

Goldzone (Asia Pacific) Ltd (formerly known as Goldzone (Singapore) Ltd) v Creative
Technology Centre Pte Ltd
[2011] SGHC 103

Case Number : Suit No 558 of 2008
Decision Date : 27 April 2011
Tribunal/Court : High Court
Coram : Andrew Ang J
Counsel Name(s) : Devadas Naidu (Mohan Das Naidu & Partners) for the plaintiff; Andre Maniam SC, Liew Yik Wee and Chen Xinping (WongPartnership LLP) for the defendant.
Parties : Goldzone (Asia Pacific) Ltd (formerly known as Goldzone (Singapore) Ltd) — Creative Technology Centre Pte Ltd

Contract – Actionable misrepresentation

27 April 2011

Andrew Ang J:

Introduction

1 In late 2007, the plaintiff, Goldzone (Asia Pacific) Ltd (“Goldzone”) entered into three agreements for the rental of a number of units in the Creative Resource Building (“the Building”) owned by the defendant, Creative Technology Centre Pte Ltd (“Creative”). Goldzone met with representatives from Creative on 1, 2 and 10 August 2007 to determine the suitability of the Building for their venture. Goldzone alleged that a number of representations were made by Creative’s Chan Ming Tat during the course of negotiations, which included site visits and subsequent e-mail exchanges. Goldzone claimed that these representations induced them into signing three tenancy agreements with Creative.

2 Goldzone took possession of only two out of the three tenancies signed with Creative, resulting in the premature termination of the third tenancy in March 2008. On 31 July 2008, Goldzone vacated the Building and soon thereafter filed a suit against Creative alleging various breaches of the agreements on the basis of actionable misrepresentations and/or an alleged oral collateral contract. In response, Creative filed a separate suit (hereinafter referred to as “the counterclaim”) on the basis of Goldzone’s breach of the agreements such as failure to pay rental, security deposits and service charges and other sums that fell due. An order for consolidation was made in December 2008.

3 Goldzone’s claims in these proceedings were for rescission of the agreements, return of security deposits, rent and service charges totalling \$833,436.60, costs and damages. Creative sought dismissal of Goldzone’s claim, judgment for \$381,734.35, interests thereto, costs, as well as damages.

The agreements

4 The three agreements (“the Agreements”) for the lease of units were as follows:

(a) Letter of offer from Creative dated 9 October 2007 in respect of units #01-04 and #01-05 for a period of one year, accepted by Goldzone on 12 October 2007 (“LO1”). Goldzone took

possession of both units on 1 November 2007.

(b) Letter of offer from Creative dated 31 October 2007 in respect of units #05-04 and #05-05 for a period of three years (with an option to renew for three years), accepted by Goldzone on 1 November 2007 ("LO2"). Goldzone took possession of unit #05-05 on 5 November 2007 and of unit #05-04 on 3 December 2007.

(c) Letter of offer from Creative dated 22 November 2007 in respect of units #01-06/07/08 and #02-06 for a period of five years (with an option to renew for three years), accepted by Goldzone on 22 November 2007 ("LO3"). Goldzone did not take possession of these units.

5 While Goldzone did not execute the draft tenancy agreements, the terms of the draft tenancy agreements were incorporated into all three Agreements by operation of cl 1.7. It is worth noting that cl 1 of all three Agreements contained express terms for the payment of rent, utilities, security deposits and parking charges.

6 The following material witnesses appeared for Goldzone and Creative respectively:

(a) Goldzone's witnesses:

Ms Joyce Cheryl Lim Bee Leng ("Ms Lim") – marketing director.

Ms Diana Marie Colley ("Ms Colley") – director.

Dr Malcom David Linsell ("Dr Linsell") – director.

(b) Creative's witnesses:

Chan Ming Tat ("Mr Chan") – employee.

John Yeo Siew Phee ("Mr Yeo") – employee.

Goldzone's case

7 Goldzone's pleaded case was built on the foundational premise that Creative's Mr Chan represented himself to possess sufficient authority to commit Creative to plans in relation to the Agreements. Goldzone also argued that Creative and Mr Chan, in particular, were well aware of Goldzone's requirement that the Building was compatible with Goldzone's vision of running a one-of-a-kind world class leadership centre. Goldzone argued that Creative was an "aligned landlord", collaborating in Goldzone's venture by, *inter alia*, undertaking wide-ranging financial commitments to upgrade the Building to Goldzone's satisfaction. As the representations allegedly made by Mr Chan were presented by Goldzone within this context, I considered the merits, if any, of these submissions prior to my analysis of the individual representations identified.

Mr Chan's authority

8 Firstly, Creative did not dispute that Mr Chan was in charge of the "special project" of the Building tenancies. However, Creative disagreed with Goldzone's allegation that Mr Chan possessed the necessary authority to commit Creative to the representations alleged by Goldzone. Analysis of the evidence indicated that Goldzone did not hold this belief either. Goldzone's witnesses admitted under cross-examination that they did not think that Mr Chan had *absolute* authority to deliver promises without higher authorisation. For example, when asked about Mr Chan's authority, Ms Colley

remarked that she was not calling him the sole decision maker. Similarly, in many e-mails between Ms Lim and Mr Chan, Ms Lim sought clarification of the right person to seek approvals from, implicitly recognising a limit to Mr Chan's authority. I was satisfied that Mr Chan clearly did not possess the unbridled authority alleged by Goldzone and that in any event Goldzone was not labouring under this assumption either.

Creative's knowledge and awareness of Goldzone's requirements

9 Secondly, Goldzone submitted that Creative, through its representatives Mr Chan and Mr Yeo, had knowledge that, *inter alia*, the building type, estimated space requirements, high quality and top class facilities were integral to the success of the unique concept of the Goldzone Leadership Centre and its ten-year plan for regional expansion. Goldzone's submission that Creative possessed knowledge of its expectations was undermined by the following factors:

- (a) Goldzone's awareness of the nature and quality of Creative's facilities;
- (b) Goldzone's evolving plans; and
- (c) the nature and scope of Goldzone's relationship with Creative.

Awareness of the nature and quality of Creative's facilities

10 Goldzone was relocating its offices from Suntec City in the Central Business District area to the Building which was located at 31 International Business Park, Singapore 609921, a business park in an industrial area in Jurong. Furthermore, Goldzone could not have been unaware that the Building had a tenant mix, including companies engaged in manufacturing, logistics and warehouse businesses. Goldzone could not reasonably compare the Suntec City premises with the Building in an industrial park, as, to begin with, it was seeking a much larger space for a quarter to a third the cost in rent per square foot. On the issue of cost alone, the comparison was illogical. In any event, from an e-mail from Ms Lim to Andrew John Harrison ("Mr Harrison"), chief executive officer of Goldzone, it was clear that Goldzone was aware that the frontage was not "great" but, despite this awareness, proceeded to enter into the multiple Agreements to lease large spaces from Creative.

11 After accepting tenancies for units #01-04 and #01-05; and #05-04 and #05-05; and entering into possession thereof, Goldzone was still looking for more space and signed the tenancy for units #01-06/07/08 and #02-06. Goldzone was well aware of the general condition and state of the Building when each of the Agreements was signed. In fact, contemporaneous documents do not evidence any protest, dissatisfaction or disappointment on Goldzone's part in relation to the lack of progress of the renovation works for the general premises and the common areas until early 2008, by which time all three Agreements had been entered into.

12 Goldzone was in a position to gauge the progress of the renovation works from August 2007 until the end of November 2007 when the third Agreement for units #01-06/07/08 and #02-06 was signed (the largest space leased), but it chose to enter into the Agreements without any protest or sign of progress in relation to the renovation works. The reasonable conclusion to be drawn from Goldzone's behaviour was that it was aware of the general conditions and surroundings of the Building but chose to enter into one tenancy after another despite the *apparent* significant deviation from its own "requirements".

Goldzone's evolving plans

13 Goldzone argued that *"its requirements for the kind of building, estimated space requirements and surroundings were all made known to Creative"*. In support of this contention, Goldzone made much of the fact that its development plan was made available to and read by Creative's representatives. However, the specifications set out in the development plan were significantly different from Goldzone's expressed needs in the course of negotiations. In contrast to the requirements in the development plan of 15,000 to 25,000 sq ft for a monthly rental of \$50,000 to \$150,000 in a central location, Goldzone was actually seeking 50,000 sq ft in an industrial park in Jurong. Documentary evidence indicated that Goldzone's plans, not least in relation to space requirements, were clearly in flux both prior to and after leasing units in the Building. Creative could not have had an *"abundantly clear"* picture of Goldzone's needs as they underwent considerable change in the course of negotiations.

Nature and scope of Goldzone's relationship with Creative

14 Goldzone's counsel in his opening statement cautioned the court that *"the very essence of the Plaintiffs [sic] case would be lost if one was just to approach this case as a straight forward Landlord Tenant relationship and dispute"*. Goldzone argued that it was looking for *"a landlord partner"* or an *"aligned landlord"* to enter into a successful collaboration to create a leadership centre which was not just for everyone but for the very high end of business leaders. Commercial reality, inconsistency between Goldzone's witnesses and contemporaneous evidence stood against this proposition. Creative had not agreed to any partnership much less made any financial commitment thereto. Ms Lim's expectation of a \$15m to \$50m expenditure by Creative on upgrading the Building without any agreement, solely on the basis of the notion of collaboration, stood starkly against commercial norms. No evidence was adduced by Goldzone to satisfy me of the existence of any such *"collaboration"*.

Alleged misrepresentations

15 Goldzone maintained that eight misrepresentations were made by Mr Chan at the introductory meeting held on 10 August 2007. Goldzone claimed that those alleged misrepresentations induced them to enter into the Agreements. Alternatively, Goldzone also claimed that those misrepresentations collectively formed the terms of an alleged oral collateral contract. I considered the representations identified by Goldzone within the context of the tort of deceit prior to my analysis of the existence of an oral collateral contract.

16 The representations, as articulated by Goldzone, are listed as follows:

- (a) **UPGRADING PLANS IN EXISTENCE:** That Creative had plans to upgrade and renovate the Creative Resource Building and particularly stated [sic] this included upgrade of toilet facilities, widening of the public walkway/erect [sic] appropriate shelter, koi ponds and rooftop garden and greenery around the building.
- (b) **RESTAURANT:** Creative had plans to operate or lease out space within the Creative Resource Building on the 1st level for a restaurant.
- (c) **RECREATION AREA AT LOADING BAY:** Creative had plans to build a recreation area at the loading bay and that area could be made available for an outdoor pool, as an extension of wellness/medi-spa facilities which Goldzone had plans for.
- (d) **HOTEL/ACCOMMODATION FACILITY:** Application could be made for the Level 7 of the building which was the staff recreational room to erect [sic] a Hotel to accommodate overseas participants of [Goldzone's] courses at the centre.

- (e) WINDOWS: Installation of Windows to Levels 1 & 2. That for a higher rental rate Creative will apply for, install, pay for and maintain these installed windows facing the grass verge on Levels 1 & 2.
- (f) GLASS PANELING [*sic*]: That for a higher rental rate Creative will install and pay for a 2-storey high glass paneling [*sic*] on the 1st Floor mirroring Creative's own existing glass paneling [*sic*].
- (g) LETTERS OF OFFER COULD BE CHANGED: That IF Goldzone signed letters of offer in respect of any offered space so as to secure them, the terms thereof could be subsequently changed to reflect the true terms agreed between Goldzone and Creative as these Letters of Offer were Internal Creative Documents.
- (h) ALIGNMENT OF LEASES: That the agreement for leases as contained in each Letter of Offer could subsequently be all aligned in one final lease document with identical commencement and expiry dates.

Tort of deceit

17 Goldzone sought rescission of the Agreements and damages for misrepresentation under the tort of deceit. The elements necessary to ground an action in deceit were set out in *Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR(R) 435 ("*Panatron*") at [14]. Each representation alleged by Goldzone was tested against the following elements:

- (a) The representation had to be one of fact made by words or conduct.
- (b) The representation must have been made with the intention that it was acted upon by Goldzone or by a class of persons which included Goldzone.
- (c) Goldzone must have acted upon the false statement.
- (d) Goldzone must have suffered damage by doing so; and
- (e) The representation must have been made with knowledge that it was false, either made wilfully or in the absence of any genuine belief that it was true.

18 It is trite law that to constitute a representation at law a statement must relate to a matter of fact, present or past as distinct from a statement of opinion, or of intention or law. Goldzone could only have characterised the alleged representations as being statements of fact rather than a statement of opinion or of intention if evidence was adduced to show that Mr Chan did not honestly have the intention/opinions he conveyed to Goldzone.

19 Goldzone's witnesses, under cross examination and in their affidavits of evidence-in-chief, never called Mr Chan a fraudster. In fact, when presented with the opportunity, Ms Lim remarked (under cross-examination on 4 October 2010):

Q: With the benefit of hindsight, Ms Lim, are you now saying that Mr Chan was dishonest to you on the 10th of August 2007?

A: I'm not sure. *I felt that what he said was accurate in terms of his representations to us.*

[emphasis added]

20 In the absence of the crucial ingredient of fraud or dishonesty, the alleged representations relating to upgrading, the hotel accommodation, the loading bay and the restaurant were not representations of fact. As such, they were *not* actionable for failing to satisfy the first element set out in *Panatron*. In any event, I examined each representation against the evidence adduced by both parties.

Upgrading representation

21 In Mr Chan's affidavit of evidence-in-chief as well as under cross-examination, he conceded that general plans to upgrade and renovate the Building were discussed as a possibility but "*no specifics were mentioned*". While upgrading plans including koi ponds, rooftop gardens and greenery were discussed as possibilities, no conclusive representation was made and no agreement was concluded. Ms Lim herself was unable to say what plans she understood Creative to have had and she conceded to having "*no clue*" of what they would cost. No evidence was adduced of any effort made by either party to contractually incorporate those discussions. Secondly, in an e-mail from Ms Lim to Goldzone's Mr Harrison and Ms Anjou MacPherson, a consultant of Goldzone, Ms Lim clearly indicated: "*renovation is just a discussion*".

22 In addition to the fact that upgrading plans were merely being *discussed* by the parties, the non-actionability of the statement is bolstered by the simple fact that the actual content/terms of the "upgrading" plans were uncertain. Goldzone was inconsistent with regard to its expectations of the nature and scope of the upgrading plans. Ms Colley's expectation was limited to the usual repairs by a landlord and that did not tally with Ms Lim's and Dr Linsell's grand expectations. Expectations for upgrading varied significantly from Ms Colley's disappointment with the "*chipped tiles, broken bathroom doors and leaking pipes*" to Ms Lim and Dr Linsell's belief that Creative would do "*whatever it takes*", irrespective of the cost, to make Goldzone's vision for a luxury leadership centre a reality.

23 Earlier, I found against Goldzone's submission that Creative was an "aligned landlord". As such, in light of the inconsistent evidence from Goldzone's witnesses, the likelihood of Mr Chan making a representation to undertake to spend up to \$50m to upgrade the venue on Goldzone's first official site visit on 10 August 2007 prior to any formal negotiations taking place, defies commercial logic and is remote, to say the very least. I accepted Creative's submission that Goldzone elevated discussions of mere possibilities to positive representations.

Restaurant representation

24 Goldzone asserted that Creative was interested in collaborating to manage a restaurant. Mr Chan did not deny that discussions were ongoing on a possible joint collaboration for a restaurant on Level 1 of the Building. Creative raised the possibility of collaboration with a maximum contribution of 20% of the costs. Similar to the upgrading representation, plans for collaboration between Goldzone and Creative in relation to the restaurant remained as discussions or mere possibilities. In an e-mail from Goldzone to Creative, Ms Lim stated:

... let's talk seriously about Creative's involvement and collaboration for the restaurant.

...

... it will be important to confirm if Creative will JV with us on this project. ...

...

Please let me know what you need from me to ... *confirm Creative's collaboration ... with us on this project.* ...

[emphasis added]

Goldzone was unable to adduce any evidence indicating Creative's *confirmation or agreement* to collaborate on the restaurant project.

25 In any event, as established by *Panatron* ([17] *supra*), to constitute actionable misrepresentation the representee must have acted upon the false statement of the representor. Goldzone was not induced by this representation, even if it was made, as Ms Lim herself indicated, "As time moved on, we didn't hear back about the joint participation on the project *so [we] just went ahead negotiating a straight lease for #01-05 for the restaurant.*" [emphasis added]. Goldzone clearly did not rely on this "representation" as it was prepared to enter into the Agreements irrespective of the outcome of the ongoing discussions on the restaurant.

Loading bay representation

26 Goldzone claimed that Mr Chan promised that Creative was planning to convert the loading bay area into a recreational area for its staff and that it could be made available as an extension of the wellness/medi-spa facilities which Goldzone had planned. This claim was unsustainable in the light of Ms Lim's unequivocal admission in court on 4 October 2010 that Mr Chan did not promise this. Discussions between the parties remained discussions and Creative, where possible, assisted Goldzone in relation to the necessary approvals required for the medi-spa activities planned.

27 Goldzone concluded negotiations in relation to LO3, units #01-06/07/08 and #02-06 without reaching an agreement on the use of the loading bay. The loading bay was never leased by Goldzone. Goldzone cannot logically argue that the alleged loading bay representation induced them to enter into the third Agreement as it was actually because of the lack of any agreement on the details of the loading bay that Goldzone left it out of LO3, subject to further negotiations. The evidence adduced clarified that Goldzone clearly recognised that the plans for the loading bay remained in the discussion phase.

28 From the evidence adduced, the first mention of the medi-spa was in an e-mail dated 18 October 2007 rather than on 10 August 2007 as Goldzone had alleged. By this time, the first Agreement had already been entered into. Goldzone also erroneously stated that it was not clearly informed of the planning approvals required to operate a medi-spa. In an e-mail dated 19 October 2007, Creative promptly responded to Goldzone stating that "*On the medi-spa for Area C, [units #01-06/07/08] it has to be approved by JTC. ... JTC may requires [sic] Goldzone to justify the Leadership Training with medi-spa activities.*" [emphasis added]. Goldzone was informed of the obstacles ahead and sought Creative's assistance where possible. No evidence has been adduced documenting Goldzone's application to convert the loading bay into a medi-spa. Neither did Goldzone's application to JTC Corporation ("JTC") in respect of units #01-06/07/08 and #02-06 contain any express mention of a medi-spa. Goldzone's failure to carry out this plan could not be blamed on Creative.

Hotel representation

29 The possibility of Goldzone converting Level 7 of the Building into a hotel was discussed between the parties but the Agreements executed by Goldzone did not relate to any space on

Level 7. Creative informed Goldzone of the planning approvals required from the Urban Redevelopment Authority ("the URA"). Both parties must have appreciated that it was unlikely that the URA would grant planning permission to build a hotel in an industrial park. In any event, applications for planning approval from the URA were never pursued or submitted and no lease for Level 7 was negotiated. I was not satisfied that any reliance on this representation induced Goldzone to enter into the Agreements.

Windows representation

30 Creative constructed windows on Levels 1 and 2 for units #01-06/07/08 and #02-06. As this fact was undisputed, there was no misrepresentation. Goldzone's claim was that the completion of this construction gave rise to the expectation that the other alleged representations would be honoured as well. However, Creative had begun to obtain quotations and the necessary permits to construct the said windows, *prior to* Goldzone's acceptance of the tenancy for units #01-06/07/08 and #02-06. In fact, at the time Creative began planning to build the windows, Goldzone was only considering renting the units on Level 1. Contemporaneous evidence indicated that the completion of the windows was simply a matter of Creative putting into action its intention to have the windows built and was unrelated to any of the other alleged representations.

Glass panels representation

31 The completion of glass panelling for Levels 1 and 2 was within the contemplation of both parties but it was common ground that the approval of the relevant authorities was required. Creative was unsuccessful in its application to the Fire Safety Board ("the FSB") for the glass panelling on Goldzone's side of the Building. Creative received the FSB rejection letter on 8 October 2007 and Goldzone's Ms Lim confirmed receipt of this letter in an e-mail to Mr Yeo on 15 October 2007. While Creative was aware of the FSB rejection prior to the first Agreement being signed on 12 October 2007, the precise date that Ms Lim received the rejection letter was unclear. Goldzone's argument that they would not have entered into the first Agreement had they known about the FSB rejection did not seem likely, as knowledge of the rejection of the application for glass panelling did not deter Goldzone from entering into the second and third Agreements. In any event, the first Agreement was for temporary space and the glass panelling would not have been built at either unit #01-04 or #01-05 (the units leased under the first Agreement).

32 Goldzone also argued that Creative dishonestly quoted a significantly smaller cost of \$100,000 for the glass panelling despite knowing that the actual cost was much higher, having received quotations for about \$400,000. Examination of the contemporaneous documents indicated that Mr Chan did not say that the panelling would cost \$100,000. Ms Lim indicated in more than one e-mail that she was aware that the \$100,000 quote was merely Creative's budget and she remarked, "*Whether the \$100k covers it or not I'm not sure. We'll have to get their plans and negotiate if its [sic] not enough for the glass panelling.*" [emphasis added]. Thus even if one could argue that Creative sought to mislead Goldzone with the proposal of \$100,000, Ms Lim clearly did not rely on this sum but rather considered it, as it was, Creative's budget for the project.

33 In any event, I accepted Creative's clarification that the quotation in the region of \$400,000 was inaccurate as it was for fire-rated glass of the wrong dimensions and the quotations were not subject to competitive bids. Cost aside, as agreed, Goldzone was supposed to make the necessary applications for the glass panelling and no evidence was adduced of any attempt to gain the requisite approvals. In any event, by 15 October 2007, Goldzone was aware of the rejection of the application for glass panelling but nevertheless not only entered into the third tenancy for units #01-06/07/08 and #02-06 but, even after its termination, continued negotiating for more space despite knowledge

of the cost and FSB's rejection of the application for glass panelling.

34 In its statement of claim, Goldzone stated that the representation made in relation to glass panelling was in essence that, "for a higher rental rate" Creative would install the said glass panelling. However, in a nutshell, Goldzone's case at trial was that in regard to the glass panelling Creative was *dishonest* about the FSB rejection letter, the grounds of rejection and the cost rather than about the alleged higher rental rates negotiated. Owing to this deviation, no evidence was adduced to show that higher rental rates were negotiated in reliance on the provision of glass panelling. Creative and Goldzone did *discuss* glass panelling but based on the evidence before me, I was not satisfied that fraudulent misrepresentation was made out in relation to the FSB rejection letter, the grounds of rejection or the cost of the venture.

Unenforceable Agreements representation

35 It was only after the second amendment of its statement of claim that Goldzone alleged that the representations made by Mr Chan constituted an oral collateral contract between the parties and that the actual Agreements entered into were merely Creative's internal documents. Goldzone's submission was that Mr Chan gave them the impression that the Agreements were internal documents only executed to ensure that Goldzone did not lose the units they were interested in.

36 In the process of negotiating the letters of offer, contractual terms such as "*accept offer*", "*terms of the agreement*", "*terms and conditions*" were frequently used by both parties; this was consistent with the Agreements being legally binding. In an e-mail dated 13 September 2007, Goldzone's Ms Lim stated:

As I mentioned to you, we [Goldzone] are committed to taking the entire 2nd floor at Creative, amounting to 4,875 sqm (plus additional space on the 1st floor). However, we are unable to sign the letter of offer provided by you without going through legal ...

We are committing to a tenancy which involves over \$12.0M to Creative over the next 6 years and it is important for us [Goldzone] to make sure that our lawyers have an overview of the terms and conditions of [the] lease.

Goldzone must have considered the Agreements to have had legal effect as it paid rent and security deposits in accordance with the terms of the Agreements. Goldzone also proposed significant amendments to the letters of offer which would only have been worthwhile if Goldzone had considered the Agreements to be legally binding.

37 Goldzone's claim that it believed that the Agreements had no legal effect stood in direct contrast to the contemporaneous evidence and Goldzone's own recourse to legal advice. Even if, as Goldzone alleged, Creative represented that the Agreements were "internal documents", of which no evidence was adduced, Goldzone clearly did not rely on this representation.

Alignment of leases representation

38 Finally, Goldzone claimed that Mr Chan's representation that the leases could be aligned into one document, induced Goldzone into signing the Agreements. The evidence adduced indicated that after all three Agreements had been signed, Goldzone's own Ms Lim had requested for the leases to be aligned in January 2008. Firstly, the fact that Ms Lim enquired into the possibility of the alignment of the leases in January 2008 casts doubt on the proposition that Mr Chan had already made such an offer at an earlier date. Secondly, in the absence of any evidence indicating that Mr Chan had made

this representation, I found that it did not exist as a pre-contractual representation and was therefore incapable of inducing Goldzone to enter into the Agreements. Furthermore, Creative's response to Goldzone's suggestion promptly clarified that alignment of the starting dates of the leases might not be possible due to JTC having approved the existing dates. Contemporaneous evidence indicated that Ms Lim knew that the alignment of leases remained the subject of negotiations.

Goldzone's act of affirmation

39 Leaving aside the facts of this dispute, in theory, if fraudulent misrepresentation had been made out, Goldzone would have had the right to decide whether to rescind the Agreements or to affirm the same and sue for damages. The right to rescind is lost by affirmation when the party entitled to rescind unequivocally manifests an intention to affirm. However, no election can be said to have been made unless the misled party is broadly aware of the true facts.

40 On 10 April 2008, Creative received four months' overdue rental for units #01-04 and #01-05, and a second cheque for fitting out works and debris removal fees from Goldzone. As at 10 April 2008 when the overdue payment was made, Goldzone was aware that most of what the alleged representations promised had not been and were not being carried out. Goldzone was notified by e-mail correspondence (on the following listed dates) that plans for upgrading and constructing a hotel facility had not progressed, the glass panelling was not approved (15 October 2007), the loading bay could not be used as a pool/medi-spa (4 March 2008) and unit #01-05 could not be used as a restaurant (20 March 2008).

41 Even if all the representations alleged constituted actionable misrepresentations, which they did not, Goldzone's act of payment of overdue rent was arguably an affirmation of the Agreements. A person who is induced by a misrepresentation to take a lease cannot rescind the lease if after discovering the truth he *continues to occupy the premises and pays rent*. Goldzone had knowledge of the "true facts" in relation to all the alleged representations and, rather than choosing to rescind the Agreements, Goldzone elected to affirm the Agreements by making payment of overdue rent.

42 Crucially, the payment of rent was initially being actively withheld by Goldzone to force Creative into performing its "obligations"; as perceived by Goldzone. Despite discovery of the alleged misrepresentations, Goldzone's change of heart to resume rent payment, to my mind indicated affirmation of the contract with, in Goldzone's words, "*the intention of moving forward in the longer term*". Accordingly, under these circumstances, the remedy of rescission was unavailable to Goldzone.

Did the alleged representations constitute an oral collateral contract?

43 The common law parole evidence rule is codified in ss 93 and 94 of the Evidence Act (Cap 97, 1997 Rev Ed) stating that evidence cannot be admitted or used to add to, vary or contradict a written instrument. However, s 94(b) allows extrinsic evidence to be adduced of a separate oral agreement as to which the written agreement is silent and which is not inconsistent with its terms.

44 The terms of the oral collateral contract (the alleged representations), were inconsistent with the express terms of the Agreement. Clause 1.1 expressly stated that Goldzone "*shall take over the Demised Premises in 'as is where is' condition and be responsible for the maintenance and repair of the Demised Premises*". This clause was plainly inconsistent with any representation alleged by Goldzone in relation to the upgrading of the premises. Furthermore, by way of cl 1.7, terms of the draft tenancy agreement bound Goldzone and, cll 3(5), 3(11), 3(13), 3(25) and 8(1) therein clearly contradicted the slew of representations alleged by Goldzone.

45 Furthermore, an oral collateral contract, distinct from the principal contract, must satisfy all the usual legal requirements of a contract, including the following:

- (a) The statement must be promissory in nature or effect rather than representational (*Lemon Grass v Peranakan Place Complex Pte Ltd* [2002] 2 SLR(R) 50 (“*Lemon grass*”) at [116]–[117]).
- (b) Certainty of terms.
- (c) Separate consideration.
- (d) Existence of *animus contrahendi*, ie, that a statement must be intended to be legally binding (*Inntrepreneur Pub Co (GL) v East Crown Ltd* [2000] 2 Lloyd’s Rep 611 at [614]).

46 Goldzone bore the burden of establishing that both parties intended to create a legally binding contract (*Kleinwort Benson Ltd v Malaysia Mining Corp Bhd* [1989] 1 All ER 785 at [796], applied in the *Lemon Grass* case at [118]). In its submissions, Goldzone did not establish the requisite elements to constitute an oral contract distinct from the written Agreements entered into. For example, in order to persuade the court that the eight alleged representations were terms capable of constituting an oral collateral contract, Goldzone could have made systematic submissions, *inter alia*, in regard to the existence of *animus contrahendi*, the certainty of terms and, *crucially*, the apparent inconsistency of the “oral contract” with the written Agreements. On the evidence before me, I found that the alleged representations were glaringly inconsistent with the terms of the written Agreements and could not be construed as promises under an oral collateral contract.

Creative’s counterclaim

47 Apart from its claim, Goldzone did not raise an independent defence to Creative’s counterclaim which was based on Goldzone’s breach of express contractual provisions in the Agreements. Since Goldzone failed to establish any actionable misrepresentation or the existence of an oral collateral contract, Creative’s counterclaim (which had been made out) therefore succeeded.

Conclusion

48 In the result, Goldzone’s claim was dismissed and I gave judgment for Creative in the counterclaim and allowed the liquidated sum of \$381,734.35 together with interest thereon at 5.33% per annum from the time the components of that sum became due and payable.

49 I ordered that damages were to be assessed by the Registrar.

50 I also ordered costs against Goldzone in the action, the counterclaim, Summons No 598 of 2010 and Summons No 678 of 2010, such costs to be taxed on an indemnity basis as stipulated in cl 3(55) (ii) of the Agreements.

Copyright © Government of Singapore.