Mcdonald's Rest Restaurants Pte Ltd v Wisma Development Pte Ltd
[2001] SGHC 375

Case Number : OS 600976/2001, SIC 602529/2001

Decision Date : 26 December 2001

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Margaret George (Koh Ong & Partners) for the appellants/defendants; Mirza Namazie and Chua Boon Beng (Mallal & Namazie) for the respondents/plaintiffs

Parties : Mcdonald's Rest Restaurants Pte Ltd — Wisma Development Pte Ltd

Judgment

GROUNDS OF DECISION

1. The defendants, Wisma Development Pte Ltd, who leased their property at Wisma Atria, Orchard Road, to the plaintiffs, McDonald's Restaurants Pte Ltd, and who agreed that the rent for an extension of the lease for another four years would be fixed on the basis of the average of the rental valuation by two appointed valuers less ten per cent, sought, inter alia, a declaration to set aside the rental valuation by one of the valuers. I dismissed Wisma's application and now give the reasons for my decision.

Background

2. The facts, shorn of details for present purposes, are as follows. Wisma Development Pte Ltd ("Wisma") entered into a number of agreements to lease their property at Wisma Atria ("the premises") to McDonald's Restaurants Pte Ltd ("MD") over a period of 16 years with effect from August 1989. Before the third four-year term of the lease expired on 27 August 2001, MD exercised their option to lease the premises for a fourth four-year term. Initially, Wisma took the view that the lease had not been validly extended for a fourth four-year term but they subsequently accepted the validity of this extension of the lease. However, Wisma and MD could not agree on the monthly rent for the fourth four-year term of the lease.

3. The parties foresaw that there could be a deadlock on the determination of the prevailing market rent for the extension of the lease and the tenancy agreement provided a mechanism for breaking the impasse. Clause 17 of the relevant tenancy agreement provided as follows:

If the parties are unable to agree, the prevailing market rent shall be determined by two (2) international valuers, one to be appointed by each party …. If the valuers cannot agree on a joint valuation the average of the valuations submitted by the valuers shall be the prevailing market rent and *shall be final conclusive and binding on the parties and shall not be called into question in any Court or be the subject matter of any review or appeal.*
(emphasis added)

4. It was further agreed that if the parties could not agree on the rent payable for the premises during the fourth four-year extension of the lease, the rent payable shall be the prevailing market rent as determined in accordance with clause 17 less ten per cent.

5. Wisma appointed DTZ Debenham Tie Leung (SEA) Ltd ("DTZ") to determine the prevailing market rent of the premises while MD appointed Knight Frank Pte Ltd ("Knight Frank') to do the same.

Problems arose with respect to the basis on which the monthly rent of the premises was to be valued. MD thought that the prevailing market rent should be computed on the basis that the lease provided that the premises shall not be used otherwise than as a McDonald's fast food restaurant. On the other hand, Wisma insisted that the prevailing market rent should be computed without taking into account any restriction on the use of the premises.

6. On 9 March 2001, DTZ valued the prevailing market rent of the premises at $55 per square foot per month without taking into account the restricted use of the premises. In contrast, on 27 March 2001, Knight Frank, after taking into account the fact that the terms of the lease prohibited MD from using the premises in any manner other than as a McDonald's fast food restaurant, valued the prevailing market rent of the premises at $34 per square foot per month.

7. On 28 August 2001, Judicial Commissioner Tay Yong Kwang ordered that the term "prevailing market rent" in clause 17 of the fourth tenancy agreement be determined without having regard to the fact that the premises shall not be used otherwise than as a McDonald's fast food restaurant. It was further ordered that the monthly rental payable under the fourth tenancy agreement be fixed by reference to "the average less 10% of the existing valuation … by [DTZ] dated 9 March 2001 @ $55.00 per square foot per month and a new valuation of the prevailing market rent … to be done by [Knight Frank]".

8. A new valuation was duly done by Knight Frank. Without taking into account the fact that the premises were not to be used otherwise than as a McDonald's fast food restaurant, Knight Frank valued the prevailing market rent of the premises on 14 September 2001 at $48 per square foot per month.

9. If the court order of 28 August 2001 was obeyed, this fresh valuation by Knight Frank would have resolved the problem regarding the monthly rent of the premises. However, Wisma, which thought that Knight Frank's fresh valuation of the prevailing market rent of the premises was on the low side, decided to challenge the validity of Knight Frank's valuation. They obtained two fresh valuations of the prevailing market rent. On 26 September 2001, Jones Lang LaSalle Property Consultants Pte Ltd ("Jones Lang") valued the prevailing open market monthly rent for the premises at $58 per square foot per month. Furthermore, DTZ, which had valued the premises earlier on at $55 per square foot per month, re-valued the prevailing open market monthly rent of the premises at $60 per square foot on 26 October 2001.

10. Armed with the fresh valuations of Jones Lang and DTZ, Wisma sought a declaration that the fresh valuation by Knight Frank of $48 per square foot per month be set aside on the ground that it does not accurately reflect the prevailing market rent of the premises. In addition, Wisma sought a declaration that Jones Lang's valuation of $58 per square foot per month be accepted as the prevailing market rent of the premises. In short, Wisma attempted to invalidate not only Knight Frank's fresh valuation which was done in accordance with the court order of 28 August 2001 but also the earlier valuation of $55 per square foot per month by DTZ.

11. The words of clause 17 of the tenancy agreement are crystal clear. This clause specifically provides that if the valuers cannot agree on a joint valuation, the average of the valuations submitted by the valuers shall be the prevailing market rent. It also provided that the valuations by the appointed valuers shall be "final conclusive and binding on the parties and shall not be called into question in any Court or be the subject matter of any review or appeal". In the face of such clear words, the following passage from Yong Pung How CJ's judgment in *Associated Asian Securities Pte Ltd v Lee Kam Wah* [1993] 1 SLR 585, 587 are instructive:

> Normally when contractual terms are clear and unambiguous they are taken at face value unless there is some compelling reason why they should not be. The fact that a term may put what appears to be a disproportionate or unfair burden upon one party is not regarded as a sufficient reason to interfere with its interpretation if it is in itself clear, because parties who contracted on equal terms must be left free to apportion risks as they see fit.

12. For the purpose of determining whether Wisma's attempt to set aside Knight Frank's fresh valuation rests on solid ground, it is pertinent to note that in *Jones v Sherwood Services Plc* [1992] 1 WLR 277, 287, Dillon LJ pointed out that the first step to take would be to see what the parties had agreed to remit to the experts as this is a matter of contract. The next step is to see whether or not the experts made a mistake by departing from their instructions. In the present case, Knight Frank followed the instructions given to them for the fresh valuation of the prevailing market rent for the premises. In the fresh valuation report, Knight Frank referred to the basis of their valuation in the following terms:

> Our valuation is our opinion of the open market rental which we would define as intended to mean "the best rental at which an interest in a property might reasonably be expected to be let at the date of valuation assuming:-

a. a willing landlord and a willing tenant;
b. a reasonable period within which to negotiate the tenancy, taking into account the nature of the property and the state of the market;
c. values will remain static throughout the period;
d. the property will be freely exposed to the market; and
e. no account is to be taken of an additional bid by a special tenant."

13. Wisma did not allege any fraud or bad faith on the part of Knight Frank. Neither did they allege any collusion between MD and Knight Frank. In paragraphs 9 and 10 of his affidavit dated 6 November 2001, Wisma's managing director and general manager, Mr Mubarak bin Fahad, summed up his company's position in the following terms:

9. It is evident that Knight Frank's … valuation of $48.00 per square foot per month is not reflective of the prevailing market rent for units such as the Premises in question.
10. In the premises, [Wisma] humbly pray for the orders and declarations sought herein.

14. That Knight Frank's valuation of $48 per square foot per month differs from DBZ's valuation of $55 per square foot per month is not altogether surprising. There being no absolute objective criterion, the valuation of the rental value of properties is not an exact science. It is precisely because the parties recognised that valuers could disagree on what is the prevailing market rent of the premises that they agreed in clause 17 of the tenancy agreement to take the average of the valuations of two valuers, one appointed by the landlord and the other by the tenant. Such an approach provided a speedy resolution of any dispute on the monthly rent for the fourth four-year term of the lease and spared the parties the delays and complexities of court proceedings.

15. In *Jones and Ors v Sherwood Computer Services Plc* [1992] 1 WLR 277, 288, Dillon LJ, while referring to the effect of an accountant's report which the parties agreed was to be conclusive, final and binding, said as follows:

> If the parties to an agreement have referred a matter which is within the expertise of the accountancy profession to accountants to determine, and have agreed that the determination of the accountants is to be conclusive, final and binding for all purposes, and the chosen accountants have made their determination, it does not seem appropriate that the court should rush in to substitute its own opinion, with the assistance of further accountants' evidence, for

the determination of the chosen accounts.

16. Dillon LJ's words apply, mutatis mutandis, to the present case. Having agreed under clause 17 of the tenancy agreement not to question in any court of law the valuation of the appointed valuers, Wisma is, without more, in no position to challenge Knight Frank's fresh valuation. It is worthwhile noting that Wisma's managing director, Mr Mubarak bin Fahad, stated in paragraph 85(d) of his earlier affidavit filed on 1 August 2001 that if the court agreed that the restricted use of the premises as a McDonald's fast food restaurant should not be taken into account for the purpose of determining the prevailing market rent, the rent payable under the Fourth Tenancy Agreement should "be the average less 10% of the … new valuation by Knight Frank Pte Ltd and that of the Defendants' valuers, DTZ Debenham Tie Leung". Wisma's volte face cannot be countenanced. As such, their application to have Knight Frank's fresh valuation set aside and to have the prevailing market rent for the premises fixed at $58 per square foot per month was dismissed with costs.

Sgd:

TAN LEE MENG
JUDGE