

October 2021

## Singapore's High Court decision in the first commercial dispute arising out of disruptions caused by government pandemic measures

### *Dathena Science Pte. Ltd. vs Justco (Singapore) Pte. Ltd.* [2021] SGHC 219

The High Court's decision in *Dathena Science Pte. Ltd. v. Justco (Singapore) Pte. Ltd.* [2021] SGHC 219 concerns one of the first, if not the very first, commercial dispute arising out of disruptions caused by government pandemic measures.

In this case, a commercial landlord was unable to deliver the premises for occupation by the commercial tenant in time. But the commercial landlord maintained that it was not in any breach of the lease agreement, citing delays and disruptions caused by government pandemic measures. It also placed reliance on various contractual terms in its standard terms of business, which purported to allow it to substitute the lease premises with other premises of "comparable size", and to exclude liability for any "interruption, delay or cessation" of the commercial tenant's use of the premises.

On this footing, the commercial landlord refused to release the commercial tenant from the lease. It also refused to return the security deposit that had been earlier paid by the commercial tenant.

The High Court held that the commercial landlord was indeed in breach of the lease agreement, notwithstanding that it might have been affected by Singapore's "circuit-breaker" pandemic measures. The High Court also found that the commercial landlord's standard terms of business to be unreasonable and invalid, pursuant to the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed). The High Court thus held that the commercial tenant was entitled to terminate the lease agreement and to a refund of the security deposit.

The High Court also determined that, in the alternative, the lease agreement had been terminated by frustration due to the extra costs and delays caused by Singapore's "circuit-breaker" pandemic measures. This is perhaps the first instance of judicial recognition in Singapore that pandemic measures can attract the operation of the doctrine of frustration.

The Plaintiff was successfully represented by Partner Joseph Tay and Senior Associate Lin Ruizi of Shook Lin & Bok LLP.

### Facts

The Plaintiff, Dathena Science Pte. Ltd. ("**Dathena**") is a cybersecurity company in the business of developing software that provides data security and privacy applications to its clients. The Defendant, Justco (Singapore) Pte. Ltd. ("**JustCo**") provides workspaces to its customers in offices or commercial buildings that it rents.

Dathena and JustCo entered into an agreement (the "**Membership Agreement**") whereby Dathena agreed to lease certain premises at OCBC Centre East (the "**Premises**") from JustCo for two years ("**the Lease**") commencing from 1 May 2020 (the "**Commencement Date**"), in return for monthly payments (the "**Membership Fee**") and a refundable security deposit (the "**Security Deposit**") payable by the Plaintiff.

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The following unexpected and/or unforeseen events arose:

- (a) The World Health Organisation declared the COVID-19 pandemic to be a global health crisis.
- (b) The Singapore Government announced that it would be implementing Circuit Breaker Measures (the “**CB Measures**”) under the Covid-19 (Temporary Measures) (Control Orders Regulations 2020) (“**Covid-19 Regulations**”).

As a consequence of the above, JustCo was unable to deliver the Premises for occupation on the Commencement Date due to delays in construction and renovation work caused by Singapore’s “circuit-breaker” pandemic measures. Dathena was also unable to move its servers into the server room in the Premises, which was critical for its business continuity.

Matters came to a head when JustCo informed Dathena on 27 May 2021 that it could not be certain when the Premises would be ready. Dathena subsequently issued a notice of termination and/or frustration of the Membership Agreement to JustCo, and requested a refund of the Security Deposit. However, JustCo claimed that Dathena was not entitled to terminate the Membership Agreement on the basis that the delay was not its fault, but instead due to the CB Measures. JustCo also claimed the Membership Agreement was not frustrated.

JustCo instead offered alternative office spaces to Dathena, whilst citing its standard terms of business which purported: (a) to allow it to substitute the lease premises with other premises of “comparable size”. JustCo sought to rely on; and (b) exclude liability for “any interruption, disruption or cessation in [Dathena’s] use of the [OCBC Premises]... for any reason whatsoever”.

As JustCo refused to refund the Security Deposit, Dathena commenced proceedings for amongst others repayment of the Security Deposit. JustCo then counterclaimed against Dathena for repudiation of the Membership Agreement, and the full balance of Membership Fees for the full duration of the Lease.

The High Court therefore had to consider the following issues:

- (a) Was Dathena entitled to and/or justified in terminating the Membership Agreement?
- (b) If the termination was valid, did Dathena waive its rights of termination by viewing/considering the alternative premises? Were those premises alternatives to the Premises?
- (c) Alternatively, was the Membership Agreement frustrated by the implementation of the CB Measures?
- (d) Are certain provisions in the Membership Agreement unenforceable under the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) (“**UCTA**”)?

## **Decision**

The High Court allowed Dathena’s claim in full, dismissed JustCo’s counterclaim, and ordered that JustCo pay Dathena costs of both the claim and counterclaim on a part-standard, part-indemnity basis. This was because amongst others:

- (a) Dathena was justified in terminating the Membership Agreement due to JustCo’s failure to deliver the Premises on the Commencement Date. The High Court found that, even by 27 May 2020 (when CB Measures were about to expire), JustCo was unable to provide any certainty as to a new move-in date.
- (b) Further, JustCo was unable to even provide the server room for Dathena to move in its servers in the interim, despite having a prior commercial relationship with Dathena and being aware of Dathena’s business needs. JustCo had in fact invoiced Dathena for provision of a server room, plus a coordination fee with M1 to install and activate internet in the Premises – yet did not assist with obtaining Time Limited Exemptions for M1 to complete activation during the CB period.
- (c) Clause 2(c) of the Membership Agreement gave JustCo the right to substitute premises of “comparable size”. However, the evidence clearly showed that none of the alternatives offered by JustCo were of

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“comparable size”, and JustCo as the defaulting party was in no position to dictate that Dathena must take these alternatives.

- (d) In any event, the following clauses in the Membership Agreement were “grossly unfair and disadvantageous to Dathena and an affront to the UCTA”, and were hence unenforceable against Dathena as a consumer or as an entity dealing on JustCo’s standard terms of business:
- Clause 2(c);
  - A clause providing that in the event the Membership Agreement is terminated by JustCo, Dathena shall be liable to pay the Defendant the Membership Fee for the remainder of the Service Term;
  - An indemnity clause in favour of JustCo; and
  - An exclusion of liability clause in favour of JustCo for “any interruption, disruption or cessation in [Dathena’s] use of the [OCBC Premises]... for any reason whatsoever”.
- (e) The evidence did not show that Dathena waived its Notice of Termination at any point in time. This being the case, Dathena could not have repudiated the Membership Agreement by filing the suit on 4 September 2020. JustCo’s counterclaim was a non-starter.

Notably, the High Court also found for Dathena on its alternative claim that the Membership Agreement was frustrated *i.e* discharged by operation of law by a supervening event. This was because (a) the significantly delayed move in dates; (b) the foisting of non-comparable alternative premises on Dathena; and (c) the additional moving costs incurred were radically fundamentally different from what the parties had agreed to.

## Case Comment

Being one of the first, if not the first, commercial case arising from disruptions caused by the Singapore’s COVID-19 pandemic measures, the High Court’s judgment is especially instructive on how contractual obligations ought to be assessed in the face of pandemic disruptions.

It may be inferred that, outside of relief afforded by legislation such as COVID-19 (Temporary Measures) Act 2020 (which was not discussed in this case), pandemic disruptions do not automatically excuse a landlord from meeting its contractual obligation, such as those requiring it to ensure that the premises are ready for occupation by the tenant on time.

It would also appear clear that the Singapore Courts are prepared, in the appropriate case, to recognise pandemic disruptions as qualifying as supervening events that would attract the operation of the doctrine of frustration, resulting in the termination and discharge of the entire contract.

This update was authored by Joseph Tay (Partner) and Lin Ruizi (Senior Associate), with the assistance of Clinton Wee (Trainee).

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