutional Trust Services (Singapore) Limited ("HSBCIT"), sues in its capacity as trustee of Mapletree Logistics Trust. HSBCIT is the owner and was the landlord of the property known as 9 Tampines Street 92 Singapore 528871 ("the Property"). The first defendant, Elchemi Assets Pte Ltd ("Elchemi"), is engaged in the business of technology asset management. The second defendant, Ang Chee Seng ("Ang"), was at all material times a director of Elchemi.

2 By a lease agreement in writing dated 12 January 2009, HSBCIT leased the Property to Elchemi for a term of 15 years commencing from 1 November 2008 and expiring on 31 October 2023.

3 By a Deed of Guarantee and Indemnity dated 8 July 2009, Ang agreed to guarantee payment of all sums that were due and payable by Elchemi to HSBCIT under the lease agreement.

4 Unfortunately, Elchemi failed to make payment of sums due under the lease agreement. As at 21 August 2009, a sum of $4,869,529.17 was due as follows:

	Description	**Quantum (S$)**
(a)	Security deposit for year 1	2,435,192.76
(b)	Rental arrears for period from 1 December 2008 to 31 August 2009 and late payment interest	2,039,836.28
(c)	Land rent and property tax and late payment interest	359,446.93
(d)	Payment for miscellaneous services for the maintenance and repair of the property (security, pest control and cleaning services)	35,053.20
	Total	**4,869,529.17**

5 Elchemi continued to be in default notwithstanding letters of demand for payment.

6 On 27 August 2009, HSBCIT's solicitors wrote to Elchemi to demand that vacant possession of the Property be delivered by 11am of 28 August 2009. They also stated that the lease agreement would be terminated upon such re-entry. On 28 August 2009, Elchemi's solicitors wrote to HSBCIT's solicitors to confirm that vacant possession of the Property would be delivered to HSBCIT. Accordingly, the lease agreement was terminated on 28 August 2009 upon re-entry by HSBCIT.

7 Subsequently, HSBCIT commenced the present action against Elchemi and Ang for outstanding rental and other arrears and for damages.

8 After a defence and counterclaim was filed by the defendants, HSBCIT filed Summons No 5625 of 2009 on 28 October 2009 to seek final judgment for $2,434,336.41 against Elchemi and Ang and interlocutory judgment against both defendants for damages to be assessed pursuant to certain provisions in the lease agreement together with interest and costs.

9 HSBCIT also filed Summons No 5626 of 2009 on 28 October 2009 to strike out the counterclaim of the defendants on the following grounds:

(a) it disclosed no reasonable cause of action;

(b) it was scandalous, frivolous and vexatious;

(c) it might prejudice, embarrass or delay the fair trial of the action; and/or

(d) it was otherwise an abuse of the process of the court.

10 On 15 December 2009, an assistant registrar granted HSBCIT summary judgment as sought and dismissed the counterclaim of the defendants with costs on an indemnity basis.

11 On 19 January 2010, Elchemi and Ang filed an appeal against the decision to grant summary judgment. Apparently, they also wanted to file an appeal against the decision to dismiss the counterclaim but were late in doing so. Instead of asking for an extension of time to do so, they decided not to pursue an appeal against the decision to strike out the counterclaim, leaving only their appeal against summary judgment to be dealt with.

12 On 11 February 2010, I heard their appeal and dismissed it. They have intimated that they will be appealing against my decision.

The court's reasons

13 At the outset, I should mention that the appeal filed on 19 January 2010 against the summary judgment granted by the assistant registrar on 15 December 2009 might itself have been out of time, but this point was not taken by HSBCIT's counsel and no argument was made thereon.

14 The sole defence relied on by the defendants in their pleadings was that the gross floor area of the Property was 9,175.75 square metres and not 11,089.22 square metres, as stated in a letter of offer from HSBCIT, and on which the rent was calculated. This discrepancy was discovered by a survey which Elchemi had obtained. The defendants claimed that this was a fundamental breach and a misrepresentation which excused Elchemi from paying whatever was stipulated in the lease agreement.

15 The short answer to this allegation was that this point had been raised by Elchemi with HSBCIT in September 2008 even before the lease agreement was signed on 12 January 2009. It was first raised in a meeting on 12 September 2008 between representatives of Elchemi and HSBCIT.

16 It was raised again in a letter of 25 September 2008 from Elchemi's solicitors as one of the issues in which Elchemi sought clarification.

17 On 9 October 2008, HSBCIT stated that the gross floor area that it (HSBCIT) was relying on was confirmed by the latest approved Grant of Written Permission issued by the Urban Redevelopment Authority ("URA") dated 29 November 2005. HSBCIT further said that Elchemi might, if it wished, request its consultants to carry out further checks with URA to ascertain the correct measurement prior to the commencement of the term on 1 November 2008.

18 No further inquiry was raised thereafter by Elchemi or on its behalf and the lease agreement was entered into.

19 In addition, Elchemi had on various occasions tendered cheques to make payment of its obligations under the lease agreement based on the gross floor area which HSBCIT was relying on and not the other way around. Those cheques were dishonoured.

20 In the circumstances, I was of the view that this reference to the gross floor area again was a sham.

21 In Ang's affidavit to resist HSBCIT's application for summary judgment, he raised fresh allegations not found in the defence. I was of the view that he was not entitled to do so unless the defendants had first applied for and obtained leave to amend his defence (see my decision in *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2008] 2 SLR (R) 786). The defendants did not seek leave to do so and accordingly, were not entitled to rely on the fresh allegations.

22 Be that as it may, I will deal quickly with the main fresh allegations.

23 One of the main fresh allegations was that HSBCIT had orally assured Elchemi that it would not insist on strict compliance with the lease agreement, which was only a formality, or that there were oral variations thereof. I found this suggestion preposterous especially when Elchemi had the benefit of legal representation before it entered into the lease agreement. There was also a provision in the lease agreement, *ie*, cl 6.10 which provides that HSBCIT is not bound by any representation or promise which is not contained in the agreement.

24 The next main fresh allegation was that the guarantee was not in fact executed on 8 July 2009 but on 14 July 2009. More importantly, Ang was saying that he executed it on the basis that he was assured that it would not be enforced against him.

25 It was immaterial to me whether the guarantee was signed on 8 or 14 July 2009. If it was signed on 14 July 2009 but wrongly dated 8 July 2009, that alone did not invalidate the guarantee.

There was no suggestion that Ang could rely on a lack of consideration for the guarantee. As for the allegation that he was assured that it would not be relied on, he would have made the allegation at the earliest opportunity if it were true. Yet no such allegation was stated in the defence.

26 Furthermore, as a businessman, he must know that the reason for taking the trouble to obtain a guarantee from him, after the lease agreement was signed, was precisely to rely on it if need be. I had no hesitation in concluding that he was concocting his allegation.

27 There are a few other points I would like to mention.

28 Since the lease agreement was terminated on 28 August 2008, the rent etc should be calculated up to that date and not 31 August 2008. Damages are claimable thereafter. This may entail some minor adjustment in the overall liquidated amount claimed by HSBCIT.

29 The costs I ordered for the appeal ($3,000) and for the hearing below (totalling $8,000) were on a standard basis as HSBCIT did not specify the basis for indemnity costs in its pleadings. Unfortunately, HSBCIT's counsel omitted to inform me that the assistant registrar had also granted on the same day, *ie*, 15 December 2009, the costs of an adjournment below at $600 on an indemnity basis. That should have been reduced to $400 on a standard basis.

Copyright © Government of Singapore.