Corwin Holdings Pte Ltd v Bhamah Ramdas (trading as Lady Fair Beauty Centre)
[2009] SGHC 43

Case Number : OS 824/2008

Decision Date : 20 February 2009

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Gopinath s/o B Pillai (Tan Peng Chin LLC) for the plaintiff; K Muralidharan Pillai (Rajah & Tann LLP) for the defendant

Parties : Corwin Holdings Pte Ltd — Bhamah Ramdas (trading as Lady Fair Beauty Centre)

Landlord and Tenant – Termination of leases – Landlord terminating lease of tenant for renovation purposes – Whether termination valid

20 February 2009

Andrew Ang J:

1 This originating summons concerned the validity of a landlord's attempt to terminate a lease agreement prematurely. Specifically, the landlord, the plaintiff in this case, sought the following prayers:

(a) A declaration that the plaintiff's Notice of Termination, dated 5 December 2007, to the defendant is valid;

(b) A declaration that the plaintiff's Notice to Recover Possession, dated 5 December 2007, to the defendant is valid;

(c) A declaration that the defendant's continued occupation of the unit following the plaintiff's above-mentioned notices is wrongful;

(d) An order that the defendant deliver vacant possession of #05-21, Tekka Mall, 2 Serangoon Road, Singapore 218227 (the "Unit") within two (2) weeks of the orders to be made herein; and

(e) That the defendant bears the costs of and occasioned by the plaintiff on an indemnity basis.

The plaintiff's case

2 The plaintiff was the landlord of the defendant, having rented out the Unit at Tekka Mall in "Little India" to the defendant since 20 February 2004. The defendant's shop was called "Lady Fair Beauty Centre" ("Lady Fair") within which the defendant provided beauty services and sold beauty products.

3 The rental period was initially for three years but, pursuant to an agreement dated 23 January 2007 ("the Tenancy Agreement"), the defendant extended the lease for a further three years, commencing 26 February 2007. The rent for the extended period of tenancy was to be $4,223 per month (excluding goods and services tax) which worked out to be about $4.40 per square foot. Clause 10 of the Tenancy Agreement provided as follows:

10.1 In the event the Landlord determines at its sole and absolute discretion that (i) due to the Landlord's trade mix policy (as determined by the Landlord from time to time); or (ii) the Building

> or any part thereof is to be renovated, retrofitted, refurbished and/or altered; or (iii) there be a change of use of the Demised Premises or that part of the Building in which the Demised Premises is situated, the Landlord shall be entitled to issue the Tenant a written notice of the Landlord's intention to recover possession of the Demised Premises ("Notice to Recover Possession") pursuant to this clause 10.1.
>
> 10.2 Upon issue of the Notice to Recover Possession, the Landlord shall use its best endeavours to find alternative premises in the Building ("Substitute Premises") as the Landlord deems suitable for the Tenant, to re-locate the Tenant. If the Landlord finds a suitable Substitute Premises, the Landlord shall issue a letter of offer to the Tenant for the Substitute Premises.
>
> 10.3 In the event the Tenant shall accept the Landlord's offer, the Tenant shall surrender the Lease and shall at the same time enter into and execute an agreement with the Landlord for the lease of the Substitute Premises and the provision of maintenance and services to the Substitute Premises upon such terms and conditions as may be mutually agreed.
>
> 10.4 In the event (i) that the Landlord is unable to offer to the Tenant a suitable Substitute Premises, or (ii) the Tenant shall refuse or fail to accept the Landlord's offer for the Substitute Premises within the period stipulated in the offer, or (iii) the parties shall fail to agree on the terms in respect of the lease of the Substitute Premises, within three (3) months of the date of the Relocation Notice, the Landlord shall be entitled to terminate this Lease by giving to the Tenant not less than three (3) months' written notice ("Termination Notice") to such effect and upon the expiry of the period specified in the Termination Notice, this Lease shall cease and determine but without prejudice to any right of action or other remedy which the Landlord has or otherwise could have for arrears or in respect of any antecedent breach of any of the provisions hereof.

4 The plaintiff issued a Notice to Recover Possession dated 5 December 2007 ("the Notice to Recover Possession"). The material paragraph of the Notice stated as follows:

> Pursuant to Clause 10.1 of the [Tenancy Agreement], we hereby give to you the requisite Notice to Recover Possession as we, the Landlord, require that part of the Building for renovations/retrofitting/refurbishment. We shall inform you shortly as to whether we are able to offer to you alternative premises in the Building, failing which we shall be issuing to you a Notice of Termination.

5 On the very same day, 5 December 2007, the defendant also received a Notice of Termination ("the Notice of Termination") from the plaintiff pursuant to cl 10.4 of the Tenancy Agreement. Curiously, the Notice of Termination referred to a Notice to Recover Possession dated 30 November 2007 even though the actual Notice to Recover Possession was dated 5 December 2007. The germane parts of the Notice of Termination read as follows:

> We refer to the above matter and to our earlier Notice to Recover Possession dated 30 November 2007.
>
> Pursuant to Clause 10.2 of the [Tenancy Agreement], we regret to inform you that as the Building is undergoing renovations, retrofitting and refurbishment, we are unable to find alternative premises in the Building to re-locate you.
>
> In the circumstances, we hereby give to you the requisite 3-month Notice of Termination pursuant to Clause 10.4 of the [Tenancy Agreement].

Please take note that on expiry of the 3 month notice on 4 March 2008, the Lease shall cease and determine but without prejudice to our rights or remedies which we have for any rent in arrears or in respect any antecedent breach of the terms of the [Tenancy Agreement].

6 Through her counsel, the defendant wrote to the plaintiff on 12 December 2007, stating that she took the view that the two notices, mentioned at [5] and [6] above, were invalid at law because the plaintiff did not have a *bona fide* intention to carry out renovations, retrofitting or refurbishment of the premises and had failed to use its best endeavours to find alternative premises in Tekka Mall for the defendant. Her allegations were rejected by the plaintiff in its reply of 10 January 2008. In the same letter, the plaintiff also asserted that the issuance of the notices was justified on the basis of the plaintiff's trade mix policy (see cl 10.1 of the Tenancy Agreement) and repeated its demand that the defendant hand over possession of the Unit by 4 March 2008. By a letter dated 10 January 2008, the defendant reiterated its view that the two notices were invalid and invited the plaintiff to commence legal action.

7 After a period in which unsuccessful attempts were made to resolve the impasse through private negotiations, the plaintiff sent another letter of demand, dated 4 February 2008, to the defendant, this time requiring the defendant to surrender the premises by 3 May 2008. This demand was again rejected by the defendant by a letter dated 5 February 2008. The plaintiff, after some delay, then began the present proceedings on 23 June 2008.

8 Before me, counsel for the plaintiff made the following arguments:

(a) The Notice to Recover Possession sent by the plaintiff to the defendant was a valid notice pursuant to cl 10.1 of the Tenancy Agreement. This was because the plaintiff had a *bona fide* intention to carry out renovations;

(b) The Notice of Termination sent by the plaintiff to the defendant was a valid notice pursuant to cl 10.4 of the Tenancy Agreement. This was because the plaintiff had used their best endeavours to secure alternative premises for the defendant but none could be found; and

(c) In any case, the notices were also justified under the plaintiff's trade mix policy pursuant to cl 10.1 of the Tenancy Agreement.

As such, the plaintiff argued that the defendant should be made to deliver vacant possession of the Unit to the plaintiff.

9 I pause here to note that, before me, the plaintiff's counsel had earlier indicated that he would file a further affidavit (apart from that filed on 19 June 2008 in support of the originating summons). However, although at the resumed hearing the defendant had agreed to the plaintiff doing so, such affidavit was not filed; neither was any reference made to the affidavit in the submissions. Accordingly, my decision was made without reference to any such affidavit.

The defendant's case

10 According to the defendant, Lady Fair had been operating as a business for more than 24 years, performing the type of services and sales as stated in [2] above. In fact, the defendant claimed that she was the "first Indian lady to open a Beauty Salon with the business model described above" and that "Lady Fair quickly became a leader in its niche market": see the defendant's affidavit filed on 14 July 2008 at paras 5 and 6. The defendant confirmed that she had operated out of the Unit since 20 February 2004 and saw an average of 1,000 clients per month. Her clientele consisted of people

from all walks of life but of which the vast majority were Indians.

11 The first indication that something was afoot with regard to the tenancy of the Unit manifested itself to the defendant in early December 2007 when several persons, on separate occasions, came to the Unit to view the premises. They informed the defendant that they were previous tenants from The Concourse, a shopping centre along Beach Road. They ran floral and gift shop businesses there but had been served with notices to vacate their premises. According to them, they had been offered shop tenancies on the 5th floor of Tekka Mall and had come came to view the premises before committing themselves.

12 On 5 December 2007, the defendant received the two notices aforementioned at [5] and [6] above. She then asked the other tenants on the 5th floor of Tekka Mall whether they had received similar notices. At that point of time, there were three other tenants on the 5th floor of Tekka Mall, all carrying on similar or associated businesses with Lady Fair. According to the defendant, they were Vanessa Beauty Salon, Salon De Tulip and Mayoori Ayurvedic Spa, occupying units #05-02, #05-01 and #05-11 respectively. The defendant learnt that only Vanessa Beauty Salon was served with similar notices.

13 On 6 December 2007, the defendant spoke to one Sarah Ching of Knight Frank Shopping Centre Management Pte Ltd, which acted on behalf of the plaintiff, regarding the notices. Sarah Ching refused to explain the notices beyond saying that "it is nothing personal, it is just business" and that it was none of the defendant's concern as to why other shops on the 5th floor of Tekka Mall were not served with similar notices. The defendant, through one of her employees, then learnt that the rental rates for a unit on the 5th floor of the Tekka Mall had been revised to $8 or $9 per square foot.

14 The exchange of correspondence between the plaintiff's and the defendant's counsel, as stated above at [7] and [8] above, then took place. However, the defendant hastened to add that after her counsel had sent their letter of 5 February 2008 inviting the plaintiff to commence legal action against the defendant, the plaintiff ceased correspondence with the defendant. Two further letters sent by counsel for the defendant to the plaintiff, dated 12 March and 11 April 2008 respectively, were ignored. In the letter of 12 March 2008, the defendant again invited the plaintiff to commence legal proceedings against her and requested that if the plaintiff were not minded to do so, to inform her by 19 March 2008. In the letter of 11 April 2008, the defendant noted the fact that the plaintiff had not responded since 5 February 2008 and stated that she would therefore treat the two notices as withdrawn. Thus, the defendant was surprised by the service of the originating summons on her on 23 June 2008.

15 In February 2008, one Mr Thomas Tan ("Tan") had approached the defendant and introduced himself as being from Exim Arts Pte Ltd ("Exim"). Tan explained that the plaintiff had tenanted the Unit to Exim and asked when the defendant would be moving out. He expressed surprise when the defendant told him that she had no intention of moving out. Since then, Tan had periodically enquired of the defendant when she would be moving out of the Unit and the state of the matter with the plaintiff. Around the last week of April 2008, a notice was put up beside the Unit which stated that Exim was "temporarily located" on the 2nd floor of Tekka Mall.

16 The final pertinent event occurred on or about 5 July 2008 when the owner of Vanessa Beauty Salon informed the defendant that the plaintiff had decided not to require Vanessa Beauty Salon to give up its premises on the 5th floor of Tekka Mall. However, the rent for her premises was increased by $200 per month.

17 In the circumstances, the defendant's legal arguments were three-fold. First, in her affidavit filed

on 14 July 2008, the defendant contended that she was not legally obliged to abide by the demands of the two notices of 5 December 2007 as the plaintiff did not possess a *bona fide* intention to renovate, retrofit or refurbish the premises. According to the defendant, the plaintiff had attempted to terminate the tenancy in order to take advantage of rising rental. Hence, the two notices were invalid.

18 Second, before me, counsel for the defendant also argued that the two notices of 5 December 2007 had been withdrawn pursuant to the plaintiff's letter of 4 February 2008.

19 Finally, it was also argued before me that the plaintiff should not be allowed to rely on the trade mix policy to terminate the lease as this ground was not mentioned in the notices of 5 December 2008. In the alternative, it was submitted that the reference to the plaintiff's trade mix policy was a sham.

The decision of the court

20 For reasons set out below, I dismissed the plaintiff's application wholly.

21 The plaintiff began this action on 23 June 2008 by originating summons. Beyond maintaining the grounds for termination were *bona fide*, the plaintiff did not seek to specifically challenge or deny the facts deposed to by the defendant in her affidavit. Hence, in coming to my decision, I took into account the defendant's undisputed account of the facts. Those facts include the visit to the Unit by former tenants of The Concourse, the defendant's conversation with Sarah Ching, the interaction with Tan of Exim and the defendant's conversation with the owner of Vanessa Beauty Salon.

Whether the Notice to Recover Possession was valid

23 Clause 10.1 of the Tenancy Agreement is a type of clause commonly known as a "demolition clause" or a "break clause". It usually allows the landlord to recover possession of the leased property, prior to the expiration of the lease, in order to achieve some specific objective, such as to renovate or redevelop the property. Since such premature termination of the lease generally imposes inconvenience, if not hardship, on the tenant, such clauses are usually interpreted very strictly. In *Commercial Leases* (The Law Book Co Ltd, 1989), at pp 194 and 195, the learned author, W D Duncan, observed as follows:

> In relation to these clauses generally, there are several, important points of construction. The right to terminate is normally exercised on the ground that the lessor desires to either refurbish, redevelop or personally occupy the premises. If either of these is the case, the lessor must have *a bona fide intention* of embarking upon such a proposal at the time when he gives the notice. In the result, the lessor cannot determine the lease simply because he chooses to do so, regardless of whether it is intended to carry out one or more of the purposes contemplated by the clause. A lessee may challenge the notice if it can be shown that the lessor is not bona fide in his intention …
>
> Second, a court will strictly construe that part of the clause which sets out the reasons upon which the notice is based. Often, the right of termination is dependent upon the lessor redeveloping or refurbishing the demised premises. Such a clause will not give an indication of the extent of refurbishment or development, but *the court would assume that the lessor, upon giving the notice, would have in mind such refurbishment or development which would require the lessee to vacate whilst it was undertaken*. … The clause might also give the lessee an option to lease a similar area in a propinquitous location for the balance of the unexpired term on similar

terms and conditions. If there is such a proviso to the clause, again evidence will be necessary to prove that *the refurbishment or redevelopment contemplated by the clause was to be undertaken to such an extent as to require the complete vacation of the demised premises*.

[emphasis added]

Hence, in order for a notice to repossess a leased property pursuant to a demolition clause to be effective, the landlord must have a *bona fide* intention to carry out the objective stipulated by the clause and such objective must be of such magnitude that it would require the tenant to vacate the property while the objective was undertaken.

24 The plaintiff's Notice to Recover Possession stated that the plaintiff was activating cl 10.1 of the Tenancy agreement "as we, the Landlord, require that part of the Building for renovations/retrofitting/refurbishment". Thus, in order for the Notice to Recover Possession to be valid, the plaintiff must have had a *bona fide* intention to renovate, retrofit or refurbish Tekka Mall to such an extent that it was necessary for the defendant to vacate the Unit and that intention must be the reason for the issuance of the notice. However, based on the evidence presented before me, I found that this was unlikely to be the case.

25 The plaintiff argued that it had a *bona fide* intention to renovate the premises. It supported its claim by testifying that it had, on 30 March 2007, obtained a reply to an URA Outline Application ("Outline Application").

26 Generally speaking, a reply from the Urban Redevelopment Authority ("URA") in response to an Outline Application is not, in and of itself, approval of the proposed alterations. An Outline Application enables an applicant, being desirous of redeveloping a property to find out important planning information and guidelines without incurring too much initial expense. The applicant would also be notified if the URA has any alternative plans for the site or if redevelopment of the site is limited by planning restrictions. The rationale behind this process is to prevent the applicant from wasting money and resources in applying for redevelopment approval if such approval would not be forthcoming from the start. Hence, even though approval is obtained pursuant to an Outline Application, this would merely be an approval with regard to the general proposal for redevelopment. The applicant would still have to submit detailed plans regarding the proposed redevelopment to the URA for approval. Thus, a response from the URA with regard to the plaintiff's Outline Application was not conclusive of the fact that there was a crystallised intention on the part of the plaintiff to renovate Tekka Mall. In many cases, a submission of an Outline Application is merely exploratory. Whether this was so in the present case cannot be discerned from the evidence presented.

27 Instead, there was evidence to suggest that the plaintiff may have had other intentions in mind in attempting to repossess the Unit. First, it was curious that former tenants from the Concourse would be offered tenancies in units on the 5th floor of Tekka Mall by the plaintiff if, as asserted, the 5th floor was to undergo renovations. In particular, the behaviour of Tan, from Exim, was especially telling. He told the defendant that he was offered a tenancy of the Unit and continually enquired when the defendant was moving out. If Tan was indeed offered a tenancy of the Unit, such an offer was incongruent with a plan to renovate the 5th floor of Tekka Mall.

28 Second, only two out of four units on the 5th floor of Tekka Mall were served with notices to recover possession. They were the Unit (located at #05-21) and Vanessa Beauty Salon (located at #05-02). It was curious that only two of the four units on the 5th floor were selected for renovation, suggesting that the landlord's decision had more to do with the lower rentals paid by the incumbent tenants than with the need to renovate.

29 This suggestion was reinforced by the fact that Vanessa Beauty Salon eventually was allowed to remain at #05-02 after its rent was increased by $200 per month. To my mind, this decision to renovate was more than merely coincidental with the rise in rental rate of units on the 5th floor of Tekka Mall – from the $4.40 per square foot that the defendant was paying to the $8 to $9 per square foot that was quoted to the defendant's employee. This also explained Sarah Ching's cryptic reply "it is nothing personal; it is just business" when the defendant asked her why Lady Fair was affected when there were other tenants who were not.

30 Based on the above factors, I was persuaded that while there may have been an intention to renovate Tekka Mall, the selection of the defendant's Unit and the issue of the Notice to Recover Possession was not *bona fide* pursuant to such an intention. As such, the Notice to Recover Possession was not valid.

Whether the Notice of Termination was valid

31 It follows that the Notice of Termination was also invalid. However, even if I was mistaken about the plaintiff's intention in issuing the Notice to Recover Possession, I also found that the Notice of Termination, in any case, was not valid as the requirements of cl 10.2 of the Tenancy Agreement were not satisfied. Clause 10.2 requires the plaintiff to "use its best endeavours to find alternative premises in the Building" for the defendant. There was scant evidence that this was done.

32 On this point, the plaintiff merely argued that it "did in fact consider alternative premises for the defendant, but the available options were smaller than the present unit and would certainly not have accommodated the defendant's fixtures and fittings". I found that this alleged attempt by the plaintiff fell short of the "best endeavours" it was obliged to use to secure alternative premises for the defendant. The plaintiff could at least have inquired if the defendant minded moving into a smaller unit. Whether the smaller unit would have suited the defendant's needs was something for her to consider, not the plaintiff. Furthermore, the fact that the Notice to Recover Possession and the Notice of Termination were issued on the same day raised doubts in my mind as to whether the plaintiff did in fact consider alternative premises for the defendant. While it was not inconceivable that such notices could *bona fide* be issued on the same day, there had to be sufficient evidence to show that there was a real, honest and concerted attempt to find alternative premises for the tenant. There was no such evidence in the present case.

33 Accordingly, in my view, the Notice of Termination was also invalid in law.

Whether the Notice of Termination was withdrawn

34 For the sake of completeness, I must add, as a separate point, that it was also my view that the Notice of Termination had been withdrawn by the plaintiff's letter to the defendant on 4 February 2008. This was evidence from the sequence of letters issued by both parties.

35 The Notice of Termination, dated 5 December 2007, clearly stated that the plaintiff was unable to find alternative premises for the defendant. As such, the plaintiff invoked cl 10.4 of the Tenancy Agreement and stated that on 4 March 2008 (three months after the Notice of Termination), the lease would cease and determine. To this, the defendant replied on 12 December 2007 that she was of the view that the notice was invalid and that she would not be vacating the Unit as demanded. She then, though not in so many words, invited the plaintiff to commence proceedings to compel her to vacate the Unit.

36 This line of correspondence was continued on 10 January 2008 when the plaintiff refuted the

defendant's contention that the notices were invalid and reiterated that the defendant should hand over possession of the Unit on 4 March 2008. Again, and on the same day, the defendant invited the plaintiff to start legal action against her. Thus, the plaintiff's unwavering stand was that the defendant should vacate the Unit on 4 March 2008, three months after the Notice of Termination was issued, pursuant to cl 10.4 of the Tenancy Agreement.

37 However, the plaintiff then entered into a period of negotiations with the defendant in an attempt to find alternative premises for her. This belied the Notice of Termination which stated that the plaintiff was unable to find any alternative premises. Furthermore, the tenor of the plaintiff's case seemed to have changed after the negotiations. In a letter to the defendant, dated 4 February 2008, the plaintiff wrote that it was exercising cl 10.4 of the Tenancy Agreement *because* the defendant rejected its offer of alternative premises (and not because no alternative premises could be found). The plaintiff then, unequivocally, stated that the defendant was to surrender the Unit by 3 May 2008, *ie*, 3 months from the 4 February 2008 letter. The letter of 4 February 2008 from the plaintiff to the defendant read as follows:

> 1. We refer to your letter of 30 January 2008. As your client's have rejected our clients' offer of alternative premises, our clients are exercising their rights under Clause 10.4 of the Lease.
>
> 2. Our clients hereby give your client three (3) months notice of termination of the captioned lease. Your client is required to surrender the premises to our clients by 3 May 2008.

38 In the circumstances, the logical conclusion was that the plaintiff had withdrawn the Notice of Termination received by the defendant on 5 December 2007 and had replaced it with the letter of 4 February 2008. As such, the plaintiff could not sue on the earlier Notice of Termination of 5 December 2007.

Whether the trade mix policy allowed the plaintiff to terminate the lease

39 Finally, it bears mentioning that, in the present case, the trade mix policy ground also did not avail the plaintiff. The Notice to Recover Possession of 5 December 2007 stated that the reason for the repossession was that the Unit was required for renovation, retrofitting and/or refurbishment. That being the case, the plaintiff could not belatedly rely on the trade mix policy to justify the Notice to Recover Possession when the ground of renovation failed. It was clearly conceived as an afterthought. Accordingly, there was no need for me to examine what the plaintiff's trade mix policy was and whether the defendant's clientele profile met it.

Conclusion

40 In the circumstances, I dismissed prayers (a) to (d), as stated in [1] above, with costs to the defendant of $4,000 and reasonable disbursements.

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