Leivest International Pte Ltd v Top Ten Entertainment Pte Ltd
[2006] SGHC 1

Case Number : OS 204/2004, Suit 809/2004

Decision Date : 06 January 2006

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Pang Xiang Zhong (Peter Pang and Co) for Leivest; B Mohan Singh (K K Yap and Partners) for Top Ten

Parties : Leivest International Pte Ltd — Top Ten Entertainment Pte Ltd

Landlord and Tenant – Tenant failing to make immediate payment to landlord's solicitors under agreement after cheque for payment bounced – Whether such failure amounting to repudiation of lease made pursuant to agreement – Whether landlord's "without prejudice" acceptance of late payment and rent thereafter amounting to waiver of alleged breach

Landlord and Tenant – Covenants – Renewal – Tenant purporting to exercise option to renew lease – Tenant failing to obtain valuation report on market rent of premises when proposing rent sum for the renewed lease as required under terms of lease – Whether tenant's exercise of option valid

6 January 2006 *Judgment reserved.*

Kan Ting Chiu J:

1 The parties in these proceedings are Leivest International Pte Ltd ("Leivest"), the owner of premises known as 40 Orchard Road, #04-35/36 and #05-18A Orchard Towers, Singapore 238875 ("the premises"), and Top Ten Entertainment Pte Ltd ("Top Ten"), the occupant of the premises.

2 Top Ten has been in occupation of the premises since 1984, when it leased them from Premier Theatre Pte Ltd under a lease dated 21 January 1985 ("the 1985 lease"). The premises have changed ownership since then. In 1986, Lucky Red Investments Pte Ltd became the owner, and in March 2002, Leivest took over.

3 After Leivest came on the scene, disputes arose over Top Ten's occupation of the premises. Leivest commenced proceedings in Suit No 634 of 2002, claiming possession of the premises. Top Ten resisted the claim and brought a counterclaim. When the action came on for hearing before Justice Tay Yong Kwang in October 2003, the parties reached a settlement.

4 The terms were set out in a letter dated 31 October 2003 from M/s Allen & Gledhill, solicitors for Top Ten at that time, to M/s Peter Pang & Co, solicitors for Leivest:

> 1. Subject to fulfilment of the other conditions, Leivest International Pte Ltd ("Leivest") will grant a new tenancy to Top Ten Entertainment Pte Ltd ("Top Ten") upon the following terms:-
>
> 1.1. The term will be for 1 year from 1 December 2003 plus an option for a further 1 year.
>
> 1.2. The rental of the premises will be $52,000 per month.
>
> 1.3. The hiring charges for all the furniture fittings and equipment will be $1 per month.

1.4. Leivest will pay for all charges imposed in respect of the premises by the MCST [the Management Corporation of Orchard Towers].

1.5. The rental for the option period will be fixed in the manner set out in Clause 6 of the current Tenancy Agreement except that the fair market rate will be determined by two licensed valuers, one to be appointed by each party. If the two licensed valuers are unable to agree on the fair market rate, but if there is less than 10% difference between their valuations of the fair market rate, the average of the two valuations shall be the fair market rate. If the difference between the valuations is 10% or more, the two licensed valuers must appoint a third licensed valuer whose sole valuation of the fair market rate shall be taken as the fair market rate for the new term. Each party must appoint its own valuer before 30 September 2004 and the two valuers must produce their valuations by 15 October 2004. If a third valuer is to be appointed (who must be from one of the following five (5) firms:

a. Jones Lang LaSalle Property Consultants Pte Ltd

b. Colliers International Singapore Pte Ltd

c. DTZ Debenham Tie Leung SEA Pte Ltd

d. CB Richard Ellis Pte Ltd

e. Knight Frank Pte Ltd

pursuant to this clause, then such appointment must be made by 30 October 2004 and the third valuer must produce his valuation by 15 November 2004. Each party will pay his own valuer. The fees of the third valuer will be borne equally by both parties.

1.6. Top Ten shall accept that pursuant to the Assignment dated 23 October 2003, the air-conditioning system and the rest of the items in the List of Inventory attached to the current Tenancy Agreement have been assigned by Lucky Red Investments Ltd to Leivest.

1.7. The rent deposit will be three months rental. The existing deposit of $225,000 will be adjusted to $156,000 and the difference of $69,000 will be refunded to Top Ten by way of deduction from the amount payable by Top Ten to Leivest as set out below.

1.8. Top Ten will be granted the right of first refusal to purchase the premises if Leivest decides to sell.

1.9. The other terms of the new Tenancy Agreement will be the same in the current lease subject only to necessary changes.

2. On or before the execution of the new Tenancy Agreement:

2.1. Top Ten will pay all arrears of rental and hiring fees amounting to $372,000 (less the credit of $69,000 for refund of rent deposit).

2.2. Top Ten will pay Messrs Peter Pang & Co the sum of $20,000 for legal charges incurred in respect of Suit No. 767 of 2003/R.

2.3. Top Ten will issue a letter of consent to Messrs Arthur Loke Bernard Rada & Lee to

release the $66,000 held as stakeholders to Messrs Peter Pang & Co.

3. Top Ten will by 5 November 2003, pay all arrears of MCST charges up to November 2003 (including interests if any) directly to MCST.

4. Leivest agrees to pay for air-conditioning repair charges of $17,347.60 and also will pay for the further repairs described in the quotation for $28,000 given to Top Ten by its contractors. The sums of $17,347.60 and $16,889.70 already paid by Top Ten will be set-off against the amount payable by Top Ten to Leivest as set out in the preceding paragraph. The balance will be set-off against future rental payments.

5. The net sum payable to Leivest under 2.1 and 4 above will therefore be $268,762.70.

6. Upon compliance with (1) and (2) above, Suit No. 767 of 2003/R, Suit No. 634 of 2002/E (except for the ongoing proceedings between Top Ten and Lucky Red Investments Ltd) and MC Summons No. 20346 of 2003 will be discontinued by all relevant parties with each party bearing its own legal costs and expenses (subject to Top Ten's contribution of $20,000 towards Leivest's legal charges in Suit 767 of 2003/R). Top Ten will also:

a. withdraw its counter-claim against Leivest and Loi Kai Meng, Loi Yan Yi and Loi Win Yen on terms that each party will bear its own legal costs;

b. withdraw in court all allegations against Leivest, Loi Kai Meng, Loi Yan Yi and Loi Win Yen save those that are relevant to the Counterclaim against Lucky Red Investments Ltd;

c. remove the Caveat filed against Leivest on 7 October 2003.

7. Default on any of the payments shall be deemed a fundamental breach and Leivest will be entitled to treat the tenancy as immediately repudiated by Top Ten and will be entitled to vacant possession of the premises forthwith and to recover all payment of all monies agreed to be paid herein.

5 For some unknown reason this letter was occasionally wrongly stated to be dated 30 October 2003 in these proceedings.

6 Pursuant to this agreement, a lease was executed by the parties and was stamped on 31 October 2003 ("the 31 October 2003 lease"). The lease was for one year commencing 1 December 2003.

7 The settlement did not bring harmony between the parties. They instituted further legal proceedings against each other. The first is Originating Summons No 204 of 2004, filed by Leivest ("OS 204") and the second is Suit No 809 of 2004 filed by Top Ten ("S 809").

8 As both actions arose from the same background, there was a large degree of overlap in the issues raised. The actions were consolidated by the time they came on for hearing.

Originating Summons No 204 of 2004

9 OS 204 was converted to one commenced by a writ, and the parties filed the usual pleadings.

10 In its Statement of Claim, Leivest claimed that Top Ten had not complied with the terms of

settlement of 31 October 2003 in that it failed to pay the agreed costs of $20,000 to Peter Pang & Co under term 2.2, that it failed to make payment of maintenance charges for November 2003 by 5 November 2003 under term 3 (this allegation was not pursued after it was established that the maintenance charges for November 2003 were not due on 5 November 2003), and that it failed to pay interest on the late maintenance charges by 5 November 2003 under term 3.

11 Leivest sought a declaration that the 31 October 2003 lease was repudiated and demanded that Top Ten deliver possession of the premises to it and pay it mesne profits or damages.

12 Top Ten's defence was that the $20,000 had been tendered in time, although the cheque was dishonoured. However, a second payment was made on 12 November 2003 and accepted.

13 With regard to the complaint on the late payment of the maintenance interest, Top Ten pleaded that Leivest had agreed to give time to Top Ten to negotiate with the Management Corporation on the interest, and that the interest was paid to the Management Corporation on 12 November 2003.

14 Top Ten also pleaded that Leivest had issued a rent invoice for the month December 2003 to Top Ten and Top Ten had paid the rent for that month to Leivest, which was accepted.

15 On the fixtures on the premises, Top Ten pleaded that when it entered into possession under the lease of 1 January 1985, the premises were a bare shell. The fittings consisted of old furniture and fittings, an air-conditioning plant and electrical fittings. This was confirmed by the evidence of Top Ten's managing director, Peter Bader, who also added that the cinema seats were removed by the owners. Leivest did not contradict this. Loi Win Yen, a director of Leivest, claimed that under a term in the tenancy agreement, all additions made to the premises by the tenant belonged to the landlord, but that was an obvious misreading of the term. Top Ten, on the other hand, also asserted that it had brought onto the premises fixtures, furniture, fittings, equipment and other items which it was entitled to remove.

16 It counterclaimed for relief from forfeiture under s 18A of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) or the equitable jurisdiction of the court, and a declaration that it is entitled to remove the fixtures and other additions it put into the premises at the determination of the lease.

17 Leivest in its Reply pleaded that the 1 December 2003 rent invoice was a "routine invoice" issued by its accounts department, that it did not accept the tender of rent as payment pursuant to the invoice and that there was no waiver of its rights.

Suit No 809 of 2004

18 In S 809, Top Ten relied on cl 6 of the 31 October 2003 lease which provided that:

> If the Tenant shall be desirous of taking a lease of the demised premises for a further term of one (1) year from the expiration of the term hereby granted at the rent and the terms and conditions hereinafter mentioned and shall not less than three months before the expiration of the term hereby granted give to the Landlord notice in writing of such desire and if it shall have paid the rent hereby reserved and shall have reasonably performed and observed the several stipulations herein contained on its part to be performed and observed up to the termination of the tenancy hereby created then the Landlord will let the demised premises to the Tenant for the further term of one (1) year from 1st December 2004 at a rent which shall represent the fair market rate of

the demised premises per month inclusive of hiring charges for the air conditioning system described in the Second Schedule hereto and subject in all other respects to the same stipulations as are herein contained except this clause for renewal provided always that that the fair market rate will be determined by two licensed valuers, one to be appointed by each party. If the two licensed valuers are unable to agree on the fair market rate, but if there is less than 10% difference between their valuations of the fair market rate, the average of the two valuations shall be the fair market rate. If the difference between the valuations is 10% or more, the two licensed valuers must appoint a third licensed valuer whose sole valuation of the fair market rate shall be taken as the fair market rate for the new term. Each party must appoint its own valuer before 30 September 2004 and the two valuers must produce their valuations by 15 October 2004. If a third valuer is to be appointed (who must be from one of the following five (5) firms:

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e. Knight Frank Pte Ltd

pursuant to this clause, then such appointment must be made by 30 October 2004 and the third valuer must produce his valuation by 15 November 2004. Each party will pay his own valuer. The fees of the third valuer will be borne equally by both parties.

19 Top Ten pleaded that although it exercised the option by a letter dated 19 August 2004, Leivest refused to grant the new lease.

20 Leivest's defence was that it had on or about 10 December 2004 accepted Top Ten's repudiation of the lease of 31 October 2003, but the act of the acceptance was not identified.

21 Specifically, Leivest brought up the late payment of the maintenance interest and the $20,000 costs under term 7 of the terms of settlement as breaches of the terms of the settlement.

22 In the alternative, Leivest pleaded that Top Ten did not exercise the option to renew because it proposed a monthly rental of $48,000 without producing a fair market valuation by a valuer as provided in cl 6 of the terms of agreement.

23 Leivest counterclaimed for loss of rent from 1 December 2003, mesne profits or damages under s 28(4) of the Civil Law Act (Cap 43, 1999 Rev Ed) and possession of the premises and damages.

Whether Top Ten had repudiated the settlement agreement of 31 October 2003

24 I will take the complaint over the late payment of the interest on the maintenance charges first as it is the less substantial complaint.

25 There was no doubt that the interest was payable. Top Ten had never taken the position that it was not going to pay the interest. The cause of the delay in payment was that Top Ten wanted a reduction of the interest. Top Ten was negotiating with the Management Corporation for it. After it failed to get a reduction, it made the full payment of $3,295.50 on 12 November 2003, which

was received by the Management Corporation in satisfaction of its claim for interest.

26 In negotiating with the Management Corporation on the sum to be paid, it was seeking to discharge that duty by paying a smaller sum. Although there was a breach of the settlement agreement, the late payment did not result in any loss or prejudice to Leivest. Leivest's actions after the late payment also had a significant bearing on the consequences of the late payment.

27 The other complaint was about the late payment of the $20,000 costs. The payment was tendered by cheque and received in time, but the cheque was dishonoured because there were insufficient funds. When the payment was tendered subsequently by cash, it was late.

28 There was no issue about the liability to pay or the amount to be paid, or the time the payment was to be made. Top Ten was informed on 8 November 2003 that its cheque was dishonoured, and the payment in cash was not made till 12 November 2003.

29 Had Top Ten breached its undertaking to pay those costs? It did not make payment immediately when it was informed of the bounced cheque. The failure amounted to a repudiation and could have brought the settlement agreement to an end if Leivest had accepted the repudiation.

30 Did Leivest accept the repudiation? Its solicitors, Peter Pang & Co, wrote to Top Ten on 10 November 2003 and gave Top Ten notice to deliver up possession. That, on its face, was an acceptance of the repudiation if matters ended there.

31 However, when payment was tendered two days later to Peter Pang & Co it acknowledged receipt "without prejudice to our clients, Leivest's rights and we have no instructed [*sic*] otherwise".

32 What was the effect of the acceptance of the payment? The $20,000 costs were payable only as part of the settlement of 31 October 2003. Outside of the settlement, there was no liability or agreement for Top Ten to pay $20,000 to Peter Pang & Co.

33 Leivest cannot accept the payment and deny the subsistence of the agreement under which the payment was tendered. By accepting the payment, it acknowledged that the agreement was in force on 12 November 2003.

34 The acceptance of the $20,000 payment on 12 November 2003 was not the only obstacle to Leivest's assertion that the settlement agreement was terminated.

35 If the settlement agreement was repudiated by Top Ten's failure to pay the $20,000 on 5 November 2003, and the 31 October 2003 lease was also terminated (as Leivest also asserted), there was no basis for Leivest to demand rent from Top Ten.

36 But by issuing the rent invoice on 1 December 2003, Leivest held itself out to be entitled to receive rent from Top Ten. That is only consistent with the subsistence of the lease at that time, for that was the only basis on which rent was payable.

37 Leivest acknowledged receipt of the payment in a letter to Top Ten bearing the caption "Re: Rental December 2003" stating:

> We have received on 1 December 2003 a cheque of $52,000.00 and we are holding your payment strictly without prejudice to all our rights at law.

> If this arrangement is not acceptable to you, we will be happy to return the same to you on receipt of your letter requesting for the return.

and enclosed a receipt marked "Without Prejudice" which referred to the "proposed payment for rental".

38 The receipt did nothing to change the picture. Counsel for Leivest suggested that the rent payment was sent out before the rent invoice was received by Top Ten. The evidence on the sequence of events was inconclusive, and the issue was irrelevant. Leivest's need to bring up this issue only underscored its anxiety over the rent invoice. All that really mattered was that Leivest requested for the rent unconditionally and Top Ten tendered rent unconditionally on 1 December 2003. That was sufficient to show that on 1 December 2003, neither the 31 October 2003 settlement nor the lease of that date was repudiated.

39 These issues have been addressed in judicial pronouncements of good authority. In *Central Estates (Bulgaria) Ltd v Woolgar (No 2)* [1972] 1 WLR 1048, the tenant was convicted of unlawfully keeping a brothel on the premises under lease. The landlords' agents issued instructions that no rent was to be demanded or accepted from him. However, through a clerical error, a demand for rent was sent to the tenant, and the rent was paid and accepted.

40 The English Court of Appeal had to decide whether there was a waiver of the right of forfeiture. Lord Denning MR held at 1052:

> Was this rent demanded and accepted by the landlords' agents with knowledge of the breach? It does not matter that they did not intend to waive. The very fact that they accepted the rent with the knowledge constitutes the waiver.

Buckley LJ examined the issue in greater detail at 1054–1055:

> The landlord's right is a right to elect whether to treat the lease as forfeit or as remaining in force. Any election one way or the other, once made, is irretractable: *Scarf v. Jardine* (1882) 7 App.Cas. 345, *per* Lord Blackburn at p. 360. If the landlord by word or deed manifests to the tenant by an unequivocal act a concluded decision to elect in a particular manner, he will be bound by such an election. If he chooses to do something such as demanding or receiving rent which can only be done consistently with the existence of a certain state of affairs, viz., the continuance of the lease or tenancy in operation, he cannot thereafter be heard to say that that state of affairs did not then exist. If at the time of the act he had a right to elect whether to forfeit the lease or tenancy or to affirm it, his act will unequivocally demonstrate that he has decided to affirm it. He cannot contradict this by saying that his act was without prejudice to his right of election continuing or anything to that effect. In this respect his act speaks louder than his words, because the act is unequivocal: it can only be explained on the basis that he has exercised his right to elect. The motive or intention of the landlord, on the one hand, and the understanding of the tenant, on the other, are equally irrelevant to the quality of the act.

41 The effect of "without prejudice" receipts was considered a long time ago in *Davenport v The Queen* (1877) 3 App Cas 115, a decision of the Privy Council from Australia. Sir Montague E Smith put it succinctly at 132 that:

> [W]here money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture, cannot countervail the fact of such receipt.

42 In *Windmill Investments (London) Ltd v Milano Restaurant Ltd* [1962] 2 QB 373, rent was paid and the landlord's receipt stated expressly that "This receipt is given without prejudice to the following breaches of covenant …", with a breach spelt out. There was a dispute whether the receipt constituted a waiver of the breach. Megaw J found in favour of the tenant, and explained at 376:

> [I]t is a question of fact whether the money tendered is tendered as, and accepted as, rent, as distinct, for example, from money tendered and accepted as damages for trespass. That is a question of fact. Once it is decided as a fact that the money was tendered and accepted as rent, the question of its consequences as a waiver is a matter of law.

43 When Top Ten failed to pay the costs and interest on time, Leivest could have terminated the settlement agreement and the lease of 31 October 2003. But it did not exercise its rights. By its acceptance of the costs and its demand for and acceptance of the rent for December 2003, it had waived the breaches, and it cannot resurrect them.

The option for renewal

44 Top Ten had sent a letter dated 19 August 2004 to inform Leivest that it wanted to exercise the option in cl 6 of the 31 October 2003 lease to renew the lease. It added that:

> [W]e agree to pay a rent which represents the fair market rent of the premises inclusive of service charges (payable to the Management Corp) and hiring charges for the air-conditioning system. We accept that the fair market rent of the premises inclusive of the service charges and air-conditioning system is monthly rent of S$48,000.

45 Leivest's response was given on 17 September 2004:

> You must be aware that in Suit OS 204 of 2004/F, our stand is that there is <u>No</u> Lease. Hence there is no question of your Option to Renew the Lease which is not in existence.
>
> Kindly refer the matter to your solicitors.

46 In its Defence to Top Ten's claim for specific performance, Leivest pleaded that Top Ten had failed to exercise the option to renew when it proposed the rent of $48,000 without complying with the procedure set out for fixing the fair market rate.

47 The question that arises is whether the proposal to fix the rent at $48,000 without obtaining the valuation reports was in breach of cl 6. Clause 6 states that upon the renewal of the lease, the rent shall be fixed at the fair market rate, and it goes on to state that the fair market rate shall be determined by the valuations of licensed valuers.

48 Counsel for Top Ten submitted that the clause should not be read to prevent the parties from agreeing between themselves on a fair market rent. I think that it is correct that the parties did not put it beyond their power to agree on the rent. It must be implied that the valuers' reports are to be obtained only if they cannot agree on the rent.

49 If there is room for agreement on the rent, then one party can propose what it should be, as Top Ten had done. It was for Leivest to accept, reject, or make a counter proposal, but Leivest did not recognise that Top Ten had an option to renew. Leivest would not have appointed valuers even if Top Ten had done that. There was no possibility for the lease to be renewed by the agreement of the parties at that time.

50 In the circumstances, I find that Top Ten had exercised its option for the extension of the lease. All that remains to be done is to fix the rent for the extension period, even though the extension period has run out. That does not mean rent for the premises in the state they were in at the commencement of the extended period. It means rent for the premises in the state they would be in if possession of the premises had been handed back to Leivest by Top Ten.

51 The Court of Appeal made it clear in *Riduan bin Yusof v Khng Thian Huat (No 2)* [2005] 4 SLR 234 that if a tenant like Top Ten delivers possession of leased premises back to the landlord, it has the right to remove the tenant's fixtures and return the premises in the state they were in when possession was first given.

52 The furniture and fittings that came with the lease were listed in the Second Schedule to the 1985 lease. In assessing the rent payable upon the renewal of the lease, account should be taken of the items in the schedule, but Top Ten's properties and tenant's fixtures on the premises should be excluded from consideration.

53 Each party had obtained a valuation report after the deadline in cl 6 for the purpose of the trial, but without a common understanding as to what constituted the demised premises. Left to their own, the valuers applied their own constructions. One valuation was made on the basis of the premises as a bare unit, apparently without regard to the furniture and fittings on the premises in 1984. The other valuation was on the basis of the premises as a discotheque, *ie* with the additions put in by Top Ten. These valuations were flawed and of no use under cl 6. With the clarification in place, it is open to the parties to agree on the rent on a proper basis. If they cannot agree, they are to proceed to get proper valuations, and to have the rent worked out in accordance with cl 6.

54 The timelines set out in cl 6 have to be changed. The parties will have one week to agree on the rent. If they are unable to agree, they shall appoint the valuers within two weeks, and the valuers shall produce their reports before the end of five weeks. If there is a need to appoint a third valuer, the appointment shall be done within seven weeks and the third valuer's report is to be produced by nine weeks. All the time periods are to run from today.

55 The reference to the 10% difference between the two valuations has to be clarified as it can give rise to uncertainty in application. This shall be taken to mean a 10% difference between the two valuations measured against the higher valuation.

Conclusion

Originating Summons No 204 of 2004

56 Leivest's claims are dismissed. For the avoidance of doubt, I find that Top Ten had breached the terms of settlement of 31 October 2003, but I also find that Leivest has waived the breaches.

57 In respect of Top Ten's counterclaim, I find that Top Ten is entitled to remove its tenant's fixtures at the termination of the lease. The parties should be able to identify the tenant's fixtures between themselves. They will revert to me on any areas of disagreement.

Suit No 809 of 2004

58 Top Ten's claim for specific performance is allowed, and Leivest's counterclaim is dismissed.