Healthcare Supply Chain (Pte) Ltd *v* Roche Diagnostics Asia Pacific Pte Ltd [2011] SGHC 63

Case Number : Originating Summons No 963 of 2010

Decision Date : 24 March 2011

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Govintharasah s/o Ramanathan and George John (Gurbani & Co) for the applicant; Tan Heng Thye and Lim Tat (CSP Legal LLC) for the respondent.

Parties : Healthcare Supply Chain (Pte) Ltd — Roche Diagnostics Asia Pacific Pte Ltd

Arbitration

Contract

24 March 2011 Judgment reserved.

Choo Han Teck J:

1 This was an application by the applicant Healthcare Supply Chain (Pte) Ltd ("HSC") under s 49(1) of the Arbitration Act (Cap 10, 2002 Rev Ed) for leave to appeal to the High Court on a point of law arising from an arbitration award dated 24 August 2010. The respondent in the arbitration, Roche Diagnostics Asia Pacific Pte Ltd ("RDAP"), was also the respondent in this application. The arbitrators were Chelva Rajah SC, Vinodh Coomaraswamy SC, and Jaya Prakash. The tribunal's award was delivered by a majority decision. Jaya Prakash delivered a dissenting opinion in the award. The subject matter of the arbitration concerned a distribution agreement dated 16 August 2001 ("the Agreement") between HSC and RDAP in which RDAP granted distribution rights of its diagnostics products to HSC for a period of five years with an option of renewing for another five. By a letter dated 2 September 2005, RDAP gave HSC six months' notice that it was exercising the right under Art 18.1 of the Agreement to terminate the Agreement upon notice and without cause. HSC claimed that the termination was a breach of the Agreement. This became a dispute that was duly referred to arbitration. HSC claimed that RDAP had exercised its rights under Art 18.1 prematurely even though Art 1.2 of the Agreement provided that:

> This AGREEMENT shall be effective as of 1 January 2002 or such other later date as may be agreed in writing by the parties (which in no event shall be later than 28 February 2002) for a period of five years and thereafter it shall be renewable for such extended periods and upon such terms and conditions to be agreed. Provided that the Parties may terminate this AGREEMENT in accordance with Art 18.

Article 18.1 reads as follows:

> Either party may terminate this AGREEMENT by giving 6 months written notice to the other party.

HSC contended that RDAP was not entitled to terminate under Art 18.1 for the initial five years of the Agreement. It contended that this would be the true intention of the parties if one were to examine the context which led to the Agreement. Article 18.2 was not relevant as it provided for a termination of the Agreement under specific circumstances that did not apply in the event. The first ground of

this application concerned the interpretation of Art 18.1, namely whether it would not be exercised during the first five years of the contract. The second ground was based on the refusal by the majority arbitrators to allow HSC's application to rectify the Agreement. From these two broad grounds HSC's counsel, Govintharasah, stated five questions of law for the determination of the High Court. The five questions were:

> Question 1: Whether as a matter of construction, the [Agreement] was for an initial fixed term of 5 years which could not be terminated by either party pursuant to Article 18.1 thereof until after the expiry of the initial fixed term, unless there was a material unremedied breach of the Agreement by the party in breach as provided for in Article 18 or the occurrence of any of the other events.
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> Question 2: Alternatively, whether the wording of Article 18 of the [Agreement] should be rectified to give effect to the common understanding and intention of the parties that the [Agreement] is for a fixed initial term of 5 years, not terminable during that period, except for material unremedied breach of the Agreement or the occurrence of any of the other events provided for in Article 18.
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> Question 3: Did the failure of the Respondent to produce Gerald Lee as a witness or make him available for cross-examination coupled with the Respondent's refusal/failure to disclose material documents ordered to be disclosed by the Tribunal, in particular Gerald Lee's/the Respondent's communications with their office pertaining to the initial fixed term of the [Agreement], constitute circumstances warranting adverse inference to be drawn by the Tribunal against the Respondent on the construction of the [Agreement].
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> Question 4: Whether Article 20.1 of the [Agreement] had the effect of embodying the entire Agreement of the parties in the [Agreement] and if so, whether extrinsic evidence of the context is inadmissible for the purpose of construing the Agreement.
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> Question 5:
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> (i) Whether the Respondent's Notice of Termination of the [Agreement] dated 2nd September 2005 was wrongful in that it was not a 6-month notice of termination, but a notice of termination having immediate effect, in breach of the [Agreement].
>
> (ii) Whether the burden of proof on the party claiming rectification of a contract is one of balance of probabilities or the test of "convincing proof" as adopted by the Majority Award?

2 Before me, counsel for HSC submitted that the true intention of the parties was that Art 18.1 of the Agreement could only be exercised after the first five years from the signing of the Agreement had elapsed. It will be helpful at this stage to introduce the background leading to the Agreement. It all began on Valentines' Day, 14 February 2000 when YCH Group Pte Ltd ("YCH"), the holding company of HSC signed a Memorandum of Understanding (the "MOU") with RDAP. YCH had been providing warehousing and logistics services to RDAP, which was a wholly owned company of Roche Pharmaholdings BV, incorporated in the Netherlands. The Roche Group's diagnostics division, of which RDAP was a member, carried on the business of manufacturing and distributing medical diagnostics equipment. RDAP had an existing distributor, referred to as Zuellig Pharmaceuticals. The MOU contemplated a project between YCH and RDAP to develop a computerized system (known as the "Intrabutor") that would enable RDAP to manage its "core functions of procurement, replenishing inventory and distribution of RDAP's products, including logistics". The result of this meant that "RDAP would not need to rely on a dedicated product distributor as RDAP would be able to access, operate

and manage the computerized system themselves with end customers having direct access to the system to place their orders online with RDAP". That project under the MOU was successfully implemented, and that enabled RDAP to terminate its distributorship agreement with Zuellig Pharmaceuticals. It left RDAP with the task of collecting, storing and delivering the products to their customers. By agreement with YCH, HSC was thus made the company to take care of that for RDAP and consequently, the Agreement was signed.

3 Yap Ai Cheng, the Executive Director of HSC stated in her affidavit in support of HSC's application for leave to appeal that —

> [f]rom the inception, it was understood and agreed between YCH and RDAP that the project to develop the Intrabutor required a long term commitment by the parties, by reason of the substantial investment required to develop the system.

It was in this context that Govintharasah submitted that Art 18.1 could only be invoked after the fixed initial term of five years had lapsed, that is to say, after the Agreement had been renewed at the end of the first five years. The only basis for saying this was Yap Ai Cheng's affidavit declaring that YCH and RDAP had made substantial investment into the Intrabutor project, implying that the resulting agreement between HSC and RDAP should run for at least five years before either party could invoke Art 18.1.

4 Govintharasah in his oral submission might have oversimplified his case by stating that the point of law concerned the divergent interpretations by the majority and minority arbitrators on the application of the parol evidence law after *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029. He said that the majority had erroneously stated that "the starting point must be the ordinary and plain meaning approach before embarking on the purposive approach". He submitted that that was "wrong because by virtue of [*Zurich*] all agreements are to be interpreted by adopting the purposive approach", which counsel suggested, was the minority approach. I think that it may be preferable to leave the phrase "purposive approach" to statutory interpretation. In *Zurich*, the phrase used was "contextual approach". With regards to statutory interpretation, s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed), specifically allows for the consideration of pre-enactment parliamentary debates in the interpretation of a statute; but in commercial law, there is a statutory provision in the form of s 93 of the Evidence Act (Cap 97, 1997 Rev Ed), specifically prohibiting the use of pre-contractual evidence in the construction of a contract. Section 93 provides as follows:

> When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

The operative words are —

> When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document ... no evidence shall be given in proof of the terms of such contract ... except the document itself

Section 94 provides that when a document such as that referred to in s 93 has been proved, "no evidence of any oral agreement or statement shall be admitted as between the parties to any such

instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms". Section 94 thus reinforces s 93 although it allows for six exceptions in the form of the provisions found in subsections (a) to (f) of s 94. It will be seen that these are exceptions to the dominant rule in s 93 and reading them in the context of ss 93 and 94 indicates that they were meant to admit exceptions to the parol evidence rule in s 93 so long as the written document represents the existing contract, and that the exceptions were not meant to admit extrinsic evidence "for the purpose of contradicting, varying, adding to, or subtracting from its terms".

5 The application of the dominant rule in ss 93 and 94 was in fact applied by *Zurich* and constitutes the *ratio decidendi* of that case. The relevant facts in *Zurich* were that B-Gold was instructed by MediaCorp (under a term contract) to carry out construction work on the ceiling of an air-conditioning room on the fourth floor of the building. A fire was negligently started by B-Gold's sub-contractors, and water that was used to put out the fire cascaded down the four floors of that building causing damage. MediaCorp was given judgment against B-Gold. B-Gold sued its insurers - Zurich Insurers - for an indemnity under the insurance. Zurich's liability depended on whether the damage four floors below the actual place of work was covered under the policy. The works covered under the policy were excluded by a special exclusion clause to Section II of the policy thereby expressly excluded the premises below the ceiling (where the work took place) from the policy, which meant that if Section II applied, B-Gold's claim against Zurich Insurers could not succeed. The Court of Appeal held that the High Court was wrong to have held that Section II did not apply because the High Court had taken extrinsic evidence (including the main contract between Mediacorp and B-Gold) into account when it ruled that the parties must have intended that the damage in that case was to be covered by the policy. The Court of Appeal held at [134] that by taking extrinsic evidence into account, the High Court "strayed far into the realm of varying a contract in contravention of s 94."

6 The Court of Appeal in *Zurich* then considered exception (f) to s 94 which reads: "any fact may be proved which shows in what manner the language of a document is related to existing facts". The Court of Appeal in important *obiter dicta* examined the relationship between the dominant rule in ss 93 and 94 and the exception in 94(f). In the preface to its discussion of s 94(f) the Court at [106] referred to its judgment in *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR (R) 891 in which it held at [29]:

> It is clear that, at common law, it has always been open to the court to have recourse to extrinsic material where such material would aid in establishing the factual matrix which would (in turn) assist the court in construing the contract in question. This assumes, of course, that the reference to such material would not result in the contravention of the parol evidence rule which is statutorily embedded within ss 93 and 94 of the Evidence Act.

Contrary to counsel's submission, the Court of Appeal in *Zurich* did not hold that the contextual approach was to be the primary rule in the construction of a contract in that one begins the construction of a contract by reference to it, and through it enter an expressway into extrinsic evidence not ordinarily permissible in the construction of a written contract, especially one that appears complete on the face of it. The minority arbitrator in the present case disagreed with the majority because he perceived the majority approach as being "unduly technical and limiting, if not mistaken". He was of the view (at [29] of the Dissenting Opinion) that —

> [T]he interpretative exercise considers the plain meaning in context to determine if the context makes it ambiguous or absurd. Ambiguity or absurdity [is] not considered first, divorced from context. Accordingly, the approach that I take in this opinion, juxtaposes the plain meaning against the context.

The Court of Appeal in *Sandar Aung* had stated however that —

> 29...if the plain language of the contract appears otherwise clear, the construction consequently placed on such language should not be inconsistent with the context in which the contract was entered into if this context is clear or even obvious, since the context and circumstances in which the contract was made would reflect the intention of the parties when they entered into the contract and utilised the (contractual) language they did. It might well be the case that if a particular construction placed on the language in a given contract is inconsistent with what is obvious in the context in which the contract was made, then that construction might not be as clear as initially thought and might, on the contrary, be evidence of an ambiguity.

In my view, the Court of Appeal clearly could not be saying that if the plain language of a contract is clear one should start looking for extrinsic evidence – which might result in rendering the clear language unclear. Contrary to counsel's submissions, Art 18.1 had neither an obvious nor latent ambiguity to justify an examination of extrinsic evidence. Sometimes when a document appears clear, it might actually be clear with nothing obscure or ambiguous about it. As Sigmund Freud the psychoanalyst and interpreter of dreams was reputed to have said, "sometimes a cigar is just a cigar."

The Court of Appeal in *Zurich* at [132] summarised its approach in the grounds of its judgment as follows:

(a) A court should take into account the essence and attributes of the document being examined. The court's treatment of extrinsic evidence at various stages of the analytical process may differ depending on the nature of the document. In general, the court ought to be more reluctant to allow extrinsic evidence to affect standard form contracts and commercial documents (see [110] above)

(b) If the court is satisfied that the parties intended to embody their entire agreement in a written contract, no extrinsic evidence is admissible to contradict, vary, add to, or subtract from its terms (see ss 93-94 of the Evidence Act). In determining whether the parties so intended, our courts may look at extrinsic evidence and apply the normal objective test, subject to a rebuttable presumption that a contract which is complete on its face was intended to contain all the terms of the parties' agreement (see [40] above). In other words, where a contract is complete on its face, the language of the contract constitutes *prima facie* proof of the parties' intentions.

(c) Extrinsic evidence is admissible under proviso (*f*) to s 94 to aid in the interpretation of the written words. Our courts now adopt, via this proviso, the modern contextual approach to interpretation, in line with the developments in England in this area of the law to date. Crucially, ambiguity is not a prerequisite for the admissibility of extrinsic evidence under proviso (*f*) to s 94 (see [114]-[120] above).

(d) The extrinsic evidence in question is admissible so long as it is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context (see [125] and [128]-[129] above). However, the principle of objectively ascertaining contractual intention(s) remains paramount. Thus, the extrinsic evidence must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. Further, where extrinsic evidence in the form of prior negotiations and subsequent conduct is concerned, we find the views expressed in McMeel's article ([62] *supra*) and Nicholls' article ([62] *supra*) persuasive. For this reason, there should be no absolute or rigid prohibition against evidence of previous

negotiations or subsequent conduct, although, in the normal case, such evidence is likely to be inadmissible for non-compliance with the requirements set out at [125] and [128]-[129] above. (We should add that the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture.) Declarations of subjective intent remain inadmissible except for the purpose of giving meaning to terms which have been determined to be latently ambiguous (see [5] above; see also sub-para (e) below).

(e) In some cases, the extrinsic evidence in question leads to possible alternative interpretations of the written words (ie, the court determines that latent ambiguity exists). A court may give effect to these alternative interpretations, always bearing in mind s 94 of the Evidence Act. In arriving at the ultimate interpretation of the words to be construed, the court may take into account subjective declarations of intent (see [50] above). Furthermore, the normal canons of interpretation apply in conjunction with the relevant provisions of the Evidence Act ie, ss 95-100 (see [75]-[80] and [131] above).

(f) A court should always be careful to ensure that extrinsic evidence is used to explain and illuminate the written words, and not to contradict or vary them. Where the court concludes that the parties have used the wrong words, rectification may be a more appropriate remedy (see [123] above).

7 Govintharasah's written submissions presented a slight, but significant, variation to his oral submission. In the written submission it was argued that the majority arbitrators misapplied the law in *Zurich*. Counsel conceded that although the arbitrators allowed extrinsic evidence by HSC to be considered, the majority award was obviously wrong. Counsel stated that —

> Having admitted extrinsic evidence by adopting the *Zurich* principles for the purpose of interpreting the [Agreement], the Tribunal ignored the evidence which clearly pointed to the fact that parties wish to commit to a commercial relationship for a minimum period of 5 years.

Counsel submitted that the majority and the minority arbitrators had divergent views as to how *Zurich* was to apply. He argued that the majority was wrong to have made "a preliminary finding that [HSC] are relying on subjective intention which [the majority] say [was] prohibited by the *Zurich* guidelines." Counsel stated that [in] contrast, the Dissenting Opinion made reference to the common intention and understanding of the parties that the [Agreement] was for an initial fixed duration of 5 years.

8 I agree with Tan Heng Thye, counsel for RDAP, and am of the view that on HSC's case as presented, the application on this ground cannot succeed. Section 49(1) of the Arbitration Act only permits an appeal against an arbitration award on a point of law. Insofar as HSC's application was based on what it considered to be a misreading of the contract as a result of applying *Zurich*, that was not an error of law but an error in the application of the law, which is not subject to appeal under s 49. The majority were entitled to find that the words of the Agreement were clear and unambiguous, and further, that HSC's interpretation of the contract was its subjective intention and did not reflect the objective common intention of the parties. In this regard, it was neither necessary nor relevant whether the majority or the minority decision was correct on the merits. The questions of law that HSC as an applicant under s 49(6) had stated were not questions of law, they were just questions as to the correct construction of the contract. I need only point out that I agree that the words of Art 1 as well as Art 18 were clear and unambiguous. There was no need to require extrinsic evidence to interpret Art 18.1. It was not necessary for me in this case to consider at length to Lord Hoffman's judgment in *Investor Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (which represents the modern approach to interpretation of contracts, and from which

much of the *Zurich dicta* drew its breath) because neither the English common law nor Lord Hoffman was encumbered by statutory provisions similar to ss 93 and 94. *Zurich*, however, did not hold that it would be obligatory for the court in all cases of contractual interpretation to refer to extrinsic evidence in order to understand the context in which the contract was made. Often, the terms of a written contract might be so straightforward and clear that nothing else would be required to understand the intention of the parties; and sometimes, the context might easily be appreciated from the contract document itself. *Zurich* did not hold that the construction of a written contract, in all cases, begins with the contextual approach as counsel submitted. Reason and logic militate against such a view as I will now elaborate. The more restrictive view of s 94(f) espoused by the Court of Appeal in 1997 in *Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] 2 SLR(R) 1 might no longer be followed after *Zurich* insofar as the latter has now allowed reference to extrinsic evidence in some situations in order to understand the context of the contract even though the contractual language was clear and unambiguous. The thrust of the *Zurich dicta* was to give the court flexibility in examining extrinsic evidence in such circumstances. It was not a directive that all contractual interpretation begins with an examination of extrinsic evidence. It is in this context that paragraph 130 of the *Zurich* judgment should be read:

> ...ambiguity is no longer a prerequisite for the court's consideration of extrinsic material (see [114] above); thus, neither is absurdity or the existence of an alternative technical meaning. Instead, the court will *first* take into account the plain language of the contract together with relevant extrinsic material which is evidence of its context. *Then, if, in the light of this context*, the plain language of the contract becomes ambiguous (*ie*, it takes on another plausible meaning) or absurd, the court will be entitled to put on the contractual term in question an interpretation which is different from that demanded by its plain language. This is in fact merely making explicit the role of extrinsic evidence, which was previously obfuscated under the traditional approach (see [52] above). [emphasis original]

Questions may remain regarding the full and proper reconciliation between what the *Zurich* Court said about s 94 and s 94(f) – between interpretation and variation. A case might arise in which those questions might be pursued – but this is not it. *Zurich* had slackened the chains on contractual interpretation but s 94(f) is still tethered to s 94.

9 Without commenting on the merits of the dissenting opinion, it may be relevant to mention, for completeness, that the majority decision appeared to have taken all the evidence save for those that HSC had wanted to adduce through Gerard Lee, a point considered by the majority in paragraphs 9.5.6 to 9.5.8 of the Award, and they gave their reasons why Gerard Lee's evidence was largely irrelevant since he did not testify. The majority arbitrators had allowed far more extrinsic evidence then was necessary in the circumstances. They accepted RDAP's explanation that the decision to enter into the contract was taken at the "local level" and correspondence with its headquarters was irrelevant. They also thought that the failure to call Gerard Lee was not material and explained so. On the face of the Agreement and on the extrinsic evidence adduced, it did not seem that the majority view was wrong. Article 18.1 was a simple term. So was Art 1.2. Reading them together, the inference seemed to be that Art 18.1 might be invoked at any time by either party. Further, if the Agreement was not renewed, the position advocated by HSC would have meant that Art 18.1 could never be invoked at all, making it redundant. It would be astonishing that the parties would have intended, whatever the context, to render such a perfectly clear and unambiguous term perfectly useless. Had the parties renewed the Agreement after five years on the same terms, Art 1.2 and Art 18.1 would have retained the meaning they express then must be the same as when they were first executed. However, Art 1.2 provided that a renewal may not necessarily be on the same terms. Hence, Art 18.1 must be for use in the first five years. Further, from Yap Ai Cheng's affidavit, it appears that any understanding for a long term relationship with RDAP did not involve HSC but YCH.

The proposal on Valentine's Day in 2000 was one made by YCH. HSC was a different suitor, presenting a different proposal, under different circumstances.

10 I should now address HSC's point of law regarding the burden of proof needed to satisfy a claim for a rectification of contract. This arose from HSC's failed attempt to have the Agreement rectified such that it would reflect that Art 18.1 cannot be invoked before five years was up. Counsel objected to the use of the phrase "convincing proof" by the majority arbitrators and argued that the threshold was a much lower one than that. In my view, the majority's statement was a fair description of what HSC needed to do to have the contract rectified. It was for good reasons that this principle on rectification remained in *Chitty on Contracts* Vol 1 (Sweet & Maxwell, 30th Ed, 2008) at [5-122]. A party seeking to rectify a contract is bound to show that the error or omission was clear and obvious. HSC produced no evidence that would have assisted the arbitrators in considering its application for rectification. Before me, counsel submitted that if extrinsic evidence were allowed, the arbitrators would have appreciated that there was to be a long term relationship and the termination clause would have been interpreted the way HSC believed it ought. As a footnote, YCH might wish to reflect on why it did not sue RDAP. The long term relationship in question did not involve HSC which was incorporated only in March 2001 solely for the purpose of becoming the distributor for RDAP. By that time, YCH, which had been a long-time business associate of RDAP, had already concluded its MOU with RDAP and the project therein described had already ended or was nearing its end.

11 For the reasons above, I am of the view that the application must fail and I so dismiss the application for leave to appeal. I shall hear the question of costs at a later date if parties are unable to agree as to costs.