Econ Piling Pte Ltd v NCC International AB
[2007] SGHC 17

Case Number : OS 694/2006, RA 239/2006

Decision Date : 09 February 2007

Tribunal/Court : High Court

Coram : Sundaresh Menon JC

Counsel Name(s) : Chiah Kok Khun / Tan Hsuan Boon (Wee Swee Teow & Co) for the appellant; Balachandran s/o Ponnampalam (Robert Wang & Woo) for the respondent

Parties : Econ Piling Pte Ltd — NCC International AB

Arbitration – Stay of court proceedings – Referral of disputes to arbitration – Whether dispute covered by arbitration clause such that proceedings should be stayed for referral to arbitration – Section 6 Arbitration Act (Cap 10, 2002 Rev Ed)

Contract – Contractual terms – Construction – Arbitration clause – Whether joint venture agreement with arbitration clause superseded or varied by subsequent variation agreement with clause for "any dispute" to be referred to Singapore courts – Lack of words limiting effect of subsequent clause to disputes arising only from variation agreement

9 February 2007

Sundaresh Menon JC:

1 With a view to tendering for a construction project of the Land Transport Authority, Econ Piling Pte Ltd ("Econ"), the appellant, and NCC International Aktiebolag ("NCC"), the respondent, entered into a joint venture agreement on 13 May 2002 ("the JVA") and a joint venture between the two companies was formed ("the Econ-NCC JV"). The JVA contains, among other provisions, cl 22, which prescribes the manner in which the parties are to resolve any dispute that cannot otherwise be amicably resolved. Most relevant to the present appeal is cl 22.5, which is in the following terms:

> Any matter which cannot be resolved in the manner provided by the preceding Sub-clauses of this Clause 22, shall be finally settled by *arbitration* in accordance with the Rules of the Singapore International Arbitration Centre presently in force by one or more arbitrators appointed in accordance with the Rules.
>
> [emphasis added]

2 The Econ-NCC JV was subsequently awarded the contract on 1 August 2002; and two weeks later, on 14 August 2002, Econ and NCC registered themselves as a partnership ("the Partnership").

3 Less than a year on, Econ began to face financial difficulties. This eventually resulted in Econ and NCC entering into another agreement dated 22 May 2003 ("the Variation Agreement") in order to restructure their commercial relationship in an attempt to secure the continued viability of their joint venture. The parties saw fit to insert into this agreement a dispute resolution provision *vide* cl 11 of the Variation Agreement, which patently differs from its counterpart which is found in cl 22.5 of the JVA (*supra* [1]). The material part of cl 11 of the Variation Agreement reads:

> 11 In the event of any dispute or difference arising between the parties, they hereby agree:-

> 11.1 that the same shall be forthwith referred to the exclusive jurisdiction of the Singapore Court and shall be pursued with all expedition by the Referring Party…

4 Problems continued to surface and Econ was eventually placed under interim judicial management on 6 January 2004. A month later, on 6 February 2004, the interim judicial manager informed NCC's solicitors that it (i.e. Econ) would not be continuing its participation in the Partnership. It was suggested in subsequent discussions that the proper course would be to effect a dissolution of the Partnership, and for its attendant contracts, liabilities and assets to be transferred to NCC. According to Econ, the parties finally agreed (after several rounds of negotiation) to dissolve the Partnership. To bring this agreement into effect, Econ executed a Deed of Dissolution and sent it to NCC for its execution of the same. The upshot of what then transpired is that NCC did not execute or return this Deed to Econ. As a result, Econ filed Originating Summons No. 694 of 2006 ("OS 694/2006") on 31 March 2006, seeking a declaration that the Partnership had been dissolved or, in the alternative, an order to dissolve the Partnership.

5 NCC responded with an application to stay the proceedings pursuant to s 6 of the Arbitration Act (Cap 10, 2002 Rev Ed).

The proceedings before the Assistant Registrar

6 NCC's application to stay OS 694/2006 was heard by the Assistant Registrar below ("the AR") and the application was granted. The AR appeared to base his decision on the following grounds:

(a) Given that there was no partnership agreement between Econ and NCC, it stood to reason that the JVA should be regarded as the contract that governed their commercial relationship. Therefore, the effect of cl 22.5 was to compel the court to stay the dispute in deference to arbitration;

(b) That notwithstanding cl 11.1 of the Variation Agreement, the right and obligation of the parties to refer the dispute over the dissolution of the Partnership to arbitration was preserved by reading cl 6.2.1(xii) of the JVA in conjunction with cl 1.3(b)(iii) of the Variation Agreement (see [18] and [19] below); and

(c) The court had the power to refer a matter to arbitration even if one of the reliefs sought was for an order to dissolve a partnership.

The appeal

7 Dissatisfied with the AR's decision, Econ filed this appeal. I heard arguments from both parties on 11 September 2006, and thereafter reserved judgment. On 20 December 2006, I delivered judgment orally in chambers with a brief statement of my reasons, reversing the decision of the AR in favour of Econ. NCC filed an appeal against my judgment on 18 January 2007. When I delivered judgment orally in chambers, I had reserved the right to, and do now, state in full the reasons for my decision.

The analysis of the arguments and contentions

8 Whether a particular dispute is to be referred to arbitration or the courts falls to be determined by the terms of the arbitration agreement. As May LJ held in *Ashville Investments Ltd v Elmer Contractors Ltd* [1988] 2 Lloyd's Rep 73, at 75:

> It is a principle of law that the scope of an arbitrator's jurisdiction and powers in a given case depends fundamentally upon the terms of the arbitration agreement, that is to say upon its proper construction in all the circumstances.

9 It is obvious that the starting point in deciding which forum the parties intended disputes arising between them to be referred to is cl 22.5 of the JVA, which in plain language, provides for "any dispute" to be referred to arbitration. It was not disputed that if cl 22.5 was the operative clause, the dispute in OS 694/2006 would have to be referred to arbitration.

10 In my judgment, the critical question is this: how should the JVA be read in the context of the Variation Agreement? In other words, was cl 22.5 of the JVA varied or superceded by cl 11.1 of the Variation Agreement, which states (contrary to the former) that disputes or differences arising between the parties are to be referred exclusively to the Singapore courts?

11 In my judgment, cl 22.5 of the JVA was so varied, and I find that to be so for two reasons.

12 First, it is undisputed that the purpose of the Variation Agreement was to reconstitute, in very significant ways, the commercial relationship between the parties following Econ's financial woes. One needs to look no further than the recitals to appreciate this. Accordingly, the JVA, which had regulated the parties' relationship prior to Econ's financial problems, was varied by the Variation Agreement to the extent of any inconsistency between the former and the latter. Indeed, cl 12 of the Variation Agreement expressly states that:

> Save and only as may be expressly varied by this further agreement, all the provisions of the JVA between the parties dated May 13, 2002 shall continue in full force and effect.

Thus, the parties' manifest intentions were clearly that the Variation Agreement should trump the JVA wherever there was an inconsistency between them but that the JVA would otherwise remain in force.

13 There is simply no gainsaying the inconsistency between the dispute resolution clauses in the JVA and the Variation Agreement and as such, cl 22.5 of the JVA must be deemed to have been superceded by cl 11.1 of the Variation Agreement. I find support for this in cl 11.3 of the Variation Agreement, which specifically articulates the applicability of cl 11.1 to the JVA itself, stating in no uncertain terms that:

> The parties shall continue with their obligations under *either the JVA or this Agreement*, notwithstanding the reference of any issue *under either agreement to the Court*.
>
> [emphasis added]

14 Consistent with this, cl 11.1 of the Variation Agreement also provides that "any dispute" shall be submitted to the courts and this is not confined to disputes arising under the Variation Agreement (see [3] above).

15 It is trite law that "where words are found to be plain and unambiguous, they must be interpreted according to the plain and unambiguous language without extraneous help. The presumption is that parties have used ordinary words which are written in the document to convey their ordinary meaning": *Citicorp Investment Bank v Wee Ah Kee* [1997] 2 SLR 759 at [61], citing *L Schuler AG v Wickham Machine Tools Ltd* [1974] AC 235. Given the unequivocal language employed in cl 11.1 of the Variation Agreement, and the lack of any words limiting the effect of that clause to

disputes arising only from the Variation Agreement, it follows in my view that cl 11.1 of the Variation Agreement and not cl 22.5 of the JVA is the controlling clause. This means that questions arising from both the JVA and the Variation Agreement are to be referred to court and not to arbitration.

16 The second reason I am persuaded that cl 22.5 of the JVA was superceded by cl 11.1 of the Variation Agreement is that it is counterintuitive for two contracts that are meant to be read together to have different dispute resolution regimes. Therefore, unless there is a clear and express indication to the contrary, it may usually be assumed that parties to two closely related agreements involving the same parties and concerning the same subject matter would not have intended to refer only disputes arising under one contract to court and not those arising under the second contract. In this respect, I refer to the decision of Tay Yong Kwang J in *Mancon (BVI) Investment Holding v Heng Holdings SEA* [2000] 3 SLR 220 where he noted as follows at [30]:

> If the two contractual documents had to be read together, it would be totally illogical to have the arbitration clause apply to one but not the other unless that was explicitly agreed upon …

17 In my judgment, this is correct. A different approach would result in the wholly uncommercial position that some disputes under what is in substance a *composite agreement* between the parties, are to be referred to arbitration while others are to be resolved in court. This difficulty becomes especially acute, even impossible, in situations such as the present where a subsequent agreement varies an earlier agreement, and where it is therefore conceivable, even likely, that many disputes might straddle both contracts. Therefore, in my judgment, any contention that cl 11.1 of the Variation Agreement should be construed as applying only to disputes arising from that document while cl 22.5 of the JVA should continue to govern disputes arising under the latter document is misconceived.

18 I turn to consider NCC's other contentions. Counsel for NCC, Mr Balachandran, urged that notwithstanding the variation to cl 22.5 of the JVA, the right to refer some disputes (including the present) to arbitration was preserved in the following way. First, given that the present dispute related to the dissolution of the Partnership, and assuming that the JVA applied to the Partnership *mutatis mutandis*, cl 6.2.1(xii) of the JVA was brought into operation. The latter clause states:

> The general policy and direction of the Joint Venture shall be determined by the Management Board, which shall be the highest authority of the Joint Venture. The responsibilities of the Management Board shall include, but not be limited to:…

(xii) the winding up of the Joint Venture and closure of its activities and accounts.

19 Secondly, while cl 6.2.1(xii) of the JVA was subsequently varied by cl 1.3(b)(iii) of the Variation Agreement, it was so varied with the proviso that the arbitration clause contained in cl 22 of the JVA would be preserved. Mr Balachandran argued that this was evident from a plain reading of cl 1.3(b)(iii) of the Variation Agreement which provides:

> 1.3 …ECON agrees:
>
> (b) that Clauses 6.2 (in relation to the Management Board) and 6.3 (in relation to the Executive Committee) of the JVA shall from the date hereof be varied as follows:-
>
> …
>
> (iii) Any decision shall be carried if approved by parties with an aggregate interest of

more than 50% in the JV, save that the party not in agreement with such decision shall be entitled to enter in the minutes of the meeting the reason for its disagreement and *may have recourse to arbitration under Clause 22 of the JVA* to seek reimbursement for any loss or damage resulting from occurrences directly consequent upon the decision so taken, provided and to the extent that the expectation of such loss and damage was the reason for the disagreement as recorded in the minutes of the meeting.

[emphasis added]

20 While Mr Balachandran is correct in pointing out the seeming inconsistency that cl 1.3(b)(iii) of the Variation Agreement gives rise to, this does not inexorably lead to his conclusion that cl 22 of the JVA would continue to apply in respect of the present dispute. It is well established that where there is an apparent conflict or contradiction in the terms agreed upon by the parties, the court must seek to construe what the real intentions of the parties are. As Lord Bingham of Cornhill wrote in the House of Lords decision of *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715 at [12]:

> [I]t has long been recognised by very distinguished commercial judges that to seek perfect consistency and economy of draftsmanship in a complex form of contract which has evolved over many years is to pursue a chimera: see, for example, *Simond v Boydell* (1779) 1 Dougl 268; *Nelson Line (Liverpool) Ltd v James Nelson & Sons Ltd* [1908] AC 16, 20-21; *Hillas & Co Ltd v Arcos Ltd* (1932) 43 Ll L Rep 359, 367; *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240, 245. The court must of course construe the whole instrument before it in its factual context, and cannot ignore the terms of the contract. But it must seek to give effect to the contract as intended, so as not to frustrate the reasonable expectations of businessmen. If an obviously inappropriate form is used, its language must be adapted to apply to the particular case: *The Okehampton* [1913] P 173, 180, per Hamilton LJ.

21 In my judgment, Mr Balachandran's reliance on cl 6.2.1(xii) of the JVA and cl 1.3(b)(iii) of the Variation Agreement is misplaced. To begin with, it is clear that cl 6.2.1 (xii) was intended only to set out the management structure of the Econ-NCC JV and/or the Partnership and to provide that its powers related to the determination of the "general policy and direction" of the joint venture and/or the Partnership. It follows from this that the Management Board may decide, as a matter of commercial sense, whether it wished to dissolve the Partnership. However, the clause goes no further than that. On no sensible reading of the clause does it confer upon the Management Board the power or the responsibility to resolve disputes between the parties, including one as to whether there had in fact been an effective agreement between the parties to dissolve the Partnership.

22 In this regard, it is noteworthy that cl 6.2.15 of the JVA expressly states that the provisions in cl 6 are without prejudice to the dispute resolution clause:

> *Without prejudice to Clause 22*, decisions of the Management Board shall be final and binding upon the Parties.
>
> [emphasis added]

This fortifies me in my view that cl 6.2.1(xii) only has application to the governance and governing structure of the commercial relationship of the parties and was not intended to displace the operation of the applicable dispute resolution mechanism, even in relation to disputes over matters otherwise within the commercial purview of the Management Board. Accordingly, Mr Balachandran's argument that cl 6.2.1(xii) was brought into effect at all fails at the threshold.

23 In addition, the fact that cl 6.2.1(xii) empowers the Management Board to deal with the closure of the joint venture's and/or the Partnership's activities does not mean that any action by the parties to terminate the Partnership must be deemed to have been taken by the Management Board. As Econ pointed out, the various responses by NCC to the Econ's request to dissolve the Partnership and/or the joint venture never made reference to the necessity to obtain the approval of the Management Board. Significantly, the negotiations over the dissolution of the Partnership were conducted directly between Econ and NCC and did not involve the Management Board at all. Indeed, the very issue raised by Econ is whether in the light of these events, the Partnership had been dissolved. This is a question of fact that is quite removed from the operation of cl 6.2.1(xii). In the circumstances, cl 6.2.1(xii) of the JVA is irrelevant to the present appeal.

24 At an even more fundamental level, even if I were to assume that cl 6.2.1(xii) of the JVA was relevant, I do not see any basis for concluding that cl 1.3(b)(iii) of the Variation Agreement (which varied cl 6.2.1(xii) of the JVA) was intended to preserve the operation of cl 22.5 of the JVA in limited circumstances such as the present, notwithstanding cl 11.1 of the Variation Agreement. I say this for three reasons.

25 First, in my judgment, the purpose of enacting cl 1.3(b)(iii) of the Variation Agreement was to vary the composition of the Management Board and the Executive Committee of the Econ-NCC JV and their voting powers. The clause was not directed at how, or in what forum, disputes relating to whether the Partnership and/or the joint venture had been dissolved were to be resolved. Furthermore, although the agreements were not well-drafted, I believe it to be reasonably clear that the real intention underlying cl 1.3(b)(iii) was to provide an avenue for a minority party that disagreed with the Management Board to seek compensation in the event it suffered loss as a result of that course of action taken by the Management Board with which it disagreed. Arbitration is not central to that relief.

26 Secondly, I note that while the reference in cl 1.3(b)(iii) is to cl 22 of the JVA, in my judgment, that is to be read subject to any finding as to whether that clause had itself been amended or varied. In the light of my finding that cl 11.1 of the Variation Clause had varied cl 22.5 so that all disputes were to be referred to the Singapore courts, whatever right might have been vested in a party under cl 1.3(b)(iii) of the Variation Agreement was in any case to be pursued in the courts. It may be noted that cl 6.2 of the JVA did include a reference to cl 22 and thus to arbitration: see [22] above. Given that, it seems to me that the like reference to cl 22 and arbitration in cl 1.3(b)(iii) of the Variation Agreement was drafted in this way simply to ensure consistency rather than to reflect a conscious and deliberate desire to preserve the operation of cl 22 of the JVA.

27 Finally and in any event, even if cl 1.3(b)(iii) of the Variation Agreement did save cl 22.5 of the JVA from complete extinction, it expressly only purported to do so in relation to claims brought by a party that did not agree with a particular decision of the Management Board and which then allegedly suffered loss as a consequence of that decision. In the present case, no decision had ever been made to terminate the JVA pursuant to the exercise of the powers of the Management Board. Accordingly, there was simply no occasion to bring OS 694/2006 within the ambit of a party invoking its rights under cl 1.3(b)(iii) of the Variation Agreement to begin with. For all these reasons, I find the argument to be without merit.

28 I make one final observation. As I set out above, Econ had prayed, in the alternative, for two types of relief: a declaration that the Partnership had been dissolved, and in the alternative an order that the Partnership be dissolved. The type of relief sought may have been important in deciding whether to order a stay because while there was no contest that an arbitrator has the power to grant a declaration, it was disputed that an arbitrator would have the power to order the dissolution

of a partnership. However, given my finding that all disputes between the parties are to be tried in the courts, it was not necessary for me to reach this issue.

Conclusion

29 For the reasons set out above, I was not persuaded that the respondent had discharged its burden to demonstrate that the proceedings in OS 694/2006 should be stayed and the dispute referred to arbitration.

30 In summary, those reasons are the following:

(a) Clause 22.5 of the JVA was amended by cl 11.1 of the Variation Agreement;

(b) Clause 6.2.1(xii) of the JVA is not relevant to this issue. That provision concerned the management structure of the Econ-NCC JV. It did not confer on the Management Board the exclusive or any jurisdiction to determine disputes between the parties as to whether the partnership had been or should be terminated;

(c) Clause 1.3(b)(iii) of the Variation Agreement did not preserve the arbitration clause. In any event, it only applied in very limited circumstances which on any basis did not include those arising in the present case.

31 Accordingly, I allowed the appeal and held that Econ may continue to prosecute OS 694/2006.

32 Finally, after delivering my judgment to the parties orally, I heard them on the issue of costs. In the premises, I set aside the order on costs in the court below, and fixed costs in favour of Econ at $2,000 for the proceedings below and a further $4,000 plus disbursements for the appeal.

Appeal allowed.