Digital Dispatch (ITL) Pte Ltd v Citycab Pte Ltd
[2003] SGHC 6

Case Number : OM 24/2002

Decision Date : 16 January 2003

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Chan Kia Pheng with Alvin Chang (Khattar Wong & Partners) for the Applicants; Tan Cheng Yew with Ng Hweelon (Tan JinHwee, Eunice & Lim ChooEng) for the Respondents

Parties : Digital Dispatch (ITL) Pte Ltd — Citycab Pte Ltd

1 This originating motion was filed by Digital Dispatch (ITL) Pte Ltd ('Digital') who is the claimant in an arbitration proceeding currently afoot between itself and Citycab Pte Ltd ('Citycab'). The arbitrator, a senior lawyer, had made an interim award on 25 October 2002 whereby he decided, amongst other things, that he had jurisdiction in the arbitration to hear the claims put forward by Citycab under paragraphs 88(a) and (b) of its counterclaim. Digital filed this motion in order to obtain leave to appeal against that portion of the interim award. I granted the order sought by Digital and Citycab has now appealed.

Background

2 There is a rather complicated contractual relationship between the parties involving 2 contracts: first, a supply agreement dated 19 July 1995 and, secondly, a service agreement dated 19 March 1998. The original parties to the supply agreement were Citycab and Spectronics Micro Systems, which, due to a take-over subsequently became MDSI Mobile Data Solutions Ltd ('MDSI'). The service agreement was originally made between MDSI and Citycab. Subsequently, MDSI was bought over by a Canadian company and renamed Digital Dispatch (Intl) Ltd ('DDSUK'). Digital and DDSUK are part of the same group of companies and, accordingly, on 19 July 1999, a novation agreement was signed among DDSUK, Citycab and Digital whereby Digital took over from DDSUK as a party to the service agreement. The current situation is therefore that Citycab and Digital are parties to the service agreement and Citycab and DDSUK are parties to the supply agreement.

3 The arbitration was initiated by Digital pursuant to cl 28.1 of the service agreement which provided that 'any dispute arising out of or in connection with this contract … shall be referred to arbitration in Singapore'. Digital has claimed arrears of maintenance charges due to it from Citycab and has also claimed damages for an alleged repudiatory breach by Citycab of the service agreement. The arbitration was commenced by way of Digital's notice of arbitration dated 23 November 2001.

4 Digital filed its points of claim in the arbitration on 8 March 2002. Citycab filed its points of defence and counterclaim on 5 April 2002. It claimed damages for alleged breaches by Digital under the service agreement. In addition, it claimed damages resulting from alleged breaches of the supply agreement. These counterclaims are found at paragraphs 88(a) and (b) of the points of counterclaim.

5 On 5 July 2002, Digital made an application to the arbitrator for an order striking out paragraphs 88(a), (b), (d), (e), (f), (h) and (i) of Citycab's counterclaim and for further consequential orders. This application was heard on 19 and 20 September 2002. The arbitrator published his interim award on 25 October 2002. In paragraph 7 of his award, the arbitrator noted that:

> [Digital's] application to strike out various claims in paragraph 48 of the counterclaim was

> essentially premised on the argument that those claims in the said paragraph 88 arose from disputes connected with Supply Agreement and not the Service Agreement. As [Digital] have no obligation under the Supply Agreement, those claims in paragraph 88 of the Respondents' Counterclaim were misconceived as the Respondents should be making their claims against [DDSUK] pursuant to the Supply Agreement.

Rejecting Digital's claim, the arbitrator refused to strike out paragraphs 88(a) and (b) on the basis that although those were counterclaims from the supply agreement, they had been transferred over into the service agreement pursuant to cl M of the service agreement.

6 Before me Digital contended that this conclusion was obviously wrong in law and it should be given leave to appeal against it.

Principle governing leave to appeal the decision of an arbitrator

7 The application is made pursuant to s 28(2) of the Arbitration Act (Cap 10) ('the Act') which governs domestic arbitrations. This section states that provided that either all other parties to the reference have consented, or leave of the court has been granted, an appeal shall lie to the court on any question of law arising out of an award made on an arbitration agreement. In this case, Citycab did not consent to an appeal being made to the court against the interim award and, accordingly, Digital had to apply for leave of court before it could lodge its appeal.

8 It should be noted that by s 28 of the Act, the court cannot grant leave to appeal unless it considers the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration. In this case it was common ground that this requirement was satisfied as whether Citycab was entitled to prosecute certain of its counterclaims against Digital obviously had a substantial effect on the rights of both of them.

9 It is well known that the court has a discretion whether or not to grant leave. How this discretion should be exercised in a case involving the construction of a contractual term was established as long ago as 1982 in the case of *The Nema: Pioneer Shipping Ltd v B.T.P. Tioxide Ltd* [1982] 3 All ER 777. Lord Diplock there stated:

> Where, as in the instant case, the question of law involved is the construction of a 'one-off' clause, the application of which to the particular facts of the case is an issue in the arbitration, leave should not normally be given unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator is obviously wrong. (at p 742)

That dictum was applied by the House of Lords in the later case of *The Antaios* [1984] 3 All ER 229 which restated the guidelines to be followed by courts hearing such applications. Our Court of Appeal in *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 3 SLR 682, endorsed these guidelines.

10 Thus, the principle which I had to apply was that where the construction of a 'one-off' contract or clause was in issue, the discretion was to be strictly exercised and leave to appeal normally refused unless the judge was satisfied that the construction given by the arbitrator was obviously wrong.

The arbitrator's decision

11 The essence of the dispute between the parties was whether certain complaints which Citycab had against DDSUK under the supply agreement had been taken over by Digital under the service agreement so that these complaints became subject to the arbitration clause in the service agreement. Such transfer would only have taken place if the complaints fell within cl M of the service agreement. That clause reads:

> **Warranty and Post-Warranty software fault resolution**
>
> This activity will commence during the Warranty Term and continue throughout the Service Term. It relates to providing fixes for Fault Investigation Reports (FIRS) which will be outstanding at the commencement of the maintenance Term.
>
> As software fixes are carried out, MDSI will retain a record of the work that has been undertaken, and will continue to provide fixes (where possible) during the Post Warranty Term.
>
> New FIRS may continue to emerge and the activity related to recording, maintaining the fix – records, ensuring of fixes, and releasing the fixes will continue to be provided by MDSI.

It would be recalled that due to the novation agreement, all obligations of MDSI under the service agreement are now the obligations of Digital.

12 There is no definition of a 'Fault Investigation Report' or FIR in the service agreement. However, in cl 14.7 of the supply agreement, the following description of a FIR is given:

> FIRs shall include the date and time of the fault, the nature of the fault and the observer. The completed FIR shall then be passed to the Company's and Contractor's Managers who shall assess the FIR. If the fault is not the subject of an existing FIR a unique FIR number shall be added and the Project Managers shall agree the category of the fault. The completed FIR shall be copied to both Parties. The FIR form shall provide space to add further information, including the cause of the fault (to be added by the Contractor when the cause is diagnosed), the action to be taken (to be added when the action is agreed) and the date of clearance of the fault. A record of all FIRs shall be maintained by the Contractor's Project Manager, and the status of all FIRs shall be reported to the Company by the Contractor on a monthly basis.

13 Most of the items of counterclaim made by Citycab which Digital contended should not be included in the arbitration were items contained in a document entitled 'List of CityNet Bugs and Undelivered Items as at 9 September 1997' and signed by both MDSI and Citycab on 11 September 1997 ('the 1997 List'). Neither the 1997 List nor any part of its contents were repeated or referred to in the service agreement. It was Digital's contention before the arbitrator that those counterclaims could not be included in the arbitration as they did not arise out of the service agreement.

14 The arbitrator rejected Digital's contentions and found that he had jurisdiction to hear the disputed counterclaims. Paragraphs 45 to 47 of his interim award give his reasons. They read:

45. Upon the above analysis, it is my ruling that the tribunal has jurisdiction to hear only those Respondents' counterclaims which tantamount *(sic)* to a true defence to the Claimants' claims, even though the Respondents did not make an express reference of those claims to arbitration. In this context, to be a true defence, those counterclaims must arise from or be connected with the Service Agreement since the Claimants' claims are made under the Service Agreement.

46. Therefore, in this Interim Award I direct that I will hear the claims under paragraphs 88(a) and (b) of the Counterclaim which *(sic)* details are found in the Agreement of 11 September 1997. A good number of those counterclaims are from the Supply Agreement which had been transferred over into the Service Agreement via Clause M therein.

47. The Claimants' argument that a number of those complaints are not FIRs as they have not been separately reduced into a document and signed by both parties is at best a technical argument of little merit. The FIR is simply a report of a fault which both relevant parties have acknowledged. No particular form needs to be put up. The clarification given to me on how the series of meetings from 1 September 1997 resulted in the list of 9 September 1997 and signed a joint acknowledgement on 11 September 1997 is sufficient for me to hold that those items listed and agreed upon in that batch of documents constitute FIRs for the purpose of Clause M of the Service Agreement and for this arbitration.

15 It can be seen from the above paragraphs that the arbitrator's reasoning was that the respondents' counterclaims in paragraphs 88(a) and 88(b) (ie the 1997 List) could only be adjudicated by him in the arbitration if those claims had been transferred to matters covered by the service agreement by the operation of cl M. He then went on to decide that cl M did so operate because the items in the 1997 List could be classified as FIRs since there was no particular form which had to be followed in order to constitute a document a FIR.

16 Digital contended and I accepted that the arbitrator was obviously wrong in his construction of cl M and the contractual meaning of a 'FIR' for two main reasons. The first was that the counterclaims in paragraphs 88(a) and (b) could not have been transferred to the service agreement by operation of cl M of the service agreement because not all the items on the 1997 List were FIRs. This was because:

(i) both contracts are clear as to what a FIR is. In cl 2.1 of the service agreement it is stated that the 'Fault Investigation Report (FIR)' is 'the document which is used to record observations of the system. FIR categories are defined in the supply contract'. That definition takes us immediately to the supply agreement which in cl 14.7 gives a detailed description of what a FIR must contain. This description is quoted at [11] above. Further, specific procedures for the preparation of FIRs are found at cl 14.6 and 14.7 of the supply agreement.

(ii) a FIR is essentially a document –

1. prepared by the project managers who, after receiving submissions of observations during the field acceptance tests, had to assess the observations and then prepare the FIR according to the procedure defined in cl 14,

2. which includes the date and time of the fault, the nature of the fault and the

details of the observer of the fault,

3. which, when completed, is passed to both project managers who shall assess the FIR,

4. is given a 'unique FIR number' if the fault it describes is not the subject of an existing FIR,

5. which sets out the category of the fault it describes (ie category A, B, C or D as defined in the supply agreement),

6. which shall provide space to add further information including the cause of the fault, the action to be taken, and the date of clearance of the fault, and

7. a record of which is maintained by MDSI's project manager and the status of which is to be reported to Citycab by MDSI on a monthly basis;

(iii) a FIR also contains a serial number, a brief description of the observation made by Citycab or the fault complained of and a brief description of MDSI's or Digital's proposed solution and the result of any rectification work carried out.

(iv) the 1997 List does not in itself comply with the description of a FIR though it does contain references to FIRs which had been previously issued.

(v) a plain reading of cl M itself shows what was meant to be covered by the service agreement and that this did not include a wholesale transfer of the items on the 1997 List because:

1. under it, Digital was only to provide 'fixes for Fault Investigation Reports (FIRs) which will be outstanding at the commencement of the Maintenance Term'.

2. cl M does not refer to the 1997 List nor to the items stated therein which included hardware FIRs;

3. the heading of cl M 'Warranty and Post-Warranty software fault resolution' shows that it was meant to cover only software FIRs which were outstanding at the commencement of maintenance; and

4. cl M does not refer to any 'undelivered items' or 'bugs' which are terms used to describe the items in the 1997 List.

17 The second reason why the arbitrator was wrong in his finding that cl M applied to the 1997 List is that he took extrinsic evidence into account to determine that all the items listed and agreed upon in the List constituted FIRs within the meaning of cl M instead of restricting himself to analysing the provisions of cl M itself in order to obtain the meaning of the clause. The arbitrator stated that the clarification given to him on how a series of meetings between the parties resulted in the List and an acknowledgement signed two days later was sufficient to allow him to hold that the items in the list constituted FIRs. The arbitrator was not entitled to take such extrinsic evidence into account as cl M is a clear and unambiguous provision in that it provided for FIRs to be fixed and the term FIRs was a term that was clearly defined in the service agreement as read with the supply agreement. Further, cl 33.1 of the service agreement provided that it was the complete and exclusive statement of the

agreement between the parties and superseded 'all previous communications, representations, agreements and other arrangements, oral or written' with regard to the subject matter of the agreement. The 1997 List came before the service agreement and thus any agreements therein relating to items that were not FIRs could not be imported into the service agreement.

18 If the terms of both the service agreement and the supply agreement are clear and unambiguous on what constitutes a FIR, then it cannot be the province of the arbitrator to decide for the parties what a FIR is. Even if both parties were mistaken as to what they had actually agreed to, the written words cannot be rectified to give a different meaning to reflect the parties' actual intention (evidence of which cannot be admitted in the first place). See *Frederick Rose v William Pim* [1953] 2 QB 450. By relying on clarification from the parties to decide that the items in the list were FIRs the arbitrator had admitted parol evidence to add to the terms of a written contract. He was not entitled to do this.

19 In the circumstances, I was satisfied that the arbitrator was obviously wrong in his interpretation of cl M and the meaning of a FIR as contractually agreed between the parties. I therefore gave leave to Digital to appeal against the arbitrator's decision.