Abundance Development Pte Ltd v Absolut Events & Marketing Pte Ltd [2009] SGHC 198

Case Number : Suit 69/2009

Decision Date : 01 September 2009

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Hong May Leng Stephanie (Lexton Law Corporation) for the plaintiff; Ooi Oon Tat (Salem Ibrahim & Partners) for the defendant

Parties : Abundance Development Pte Ltd — Absolut Events & Marketing Pte Ltd

Contract

1 September 2009

Choo Han Teck J:

Introduction

1 The dispute between the parties arose from the contrasting interpretations of the phrase "whole area of Punggol Plaza Main Atrium" in a licence agreement dated 1 October 2007 ("the Licence Agreement") between the plaintiff and the defendant. The plaintiff was the licensor of Punggol Plaza and the defendant, an events and marketing company, was the licensee. The plaintiff had divided the said Atrium into 5 lots of land and claimed that the Licence Agreement was only for the rental of lots 1–4 of the Atrium, as per a previous contract between the plaintiff and another company ("Aquarium Media Singapore Pte Ltd") that was run by two of the staff in the defendant's company. The defendant argued that without the qualifying words "consisting of 04 slots" which were present in the earlier contract indicated that the Licence Agreement impliedly included lot 5. The defendant refused to pay rent to the plaintiff from February 2008 to July 2008 on the grounds that the Licence Agreement included lot 5 and that the plaintiff had denied them the use of lot 5. There were attempts to negotiate a resolution to the dispute but to no avail. The plaintiff terminated the Licence Agreement on 2 July 2008 and asked the defendant to vacate the premises. The plaintiff alleged several breaches of the Licence Agreement by the defendant which it claimed justified the termination of the agreement. One of these breaches was the non-payment of rent. The defendant counterclaimed. It asserted that the plaintiff was in breach of its contract with the defendant. The defendant also claimed that the plaintiff's termination of the Licence Agreement was wrongful.

2 I allowed the plaintiff's claim and dismissed the defendant's counterclaim. My decision turned on the finding that, on the facts, the parties did not intend the phrase "whole area of Punggol Plaza Main Atrium" to include lot 5. The issue was simply, what was the "whole area"? On the facts, this question cannot be answered without extrinsic evidence because the contract itself did not define the area of the Atrium. On the facts, it was clear that the parties did not intend "whole area" to mean every inch of the Atrium.

3 More specifically, evidence of an antecedent agreement is an objective fact that the court should take into account as part of the finding of fact in which the parties made their contracts. In the present case, prior to the conclusion of the Licence Agreement, the plaintiff had concluded a licence agreement with Aquarium Media Singapore Pte Ltd ("the Aquarium Licence") for a period of six months commencing on 1 February 2007. The terms of the Licence Agreement with Aquarium Media Singapore Pte Ltd are identical to the Licence Agreement in dispute in the present case, save for the duration of the licence, date of commencement, name of licensee, licence fee and the fact that the

phrase "consisting of 04 slots" at para 2 of the Aquarium Licence under the heading "Event Space", is missing from the Licence Agreement. The Aquarium Licence stated that:

> The space to be used for event purposes is:
>
> (a) The whole area of Punggol Plaza Main Atrium *consisting of 04 slots* on the 1st level of that Building.
>
> [emphasis added]

This is in contrast to the present Licence Agreement which merely stated that:

> The space to be used for event purposes is:
>
> (a) The whole area of Punggol Plaza Main Atrium on the 1st level of that Building.

The fact that the phrase "whole area of Punggol Plaza Main Atrium" was defined to mean "consisting of 04 slots on the 1st level of that Building" in the Aquarium Licence demonstrated that the phrase was capable of such an interpretation and that to interpret the phrase in a way which restricted it to lots 1-4 would not be contrary to the plain meaning of the words used in the Licence Agreement.

4 The defendant drafted the disputed Licence Agreement in the present case. Before the Licence Agreement was entered into on 23 July 2007, the officers of the defendant were with Aquarium Media Pte Ltd. The *contra proferentum* rule ought to be applied in the present case. Had the defendant intended to specifically include Lot 5, it should have provided for this in the Licence Agreement. It was not enough to remove the phrase "consisting of 04 slots" as this merely left the contract ambiguous as to the definition of "whole area of Punggol Plaza Main Atrium". Such ambiguity should be construed against the writer of the contract, i.e. the defendant.

5 The defendant was aware that Aquarium Media was not using lot 5. It was also aware that an egg-tart vendor was then occupying lot 5 and would not be vacating the area until November 2007. However, the defendant did not negotiate for a lower rent for the period until November 2007. Whilst the defendant claimed that it was unwilling to forego the use of the premises during that period as part of the bargain it received due to how valuable the possession of lot 5 was to them, its actions contrasted sharply against this explanation. After the egg tart seller had vacated the premises in November 2007, the defendant did not demand for the return of lot 5 from the Plaintiff. Instead, the Plaintiff rented lot 5 to another company – Value Posh Marketing, from November 2007 to March 2008 and then to Doti in April 2008 at $4,500 per month. The defendant did not take steps to enforce its alleged rights to lot 5. It was only on 22 February 2008, after the defendant had defaulted on rent that the defendant reminded the Plaintiff that the defendant had yet to take over the remaining part of the Atrium from the plaintiff's management and requested that the atrium be handed over to it by 29 February 2008. Had lot 5 been so valuable to the defendant that it justified, as it claimed, an increase in rent by almost 100%, it was unlikely that the defendant would have waited so long to demand lot 5 from the plaintiff, particularly in view of the fact that November – February is the festive period when sales are likely to be more swift and usage of the premises more valuable. As the court said in *Southland Frozen Meat and Produce Export Co Ltd v Nelson Brothers Ltd* [1898] AC 442, 444; commercial contracts "must be construed in a business fashion". It does not make commercial sense to forego the use of the premises for five months when the defendant had claimed that half the total rents that they were paying were for the use of such premises.

6 The parties had both submitted that the agreement as to the area of the premises rented was partly oral and partly in writing. Whilst the common law traditionally did not take into account post-contractual conduct in construing the terms of a contract to avoid the undesirable result "that a contract meant one thing the day it was signed but, by reason of subsequent events, meant something different a month or a year later" (*James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 572 at 603, 606; *Wickman Machine Tool Sales Ltd v L. Schuler A.G.* [1974] AC 235), subsequent conduct may be used to ascertain the terms of an oral and only partially expressed agreement See, for example, *Ferguson v Dawson & Partners (Contractors) Ltd* [1976] 1 WLR 1213; *Wilson v Maynard Shipbuilding Consultants A.B.* [1978] QB 665; *Mears v Safecar Securities Ltd* [1983] QB 54 at 77; and *Carimichael v National Power Plc* [1999] 1 WLR 2042 at 2050-2051. In *Zurich Insurance* [2008] 3 SLR 1087, the Court of Appeal held that there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, although the Court of Appeal added that the relevance of subsequent conduct remains a controversial and evolving topic. In my view, the subsequent conduct of the defendant in not requesting for lot 5, combined with the fact that it did not negotiate for a lower rent at the time the contract was made despite its knowledge that it would not have the use of lot 5 until November 2007 at the earliest, supported the finding that the Licence Agreement did not extend to lot 5.

7 The only indication in the Licence Agreement which might favour the defendant's interpretation of it is the agreed rent. Whilst the Aquarium Licence stipulated a monthly rent of $4,600, this was increased to $8,000 in the Licence Agreement. The defendant claimed that this increase in rent was based on the assumption that the Licence Agreement included lot 5. However, the plaintiff disputed this on the grounds that it had previously undercharged Aquarium Media Pte Ltd for use of the premises and the defendant knew this. The plaintiff claimed that it was willing to rent lots 1 to 4 at $8,000 per month and lots 1 to 5 at $12,400 per month. The negotiations between the defendant and the plaintiff that took place in September, in particular, an email from the defendant to the plaintiff on 22 September 2007 at 5.45pm and a reply by the plaintiff to that email on 25 September 2007 at 11.31am shed light on this issue. That email on 22 September 2007 referred to lots 1–4 and lot 5 separately. In that e-mail, the defendant specifically stated that "[t]he total space [would] be reduced from lot 1–4, rates for lot 5 will be determined later". Moreover, the reply e-mail from the plaintiff referred to a rate of $10,000 for lots 1–4 and, "[a]s for lot 5 [the plaintiff] will stick to [its] discussion earlier of either outsourced by [the defendant] or by [the plaintiff]." The correspondence indicated that the contractual price of $8,000 was for lots 1–4 as per the plaintiff's construction, rather than for lots 1–5.

8 The plaintiff's witnesses gave evidence that the defendant had agreed at a meeting on 26 October 2007 to occupy the space of 19m by 6m at the monthly fee of $8,000 per month. The plaintiff confirmed this alleged agreement in its letter dated 26 October 2007 to the defendant. The defendant disputed the claim that this letter evidenced an agreement. The letter reads:

> We shall agree to Lot 1 to Lot 4 at Level one with a total area of 19m X 6m to be licensed to you at a monthly licence fee of $8,000.00 for a period of 6 months…
>
> Hence, if you would like to confirm your booking of the abovementioned lots, please quickly sign back the form attached. You are required to submit a deposit of one month licence fee amounting to $8,560 together with the form duly signed.
>
> [emphasis in original]

The defendant argued that the use of the word "shall" showed a mere intention and that the defendant did not accept the plaintiff's offer to vary the Licence Agreement because it neither signed

the forms attached nor paid the deposit. The defendant also argued that the plaintiff's failure to refer to this alleged varied agreement in the plaintiff's letters to the defendant threatening to terminate the Licence Agreement indicated that no variation of the Agreement had been made. On the other hand, the plaintiff argued that the defendant had not done anything to deny or contradict the content of the letter on 26 October 2007 and had commenced payment of the monthly rental fee thereafter. Moreover, the defendant had allowed the plaintiff to adjust the carpet to 19m by 6m and had not protested to the same. The defendant also used the space of 19m by 6m thereafter. Whilst the defendant did not accept the offer to vary the contract on the terms and in the manner suggested by the plaintiff in it letter dated 26 October 2007, nevertheless, their acceptance of the offer made on 26 October 2007, at least to the extent that it concerned the area of rented premises, may be implied from its conduct as described in the paragraph above.

9 In view of my findings that the Licence Agreement was for the whole area of Punggol Plaza Main Atrium consisting of lots 1 to 4 only, it followed that the defendant's reason for not paying the rent was not valid. Hence, the defendant was in breach of the contract by refusing to pay the rent from February 2008 to July 2008. The principles governing when an innocent party may terminate a contract are set out in *RDC Concrete Pte Ltd v Sato Kayo (S) Pte Ltd* [2007] 4 SLR 413 (followed in *Sports Connection Private Limited v Deuter Sports GmbH* [2009] SGCA 22). The plaintiff fulfilled two of the four principles laid down in the above cases and is entitled to terminate the contract for non-payment of rent. First, the defendant had renounced the contract inasmuch as it had unequivocally told the plaintiff that it would not perform its contractual obligation to pay rent — see its letter dated 18 April 2008 from its solicitors to the plaintiff's solicitors. Secondly, the breach of the obligation to pay rent deprived the plaintiff of substantially the whole benefit which it was intended to obtain from the contract. Given that the defendant's repudiation of the Licence Agreement through its refusal to pay rent was sufficient to justify the termination of the contract, there was no need to consider the other alleged breaches of the Licence Agreement.

10 The plaintiff's claim was allowed. The Licence Agreement dated 1 October 2007 was for the rental of lots 1–4 of the Punggol Plaza Main Atrium by the plaintiff to the defendant. The defendant's refusal to pay rent was a repudiation of the contract which entitled the plaintiff to terminate the contract. The defendant was liable to the plaintiff for fees in arrears from February 2008 to 2 July 2008. Interest would be at the usual rate from 20 August 2009. The defendant's counterclaim was dismissed. Costs were to be agreed or taxed. I also granted the plaintiff leave to withdraw High Court Suit No 488 of 2008 in respect of the same matter.