Thomson Plaza (Pte) Ltd v Liquidators of Yaohan Department Store Singapore Pte Ltd (in liquidation)
[2001] SGHC 172

Case Number : CWU 325/1997

Decision Date : 06 July 2001

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Harish Kumar and Thomas Sim (Engelin Teh & Partners) for the applicants; Suhaimi Lazim and Pradeep Pillai (Shook Lin & Bok) for the respondents

Parties : Thomson Plaza (Pte) Ltd — Liquidators of Yaohan Department Store Singapore Pte Ltd (in liquidation)

Contract – Formation – Subject to contract – Agreement to lease – Formal lease not executed – Whether binding and enforceable contract exists between parties

Insolvency Law – Winding up – Proof of debt – Liquidator rejecting claims – Application to court for relief – Approach of court to application – De novo hearing

Insolvency Law – Winding up – Proof of debt – Preferential claim – Whether claim for costs accruing before liquidation qualify as preferential claim

Insolvency Law – Winding up – Proof of debt – Whether claim for restoration of premises as can be made

Words and Phrases – "Subject to contract" – Meaning and effect of phrase

: In this case, the applicants, Thomson Plaza (Pte) Ltd (`Thomson Plaza`) made an attempt to recover $3,598,111.57 as ***damages for breach of contract*** against the liquidators of Yaohan Department Store Singapore Pte Ltd (in liquidation) (`Yaohan`).

Thomson Plaza were the owners of a building, also called Thomson Plaza (`the premises`). Yaohan became the lessees of Thomson Plaza in 1979. The lease was renewed several times. The last tenancy period was from 1 August 1994 to 31 July 1997.

On 24 October 1997, Yaohan was placed under judicial management. Ong Yew Huat, Fang Ai Lian and Wong Tui Sun of Ernst & Young were appointed as the judicial managers of Yaohan.

The judicial managers saw no purpose in continuing with the judicial management. So they passed a resolution for Yaohan to be wound up by the court. Provisional liquidators were appointed on 12 December 1997. By an order of court dated 16 January 1998, Yaohan was ordered to be wound up. The same persons who were judicial managers were appointed the liquidators.

Proofs of debt were lodged by creditors with the liquidators. One of them was by Thomson Plaza. The statement of account was for the sum of $3,598,111.57. The details were as follows:

Duty to restore premises	$	2,379,300.00
Duty to deliver in good repair	$	10,197.00
Duty to pay rent	$	1,205,444.89
Interest for late payment of rent	$	3,169.57
	$	3,598,111.57

Paragraph 1 of the Statutory Declaration verifying the Proof of Debt (General Form) made by one Yong Tseng Hah, on 3 March 1998 read as follows:

> *That Yaohan Department Store Singapore Pte Limited the abovementioned company was, at the date of the commencement of the winding up (namely, the 12th day of December, 1997) and still is justly and truly indebted to (see note (a) overleaf) Thomson Plaza Pte Ltd in the amount of ($3,598,111.57) for* ***damages for breach of contract*** *as shown by the account on the reverse. [Emphasis is added.]*

So, the proof was against the company for ***damages*** . It was not a claim for ***debts*** incurred by the judicial managers or the liquidators in those capacities. Additionally it is not to be forgotten that the winding-up order was made in January 1998 after possession of the premises was surrendered with all the fittings. The proof of debt was accompanied by a letter dated 2 March 1998 from DBS Property Services which read as follows:

> *We hereby lodge the Proof of Debt (Form 77) in respect of our claims.*
>
> *All our rights are reserved in full. The submission of the Proof of Debt shall not constitute or be construed in any way as any waiver on our part of any of our rights or any release of [* ***sic****] discharge of any of your obligations or liability, including but not limited to any personal liability you may have incurred in the liquidation or judicial management of the company. This submission shall also be without prejudice to our position that our claims fall within costs and expenses of the winding up pursuant to section 328(1)(a) of the Companies Act (Cap 50) and, as such, our claims rank as preferential claims ahead of all unsecured creditors.*
>
> *Please keep us informed of the status of our claims.*

Before the expiry of the lease on 31 July 1997, an agreement was reached in principle between Thomson Plaza and Yaohan. It was agreed that Thomson Plaza would grant Yaohan a fresh lease of the premises for a term of one and a half years from 1 August 1997 to 31 January 1999. It was contained in a letter of offer dated 19 May 1997. Clause (j) of the letter is important. It read as follows:

> *This tenancy shall be subject to all the terms and conditions as contained in the specimen Lease Agreement.* ***On or before commencement of the tenancy****, a formal Lease of the same form as the specimen Lease Agreement shall be executed between you and the Landlord. [Emphasis is added.]*

The tenancy was expected to commence on 1 August 1997 for one and a half years. The intended lease agreement was not signed on or before the commencement of the tenancy. Yaohan did not execute the formal lease but continued to occupy the premises.

Then Yaohan was placed under interim judicial management. Later, there were orders for judicial

management and winding up as mentioned earlier. The judicial managers continued to pay rent on a month-to-month basis. Thomson Plaza accepted the rent. Thomson Plaza`s property managers, Property Services Pte Ltd (DBS Property Services) acknowledged and asserted that there was a month-to-month tenancy held by the judicial managers in a letter to the judicial managers. Their letter dated 28 October 1997 said this:

> *Dear Sirs*
>
> *Yaohan Department Store Singapore Pte Ltd*
>
> *Lease of Part of Unit 01-01 & Units 03-25 to 03-31*
>
> *Thomson Plaza*
>
> *We refer to the recent discussions we had with your Mr Ong Yew Huat in relation to the lease of the above premises.*
>
> *As you know, until now, the Company has still not executed the Lease Agreement in accordance with our Letter of Offer dated 19 May 97. Notwithstanding the same, the* ***Company continues to occupy the premises on a month to month basis and you have as judicial managers continued to pay rental as such****.*
>
> *Please note that* ***we are unable to let the situation continue and unless you proceed as judicial managers to adopt and to execute the Lease Agreement, we will have to take all necessary actions to protect our interest, including the termination of the current monthly tenancy. In such event, we shall require the premises to be returned to us forthwith upon such termination****.*
>
> *Kindly let us hear from you within five (5) days from the date hereof.*
>
> *Yours faithfully,*
>
> *HEIDI YONG*
>
> *[Emphasis is added.]*

The judicial managers never adopted the lease. They continued to have a month-to-month tenancy. Subsequently the judicial managers decided to close down the business of Yaohan by 31 December 1997. On 26 November 1997 the judicial managers wrote to DBS Property Services. The letter said, inter alia, `the intention is to close the store by 31 December 1997 but this date may be delayed by one or two weeks given the staff constraints at that time of the year`. So there was no question of a fresh tenancy as originally contemplated or at all. Thus, the judicial managers put an end to the month-to-month tenancy. Thomson Plaza accepted it. So on 1 January 1998 there was neither a lease as originally contemplated nor a month-to-month tenancy.

In the event, the judicial managers/provisional liquidators gave vacant possession of the premises to DBS Property Services on 31 December 1997 and DBS Property Services accepted it. All rents due were paid.

Following that, NTUC Fairprice Co-operative Ltd (`NTUC`) became a tenant of the premises for the period 2 January 1998 to 31 March 1999. But in January 1999, Thomson Plaza sold the premises to NTUC and reportedly made a profit of $34m.

The liquidators rejected Thomson Plaza`s claims. Mr Ong Yew Huat stated the grounds for rejection as follows:

> *Take notice that, as Liquidator of the above-named company, I have this day rejected your claim against the company to the extent of S$3,584,744.89 on the following grounds:*
>
> *(a)* ***Restoration of premises to original condition***
>
> *The proof in respect of the costs of restoration of the premises to its original condition amount to S$2,379,300.00 is rejected on the grounds that there is no evidence of any restoration works required and that the property had been sold by your clients without the premises being restored to its original condition.*
>
> *(b)* ***Loss of rental***
>
> *The claim in respect of the alleged loss of rent for the sum of S$1,205,444.89 is also rejected on the grounds that the tenancy had been duly terminated and no further rent is payable by the liquidators to your client upon termination of the tenancy.*
>
> *(c)* ***Cost of repairs***
>
> *I have rejected your claim for the cost of repairs amounting to S$10,197.00 as a preferential claim but I have admitted the same as part of your claim on which dividend will be calculated.*

Dissatisfied with the rejection of the claims, Thomson Plaza has applied to the court for a second bite at the cherry. The law requires the court to treat this as a de novo hearing. Buckley J stated the function of the judge when he undertakes the adjudication of such an application in the case of **Re Kentwood Constructions** [1960] 2 All ER 655[1960] 1 WLR 646 at 648:

> *It was not merely the function of the court to say that a decision was right or wrong ... The court must approach the question de novo ...*

That does not mean that the judge may discard the grounds of rejection stated by the liquidator. Due weight must be given to the words of the liquidator if they contain some wisdom. I shall now consider the claims.

The restoration claim

The first claim was for damages for breach of contract and was based on a provision in the expired tenancy. The relevant provision read as follows:

> *In addition to the foregoing and immediately prior to the expiration or sooner determination of the term hereby created and as instructed by the Landlord to restore the Demised Premises to its original state and condition to the satisfaction of the Landlord and if the Tenant shall fail to restore the same the Landlord may recover from the Tenant the costs of such restoration together with all rent and other amounts which the Landlord would have been entitled to receive from the tenant had the period within which restoration is effected by the Landlord been added to the terms hereby created provided that such period to be added by the Landlord shall not exceed fifteen (15) days.*

The next clause expanded the provision as follows:

> *In complying with Clause 2(36) hereof and if so required by the Landlord the Tenant shall remove all internal partitions and/or fixtures and installations of the Tenant or any part thereof from all portions of the Demised Premises vacated by the Tenant immediately upon or prior to the expiration or sooner determination of the term hereby created and in default thereof the Landlord may remove and dispose of the same. All damage done to the Demised Premises by such removal shall be made good by the Tenant immediately upon or prior to the expiration or sooner determination of the term hereby created and if the Tenant fails to do so the Landlord may make good all such damage. All costs incurred by the Landlord in such removal or disposal or in making good such damage shall be a debt due from the Tenant to the Landlord and shall be paid by the Tenant to the Landlord within fourteen (14) days of the Landlord notifying the Tenant of the amount hereof.*

Clause 5(2) of the expired lease read as follows:

> *In the interpretation of this Lease except to the extent that such interpretation shall be excluded by or be repugnant to the context when used herein:*
>
> *(d) "restoration" used in the context hereof shall mean the restoration of the Demised Premises to its original state and condition including:*
>
> *(i) the making good of any damage or disfigurement caused to walls doors windows or any part of the Demised Premises;*
>
> *(ii) the washing down of the whole of the interior of the Demised Premises;*
>
> *(iii) the painting with two coats of oil paint or emulsion paint or other appropriate treatment of all of the internal parts of the Demised Premises previously so treated respectively;*
>
> *(iv) the re-polishing of all the internal parts previously polished;*
>
> *(v) the graining and varnishing of all the internal parts previously grained and varnished;*

(vi) the replacing of all floor tiles which in the opinion of the Landlord are worn or damaged and in need of replacement;

(vii) the removal and clearance of all waste rubbish and other unwanted material from the Demised Premises;

(viii) the surrender of all keys giving access to all parts of the Demised Premises held by the Tenant or any of the Tenant`s employees or agents irrespective of whether or not the same have been supplied by the Landlord.

The plain meaning of the above provision is that there must be an actual restoration. Without an actual restoration there can be no claim for restoration. Additionally, Thomson Plaza has submitted the purported claim for restoration as a claim for special damages. Special damages must be proved. In this case, there was no expense at all. What was sought was a windfall when there was no provision for it. Apart from that, inferentially Thomson Plaza appeared to have benefited from non-compliance with the restoration provisions. The premises were rented out to NTUC who were in the same business as Yaohan. Thomson Plaza`s claim for restoration was, therefore, without any legal, moral or commercial basis. It was rejected by the liquidator for a good reason. The law does not award special damages which are patently unreasonable and exorbitant. See **Ruxley Electronics and Construction v Forsyth** [1996] AC 344[1995] 3 All ER 268.

Claim for rent

The claim for rent is based on a new lease from 1 August 1997. This point requires a consideration of the law.

In **Alpenstow v Regalian Properties plc** [1985] 2 All ER 545[1985] 1 WLR 721 the plaintiffs appointed the defendants as development consultants in connection with a planning inquiry affecting land which they had bought for development. In February 1983, they undertook that if, on the grant of permission, they wished to dispose of the land, they would either grant the defendants the right to purchase the land or would pay them o500,000. In July 1983, by an exchange of letters, that agreement was cancelled. A fresh agreement was entered into, whereby if, following the grant of permission, the plaintiffs wished to dispose of the land, they would serve a notice on the defendants of their willingness to sell a 51% interest in the freehold, or pay the defendants o500,000.

If they wished to sell any part of their interest in the property, (a) they were to give notice to the defendants of their willingness to sell to the defendants at a stated price, (b) within 28 days of the notice the defendants would inform them of their acceptance of the contract, subject to contract, and within seven days thereafter, the plaintiffs would submit a draft contract for approval by the defendants, and (c) within 28 days of receipt of the draft contract the defendants would approve the contract, and exchange contracts within seven days thereafter. The defendants were given the liberty to make amendments reasonably required by them. The letter concluded by stating that the plaintiffs were awaiting confirmation of acceptance of the agreement set out in the letter. The defendants duly accepted the agreement. Subsequently planning permission was granted and the plaintiffs gave notice of their willingness to sell part of their interest to the defendants. The defendants accepted the contract, but on request for a draft contract the plaintiffs contended that the letter of 12 July setting out the agreement was `subject to contract` and accordingly was not a binding contract. That is to say, they were entitled to withdraw without giving any reason. The

defendants sought specific performance of the agreement and registered cautions against the land concerned in order to protect their position. The plaintiffs moved to have the cautions removed, and the question arose as to what was the effect of the words `subject to contract` in the circumstances.

Notably, if the plaintiff had not made the offer to sell, they would have had to make an outright payment of o500,000 to the defendants. By making the offer to sell, they effectively deprived the defendants of their right to receive o500,000. By invoking the magic phrase `subject to contract`, they were now seeking to deprive the defendants of their right to an interest in the property. The question, therefore, was whether the magic phrase was intended to give them that right. Nourse J said `no`. He explained:

> *On their true construction the letters, which constituted a detailed and conscientiously drawn document cancelling and replacing a previous binding agreement, provided a very strong and exceptional context in which the words "subject to contract" should not be given their prima facie meaning whereby either party could withdraw before contracts were exchanged in accordance with ordinary conveyancing practice; and that, accordingly, when the defendants accepted the plaintiffs` notice of willingness to sell there was an agreement for the sale of the plaintiffs` interest in the land under which the defendants took an equitable interest.*

The requirement of `a very strong and exceptional context`, therefore, emphasises the general inflexibility of the meaning of the magic phrase `subject to contract`.

I shall now state the law on the meaning and effect of the magic phrase `subject to contract`. It would be apt to start with the excellent case **Low Kar Yit v Mohamed Isa** [1963] MLJ 165 . In that case Gill J made a comprehensive review of relevant authorities extant in 1963.

The defendants, the administrators of the deceased owner of 10 acres of land, granted an option to purchase the land. As usual the option was to be exercised, by giving notice in writing. If the option was exercised it was subject to:

> *(a) a formal contract to be drawn up and agreed upon by yourself and ourselves;*
>
> *(b) the approval of the sale and of the said contract by the High Court at Kuala Lumpur.*

The option was exercised. Then there were discussions between the solicitors of the respective parties and agreement was reached between them. A document reflecting the agreement was prepared by the vendors` solicitors who sent six copies to the purchasers` solicitors. They were executed by the purchasers and returned to the vendors` solicitors. The purchasers` solicitors stated in a letter that they were holding the deposit amount and would hand it over to the vendors` solicitors upon receipt of five copies of the agreement signed by the vendors. Eighteen days later, the vendors wrote stating that one of the administrators had refused to execute the agreement. The purchasers filed an action claiming specific performance or alternatively damages for breach of contract. The vendors asserted in response that no contract was concluded. The court decided that no contract had been concluded. The decision essentially turned on the stipulation that `a formal

contract was to be drawn up and agreed upon`. The stipulation was a condition precedent. The court decided thus even though the essential elements of the agreement had been agreed upon between the solicitors and were embodied in a document. Gill J enunciated the following important principles at p 173:

> *The authorities would appear to support the view that even where there is nothing in the agreement to suggest that the parties contemplate that the subsequent contract shall contain any new or different terms, nevertheless if it appears that the parties do not intend to bind themselves contractually by the agreement but only by the subsequent contract if and when they should enter into it, there will be no contract. Moreover, if the reference to the execution of the subsequent contract is in words which according to their natural construction import a condition, this will almost invariably be conclusive that the agreement itself was not intended to be a contract. To my mind this was true of this case. It will bear repetition if I say that when the actual phrase "subject to contract" is used, the courts tend to give effect to those words unless there is strong evidence to the contrary. The result is that the agreement which is made "subject to contract" is of no legal effect. Perhaps I should add that the plaintiffs in this case are asking the court to order the defendants to execute the draft agreement agreed upon, which amounts in effect to asking the court to enforce an agreement to enter into an agreement. That is an order which the court clearly has no power to make in the circumstances of the case.*

The judge went on to add this:

> *In the result I have reluctantly come to the conclusion that there was no concluded contract between the parties to this action. I say "reluctantly" because of the conduct of the defendants in breaking off the negotiations when the terms of the proposed agreement were agreed upon and in capriciously refusing to sign the agreement. However, in the words of Tomlin J. in* ***Lockett v. Norman Wright****, supra, "it is no part of my duty to pronounce whether or not the conduct of any of the parties concerned in this matter is open to censure. All I have to do is to determine whether there is or is not a concluded contract between the plaintiffs and the defendants which the plaintiffs can enforce".*

The law with regard to a commercial contract between hardnosed businessmen is that, save in extreme cases, the court must not rewrite what the parties have agreed simply by relying on the court`s notions of unreasonable or unconscionable conduct. To do so would undermine certainty and security in the law of contract.

Authorities abound to establish this principle. Save exceptions excepted, the expression `subject to contract` means that unless and until a formal written contract has been executed and exchanged by the parties there is no binding and enforceable contract between them. That is so even if the parties are in agreement as to all the terms.

Parties who contract on the basis of `subject to contract` do so because they want an escape route in case they wish to call the transaction off. They do not consider it a wrong way of business. It is a last chance escape route in case they find it impossible or undesirable to fulfil the contract.

In this case, cl (j) was in effect a `subject to contract` provision. The words `on or before the

commencement of tenancy` made it clear that the execution of the lease agreement was a condition precedent to the tenancy coming into being. Accordingly, I would follow Gill J in ***Low Kar Yit v Mohamed Isa*** and hold that there was no tenancy, as asserted by Yaohan. Accordingly, the claim for rent has no basis.

Priority

Finally, I come to the claim for priority. The claim for repairs had accrued well before the commencement of liquidation. In any event, it was not necessary for the liquidation and had nothing to do with liquidation. The judicial managers as such discharged all their liabilities before the order for winding up was made. They incurred no liability as liquidators vis-.-vis Thomson Plaza. Accordingly, there was no claim which qualified as a preferential claim. This applies to the other claims even if they had been held to be valid.

Outcome:

Application dismissed.