WR GLOBAL HOLDINGS SDN BHD …Appellant

AND

HAJI MOHAMMED SHAHRI BIN HAJI MOHD ALI …1st Respondent
PENGIRAN HJH SITI ZAILAN BINTI PENGIRAN HJ SYED SHAHMINAN …2nd Respondent

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Court of Appeal of Brunei Darussalam
(Civil Appeal No.1 of 2020)

Before: Burrell P, Seagroatt and Lunn JJ A.
21 June 2021

Headnote: Assessment of damages for breach of tenancy agreement – award at trial upheld.

Mr. Pengiran Izad bin PLKD Pg Hj Bahrin of m/s Pg Izad and Lee for Defendant/Appellant.
Mr. Lim Rui of m/s Ridzlan Lim for the Plaintiff/Respondent.

Cases cited in the judgment

Ruxley Electronics and Construction Ltd [1994] 1 WLR 650
Yapp Pow Kin vs Hjh Jamilah binti Udin (Civil Appeal 3/2011)

JUDGMENT

Burrell, P.:

This appeal concerns an assessment of damages following the undisputed breach of a tenancy agreement. The appellant was the lessee to the agreement and submits that the damages awarded at first instance following a trial before Senior Registrar Hazarena on March 2020 are excessive and wrong in law. Her ruling was delivered on 7 April 2020.

The tenancy agreement was in relation to the Riviera Hotel in Kuala Belait. I shall refer to the parties as the plaintiffs and the defendant. The plaintiffs (respondents in the appeal) were the owners of the hotel and the lessor to the tenancy agreement. The 3rd defendant, WR Holdings Sdn Bhd, was the tenant and is the appellant in this appeal.

The plaintiffs had owned the hotel since 2002. At the time of the tenancy agreement (dated 16 May 2017) the hotel was fully furnished and fit for occupancy. It was acknowledged however that due to financial constraints it had become somewhat run down and the occupancy rates were less

than 10%. It became apparent that the defendant intended to use the building, not as a hotel, but for office space. The tenancy agreement was for a fixed term of 5 years.

Immediately upon taking possession in May 2017 the defendant commenced major construction alterations to the 1st and 2nd floors. Almost everything was ripped out including the sewerage system which left all the higher floors without water.

However, just 3 months later, on 11 September 2017, the defendant gave notice in writing of their intention to end the tenancy agreement. In evidence, the defendant agreed that when they terminated they left the hotel *"as an empty shell"*. It was uninhabitable.

There was no issue on liability, judgment in default had been entered on 21 July 2018. The Senior Registrar's findings included the following:

> *"The Defendant admits that renovations had been carried out and that the hotel had been returned in an unrepaired state. Going back to the underlying intention of the parties upon entering into the tenancy agreement was for the hotel to be rented out to the defendants and upon expiry of the tenancy agreement for the hotel to the returned to the plaintiffs. There is evidence that the plaintiff did not intend to sell the hotel prior to signing of the tenancy and this was agreed to by the 2nd Defendant."*

Three heads of damages are in dispute. Firstly, the award given for the rents due after repudiation. Secondly, the sum awarded for the cost of re-instatement following the defendant's gutting of the first two floors and thirdly the submissions concerning the diminution of the hotel's value as a result of the incompleted works.

Terms of the agreement and statutory provisions

Before considering the awards made or not made under the three heads we set out all the material provisions of the agreement and the relevant sections of the Contracts Act Chapter 106.

(i) The Tenancy Agreement shall commence on the 1st day of June 2017 but the landlords shall give the tenants a rent-free grace period for 3 months.

(ii) The tenants shall pay the monthly rent of BND25,000.00 to the landlords on or before the 7th day of each calendar month commencing 1st September 2017.

(iii) The tenants shall pay the sum of BND100, 000.00 being three months deposit and 0ne-month advance payment on the date of signing of the Tenancy Agreement.

(iv) Clause III (4) provides:- *"The Tenancy Agreement is fixed for a term of five (5) years. In the event that any one of the parties were to prematurely terminate the Tenancy Agreement, the Defaulting Party is answerable to pay to the Innocent Party for the remaining period. The Innocent Party reserves all his other legal rights in this matter."*

(v) In Part 13 of the Schedule:- *"a.During the Five (5) years term period between 1st June 2017 to 31st May 2022, neither party is allowed to terminate this Tenancy Agreement. b. In the event any one party wishes to terminate this Tenancy Agreement before the expiry date due (31st May 2022) then the Defaulting Party must pay the outstanding monthly rentals from the date of premature termination to the 31st May 2022 to the Innocent Party".*

(vi) General Condition 1(6): - *"to use the said premises for the purpose(s) stated in Section 11 of the Schedule hereto and all legal business which the said Tenant undertakes to do."*

(vii) Section 11 of the Schedule states that the purpose is "Hotel Restaurant and related Business of the sub-tenant".

(viii) General Condition 1(7):- *"That upon determination of the Tenancy, the tenants are to deliver to the landlords the Said Premises in such state of repair condition order and preservation as shall be strict compliance with the Landlord's stipulations herein contained and with all locks keys and fastenings complete".*

(ix) Clause 4 of the Special Conditions states, *"The Tenants are responsible for all repairs at the Tenant's own expenses and shall not claim any monies expended from the Landlord."*

(x) Clause 8 of the Special Conditions states, *"The Tenants agree that at the end of the tenancy, all equipment and fixtures must be returned in good working condition to the landlords subject to usual wear and tear".*

(xi) Clause 18 states, *"It is hereby agreed that when the five (5) year term expires the Tenant will return the said premises without removing any renovations, equipment or fixtures."*

The relevant provisions of the Contract Act are:-

(a) Section 74

"(1) When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

(2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach."

(b) Section 75

> *"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach in entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."*

The Senior Registrar's awards

Loss of rent

It was a fact that the agreement was terminated 57 months prematurely. The senior registrar recited Clause 111(4) of the agreement, part 13 of the schedule and section 74 and 75 of Chapter 106.

She observed that the express terms of the contract could not be clearer. It is not open to the defendant to rewrite the contract. After termination the defendant is liable for *"the remaining period"* and must pay *"the outstanding monthly retails"*. There is no dispute about the arithmetic which results is the award under this head of $1,352,500. It is not suggested by the defendant, nor could it be, that loss of rent is payable other than by a lump sum at the date of termination.

It was an agreed fact that the plaintiffs sold the premises in its gutted condition, in August 2019 for $2,491,764.

The defendant submits that their liability for loss of rent should end upon the sale of the property.

The senior registrar found there to be no merit in this submission and we agree. We note two matters in support.

Firstly, there are no provisions in the agreement which, on any view, could be construed in favour of the defendant's submission.

Secondly, the sequence of events were as follows:-

(i) repudiation by the defendant;

(ii) a two years period in which the plaintiff tried to find a new tenant but without success;

(iii) sale of the hotel in 2019; and

(iv) this litigation and award in 2020.

The defendant's untenable argument is highlighted by hypothetically, reversing (iii) and (iv) above. Namely, that the award of damages was given in 2019 and the hotel sold in 2020. The legal position would be identical. The liability to pay all outstanding rent arises on the date of termination. The suggestion that a defaulting tenant could later return to court and submit that he would be entitled to a return of a proportion of the damages due to a subsequent sale would be nonsense.

Damages for breach of covenant and repair

The senior registrar found that the obligation on the defendant was to return the hotel back in the same condition as it had been at the time of the commencement of the agreement. The senior registrar was alive to the point that in 2017 the hotel was in a poor condition; little or no money having been spent on upkeep or refurbishments on the previous years. There are multiple reference in the agreement as to the defendant's obligations:-

Clause 1(7) *"….. in such state of repair condition order and preservation as shall be strict compliance with to landlord's stipulation ….."*

Clause 8 *"….. fixtures and fittings must be returned in good working order."*

Clause 18 *"….. when the 5 years term expires the tenant will return the said premise without removing any renovations equipment or fixtures."*

The only evidence as to the cost of re-instatement to its pre-tenancy condition was adduced by the plaintiff. They produced an unchallenged report prepared by Hanafi Konsultant, a quantity surveyor, which estimated that the cost would be $715,835. This was the amount awarded by the senior registrar.

The defendant submits that the fact that the plaintiff did not actually spend any money on repairs should be taken into account. There is no merit in this argument.

The plaintiff cited Ruxley Electronics and Construction Ltd [1994] 1 WLR 650 in which it was said:-

> *"The defendants loss as a result of breach of contract was the amount required to place him in the same position he would have been if the contract had been performed ….. the defendant was entitled to recover the estimated cost of rectification, whether or not rectification was to be carried out".*

The senior registrar also noted section 74 and section 75 of Chapter 106, already recited above. She said:

"Therefore, upon repudiating the tenancy agreement, the defendants are under an obligation to return the hotel back to its original state. The 2nd defendant's evidence confirmed that renovation works were carried out and the hotel was returned with unfinished works to the first and second floors.

The plaintiff spoke fondly about the hotel being his first business venture upon his retirement. Selling the hotel was not an option when he was first approached by the defendants. Therefore it would be reasonable to assume that as the plaintiff had kept the hotel for 14 years he would retain the hotel upon acquiring it back from the defendants.

It is therefore reasonable for the plaintiff to require that work be done to reinstate the hotel. Whether or not this was actually done does not matter as is provided for under section 74 and 75 of the Contracts Act, Cap 106."

Put simply, there is no cogent argument against the proposition that the reasonable cost of putting the hotel back to what it was before the defendant gutted it was the estimate in the unchallenged report which was the sum awarded.

Diminution in Value

At trial the plaintiffs contended that they were entitled to a further award to reflect the diminution in the value of the hotel when it was sold in 2019 for $2,491,764.

It was accepted that the plaintiffs' initial attempt to mitigate their loss was to find a replacement tenant willing to take on the hotel in the condition left by the defendant. Unsurprisingly, they were not able to do so. They then reluctantly sold at an under value.

The difficulty with this head of damage was the lack of evidence. There was no valuation of the hotel at the time of the commencement of the tenancy. There is no reason why, there should have been. The only valuation was one made in October 2013 for $5,460.000. Other than its production to the court no further evidence was adduced in relation to it. There was no evidence as to why that valuation had been made in 2013.

Moreover, the senior registrar felt unable to assess the relationship between the 2019 sale price and the true value of the hotel at that time.

Her conclusion that *"for the reasons above I am unable to award any further damages to the plaintiff"* is wholly unobjectionable. She was clearly satisfied that her awards under loss of rent and cost of re-instatement sufficiently put the plaintiffs in the position (as noted in her judgment at paragraph 27) referred to in ***Yapp Pow Kin vs Hjh Jamilah binti Udin (Civil Appeal 3/2011)***:-

"The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

First and foremost, the parties are bound by the express terms in the contract. We are satisfied that the senior registrar's application of the clear terms of the agreement to the facts as she found them, does just that, namely, it places the plaintiff, as far as reasonably possible, in the same situation as if the contract had been performed.

To test this, the court addresses the concerns of the defendant who, in short, submits that the final award is excessive, there has been duplication of damages and the plaintiffs have profited as a result. In Ruxley (above) the court observed:-

> *"At the end of the day the entire circumstances of the case must be considered to determine whether the claim made was reasonable or was made with a view to obtaining an uncovenanted benefit."*

Applying these two citations it can readily be seen that the defendant's submissions are plainly erroneous.

This can be demonstrated in the following ways. At the conclusion of these proceedings the plaintiffs' total proceeds were the proceeds of sale plus the award of damages, a total of $4.555 million. The two *"valuations"* of the hotel were $5.460 million (2013) and $2.491 million (2019). There can be no doubt that the defendant's works between May and September 2017 caused the major decrease in value after 2017. There would have been some small decrease in value between 2013 ($5.46 million) and 2017 (the tenancy date). Assuming that it had not fallen below $4.5 million (approximately) there can be no complaint.

Additionally, had the tenancy agreement not been breached the plaintiff would in 2022 be the owner of a fully renovated operational office building or hotel plus $1.4 million in rents received. On any view this is a much healthier financial situation than having $4.555 million plus interest at the date of the senior registrar's decision in 2020.

Finally from the standpoint of the defendant it is submitted that damages for loss of rent should be $550,000 plus a much reduced award for re-instatement. Thus the plaintiff's financial position at the time of judgment would have been under $3.5 million ($2,491 million + $600,000 + a reduced sum for breach of covenant). On any view this falls well short of placing the plaintiff in the same situation had the agreement been carried out.

For the sake of completeness, the defendant raised a number of additional matters which it was submitted, should have been taken into account in the assessment of damages. For example, that the defendant had not been given an inventory list at the time of handover, that the handover had not been done properly, that there was no professional valuation done at the time of sale and that the poor condition of the hotel in 2017 was not sufficiently recognised.

The senior registrar referred to such issues as *"indeterminate"* (paragraphs 18 and 19 of the judgment). We agree, we regard them as at best peripheral, at worst irrelevant.

Decision

We dismiss the appeal and uphold the senior registrar's order in its entirety. We award the costs of the appeal to the respondents to be taxed if not agreed.

Burrell, P.

Seagroatt, J.A. **Lunn, J.A**