Singapore High Court Issues First Reported Decision in Dispute Arising from Circuit Breaker Measures

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The General Division of the High Court of Singapore ("**High Court**") has found that, even where a tenant does not have a contractual right to terminate a lease agreement, such an agreement can be terminated or, in the alternative, discharged by frustration due to the COVID-19 restrictions implemented by the Singapore government: *Dathena Science Pte Ltd v JustCo (Singapore) Pte Ltd* [2021] SGHC 219.

Our Comments

This is the first reported High Court decision which considers the effects of measures implemented by the Singapore government to curb the spread of COVID-19 on contractual relationships, against the backdrop of a contract that was executed on one party's standard terms (and therefore largely in favour of that party).

Prior to this decision, it was unclear how the Singapore courts would view parties' reliance on COVID-19 as a reason for termination and/or frustration of contracts.

In this case, the High Court found that the innocent party was entitled to issue a notice of termination despite having no contractual right to terminate the contract. In making this finding, the High Court took into account the fact that the party in breach (who was unable to perform its contractual obligations due to the COVID-19 pandemic and resulting restrictions) was unable to state with any certainty when it could perform its obligations.

The High Court found that, alternatively, the contract between the parties was discharged by frustration. It found that, although the party in breach sought to deny that the contract was terminated, that party took the view, and its own acts also indicated, that the COVID-19 pandemic rendered it impossible for it to fulfil its contractual obligations. The High Court then ruled that, once a supervening event occurs without the default of either party which renders the contractual obligation radically fundamentally different from what was agreed or a contract becomes impossible to perform, both parties are automatically discharged from their contract by operation of law.

This decision also shows that although the Singapore courts, in interpreting a contract, typically would give effect to the intention of the parties as objectively ascertained, there are limits to this. Here, the High Court considered some of the terms in the contract, which were largely in favour of that party who provided the template contract, grossly unfair and unenforceable.

Background

JustCo (Singapore) Pte Ltd ("**JustCo**"), a co-working space operator, and Dathena Science Pte Ltd ("**Dathena**"), a cybersecurity company, entered into an agreement ("**Membership Agreement**") by which Dathena agreed to lease from JustCo certain premises ("**Premises**") for two years from 1 May 2020 to 30 April 2022 ("**Lease**").

Under the Membership Agreement:

(a) Dathena was to pay JustCo a monthly sum, and if the agreement was terminated by JustCo, Dathena was to be liable to pay the sum due for the remaining term of the Lease in full [**Clause 8(c)(i)**];

(b) Dathena was to pay JustCo a refundable security deposit (which along with the monthly sum for May 2020 was paid on 5 March 2020);

(c) If necessary, JustCo had a right to replace the Premises with any other premises of comparable size due to JustCo's operational requirements [**Clause 2(c)**];

(d) Dathena had no claim whatsoever against JustCo arising out of "*any interruption, disruption or cessation in* [Dathena's] *use of the* [Premises]" [**Clause 12(b)(i)**];

(e) Dathena had to indemnify JustCo against all claims, demands, actions etc. [**Clause 11**]; and

(f) JustCo had (under clause 8) a unilateral right of termination and there was no clause that allowed Dathena to terminate the Membership Agreement.[1]

Due to the nature of Dathena's cybersecurity business, it was of paramount importance to Dathena that the Premises meet its information technology ("**IT**") requirements. JustCo, who was well aware of Dathena's requirements as Dathena had also rented office space from JustCo in Bangkok,[2] confirmed to Dathena that the Premises were able to meet Dathena's requirements. The parties further agreed that Dathena could move into the Premises early so that Dathena's servers could be set up, and Dathena paid JustCo to provide certain items to assist with the set up.

1 May 2020 came and went but Dathena was unable to occupy the Premises. This was because JustCo claimed it was unable to ready the Premises as a result of the circuit breaker measures ("**Circuit Breaker Measures**") imposed by the Singapore government in April 2020 (which required all non-essential services to cease from 7 April 2020 to 1 June 2020). JustCo also informed Dathena that the installation of internet services was "*not an essential service*" and that it was unable to seek the government's permission to allow Dathena to set up its servers.

On 29 May 2020, Dathena issued a notice of termination ("**Notice of Termination**") stating that the Membership Agreement was "*terminated, or frustrated*" for two main reasons:

(a) While JustCo explained on three occasions that the 1 May 2020 commencement date was delayed due to delays in construction and renovation works on the Premises, there was no indication as to when the Premises would be available for occupancy.

(b) Due to the COVID-19 pandemic that was "*unforeseen by all*", "*the broad scope of social-distancing measures implemented by the Singapore government, as well as the continued expectation of Singapore government for all businesses to telecommute from home as far as possible for the*

1 [160] of Judgment
2 [158] of Judgment

> *foreseeable future, it would be reasonable to say that Dathena's original intended use of the Premises is now no longer possible or viable*".[3]

This was rejected by JustCo on 1 June 2020. JustCo offered two alternative premises which Dathena did not accept. One of the reasons for Dathena's rejection of the alternative premises was that Dathena would have to share the alternative space with other companies, which was not ideal given the safe distancing and contact tracing requirements under the COVID-19 regulations.

On 6 July 2020, JustCo gave Dathena a definite date of 9 September 2020 to move into the Premises. That was a delay of more than 4 months (or 17% of the duration of the Lease).

Dathena commenced a claim for a declaration that the Membership Agreement was terminated with effect from 29 May 2020, and sought a refund of the monies paid thereunder. JustCo counterclaimed for the fees payable for the remainder of the Lease.

The High Court's Decision

The following issues arose for decision before the High Court:

- Was Dathena entitled to and/or justified in giving the Notice of Termination? If the Notice of Termination was valid, did Dathena waive its rights of termination by viewing the alternative premises?
- Alternatively, was the Membership Agreement frustrated by the Circuit Breaker Measures?
- Were certain provisions in the Membership Agreement unenforceable under the Unfair Contract Terms Act ("**UCTA**")?

Dathena was entitled / justified in giving the Notice of Termination, and did not waive its rights of termination by viewing the alternative premises

The High Court found that Dathena was entitled and/or justified in giving the Notice of Termination despite having no contractual right to terminate the Membership Agreement. This was especially so since JustCo could not state with any certainty when Dathena could occupy the Premises, and it was well aware of the nature of Dathena's business and its IT requirements.

The High Court further took the view that:

(a) It "*cannot be right as a matter of contract law in a commercial context*" that there was no clause allowing Dathena to terminate the Membership Agreement, unlike JustCo who had a unilateral right to do so under Clause 8.

(b) Dathena had an implied contractual right to terminate the Membership Agreement. The fact that the Membership Agreement contained an entire agreement clause (i.e., a clause stating that parties agree that all the terms between them are in the agreement) did not preclude the implication of terms into the contract.

[3] [29] of Judgment

(c) Even if the entire agreement clause was an exception clause precluding the implication of a term allowing Dathena to terminate the Membership Agreement, such an exception clause "*would be subject to both the common law constraints on exclusion clauses as well as the UCTA*".

The High Court also held that Dathena did not waive the Notice of Termination by viewing the two alternative premises. This was because Dathena had made clear that its willingness to view these alternatives was without prejudice to the Notice of Termination. Further, the alternative premises were not comparable to the Premises in terms of size and other factors such as location and exclusivity to use the premises.

As for JustCo informing Dathena that the installation of internet services was "*not an essential service*" (which was inaccurate under the COVID-19 (Temporary Measures) Act), the High Court found that JustCo could have but failed to take steps to assist in Dathena's early set up of servers.

Alternatively, the Membership Agreement was frustrated by the Circuit Breaker Measures

Dathena relied on section 2 of the Frustrated Contracts Act, which states:

> (1) Where a contract has become impossible of performance or been otherwise frustrated, and the parties to the contract have for that reason been discharged from the further performance of the contract, this section shall, subject to section 3, have effect in relation to that contract.

The High Court was of the view that JustCo's repeated insistence that the Membership Agreement was not frustrated (but contradictory stance that the COVID-19 pandemic rendered it impossible for JustCo to fulfil its contractual obligations, which was the very test for frustration under the Frustrated Contracts Act) was irrelevant. Noting that parties' views had no bearing on the operation of the Frustrated Contracts Act, the High Court reiterated that:

> Once a supervening event occurs after the formation of the contract without the default of either party which renders the contractual obligation radically fundamentally different from what was agreed or, a contract becomes impossible to perform, a contract is frustrated. The result is that both parties are automatically discharged from their contract by operation of law.

The High Court found that, if the Membership Agreement was not terminated by the Notice of Termination, it was terminated by operation of law (i.e., it was discharged by frustration pursuant to the Frustrated Contracts Act) as:

(a) JustCo had itself attempted to persuade Dathena to sign a new agreement to replace the Membership Agreement. JustCo's own conduct indicated that it was aware that it could not perform its contractual obligations as previously agreed to in the Membership Agreement; and

(b) As the alternative premises were not comparable to the Premises, JustCo's repeated attempts to replace the Lease with a new lease at the alternative premises "*amounted to a fundamentally different contract than what the parties bargained for*".

Clauses 2(c), 8(c)(i), 11 ad 12(b)(i) are unenforceable under UCTA

The High Court found that clauses 2(c), 8(c)(i), 11 and 12(b)(i) of the Membership Agreement were "*grossly unfair and disadvantageous to Dathena and an affront to the UCTA*" and therefore unenforceable.

The UCTA applies as between contracting parties "*where one of them deals as consumer or on the other's written standard terms of business*" (section 3 of the UCTA). The High Court found that Dathena was a "consumer" and/or had dealt with JustCo's "written standard terms of business" within the meaning of section 3 and that the UCTA applied to the Membership Agreement.

JustCo sought to argue that, while it had provided Dathena the initial draft of the Membership Agreement, the signed copy was a product of negotiations between the parties and that JustCo "*would have been open to changes in the contract terms if Dathena had requested*". JustCo therefore argued that the terms were "*fair and reasonable*".

The High Court rejected this argument as no evidence was presented to show that there was any room for negotiation of the standard terms in the Membership Agreement. JustCo's representative had additionally testified that it was "*just a standard agreement that it was – is generated from the system*".

In the circumstances, the High Court granted Dathena the declaration requested (namely, that the Membership Agreement was terminated with effect from 29 May 2020) and awarded Dathena the refund of the monies it had paid under the Membership Agreement, plus interest and costs. JustCo's counterclaim was dismissed with costs.

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