

Gateway 21 Consultants Pte Ltd v Gateway 21 Pte Ltd
[2010] SGHC 289

Case Number : District Court Appeal No 7 of 2010
Decision Date : 30 September 2010
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Lim Joo Toon (Joo Toon & Co) for the appellant; Solomon Richard (Solomon Richard & Co) for the respondent
Parties : Gateway 21 Consultants Pte Ltd — Gateway 21 Pte Ltd

Contract

30 September 2010

Kan Ting Chiu J:

1 This matter arose out of the sale of a business engaged in providing corporate secretariat, business advisory and courier services. The vendor of the business is the plaintiff in the original action and the respondent in the appeal. The purchaser is the defendant in the original action and the appellant in this appeal. I shall refer to the vendor as the respondent and the purchaser as the appellant.

2 The conditions of the sale were incorporated in an agreement dated 5 October 2004 ("the sale agreement"). The consideration for the sale of the business was agreed to be \$200,000, and the date for the transfer of the business was set at 1 January 2005. The purchase price was to be paid in instalments, with the last instalment to be paid on 31 December 2006.

3 The respondent's action against the appellant was for \$110,000 of the agreed purchase price which was not paid. The appellant denied that it was liable to make the payment, and counterclaimed against the respondent for a refund of \$68,062.11 due from the payment of \$90,000 it had paid to the respondent, \$29,898.97, being the amount the respondent billed before 1 January 2005, the date of transfer under the sale agreement, and another sum of \$29,552.63 for payments billed and received by the respondent in 2005, and for damages for breach of contract for competing against the appellant.

4 The claims and the counterclaim went on for hearing before a District Judge ("DJ"). The respondent's claim was allowed and the appellant's claims for the sums of \$68,062.11 and \$29,898.97 were disallowed while the claim for \$29,552.63 was allowed. The appellant has appealed against the DJ's decision. The respondent has not appealed against it.

The Guaranteed Annual Turnover ("GAT")

5 The foremost issue between the parties is the GAT. Clause 3.1 of the sale agreement set out the schedule of payment and specified that payment was:

... subject to the turnover of the business as follows:

(k) for the year ending 31st December 2005: Singapore dollars One Hundred and Eighty Thousand (S\$180,000.00); and

(l) for the year ending 31st December 2006: Singapore dollars Two Hundred and Twenty Thousand (S\$220,000.00).

6 The GAT was referred to in the sale agreement again in cl 13.5, *inter alia* that:

13.5 The Vendor warrants and guarantees *inter alia* as follows:

(a) (i) the annual turnover of the Business for the year ending 31st December 2005 shall be Singapore Dollars One Hundred and Eighty Thousand (S\$180,000.00); and

(ii) the annual turnover of the Business for the year ending 31st December 2006 shall be Singapore Dollars Two Hundred and Twenty Thousand (S\$220,000.00).

7 The major grievance of the appellant was that the GAT was not achieved. It complained that there were shortfalls in the GAT for the two years [\[note: 1\]](#):

Year ending	GAT	Amount achieved	Shortfall
2005	\$180,000	\$125,966.89	\$54,033.11
2006	\$220,000	\$91,354.00	\$128,646.00
		Total shortfall:	\$182,679.11

The effect of the GAT provisions

8 The effect of the aforementioned clauses was an issue at the trial. The DJ found that there was no actionable agreement on the GAT. He declared that:

I am of the view that, like a representation, the supposed guaranteed annual turnover was really in the nature of a salesman's puff and not an actionable warranty. [\[note: 2\]](#)

9 In my view, however, he had failed to give effect to the clear and unequivocal meaning of cl 3.1 and cl 13.5, and was wrong in ruling that the provisions were not enforceable.

10 It was clear that the agreement on the GAT was intended to be enforceable because the sale agreement had gone further to make it clear that a failure to meet the GAT would bring on consequences. Clause 3.2 provided that:

In the event that the actual annual turnover of the Business is less than the amounts specified in clauses 3.1(k) and (l), it is hereby agreed that the Consideration required to be paid by the Purchaser in progress payments as specified above shall be adjusted by way of set-off and/or deduction in the next progress payment due to the Vendor and the amount to be adjusted shall be the difference between the Vendor's Guaranteed Annual Turnover and the actual annual turnover achieved by the Purchaser for the relevant year.

Whether there were shortfalls in the GAT

11 The sale agreement made provision for the ascertainment of the actual annual turnovers attained. Clause 3.8 provided that:

The Vendor and the Purchaser agree that in order to ascertain and confirm the actual annual turnover achieved by the Purchaser, the Purchaser shall furnish to the Vendor copies of invoices, bank deposits and credit notes, correspondence with the clientele during the 24 months' period from the Transfer date.

12 The appellant did not go through that process and pleaded in its defence that:

... The Defendants say that they had written to the Plaintiffs on or about 18 October 2005, after 1 year from the execution of the Agreement tabulating the *estimated annual turnovers* and the shortfalls from the Guaranteed Annual Turnover and pursuant to the terms of the Agreement, that the Purchase Price and the balance of payment outstanding would consequently have to be revised, reduced and suspended accordingly. [\[note: 3\]](#)

[Emphasis added]

13 The letter of 18 October 2005 is an important document because it showed that the appellant believed that it can rely on its estimated GAT shortfall to regulate the contractual obligations. In the letter, the appellant had set out the estimated shortfall in the GAT:

Estimated Shortfall in Guaranteed Turnover

	Guaranteed Amount	Expected Billing	Estimated Shortfall
	S\$	S\$	S\$
Year 2005	180,000	149,370	30,630
Year 2006	220,000	119,600	100,400
			131,030

and it went on to inform the respondent that:

... in view of the estimated revised purchase consideration maybe lesser than the amount paid to-date, we shall suspend all payment from now until 31 December 2006. Upon finalisation of all the billings up to 31 December 2006, we will make good any shortfall to you. In the event that there is an overpayment, we reserve the right to claim back the overpayment amount from you.

14 This part of the letter also showed that the appellant did not repudiate the agreement as the respondent had maintained, and was seeking only to suspend payment of the instalment payments, and had not decided to stop payments. That raises a question whether the respondent can sue for full payment of the purchase price which was due on 31 December 2006 when it commenced action in July 2006. However, no issue was raised, and this question was not addressed by counsel or the DJ at the trial, or counsel at the appeal.

15 In the Defence and Counterclaim, the GAT shortfall based on 'actual turnover' was set out in para 32 as:

Year Ending	Guaranteed Turnover	Actual Turnover	Shortfall
31/12/2005	S\$180,000.00	S\$125,966.89	S\$54,033.11
31/12/2006	S\$220,000.00	S\$ 95,971.00	S\$124,029.00

The two shortfall figures added up to a total of \$178,062.11. On this basis the appellant claimed \$68,062.11, as the amount due to it after setting off the \$110,000 of the unpaid purchase price. In the evidence adduced at the trial, this head of claim was quantified at \$72,679.11 [\[note: 4\]](#) and the difference in the sum claimed was not explained by the appellant.

16 The appellant had obviously overlooked that under cl 3.8 it had to forward to the respondent copies of the invoices, bank deposits and credit notes and correspondence with the clientele. In addition to that it had made its claim against the respondent for the shortfall in the GAT in August 2006, before the period for computing the annual turnover for the year 2006 was completed, but no issue was taken by the respondent.

17 The appellant's complaint and claim over the GAT is misconceived and unproven.

The disallowed claim for \$29,898.97

18 This claim was pleaded as being for payments received and retained retainer fees in 2004. [\[note: 5\]](#) The appellant's case as presented was based solely on the invoices issued by the respondent to the clients in the year 2004 for services to be rendered in 2005. [\[note: 6\]](#)

19 The DJ dismissed this claim, and in his Grounds of Decision, he explained [\[note: 7\]](#):

I do not believe that the plaintiff [respondent] would have rendered bills going back to 1st January 2004 for work to be done wholly in 2005. While it was possible that for some bills, some work had straddled 2004 and 2005 and been done by both parties, there was no evidence as to who did what part of the work for which parts of this claim.

The reasoning is hard to understand because there was no issue over the invoices in question that the appellant was relying on. They were issued by the respondent, which had not disputed the truth of its own invoices. If this was the only basis on which the claim can be determined, I would have allowed the appeal.

20 In the event, there are other matters which impacted on the claim. Firstly, there is a clause in the sale agreement that catered for such payments. This is cl 6.1, which provided that:

Notwithstanding any provision in this Agreement, upon the Transfer of the Business as at the Transfer date, all monies due and payable to the Vendor before the transfer date in respect of any Contracts or arrangements shall belong to the Vendor absolutely notwithstanding that the payments are made after the Transfer date.

21 Secondly, the claim referred only to invoices issued by the respondent; there was no evidence that the respondent had received or retained any payment under any of the invoices that could be paid over to the appellant.

22 I affirmed the dismissal of this claim on these alternative grounds.

The appellant's claims under clauses 3.6 and 14

23 The appellant claimed that the respondent had breached other clauses of the agreement. [\[note: 8\]](#) Clause 3.6 and cl 14 provided that the respondent and the two shareholders of the respondent were not to compete against the appellant after the transfer of the business.

24 The DJ did not address this claim in his Grounds of Decision at all. Inexplicably, the appellant confined its appeal to the parts of the DJ's decision which [\[note: 9\]](#):

- (1) Gave judgment for the [respondent] on its claim in the sum of \$110,000 plus interest;
- (2) Dismissed the [appellant's] main counterclaim in the sum of \$68,06211;
- (3) Dismissed the [appellant's] further counterclaim in the sum of \$29,898.97;

and did not refer to the DJ's failure to rule on this claim, and this was not part of the appeal that was presented.

25 For the foregoing reasons, I dismissed the appeal with costs.

[\[note: 1\]](#) Defendant's Closing Submissions para 71

[\[note: 2\]](#) Grounds of Decision para 21

[\[note: 3\]](#) Defence and Counterclaim para 17

[\[note: 4\]](#) Affidavit of Evidence-in-Chief of Luk Chiew Peng para 9

[\[note: 5\]](#) Defence and Counterclaim para 30

[\[note: 6\]](#) Affidavit of Evidence-in-Chief of Luk Chiew Peng para 75

[\[note: 7\]](#) Grounds of Decision, para 40

[\[note: 8\]](#) Defence and Counterclaim para 30

[\[note: 9\]](#) Appellant's Case para 1