Housing & Development Board (a body incorporated under the Housing & Development Act) v Microform Precision Industries Pte Ltd
[2003] SGHC 214

Case Number : Suit 1230/2002

Decision Date : 22 September 2003

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Foo Say Tun and Kalyani Rajendran (Wee Tay & Lim) for plaintiffs; Shriniwas Rai (Hin Rai & Tan) for defendants

Parties : Housing & Development Board (a body incorporated under the Housing & Development Act) — Microform Precision Industries Pte Ltd

Contract – Contractual terms – Conditions – Whether burden to fulfil conditions on lessee or lessor.

Contract – Contractual terms – Implied terms – Whether implied term justified when there was known risk.

Contract – Frustration – Foreseeability – Whether contract frustrated when risk of not procuring access to land known.

1 The defendants are manufacturers of machine tools and jigs. They leased a piece of land from the plaintiffs at Ang Mo Kio Industrial Park Street 63, hereinafter to be referred to as 'Plot 1'. The lease was for 30 years with an option to extend for another 30 years. The defendants constructed a factory building on this piece of land and their business became very successful. It would be useful to describe the location of Plot 1 before proceeding further with the narrative of the largely undisputed facts. As one stands on Street 63 facing the defendants' factory, one would see a drainage reserve and another factory next to Plot 1 on its left. Behind Plot 1 is a piece of vacant land also belonging to the plaintiffs. The plaintiffs sub-divided that vacant land into two lots. The larger of the two shall be referred to as 'Plot 2'. The second, smaller portion was reserved for a Hindu temple. There is an access from the smaller portion past the Chinese temple to Street 63. Plot 2 is locked in by a drainage reserve on its left (as one faces it from the defendants' factory), the defendants' factory and part of the Chinese temple anteriorly. The portion reserved for the Hindu temple is on its right. There is a road that runs across the posterior of Plot 2. However, the Land Authority notified the defendants that that road is reserved for the Ministry of Defence and is not accessible to the defendants. Plot 2 is thus completely land-locked with no ostensible access.

2 The present dispute between the parties arose in this way. In early 1994 the defendants wrote to the plaintiffs indicating an interest in leasing Plot 2 from them. By a letter dated 19 November 1996 the plaintiffs offered to lease Plot 2 to the defendants for 21 years with an option to renew for 30 years. It was not disputed that the parties agreed to start with 21 years for the Plot 2 lease so that that lease would tie up neatly with the lease of Plot 1, and the lease for the two plots would thereafter run concurrently for 21 years (and an option for a further 30). Plot 2 consists of 2,887 square metres of land. The rent was eventually agreed at $216,381.00 per annum payable quarterly. The plaintiffs' letter of offer is important. The salient parts are reproduced as follows:

> 'We are pleased to inform you that HDB has agreed to lease to your company the industrial land having an area of approx 2,886.9 sq m (subject to final survey) at Ang Mo Kio Industrial Park 3 (as shown edged in red on the attached Plan A) for "Manufacture of semiconductor tooling, trim & form die set & system, precision machining & automation equipment".
>
> 2 TERMS OF LEASE

The lease of the abovementioned site will be subject to the following:

(a) 21 + 30 years lease wef 1 Jan 97 at $216,374 pa ($74.95 psm pa) excluding GST payable and the 10% levy if plot ratio of the development is less than 1.0;

(b) to comply with PCD's requirements as per attached letter dated 15 Oct 96;

(c) to comply with the requirements from all the relevant authorities, eg URA, Land Office, LTA, CAAS etc; and

(d) terms and conditions of lease as shown under Annexure B.

The land will be allocated in as it is condition.

3 PAYMENT OF RENTAL & OTHERS

Please arrange to forward us a cheque for the amount of $55,716.31, being quarterly rent of $54,093.50 and 3% GST of $1,622.81, made payable to "HDB" being the first quarterly rent (i.e. 1 Jan 97 – 31 Mar 97) to reach us 7 days before 1 Jan 97. The tax invoice for the next 12 months is enclosed for your use.

…

8 ACCEPTANCE OF OFFER

Kindly let us have your written confirmation (company's resolution) of your acceptance of our offer of lease within the next 10 days. You are required to remit the payment of the 1st quarter's Rent/ GST 1 week before the lease commencement date, i.e. by 25 Dec 96.'

3 The defendants accepted the offer by letter dated 4 December 1996 and sent their first quarterly cheque on 8 January 1997. It will be seen that on record, the defendants had to confirm acceptance within ten days from 19 November 1996, i.e. by 29 November 1996. They had also to remit payment of the first quarterly rent by 25 December 1996. The defendants were late on both counts but no issue arose from this. The defendants took possession of Plot 2 from 1 January 1997 and paid rent up to 30 June 1997 but had defaulted since 1 July 1997. On 14 April 2000, the plaintiffs' solicitors wrote to the defendants stating that the contract had been repudiated and demanded payment of arrears of rent and delivery of vacant possession. The defendants pleaded frustration of contract and estoppel as their defence. However, only the frustration defence was advanced with vigour at trial. So far as the defence of estoppel was concerned, Mr Rai, counsel for the defendants, submitted that there was an implied warranty in the contract that 'the site could be used as an industrial land to build a factory'. The defence rests on this simple point – that since the defendants were unable to secure access to Plot 2 they could not build a factory there and, consequently, the contract was at an end by virtue of the doctrine of frustration.

4 The full picture is not so simple. As early as 24 October 1994, two years before the plaintiffs' offer of lease, the defendants were already interested in leasing Plot 2, were aware of a problem concerning access to Plot 2. By a letter of that date, Archispace Designs (who were the architects for the defendants) wrote to the plaintiffs informing them of a potential problem with access. Mr Hector Chia, the architect in charge from Archispace deposed in his affidavit that the plaintiffs replied by letter dated 9 November 1994 that they (the plaintiffs) 'still insisted on access from the existing factory'. The letter cannot be understood in that way. All it said was, 'Please forward the schematic plan on the proposed new development *and the proposed vehicular flow via the existing building in front*' (my emphasis). Far from an insistence from the plaintiffs, it appears to

be a proposal from Archispace. By letter dated 22 April 1995 the Public Works Department referred to Archispace's consultation with them and set out the PWD's position very unequivocally as follows:

> 'This stretch of Yio Chu Kang Road is for the exclusive use by MINDEF and as such your proposed second access to be taken from this road is not supported.'

On 10 July 1995 Archispace wrote to MINDEF asking them to consider allowing emergency access through Old Yio Chu Kang Road for the Civil Defence fire engines should the need arises. They received a reply dated 19 July 1995 saying that -

> 'we are in no position to allocate the subject land and you are advised to approach Land Office for the allocation. The Old Yio Chu Kang Road is also shared by other users and permission from PWD is necessary. We are not managing the road which falls on State land.'

Archispace then forwarded MINDEF's letter of 19 July to the plaintiffs. The architects told the plaintiffs that they could not understand why the Old Yio Chu Kang Road could not be used for emergency access when it was 'shared by others'.

5 About a year later with nothing significant transpiring between the plaintiffs and the defendants in the interim, the plaintiffs wrote to Archispace enquiring whether their clients (the defendants) were 'still interested on the additional land'. This letter was dated 5 August 1996 and Archispace replied on the same day to say that the defendants were still interested, and asked for the 'procedures and conditions to secure the land so that the lease could be finalised'. Archispace's letter also, inexplicably, stated that 'our preliminary discussion with MINDEF reveals that the Old Yio Chu Kang Road is accessible to the public and can be used as an access to the site'. No evidence was led to justify this statement. In fact, to the contrary, the only letter from MINDEF was the one they received a year ago denying access. Archispace wrote a further letter to the plaintiffs dated 21 August 1996 in which, among other matters, it stated that the PWD 'confirmed that the Old Yio Chu Kang Road was for the exclusive use of MINDEF'. They went on to say in their letter that 'we subsequently wrote to MINDEF to allow emergency access only but was pleasantly surprised that MINDEF approved the access as it is "shared by other users".' This last statement was untrue. MINDEF did not approve access. Their statement was clear. They had no authority to grant access. That lay with the PWD who had expressly refused to grant access.

6 On 1 November 1996 the plaintiffs wrote directly to the defendants asking if they were still interested in the additional land ('Plot 2') with a lease of 21 plus 30 years with effect from 1 January 1997 at the rate of $74.95. Archispace replied in the affirmative on behalf of the defendants. Hence, the plaintiffs' letter of offer dated 9 November 1996 was given to the defendants. The defendants accepted the lease on 4 December 1996 without qualification. This is significant because two days before that, their architects (Archispace) wrote to the Land Transport Authority asking if the LTA would confirm that access could be obtained through the Old Yio Chu Kang Road. The LTA wrote on 12 December 1996 asking to meet Archispace to discuss the access question. Archispace only replied on 9 January 1997 asking to meet on 13 or 14 January 1997. Archispace alluded to their meeting with LTA in their letter about two months later (dated 14 March 1997) to the plaintiffs. They said:

> 'Although the issue of whether Old Yio Chu Kang Road next to the MINDEF camp is usable by public is "resolved", we understand from informal discussions with LTA recently that this "Public Cat 3 Road", may not be built in the near future.'

Several months later, Archispace wrote a letter to the Urban Redevelopment Authority dated 23 May 1997 confirming that 'the proposed future vehicular traffic entry and exit as shown on Drawing No. 00/A-RA is to be removed from the submission set as the Land Transport Authority has no future plans of upgrading the "Old Yio Chu Kang Road" in the near future.' On 28 August 1997 Archispace

wrote to the plaintiffs to say that the defendants were "concerned" that at the moment, they were liable to pay the rentals for the additional land and were also unable to proceed with their planned development.

7 On the facts above, Mr Rai made an impassioned submission on behalf of the defendants that the contract of lease for Plot 2 must be deemed to be frustrated. But what really frustrated it? Mr Rai says that because the authorities had refused them access through the Old Yio Chu Kang Road Plot 2 had become land-locked and totally inaccessible. That, he says, was the frustration. Counsel's crutch was the Reid test in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 721, cited with approval in *Singapore Woodcraft Manufacturing v Mok Ah Sai* [1978-79] SLR 516, 519 as follows:

> 'The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end …'

Counsel also relied on *Lim Kim Som v Sheriffa Taiba Bte Abdul Rahman* [1994] 1 SLR 393. In that case, the appellant was served with the 21-day notice to complete the purchase of land he had contracted to buy from the respondent. On the same day, a declaration was made under s 5 of the Land Acquisition Act, Ch 272 whereby the subject of the sale was declared to be acquired by the government. The appellant refused to complete, pleading frustration. The High Court held that compulsory acquisition was a process and not an act and that the vendor is not divested of his title until after the State had taken possession of the land. The Court of Appeal reversed the High Court and held that the contract had been frustrated. Thean JA held that -

> 'the process of compulsory land acquisition which *de facto* had begun with the s 5 declaration had changed the nature or duration or the title. The title had become no longer one as provided in the agreement – be it a fee simple or in perpetuity – but a defensible one which within a short period of time would vest in the state as it did' *ibid.* page 413.

It can be seen that the facts there are very different from the present one. The doctrine of frustration may be stated as a doctrine in contract law that where an unforeseen contingency occurs after a contract is made, and is due to neither party's fault, and thereby rendering the contract incapable of performance (at least on the part of one of the parties), or performed in a way that was not envisaged by the parties, then the contract is said to be frustrated and the courts will, as far as possible, relieve the parties from further performance of the contract. The doctrine of frustration as understood is naturally, limited by the facts of each case. In the present case before me, the alleged contingency was the inability of the defendants to procure access to the contract site from the Old Yio Chu Kang Road. This cannot by any count be regarded as an unforeseen contingency. The converse is true. It was not only foreseen before the contract, but it was made clear to the defendants, at least from an objective reading of all the correspondence disclosed and admitted into evidence, that consent from the relevant authority (in this case the Public Works Department) was required. It was a known problem and one that was known for a long time. But the defendants, through their architects, chose to interpret the correspondence as evidence of consent having been granted and represented as such to the plaintiffs.

8 Even though they did not obtain approval, the defendants' architects wrote to the plaintiffs and represented to them that 'MINDEF approved the access as [the road] was shared by others'. It is clear from the correspondence that this representation was untrue. I find, therefore, that at best, the defendants were happy to juggle two alternatives available to them at that time. The first was to assume the known risk that approval for access from the Old Yio Chu Kang Road may not be granted, but they hoped that they could get the authorities eventually to relent. The danger contemplated was that the authorities might not relent. In such a case, there can be no frustration of the contract just because the risk delivers the harm that it had been carrying. The second option

the defendants had at that time, was to rebuild his factory by amalgamating the old and new sites. However, as counsel submitted, the economic situation from 1997 onwards might have rendered this option unviable or impractical. The story of the landlocked tenant goes some distance in evoking sympathy, but it was nonetheless opportunistically conceived and thus, must be appraised reasonably and with detachment.

9 Mr Rai also submitted that we ought to head the 'reality of the situation' and take into account that the lease agreement carry terms and conditions which stipulated that the defendants as lessees had to comply with the requirements from all the relevant authorities. Hence, if any of the relevant requirements could not be met owing to no fault of the defendants the contract of lease must be held to be frustrated. The reality in such cases, which is similar to cases concerning the sale and purchase of real property, is that a lessee or, in the case of a sale and purchase, the purchaser, must protect himself if he enters into a contract before verifying whether all the relevant approvals that he requires will in fact be granted. He does so simply with the standard 'subject to approval' clause. No such clause was inserted in the present contract nor was there any attempt to do so. Mr Rai's reliance on cl (C) in the Terms of Lease 'to comply with the requirements from all the relevant authorities, e.g. URA, Land Office, LTA, CAAS etc' as having the same effect is misplaced.

10 Clause (c) was admittedly part of a sparsely drawn set of conditions, but one must be reminded that these are conditions, not conditions precedent. Thus a breach would not render the contract void in itself. In the case of a condition, the remedies for breach may be determined in part by the nature and extent of the breach, the damage suffered, and any other relevant factor such as estoppel or waiver in the sense that the innocent party may choose to proceed notwithstanding that he had come to know, or ought reasonably have known about the breach. Reading that clause in context, the reader will naturally assume that if these conditions are breached the contract will be affected. The question is, in what way would a breach affect the contract? Unless expressly stated otherwise, these conditions must be complied with by the party on whom the burden to effect compliance falls, and that, conversely, gives the other party such remedies for breach as the law may allow. In the context of the present terms and conditions, I am of the view that they were addressed to the lessee. There was no evidence to suggest that the plaintiff landlord had to satisfy any requirement of any of the suggested relevant authorities. The correspondence between the plaintiffs and defendants from 1994 to the end of 1997 is replete with indications that the defendants had to obtain a number of clearances from such named authorities. They are standard terms in lease agreements. That being the case, the terms and conditions cannot reasonably be read to mean that if any of them had not been satisfied the defendants were entitled to treat the contract as at an end and walk away from it. It is not that simple. If the duty or burden falls on the defendants then they cannot rely on their own failure to avoid the contract. Furthermore, if the defendants' interpretation is right, then the established practice of inserting a 'subject to approval' clause by the purchaser or tenant will become virtually redundant because in most (if not all) such contracts, the vendor or landlord would have inserted conditions similar to the ones found in the present case. The purchaser or tenant would then be placed in a more favourable position at the expense of the vendor or landlord. In other words, if the defendants' reliance on cl (c) is correct, then (without a 'subject to approval' clause) a failure to comply with any statutory requirement such as the failure to install a fire exit would entitle the defendants to avoid the contract. The same set of terms (cl (c)) cannot be interpreted one way for some requirements and another for others.

11 The argument for an implied warranty must be rejected because the correspondence shows that it was the defendants who were giving the plaintiffs the impression that there would be no difficulty getting access from the Old Yio Chu Kang Road. But more fundamentally, if the warranty to be implied was that the defendant would be able to build a factory on Plot 2, then it cannot be said that there had been a breach because there was no evidence that a factory could not be built there. On the contrary, from the evidence it appeared that it could have. The problem was really

one of access. However, the evidence also does not justify an implied warranty that a factory could be built on Plot 2 '*with access to the Old Yio Chu Kang Road*'. This is so partly because there was a real possibility that access could be gained from Ang Mo Kio Street 63 either through the side of the defendants' then existing building, or through a reconstruction of the existing building. Indeed, even up to 17 December 1997 it will be seen from the letters of Archispace, that the construction of a factory at Plot 2 was to be carried out simultaneously with the reconstruction of the existing building. Their letter of 17 December 1997 to the URA has the heading:

> 'PROPOSED ERECTION OF A 6-STOREY LIGHT INDUSTRIAL FACTORY AND PROPOSED ADDITIONS AND ALTERATIONS TO EXISTING 3-STOREY LIGHT INDUSTRIAL FACTORY ON LOTS 12820, 13062 PT MK 18 AT 10 ANG MO KIO STREET 63'

and a text that says –

> '…
>
> As discussed, we have to inform you that the previously approved plans under Notice of Grant of Written Permission Decision No. P300497-31F2 dated 10 July 1997 will be reoriented with major alterations due to the change in vehicular access.
>
> As agreed, we will be submitting a revised plan under Alteration and Addition works (Form DC12) which includes the upgrading of the existing factory building façade and the new extension. We are presently preparing the plans and expect the submission to be made sometime in January 1998.
>
> …'

Therefore, any implied warranty would have to be in terms that a factory could be built on Plot 2 with access to the Old Yio Chu Kang Road or Ang Mo Kio Street 63. But it would not be reasonable to imply a warranty in such wide and malleable terms when the party to whom that implied term would aid was at the material time, fully and totally aware of the nature and extent of the lack of access to Plot 2. On the facts, by reason of the concurrent leases held by the defendants, the defendants were in a position to rebuild their factory with access from Street 63. To say now that it would be too costly to do so does not detract from the evidence that it was a distinct prospect or reasonable possibility in 1996, when the defendants' business was expanding. I should emphasize that if the problem of access was not apparent to the defendants prior to the contract, they might have a reasonably strong case to avoid the contract on the ground that no reasonable tenant can be expected to rent property without at least an implied warranty from the landlord that there must be some means of access to the property. The case before me was, however, not pleaded or fought on that basis and the facts were very different. The defendants who raised the defence of frustration had not satisfied me that the lack of access – whether via the Old Yio Chu Kang Road or Ang Mo Kio Street 63 – was unforeseen at the time of the contract. But, more importantly, the defendants were, on the other hand, aware of the risk. By assuming that risk, they can neither now rely on frustration or an implied warranty of access. An implied warranty works only when something so obvious (to the 'officious bystander') was overlooked by the parties at the time of contract. Given these circumstances, I am unable to find that there would be any implied warranty.

For the reasons above, there will be judgment for the plaintiffs except prayers 4 and 5 of the statement of claim.