Chye Lian Huat Sawmill Co v Hean Nerng Industrial Pte Ltd
[2002] SGHC 300

Case Number : Suit 1360/2001

Decision Date : 11 December 2002

Tribunal/Court : High Court

Coram : Lai Kew Chai J

Counsel Name(s) : Rabi Ahmand s/o M Abdul Ravoof (PK Wong & Advani) for the plaintiffs; Daniel Koh and Martin Lee (CTLC Law Corporation) for the defendants

Parties : —

Contract – Discharge – Breach – Clause providing for termination of Licensing Agreement upon giving four months' notice – Whether plaintiffs in repudiation of Licensing Agreement

Contract – Illegality and public policy – Sanctity of contract – Whether Licensing Agreement unenforceable

HELD, JUDGMENT FOR THE PLAINTIFFS :

(1) It was not possible to identify any illegality. The sanctity of a contract freely entered into should not be invalidated without good legal reason. Where the doctrine of public policy is invoked, there is a need for the court to be circumspect. In this case, even though the subletting was done without the approval of JTC and there was subletting of open space, nevertheless, JTC was not without its remedies. However, instead of exercising its rights, JTC had chosen to give all concerned time to unscramble. The court would decline from venturing into the proper province of public policy in relation to subletting of industrial properties in respect of which JTC is, professionally and administratively, the best statutory agency to make the calls of judgment (See [10]-[16]).

(2) The preponderance of documentary evidence supported the plaintiffs' claim for the licensing fees. The plaintiffs' claims for reimbursement of the costs for the removal of the debris were also allowed as the hardcore debris were incontestably left behind by the sub-tenants of the defendants and there was evidence to show that it was the defendants and/or their sub-tenants and not the plaintiffs who were responsible for the clearance of the debris. On the other hand, the evidence demonstrated that the expenses claimed by the defendants under the Management Agreement were actually incurred by and for the benefit of the defendants themselves and hence, their claims for such expenses were rejected (See [18]-[20]).

(3) The Licensing Agreement had provided for its termination on the expiry of 4 months' notice. In this case, the defendants were given ample notice and they had, in fact, more than the 4 months to vacate. They did not suffer any damages and accepted the notice to vacate because they were fully aware that that was the requirement of JTC. The plaintiffs were, therefore, not in repudiation of the Licensing Agreement (See [21]-[24]).

CASE(S) REFERRED TO

British Guiana Credit Corporation v Da Silva [1965] 1 WLR 248 (refd)

Gunton v Richmond-Upon-Thames London Borough Council

[1981] 1 WLR 448 (appd)

In re London and Colonial Company ex parte Clark

[L.R] 7 Eq 550 (distd)

Monkland v Jack Barley Ltd

[1951] 1 All ER 714 (refd)

Tan Seng Huat v Golden Seal Pte Ltd

[Suit No 1632 of 1996, unreported] (refd)

Judgment

GROUNDS OF DECISION

Introduction

1 The sawmills in the Sungei Kadut area, each of which occupied more than 4 acres of valuable industrial land, became a sunset industry. After they stopped sawmilling and carpentry operations, they sublet their premises. In this case, the problems were compounded by partnership disputes. The plaintiffs therefore licensed a substantial part of their property to the defendants so that the latter could in turn sub-licence to third parties. They also engaged the defendants to manage their business, which was principally sub-lettings to their own sub-tenants. As will be seen, the arrangements have spawn this piece of litigation.

2 In this action, the plaintiff partnership, for which a Receiver and Manager was appointed by Order of Court made on 25 September 1998, claim from the defendants the sum of $912,154.25 or such other sum that may be found to be due for the balance of the monthly fee payable to the plaintiffs by the defendants for the use of the woodworking factory area and the open space area for the period between 13 February 1997 to 11 February 1999. According to the plaintiffs the gross licensing fee was $1,753,428.60 and they gave credit to the defendants for the payment of $841,274.35 already made. They further claim the sum of $198,631.08 due from the defendants to the plaintiffs for the expenses incurred by the Receiver for the dismantling of the unauthorised structures and for the removal of the debris from the plaintiffs' premises. They also claim interest on all moneys found to be due to the plaintiffs at the rate of 6% per annum from the date of the writ of summons to the date of judgment and costs.

3 According to the defence, the gross licensing fee for the period of 2 years should be $1,184, 437.20 and not the sum of $1,753,428.60 as the plaintiffs have alleged. The defendants further claim that under another agreement they had with the plaintiffs, namely the Management Agreement, they were entrusted with the management of the property and they claim the expenses of $589,497.18 which are particularised in exhibit P2 and elaborated in exhibits D2 and D3. All three exhibits were documents in the nature of Scott's Schedule which I had directed to be prepared for ease of reference. They were schedules of items, the amounts, the grounds why the plaintiffs have rejected them and the reasons which the defendants rely on in support of their claims for reimbursements. Thirdly, and finally, the defendants counterclaim liquidated damages in the sum of $944,524.20 which they allegedly suffered by reason of the plaintiffs' wrongful termination and repudiation of the licensing agreement. Alternatively, the defendants seek the entry of an interlocutory judgement for wrongful repudiation and for damages to be assessed by the Registrar. I now turn to the background.

The background

4 The plaintiffs were at all material times the lessees of the industrial premises at No. 44, Sungei Kadut Street, Singapore ("the premises") of which the lessor was the Jurong Town Corporation ("JTC"). They were a partnership firm dealing in, until the events hereinafter recited, sawmilling and carpentry works. The partnership encountered partnership disputes and they were dissolved by an Order of Court on 25 September 1998 and Mr Don Ho Mun-Tuke ("Mr Don Ho") was appointed the Receiver and Manager.

5 Sometime in early 1997, the defendants, which were associated with one of the partners by ties of kinship, were invited by the plaintiffs to help manage the premises. This was necessary because the partners were at loggerheads and matters of the firm suffered. Matters deteriorated, arrears of rent from their subtenants mounted and the premises were left in a state of disrepair. The plaintiffs granted a licence to

the defendants to use a substantial portion of the premises for differentiated monthly licence fees and they also appointed the defendants to run the business of the plaintiffs, which was then solely the business of subletting, and to maintain the premises, keeping them in a state of tenantable repair.

6 The Licensing Agreement ("the Licensing Agreement") was entered into under an agreement dated 13 February 1997. Under it, the defendants agreed to use up to 30,000 square feet of the woodworking factory area ("the woodworking area") and up to 100,000 square feet of the open space area ("the open space area") for a period of sixty (60) months with effect from 13 February, 1997, expiring on 12 February 2002. Both areas were delineated in a plan. The monthly licence fee for the woodworking area was $1.20 per square foot and for the open space area was 60 cts per square foot. The Licensing Agreement conferred on the defendants the right to sub-license their portion of the premises to third parties. A schedule of the defendants' various sub-licensees is attached to the affidavit evidence in chief of Mr Lim Lung Tieng.

7 It was also agreed that the defendants were to pay to the plaintiffs all utilities charges by meter reading promptly on demand upon presentation of the invoices for the same by the plaintiffs to the defendants. That was because the plaintiffs continued to pay for the utilities to the Public Utilities Board.

8 There was a termination clause. Under it, the defendants or the plaintiffs were entitled to give the other party four (4) months' notice in the event that either party wished to terminate the Licence Agreement and in the event the plaintiffs were to terminate the Licence Agreement upon giving the requisite four (4) months' notice, the defendants were allowed to use and occupy the woodworking and open space areas without the need to pay the plaintiffs the monthly service and supervision fee during the notice period.

9 By the Management Agreement between the parties hereto and dated 30 March, 1997 the defendants agreed to assist the plaintiffs in carrying out various matters in relation to the maintenance of the premises and the running of the plaintiffs' business. The relevant portion of the Management Agreement stated:

> "We confirm our agreement that you are to help us:-
>
> 1) do necessary repairs and maintenance works etc to the land, structure and drains etc in our premises including the part on electricity supply,
>
> 2) pay worker's salary & Central Provident Fund contribution including wages of odd job labourer hired to assist in the above mentioned repairs and maintenance,
>
> …..
>
> 6) dispose any unused machinery at reasonable amount or being properly disposed of and,
>
> 7) *Any expenses that may (sic) incurred in the running of our business*
>
> for which you are to deduct the expenses from the outstanding payable to us and the above will include favour done to us since 13-2-1997" **(emphasis added to focus attention.)**

The Preliminary Issue

10 At the beginning of the trial, I acceded to the joint application of both counsel that I address a preliminary question. I was told and I was of the same view, having read the trial papers in advance, that the determination of the preliminary question would save a considerable amount of time. The preliminary question was whether the plaintiffs' claim for the sum of $912,154.25 allegedly due under the Licensing Agreement and the defendants' counterclaim for repudiatory breach of it ought to be dismissed because the Licensing Agreement is unenforceable. Initially, the defendants relied on two grounds for unenforceability, namely illegality and public policy. The Jurong Town

Corporation Act (Cap. 150) ("the Act") did not criminalise or even prohibit subletting of industrial properties under JTC leases or licence, unlike the case of subletting of residential properties under JTC leases is unlawful under section 51 read with section 36 of the Act. It was not possible to identify any illegality. Therefore public policy remained as the sole ground for unenforceability.

11 For the purposes of the preliminary question, some further facts were agreed. Under the then applicable JTC guidelines, the subletting of JTC land and industrial building was subject to the approval of JTC and the relevant Government authorities. A party applying for approval was required to pay to JTC a subletting fee and administrative fee. The application would have to be completed by both the lessee/applicant and the proposed sub-tenant and submitted by the lessee/applicant to JTC. Under the JTC 21 Policy, which came into force in or about August 1997, the subletting of open land was not allowed. It was also common ground that no application for approval was submitted to JTC in respect of the Licensing Agreement. The Licensing Agreement included open space.

12 It was submitted on behalf of the defendants that it would be contrary to public policy to allow the claim. He relied on the agreed facts which established that JTC, the principal engine for industrial development in Singapore, did not permit the subletting of open space and did not permit any subletting without its prior approval. But JTC was not without its remedies. The lease prohibited subletting and JTC had its rights, including the rights of forfeiture. For reasons of good industrial and sensitive management, they elected to give all concerned time to unscramble. It was fully aware of the subletting but it allowed them sufficient time for arrangements to be made to enable unauthorised sub-tenants to find alternative premises. For myself, I would decline from venturing into the proper province of public policy in relation to subletting of industrial properties in respect of which JTC is professionally and administratively, armed with all relevant data and institutional knowledge and staffed by experienced officers, the best statutory agency to make the calls of judgment.

13 The sanctity of a contract freely entered into should not be invalidated without good legal reason. Where the doctrine of public policy is invoked, there is a need to be circumspect for under its guise courts may rush in where angels fear to tread. There are a number of reported cases where public policy has been shown to be an unruly horse. In this connection, the following dicta of Asquith LJ in *Monkland v Jack Barclay, Ltd* [1951] 1 All ER 714, at p 723A is helpful: "Certain specific cases of contracts have been ruled by authority to be contrary to the policy of the law, which is, of course, not the same thing as the policy of the government, whatever its complexion-e.g., marriage brokerage contracts, contracts for the sale of honours, contracts in restraint of trade and so on. The courts have again and again said that, where a contract does not fit into one or other of these pigeon-holes but lies outside this charmed circle, the courts should use extreme reserve in holding a contract to be void as against public policy, and should only do so when the contract is incontestably and on any view inimical to the public interest:…".

14 The defendants rely on *Tan Seng Huat v Golden Seal Pte Ltd* [Suit No. 1632 of 1996]. The decision of the High Court was delivered on 30 April 1998. It is not reported. The High Court in that case dismissed the plaintiffs' claim for vacant possession of their JTC factory, reinstatement costs and mesne profits and at the same time dismissed the counterclaim of the defendants for damages resulting from the plaintiffs' breach of an alleged tenancy agreement. The High Court noted that both parties were aware that JTC approval to sublet had not been obtained and that they had taken the risks of moving into the premises anyway. According to the High Court, neither party deserved the Court's sympathy.

15 At para 56 of the judgment, which dealt with a whole hosts of other facts not relevant for present purposes, the Court stated:

> "Consequently, the plaintiff is not entitled to the reliefs he has claimed against Golden Seal nor Golden Seal to its counterclaim. The profit should not profit from Golden Seal's occupation of the premises and neither should Golden Seal be reimbursed any of its costs and consequential loss in moving into and then out, of the factory; both sides were equally blameworthy-they were aware of and took the risk of Golden Seal's moving in without the blessings of the JTC and without TOP; neither deserve the Court's sympathy".

16 The reasoning in terms and in language was not grounded on public policy. I am not sure that there was an explicit ruling that the contract of sub-tenancy was contrary to public policy. If public policy was the ground for not enforcing the rights of the parties in the claims and counter-claim, I am ineluctably driven to say that the scope of public policy invalidating the sub-contract cannot go that far. It was an extension of public policy which, for my own part, I would not make.

The claims and counterclaims

17 Before I deal with the claims and counterclaims, I should recite the facts as gleaned from the evidence of the witnesses. Though Mr Don Ho had come upon the scene after his appointment as the receiver and manager, he attended the premises immediately after his appointment. The plaintiffs had ceased sawmilling and carpentry business. He ascertained that the gross area of the premises was 400,000 square feet. The defendants were in occupation and use of the whole of the woodworking factory area and the open space within the plaintiffs' premises from 13 February until 27 September 1999. A small number of the subtenants of the plaintiffs remained. On 27 September 1999 the defendants delivered possession of the plaintiffs' premises to Mr Don Ho in response to his demands to vacate and deliver up vacant possession after JTC had set the deadline. In the correspondence it was very clear that JTC had required the plaintiffs to remove all the sub-tenants. It was very clear from the evidence and correspondence disclosed in 2AB384, 391, 402 to 405 and 418 *that the defendants in truth and in fact were given and had taken about 8 months to deliver vacant possession which was required by JTC.* After they had left, the premises were sold by Mr Don Ho. The plaintiffs sold their residue of 6 years interest in the JTC leasehold.

18 I now turn to the plaintiffs' claim for the monthly licence fees. According to Mr Don Ho he had perused copies of the documents, including the warehousing agreements which the defendants had entered with various other sub-sub licencees. He was able to ascertain that the monthly fees payable to the plaintiffs by the defendants for their use and occupation of the premises was $1,753,428.60. He prepared a spreadsheet from the documents produced by the defendants during the discovery process. It is marked DHMT-1 and appeared as Schedule A annexed to the RE-Amended Statement of Claim. His evidence was not dented in cross examination. Mr Lim Lung Tieng gave evidence for the defendants. He said that the defendants' monthly statements were furnished to the receiver and manager. He disclosed that the defendants earned a gross profit of $31,484.14 per month on the basis of the highest occupancy rate. That highest occupancy rate occurred during the latter part of 1998. I should be noted that the management lasted from February 1997 to September 1999. The preponderance of the documentary evidence support the plaintiffs' claim for the licensing fees. I reject the defendants assertion that the gross licensing fees were less.

19 I next turn to the defendants' claims for deduction of expenses from the amounts they had to pay the plaintiffs. The expenses were said to total $589,497.18 less some items which the parties had expressly agreed before me. The plaintiffs prepared the Schedule of Disputed claims where they set out their reasons for rejecting the claims. The schedule is marked as exhibit P2. In my judgment, based on the totality of the evidence, it was demonstrated by the plaintiffs all expenses were actually incurred by and for the benefit of the defendants. The reasons are all set out in the third column of exhibit P2. I need not repeat them. The defendants' claims for the so-called expenses are therefore rejected, save for those which the plaintiffs have agreed.

20 The plaintiffs claim that the defendants are liable to pay to them the debris disposal charges which they had paid to remove them. They totalled $198,631.08. The hardcore debris were incontestably left behind by the sub-tenants of the defendants. There were photographs showing the debris. They were left behind by Hong Wee Construction Pte Ltd ("Hong Wee"). Mr Kelvin Lim, a witness for the defendants, explained that Hong Wee was the sub-tenants of Hean Nerng Holdings Pte Ltd ("HNH"). HNH was a related company of the defendants. Mr Kelvin Lim in cross examination admitted that the defendants were responsible to clear the debris left behind by their sub-tenants. He said Hong Wee had wanted to re-cycle the debris but did not do so. In fact, HNH had sued Hong Wee in the Subordinate Courts for the self-same costs for the removal of the debris. Another witness of the defendants, Mr Lim Heng Choon, told the court that it was the defendants and/or their sub-tenants and not the plaintiffs who were responsible for the clearance of the debris left behind by the defendants' sub-tenants. I therefore allow plaintiffs' claims for reimbursement of the costs for the removal of the debris.

21 I turn to what is superficially a substantial counterclaims of the defendants for damages by reason of the wrongful repudiation of the Licence Agreement. They in effect counterclaim for loss of profits for the residue of the Licence Agreement of 2 years and 6 months. The first matter to note is that the Licence Agreement provided for its termination on the expiry of the 4 months' notice. Further, the defendants continued to enjoy the premises for 8 months before they vacated in September 1999. In fact, the defendants knew full well that JTC wanted the clearance of the site of all authorised sub-tenants. They left without any demur.

22 In *Gunton v Richmond-Upon-Thames London Borough Council* [1981] 1 WLR 448 the plaintiff was dismissed without compliance with a contractually binding procedure. The damages to be assessed was only up to the expiry of the contractually due notice of one month notionally served on the day when the proper disciplinary procedure, if followed, could have been concluded. Again, this rule was previously invoked by the Privy Council in *British Guiana Credit Corporation v Da Silva* [1965] 1 WLR 248. The respondent was offered employment

by the appellant as their general manager under a 6 year contract (though a 3 year contract was found on appeal) and in either case, the contract was terminable upon 6 months' notice. The appellant repudiated the contract and the respondent sued for damages. The Privy Council concluded that the claim for damages should be limited to 6 months. The Gunton's rule is consistent with principle. To rule otherwise would render otiose the earlier termination clause. It is not permissible to ignore the clear bargains in a contract. Counsel for the defendants in his response filed in court by way of his letter of 19 November 2002 submitted that in *British Guiana Credit Corporation* there was no express term that the contract of service could be terminated by 6 months' notice. In my view, this was immaterial to the principle of assessment of damages. The controversy in that case, where the respondent was appointed but yet did not take office before his dismissal, proceeded on the basis that it was contemplated by both parties that there would be a termination clause. The negotiations contemplated the finalisation of the terms of contract. As for what was the reasonable period, the respondent himself had suggested 6 months in one of the documents. The ruling was that damages would be for the period of the notice if one had been given in accordance with the contract.

23 The defendants rely on *In re London and Colonial Company Ex parte Clark* [L.R.] 7 Eq 550. It was submitted that the fact that a fixed term contract was terminable by notice does not ipso facto bar the innocent party from claiming damages in relation to the unexpired term of the agreement. The court ruled, it was pointed out, that Mr Clark was entitled to his salary for the remaining period of his service agreement and not just for the 6 months' period. In that case, the contract between the limited trading company and Mr Clark was that he as an agent would be paid a salary of oe750 a year for a period of 5 years from the day of his arrival at the colony. In addition, he was to be allowed certain commission on remittances in money or produce which should be made by him to England. Mr Clark was to pay up at once oe2 per share of fifty shares of oe100 each, which he had been required to take up in the company, and the company agreed from time to time to place oe8 per share, as well as all other sums that might become due from the agent, to his debit on account of the calls to be made to him on the shares. It is clear that this was an agency agreement coupled with a separate share subscription agreement involving part paid shares with calls upon the agent from time to time during the period of the appointment. That case is miles away from the instant case. Although the reasons were not altogether transparent in the report, it seems to me the contract required Mr Clark to be paid the full salary to enable him to pay on the calls for the shares. Accordingly, the case does not assist the defendants.

24 In my view, the defendants were given ample notice and they had more than the 4 months to vacate. They did not suffer any damages. They were quite happy to vacate. They accepted the notice to vacate because they were fully aware that that was the requirement of JTC. The plaintiffs were not in repudiation of the Licence Agreement. Finally, I accept the contention of the plaintiffs that if there was any repudiatory breach on their part the same had been waived by the conduct of the defendants. They had accepted the situation and they left, though they did so only after 8 months without any demur or protest whatsoever.

25 In the premises, there will be judgment for the plaintiffs as claimed. The claims of set-off and counterclaims of the defendants are dismissed with costs. The parties are directed to settle the Order and submit the same for my approval.

Sgd:

Lai Kew Chai

Judge