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Covid-19 Frustration – High Court rules in favour of tenant in a dispute involving the late handover of leased premises due to Covid-19 restrictions

Dathena Science Pte Ltd v Justco (Singapore) Pte Ltd [2021] SGHC 219

This is one of the first cases – if not the very first case – that has resulted from the implementation of Covid-19 measures by the Singapore Government. It provides useful insight on the legal implications of the ongoing Covid-19 pandemic, especially pertaining to project delays caused by Government restrictions. It also provides guidance on the application of the Unfair Contract Terms Act (Cap 396 Rev Ed 1994) (**"UCTA"**) and the Frustrated Contracts Act (Cap 115, 2014 Rev Ed) (**"FCA"**), two pieces of legislation which have rarely been litigated in the Singapore courts.

Background

JustCo (Singapore) Pte Ltd (**"Justco"**), a co-working operator, entered into an agreement with Dathena Science Pte Ltd (**"Dathena"**), a cybersecurity software company, to lease office units for a period of two years from 1 May 2020 to 30 April 2022 (the **"Membership Agreement"**). Due to the nature of Dathena's business as a cybersecurity service provider, it was essential to Dathena that the leased premises could meet its information technology (IT) requirements and that its servers could be housed at the premises before the lease commencement date.

On 3 April 2020, the Singapore Government announced the implementation of Covid-19 measures that came to be known as the Circuit Breaker Measures (**"CB Measures"**). Under the CB Measures, all non-essential services were required to cease, and restrictions on renovations works were imposed. This caused delays to the agreed timelines for fitting out of premises (including the setting up of power supply for network installation and air-conditioning to the server room, and activation of internet connectivity) and JustCo was unable to deliver the premises on time.

On 29 May 2020, Dathena issued a notice of termination on the grounds that the Membership Agreement was terminated or frustrated. This was rejected by JustCo. Subsequently, JustCo offered Dathena two alternative premises to occupy, which were eventually rejected by Dathena as it found these premises to be unsuitable for various reasons, including a failure to meet its IT requirements.

On 4 September 2020, Dathena brought an action against JustCo to recover a sum of S$286,892, comprising the security deposit and monthly membership fee paid in advance to JustCo. In response, JustCo brought a counterclaim for nearly S$2.4 million, comprising its membership fees for the entire duration of the lease, asserting that Dathena had no right to terminate the Membership Agreement and that the Membership Agreement was not frustrated by the implementation of the CB Measures.

The High Court ultimately found that: (i) Dathena was entitled to terminate the Membership Agreement, notwithstanding that there was no clause which allowed Dathena to terminate the contract; (ii) the terms in the Membership Agreement violated the UCTA and were unenforceable; (iii) on the evidence, Dathena's consideration of alternative premises offered by JustCo did not amount to a waiver of its termination rights; and (iv) the Membership Agreement had been frustrated by the implementation of the CB Measures.

Right of termination and the UCTA

One of the issues addressed by the High Court was whether Dathena was entitled to terminate the Membership Agreement. Only JustCo had a unilateral right to terminate under the Membership Agreement.

The Court held that this asymmetric right of termination cannot be right as a matter of contract law in a commercial context. Even if an entire agreement clause was present in the Membership Agreement, this did not preclude the implication of terms into a contract, and even if such a clause could exclude the implication of terms into the contract, if in substance it was an exception clause, the clause would be subject to both the common law constraints on exclusion clauses as well as the UCTA.

The Court also considered various provisions in the Membership Agreement, which extended the following rights and remedies to JustCo:

- A right to replace the leased premises with another space of comparable size, where "necessary due to the operational requirements of JustCo".
- An obligation on Dathena to pay the full membership fees for the remainder of the service term, in the event of early termination.
- An obligation on Dathena to indemnify JustCo and related indemnified persons from claims and losses arising as a result of certain events, including "any occurrences in the leased premises", "any claims against JustCo by third parties regarding the rights granted to Dathena" or "use of the services".
- A broad exclusion of liability in favour of JustCo and related indemnified persons, in which it was stated that they are not liable for any interruption, disruption or cessation in Dathena's use of the leased premises for any reason whatsoever.

In finding the terms of the Membership Agreement grossly unfair and disadvantageous to Dathena, the Court held that these terms violated the UCTA and were unenforceable. In particular, the Court found that Dathena was a "consumer" for the purposes of the UCTA, and that in any event, Dathena was also dealing with JustCo on JustCo's "written standard terms of business", without room to negotiate these terms. The threshold conditions for the application of the UCTA were thus satisfied.

Frustration of Contract

Another issue that was raised was whether the Membership Agreement was frustrated by the implementation of the CB Measures and whether Dathena was entitled to rely on Section 2 of the FCA to discharge the Membership Agreement, and recover all sums paid to JustCo before the contract was discharged.

For a contract to be frustrated, there must have been an unforeseen supervening event which renders the contract impossible to perform, or which renders the contractual obligation radically and fundamentally different from what was agreed to. Upon the occurrence of such a supervening event, the doctrine of frustration applies and both parties are automatically discharged from their contract by operation of law.

The Court found that the Membership Agreement was frustrated as a result of JustCo's four-month delay in delivering the office premises to Dathena, as well as its inability to provide alternative comparable premises during that period. While JustCo had offered two different alternative premises to Dathena, this amounted to a fundamentally different contract than what the parties bargained for. This is because the alternative premises were not comparable to the original premises in terms of size, location, exclusivity and other factors.

Key Takeaways

This case is noteworthy for recognising that Covid-19 restrictions can form the basis on which a contract may be frustrated. This may encourage more Covid-19-related disputes to be brought to the courts for resolution. However, it is worth noting that whether the doctrine of frustration would apply would depend on the specific circumstances of each case.

This case has also shone the spotlight on the application of the UCTA in commercial leases, which are typically drafted in favour of lessors, and which are often accepted by the lessees without further negotiations. That the UCTA was readily applied to a transaction that involved a tenant, which has sizeable clout and was in a position to negotiate, has also raised eyebrows. Nevertheless, in the absence of further judicial clarity on this, parties that are contracting with consumers or on their standard from contracts, should consider reviewing their standard terms to avoid overly broad and one-sided terms, where such contracts are used in regular and routine transactions, with no or little opportunity for negotiation by the other party.

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