

Cytec Industries Pte Ltd v Asia Pulp & Paper Co Ltd
[2009] SGHC 32

Case Number : Suit 161/2007
Decision Date : 09 February 2009
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Yap Yin Soon and Edmund Tham Weiheng (Allen & Gledhill LLP) for the plaintiff;
Adrian Tan and Ho Kheng Lian (Drew & Napier LLC) for the defendant
Parties : Cytec Industries Pte Ltd — Asia Pulp & Paper Co Ltd

Contract – Consideration – Affixation of company seal – Consideration purportedly set out in preliminary statements – Whether document executed as a deed

Limitation of Actions – Particular causes of action – Contract – Whether parties could contract out of limitation provisions – Section 4 Limitation Act (Cap 163, 1996 Rev Ed)

9 February 2009

Judgment Reserved

Choo Han Teck J:

Introduction

1 This dispute revolves around the construction and validity of a corporate guarantee. On 18 October 1999, the plaintiff, Cytech Industries Pte Ltd, concluded a Letter of Intent ("LOI") with APP Chemicals International (Mau) Ltd ("APP Chemicals"). The LOI confirmed APP Chemical's intent to purchase products from the plaintiff and the plaintiff's willingness to sell. If the plaintiff proved to be up to mark as a supplier, a Purchase Agreement ("PA") would then be awarded to it. On 28 February 2000, the defendant Asia Pulp & Paper Company Ltd, the parent company of APP Chemicals, entered into a guarantee with the plaintiff, whereby it undertook to guarantee the payment obligations of APP Chemicals ("the Guarantee"). The Guarantee was backdated to 25 October 1999 and its salient terms are as follow:

Preliminary Statements

(i) Whereas, at the request of the Guarantor, the Supplier has entered into or will enter into a purchase agreement (such agreement, as amended from time to time, together with all documents entered into in connection therewith, the "Purchase Agreement") with APP Chemicals International (Mau) Limited, a subsidiary of Guarantor and a corporation organized and existing under the laws of Mauritius, for the purchase of chemicals from the Supplier which APP Chemicals International (Mau) Limited will on-sell to the subsidiaries of the Guarantor;

(ii) Prior to the execution of the Purchase Agreement, each sale transaction between the Supplier and APP Chemicals International (Mau) Limited may be evidenced by purchase orders, acknowledgements, invoices and other documents usual and customary for transactions of this type. The Purchase Agreement and all such other prior documents shall be referred to as the "Transaction Documents";

(iii) Whereas, a condition precedent to the transactions contemplated in the Transaction Documents is that the Guarantor shall have executed and delivered this Guarantee on or prior to

the date hereof; and

(iv) Whereas, in satisfaction of such condition, and because of the direct and indirect benefits to the Guarantor from the transactions contemplated by the Transaction Documents, the Guarantor agrees to provide this Guarantee as set forth herein.

(v) Now, therefore, in consideration of the foregoing preliminary statements and the Supplier entering into the Transaction Documents, the Guarantor hereby represents, warrants, covenants and agrees as follows:

(roman numerals added)

Article 1 Guarantee

The Guarantor hereby unconditionally and irrevocably guarantees and promises to duly and punctually pay to Supplier on written demand of Supplier, if the Guaranteed Party fails to pay any of its obligations on their respective due dates and the non payment is not cured within 30 days notice by Guarantor or by Supplier to the respective Guaranteed Party, on a full, unsubordinated and unsecured basis to the Supplier all amounts of any nature whatsoever payable under the Transaction Documents by APP Chemicals International (Mau) Limited (the "Guaranteed Party") to the Supplier as and when due, whether upon stated maturity, acceleration or otherwise (such payment obligations being the "Obligations"); provided always that the total amount in US Dollars of monies recoverable under this Guarantee shall not exceed US\$5,000,000.00 (Five Million US Dollars).

Article 2 Guarantee Absolute

The Guarantor absolutely guarantees that the Obligations will be paid or performed in accordance with the terms of the Transaction Documents to which the Guaranteed Party is a party, regardless of any law, regulation or order now or hereafter in effect in any jurisdiction affecting any of such terms or the rights of the Supplier with respect thereto. The Guarantor understands and agrees that its obligation to pay the amounts in Article 1 is a direct and primary undertaking to the Supplier to pay such amounts even though the Guaranteed Party may have no obligation under any Transaction Document to pay such amounts. To the maximum extent permitted by law, the liability of the Guarantor under this Guarantee shall be irrevocable, absolute and unconditional, irrespective of (and the Guarantor shall not be released by):

...

(e) any other act, omission or circumstances (including, without limitation, any statute of limitation) which might otherwise constitute a defense available to, or a discharge of, the Guarantee Party or the Guarantor.

Article 10 Continuing Guarantee

This Guarantee is a continuing guarantee and shall (i) remain in full force and effect until the payment and performance in full of the Obligations and all other amounts payable and actions required to be performed under this Guarantee, (ii) be binding upon the Guarantor, its successors and assigns, (iii) inure to the benefit of the Supplier and their respective successors, transferees and assigns and (iv) be enforceable by the Supplier, to the extent expressly provided for in the Purchase Agreement.

The parties' contentions

2 The defendant took the position that execution of the PA is required under the Preliminary Statements of the Guarantee and that it forms part of the consideration for the same, and the fact that no PA was entered into between APP Chemicals and the plaintiff meant that the Guarantee was unenforceable for want of consideration. Further, the defendant argued that the parties never intended that the Guarantee be executed as a deed. In particular, the defendant said in its written submission, filed on 7 November 2008, (at [24]) that:

The Plaintiffs cannot ignore that the law that the parties to the Guarantee must evince an intention to execute the document as a deed. All the authorities relied on by the Plaintiffs contain the same underlying principle: in deciding whether or not a document is a deed, it must be shown that the parties intended to execute the document as a deed. Once that all important intention is present, the Court will then decide whether the other requirements of being signed, sealed and delivered are fulfilled.

The defendant also submitted that part of the plaintiff's claim was time-barred.

3 On its part, the plaintiff contended that the Guarantee was executed as a deed and, alternatively, consideration was furnished by the plaintiff in any event. It also submitted that the scope of the Guarantee covered pre-PA purchases made by APP Chemicals. As for the limitation defence raised by the defendant, the plaintiff took the position that the former was not entitled to plead a limitation defence as a result of Article 2(e) of the Guarantee.

The decision of the court

The consideration issue

4 I shall begin with the "deed" issue first. When the requisite intention is clear, the courts have held that the non-affixation of a seal on a deed was of no material consequence: see *First National Securities Ltd v Jones* [1978] Ch 109. What then are the consequences when a company affixes its common seal upon a contract? In *Johnsey Estates (1990) Ltd v Newport Marketworld Ltd* (Unreported, May 10, 1996), it was held that the mere fact that a document was made under seal was sufficient to make it clear that it was executed as a deed. This particular decision has however been criticised by the UK Law Commission in *The Execution of Deeds and Documents by or on behalf of Bodies Corporate* as being "wrong in principle" (LC No. 253 at para 2.17). Such criticism is not unjustified as the position at common law has always been that while all deeds are documents under seal, not all documents under seal are necessarily deeds: see *Chitty on Contracts* (Sweet & Maxwell, 30th ed, 2008) ("*Chitty*") at p 60. Indeed, this point was made clear when the English Parliament amended the Law of Property (Miscellaneous Provisions) Act 1989 in 2005 to expressly state that "an instrument shall not be taken to make it clear on its face that it is intended to be a deed merely because it is executed under seal" (*viz.* s 1(2A)). Here, it should also be pointed out that the execution of deeds in England is now in part governed by the Law of Property (Miscellaneous Provisions) Act 1989 as well as the Regulatory Reform (Execution of Deeds and Documents) Order 2005. In my view, therefore, the fact that the company seal had been affixed on a document does not *per se* raise any legal presumption that the parties intended it to be executed as a deed. However, evidentially, it could lend weight to a party's assertion that the document was intended to be and had in fact been executed as a deed.

5 In the present case, apart from the fact that the Guarantee was sealed, there were no definitive words in the Guarantee which indicated that it was intended to be executed as a deed.

Pertinently, no evidence was led by either party on this issue. On balance, however, I am of the view that the Guarantee had in fact been executed as a deed. First, the fact that it was sealed lends support to the contention that it was intended to be executed as a deed. Second, it was somewhat unusual, in today's commercial context, to set out the "consideration" in the Preliminary Statements or recitals, given that:

... the court [is] cautious in spelling a covenant out of a recital, because that is not the part of the deed in which covenants are usually expressed. The court must be satisfied that the language does not merely show that the parties contemplated that the thing might be done, but it must amount to a binding agreement upon them that the thing shall be done: per Lewinson on *The Interpretation of Contracts* (Sweet & Maxwell, 3rd ed, 2004) at p 328.

6 Third, the contracting parties saw it fit to backdate the Guarantee to October 1999 despite knowing that no consideration had been provided by either party then. In the premises, I am satisfied that it was more likely that the parties had intended to execute the Guarantee as a deed to formally avoid the issue of consideration.

7 But even if the Guarantee was not executed as a deed, I am of the opinion that the requisite "consideration" had been given by the plaintiff. Clause (v) of the Preliminary Statement states that the Guarantee was given "in consideration of the foregoing preliminary statements and the Supplier entering into the Transaction Documents". Clause (i) of the Preliminary Statement provides that "... at the request of the Guarantor, the Supplier has entered into or will enter into a purchase agreement", while cl (ii) envisages transactions prior to a PA, and defines the documents *vis-à-vis* these prior transactions, and the PA, as "Transaction Documents".

8 There is no doubt that the scope of the Guarantee covers obligations incurred by APP Chemicals prior to the entry of the PA. That said, is the PA a condition precedent or forms part of the consideration for the Guarantee? The defendant's position is that the fact that no PA was signed meant that the Guarantee was unenforceable for want of consideration. Reliance was placed on cl (i) of the Preliminary Statement and Article 10 of the Guarantee. In my opinion, the defendant's stance is, however, not a tenable one. Evidentially, even if the Guarantee is to be construed literally, both parties knew that the PA had not been signed when the Guarantee was issued. The relevant portion of cl (i) should therefore have read "at the request of the Guarantor, the Supplier will enter into a purchase agreement". No evidence was placed before me to show that the defendant had requested the plaintiff to enter into a purchase agreement with APP Chemicals. This alone could put to rest the consideration issue.

9 Alternatively, on a purposive and reasoned construction, it would appear that the PA is not part of the consideration for the Guarantee *vis-à-vis* the pre-PA obligations. Clause (iii) of the Preliminary Statement states that it is a condition precedent to the Transaction Documents (which includes the pre-PA transactions) that a guarantee first be issued. This was confirmed by the evidence of the plaintiff's then-President Shane Dean Fleming, the terms of the LOI itself (there is a dispute as to its expiry but this is of no material consequence in light of cl (iii) of the Preliminary Statements), and the fact that the plaintiff began transacting with APP Chemicals only after the Guarantee was issued. In short, this all meant that the plaintiff would not have transacted with APP Chemicals in the absence of a guarantee (including at the pre-PA stage), and that the parties never intended the PA to be a condition precedent for the Guarantee to operate. In my view, consideration for the guaranteeing of the pre-PA obligations was furnished by the plaintiff by its entry into pre-PA transactions with APP Chemicals, and the PA is "consideration" only for APP Chemical's payment obligations under a PA. The latter has no relevance to any pre-PA transactions.

The limitation issue

10 The defendant argued that part of the plaintiff's claim was time-barred and Article 2(e) was of no avail to the plaintiff as apart from it being insufficiently clear, the clause was contrary to public policy. The plaintiff contended otherwise and submitted that Article 2(e) of the Guarantee prevents the defendant from raising any limitation defences. On an objective view, it was clear beyond peradventure that the phrase "any statute of limitation" in Article 2(e) would include the Limitation Act (1996 Rev Ed, Cap 163), as amended from time to time ("the Limitation Act"). As for the public policy point, it would be helpful to briefly examine the history of the Limitation Act, whose origins could be traced to England.

11 The earliest formal law dealing with the matter of limitation in general is the Statute of Limitations 1623. In *A'Court v Cross* (1825) 3 Bing. 329, Best CJ said:

It has been supposed that the Legislature only meant to protect persons who had paid their debts, but from length of time had destroyed the proof of payment. From the title of the Act to the last section, every word of it shows that it was not passed on this narrow ground. It is, as I have often heard it called by great judges, an Act of peace. Long dormant claims have often more of cruelty than of justice in them. Christianity forbids us to attempt enforcing the payment of a debt which time and misfortune have rendered the debtor unable to discharge. The Legislature thought that if a demand was not attempted to be enforced within six years, some good excuse for non-payment might be presumed, and took away the legal power of recovering it.

12 As pointed out by Andrew McGee in *Limitation Periods* (Sweet & Maxwell, 2006, 5th ed), a further justification for statute of limitations is as stated by Lord Atkinson in *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610:

The whole purpose of the Limitation Act is to apply to persons who have good causes of action which they could, if so disposed, enforce, and to deprive them of the power of enforcing them after they have lain for a number of years respectively and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use.

13 The above passages suggest that the rationale underpinning limitation provisions is the need to protect potential defendants from stale claims, given that they might be prejudiced by a change in circumstances, and/or the quality and availability of evidence. That being the case, I see no reason why, in principle, a defendant could not elect to forgo the protection afforded by the Legislation, and this proposition is evident in s 4 of the Limitation Act:

Limitation not to operate as a bar unless specially pleaded

Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.

14 If a defendant is at liberty to waive the protection accorded by the Limitation Act by simply not pleading it as a defence after an action has been commenced, there is little reason why he could not decide beforehand that he does not need the limitation safeguard, and contract out of it. Indeed, both case and text authorities take the view that a party may contract out of limitation provisions: see Robert Merkin, *Limitation of Actions*, (LLP, 1998) at p 298, *Chitty* at p 1812, and *Lubovsky v Snelling* [1944] 1 KB 44. It also bears mention that in 2001, in a report entitled *Limitation of Actions*

(LC No. 270), the UK Law Commission expressed the view that parties should be allowed to contract out of the limitation periods imposed by statute, as “the principles of freedom of contract overrode any other limitation considerations” (at para 3.172). I agree. In the circumstances, I hold that parties are free to contract out of the Limitation Act, and as it is evident that the parties in the present action have indeed done so by way of Article 2(e), it would follow that the defendant is estopped from raising any limitation defences.

Conclusion

15 In the premises, I will allow the plaintiff’s claim. I will hear the parties on costs at a later date.

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