MCI Worldcom Asia Pte Ltd v Chembell Technology Sdn Bhd
[2003] SGHC 251

Case Number : Suit 819/2002

Decision Date : 20 October 2003

Tribunal/Court : High Court

Coram : S Rajendran J

Counsel Name(s) : Lim Yee Ming (Ng Chong Hue LLC) for the plaintiffs; Zaheer K Merchant and Christina Lee (Madhavan Partnership) for the defendants

Parties : MCI Worldcom Asia Pte Ltd — Chembell Technology Sdn Bhd

Civil Procedure – Stay of proceedings – Whether application for stay can be made at trial

Civil Procedure – Summary judgment – Disposal on point of law – Determination of questions of law or construction of documents under O 14 r 12 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) – Whether provisions of a foreign statute breached

Commercial Transactions – Sale of services – Breach of contract – Claim for price of services rendered and loss of profit

Contract – Illegality and public policy – Whether provision of services illegal under Malaysian law

1 The plaintiffs, MCI Worldcom Asia Pte Ltd ("MCI") are a company incorporated in Singapore and are in the business of high-speed data communications services. The defendants, Chembell Technology Sdn Bhd ("Chembell") are a company incorporated in Malaysia and in the business of Internet Protocol Telephony services.

2 On 16 December 1999, MCI and Chembell entered into a Master Services Agreement ("MSA") and two Service Orders ("SO") thereunder pursuant to which MCI was to provide certain international communication services to Chembell to and from Malaysia. The MSA was governed by Singapore law and the parties agreed to the exclusive jurisdiction of the courts in Singapore. Thereafter MCI commenced providing the requisite services to Chembell and periodically invoiced Chembell for the same.

3 Chembell paid the invoices issued for services rendered up to November 2001 but failed to pay the invoices issued thereafter. MCI therefore terminated its services to Chembell – as it was entitled to under the MSA – and commenced these proceedings for the recovery of the amount of US$136,640.87 being the total of the unpaid invoices. MCI also claimed damages in the sum of US$227,407.13 (alternatively, damages to be assessed) in respect of the fees that MCI – but for the breach by Chembell – would have earned under the MSA and SO.

4 In its defence, Chembell did not dispute that MCI had provided the contracted services to Chembell but alleged that the provision of such services was illegal under the Communications and Multimedia Act 1998 ("CMA 1998") of Malaysia and, prior to the CMA 1998 coming into force, under the Telecommunications Act 1950 ("TA 1950") of Malaysia in that MCI did not have the requisite licences under those Acts to provide these services in Malaysia. It was Chembell's case that in the circumstances it would be contrary to public policy both in Malaysia and Singapore for the MSA to be enforced. Chembell, accordingly, prayed for MCI's claim to be dismissed and that judgment be given in its favour in the sum of US$655,387.38 being the total amount that Chembell had paid to MCI under the MSA.

5 MCI denied the alleged illegality and averred that the Malaysian component of the services

made available to Chembell under the MSA was provided through Vads Sdn Bhd ("Vads") – then a wholly-owned subsidiary of Telekom Malaysia – which was duly licensed to provide such services in Malaysia by the relevant regulatory authorities. The Regulatory Authority under the CMA 1998 was the Malaysian Communications and Multimedia Commission ("Commission").

6 On the first day of this hearing, counsel for Chembell, Mr Zaheer Merchant, applied under O 14 r 12 of the Rules of Court that the court determine the question of construction – namely, whether MCI has breached the provisions of the TA 1950 and CMA 1998 – as a preliminary issue of law. The construction of a Malaysian statute was a matter of foreign law and foreign law would have to be proved as a question of fact. It would therefore be necessary to hear the evidence adduced by the parties to determine what the Malaysian law was. The matter was therefore not a matter that could appropriately be dealt with under O 14 r 12 and I therefore dismissed the application.

7 Upon the application under O 14 r 12 being dismissed, Mr Merchant applied for a stay of these proceedings to enable the parties to apply to the Malaysian courts for a determination of that issue of law. In support, Mr Merchant argued:

(a) the Singapore court will be asked to decide on a Malaysian law which is a new law and without the benefit of any Malaysian case law on the matter.;

(b) if the matter is determined in Malaysia, there will be the advantage of the Malaysian court dealing with its own statutes. That meant Malaysian courts could look at the intention of the Malaysian legislature when it enacted the law;

(c) Malaysian courts may invite the Commission to participate in the Malaysian proceedings.

(d) if Malaysian courts find there is illegality or rules it is legal, that decision can be brought back to the Singapore courts.

Mr LimYee Ming, who appeared for MCI, objected to the application on the grounds that as the parties were already at trial, the trial should proceed. I upheld this objection. Chembell should have made any such application at about the time when the writ was served. To make the application at the start of the hearing, without good reason for the delay, was an abuse of process.

8 The first witness called by MCI was Kam Wei Peng of Vads who testified that Vads had a Facility Management Agreement with Worldcom Asia Pacific Ltd ("Worldcom Asia Pacific") pursuant to which Vads would provide the Malaysian component of services required by customers of Worldcom Asia Pacific and its associated companies (including MCI). Kam testified that Vads was duly licensed to provide these services in Malaysia under a Value Added Data Network Licence issued under the TA 1950 and by an Applications Service Provider Individual Licence issued by the Commission under the CMA 1998 which replaced the earlier licence. She testified that the provision of such services was a major part of Vads business which Vads had been openly providing for very many years and added that, up to the time of this litigation, no one – including the relevant regulatory authorities in Malaysia – had ever alleged that Vads was providing these services in breach of Malaysian law.

9 The document that Kam had annexed to her AEIC as the Value Added Data Network Licence held by Vads was not the licence itself but an amendment to that licence. This was an inadvertent mistake by Kam. At the hearing when this error came to light, Kam produced the original licence. Mr Merchant informed the court that the original now produced had taken him by surprise and, as it was a document which Chembell would have to substantially rebut, his clients needed time to meet and discuss that licence with the Commission. Mr Merchant asked for an adjournment to enable this to be

done.

10 Whether or not Vads was licensed to provide the services in question was one of the core issues in this case. It seemed to me that to determine that issue the views of the Commission could be highly significant and, as the licence had only been produced at the last minute, I allowed Mr Merchant's application that the hearing be adjourned to enable Chembell to take the matter up with the Commission.

11 The hearing resumed some 3 weeks later. Mr Merchant informed the court that he was still pursuing the matter with the Commission and a meeting was scheduled in the next few days at which he hoped to get evidence about the illegality. After all the witnesses had testified, Mr Merchant applied for another adjournment so that he could get a witness from the Commission to testify. When asked whether the necessary arrangements had been made with the Commission, Mr Merchant told the court that the scheduled meeting had – because this case was being heard – been called off and so he could not say for sure whether an officer from the Commission would testify if the adjournment was granted.

12 Chembell's case was that they realised in April 2002 that the services provided by MCI was tainted with illegality. They therefore had more than sufficient time to explore the matter with the Commission and arrange for a representative of the Commission to testify. They could have done this even after the adjournment on 25 August 2003 granted specifically for that purpose. In spite of this long length of time and this accommodation, the necessary arrangements had not been made. In the circumstances, I was of the view that any further adjournment would not be justified and, accordingly, refused the application.

13 Two experts on Malaysian law were called to testify on whether the services provided by MCI to Chembell were illegal under Malaysian law. MCI called Adeline Wong Mee Kiat ("Ms Wong") and Chembell called Dato Ghazi Ishak ("Dato Ghazi") – both advocates and solicitors of Malaysia – as their respective experts.

14 Ms Wong's credentials as an expert in the laws relating to information technology/communications/telecommunications were impressive. She was a specialised practitioner in this area of the law and her firm, Wong & Partners, was the correspondent firm in Kuala Lumpur of Baker & McKenzie, a well-known law firm with branches in several countries. Ms Wong had also published several articles on topics related to telecommunications law. Amongst them was an article entitled "Malaysia's Telecommunications Industry: A New Licensing Regime". Ms Wong had also advised numerous telecommunications companies on licensing issues in Malaysia.

15 Ms Wong confirmed that Vads was duly licensed to provide frame relay services in Malaysia pursuant to the two licences that Kam had produced in evidence. For the Value Added Network Data Service Licence, Ms Wong testified that cll 2.1(b) and 2.1(c) of the licence, in particular the terms "electronic file/information exchange service" and "electronic data interchange" allowed frame relay services. With regard to the Applications Service Provider Individual Licence, she testified that frame relay services would fall under "public switched data services", a category of service for which the CMA 1998 specifically requires an Applications Service Individual Licence. Ms Wong testified that MCI, by providing services to Chembell through Vads, was not in violation of any law or licensing requirement in Malaysia.

16 Dato Ghazi's credentials were also impressive. He was a leading litigation lawyer in Malaysia especially in commercial law. He candidly admitted, when asked, that he was not an expert in telecommunications law. He also admitted that he has not advised any client on matters relating to

licensing under the TA 1950 or CMA 1998.

17 Given his unfamiliarity with telecommunications law and the terminology associated therewith, Dato Ghazi, in the opinion he rendered that the services of MCI under the MSA was illegal, relied heavily on the views of a young lecturer, Hairul Azhar bin Abdul Rashid ("Encik Hairul"), from the Faculty of Engineering, Multimedia University Cyberjaya, Malaysia.

18 Encik Hairul was erudite in his testimony and gave an eloquent primer on basic telecommunications technology. At the close of Encik Hairul's testimony, I had a better understanding of the way in which modern communication systems worked but this understanding did not translate into an understanding of why Chembell maintained that the licences that Vads held were insufficient under the TA 1950 and CMA 1998 to cover the services that Vads, on behalf of MCI, had provided to Chembell.

19 Both Ms Wong and Dato Ghazi confirmed that there had been no prosecution or other litigation under the TA 1950 or CMA 1998 and so there was no Malaysian case law relating to the licensing requirements under those Acts that could serve as a guide to what the Malaysian law was. In the absence of case law, it would have been helpful to this court if the views of the regulatory authority – the Commission – had been solicited and adduced in evidence. As noted above, although Chembell had given indications that it was soliciting the views of the Commission, in the result, no evidence from the Commission was led in evidence.

20 At the close of the hearing, Chembell – on whom the burden lay – had not persuaded me that the services that MCI, through Vads, had provided to Chembell under the MSA and SO were in contravention of the provisions of the TA 1950 and CMA 1998: the defence of illegality raised by Chembell to the claims by MCI must therefore fail.

21 For the above reasons, I allow MCI's claim for the sum of $136,640.87 for the services rendered with interest at 4% per annum from the date of the writ. I also allow MCI's claim for damages for the loss of income in respect of the balance of the contract term. These damages are to be assessed by the Registrar. Chembell is to bear MCI's costs in this action. The counterclaim by Chembell is dismissed but, as the counterclaim raised no new issue of fact or law, I make no order as to the costs of the counterclaim.

Plaintiffs' claim allowed with costs.
Defendants' counterclaim dismissed.