Holland Leedon Pte Ltd (in liquidation) *v* Metalform Asia Pte Ltd
[2010] SGHC 280

Case Number : Originating Summons No 1679 of 2007

Decision Date : 17 September 2010

Tribunal/Court : High Court

Coram : Philip Pillai J

Counsel Name(s) : Sundaresh Menon SC, Sim Kwan Kiat, Farrah Salam (Rajah & Tann LLP) for the plaintiff; Chelva Rajah SC, Chew Kei-Jin and Moiz Haider Sithawalla (Tan Rajah & Cheah) for the defendant.

Parties : Holland Leedon Pte Ltd (in liquidation) — Metalform Asia Pte Ltd

Arbitration

17 September 2010 Judgment reserved.

Philip Pillai J:

1 This is the plaintiff's application for leave to appeal against a summary determination of issues ("the Decision") by the sole arbitrator in the arbitration between the parties in SIAC Arbitration No 069/DA17/05 ("the Arbitration"). The plaintiff, Holland Leedon ("the Vendor"), is the respondent in the Arbitration, while the defendant, Metalform Asia Pte Ltd ("the Purchaser"). The dispute between the parties relate to the interpretation of terms in an agreement between the parties for the sale and purchase of the Vendor's business ("the SPA").

Arbitration Act

2 The relevant statutory provision is s 49 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act"), the material part of which read as follows:

> **Appeal against award**
>
> 49. —(1) A party to arbitration proceedings may (upon notice to the other parties and to the arbitral tribunal) appeal to the Court on a question of law arising out of an award made in the proceedings.
>
> (2) Notwithstanding subsection (1), the parties may agree to exclude the jurisdiction of the Court under this section and an agreement to dispense with reasons for the arbitral tribunal's award shall be treated as an agreement to exclude the jurisdiction of the Court under this section.
>
> (3) An appeal shall not be brought under this section except-
>
> (a) with the agreement of all other parties to the proceedings; or
>
> (b) with the leave of the Court;
>
> (5) Leave to appeal shall be given only if the Court is satisfied that –

(a) the determination of the question will substantially affect the rights or one or more of the parties;

(b) the question is one which the arbitral tribunal was asked to determine;

(c) on the basis of the findings of fact in the award –

(i) the decision of the arbitral tribunal on the question is obviously wrong; or

(ii) the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and

(d) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.

(6) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

3 The present application turns on subsections (2), (5) and (6). I will deal with each in turn.

Section 49(2): exclusion of appellate jurisdiction

4 The Purchaser argued that the parties had agreed to exclude the appellate jurisdiction of the court granted by s 49(1) by virtue of cll 21.2, 21.6 and 21.7 of the SPA, which read as follows:

21.2 In the event that any disagreement, dispute, controversy of claim (the "Dispute") is not resolved amicably between the parties, then, save as otherwise provided in this Agreement, such Dispute shall be settled exclusively and finally by arbitration. It is specifically understood and agreed that, save as otherwise provided in this Agreement, any Dispute that cannot be resolved between the parties, including any matter relating to the interpretation of this Agreement, shall be submitted to arbitration irrespective of the magnitude thereof and the amount in dispute or whether such Dispute would otherwise be considered justifiable or ripe for resolution by any court. This Agreement and the rights and obligations of the parties under this Agreement shall remain in full force and effect pending the award in such arbitration proceedings, and the award shall determine whether and when the termination of this Agreement, if relevant, shall become effective.

21.6 The [arbitral] Tribunal shall give a reasoned decision or award, including as to the costs of the arbitration, which shall be final and binding on the parties. The parties agree that the Tribunal's award may be enforced against the parties to the proceedings or their assets, wherever they may be found.

21.7 The parties agree to exclude any right or application to any court or tribunal of competent jurisdiction in connection with questions of law arising in the course of any arbitration.

5 I can see nothing in cl 21.2 which avails the Purchaser. As for cl 21.6, the Purchaser argues that the clause excludes the jurisdiction of the court by providing that the decision or award shall be "final and binding". I am unable to agree. In every arbitration agreement there must be some form of words providing for the binding effect of the award. It would not be sensible to construe such words as serving the further function of excluding an appeal – otherwise parties to every arbitration agreement would have to positively provide for a right of appeal. This would be contrary to the tenor

of s 49(1) and (2), which provide for a right of appeal in the first place, which the parties may then exclude. So, in my view, the exclusion of the right of appeal must be effected through something more than a provision which merely provides for the binding effect of the arbitral award. On the facts, I appreciate that the word "final" can, read alone, be taken to be that something more, but reading clause 21.6 as a whole I think that the overall effect of the clause is merely to provide for the binding effect of the arbitral award. I am fortified in this conclusion by the *dicta* of Ramsey J in *Essex County Council v Premier Recycling Ltd* [2006] EWHC 3594 at [22] that:

> the use of the words 'final and binding', in terms of reference of the arbitration are of themselves insufficient to amount to an exclusion of appeal. Such a phrase is just as appropriate, in my judgment to mean final and binding subject to the provisions of the Arbitration Act 1996.

6 I turn now to cl 21.7. The Purchaser submitted that cl 21.7 tracks s 45 of the Act, which provides in material part as follows:

> **Determination of preliminary point of law**
>
> **45**. —(1) Unless otherwise agreed by the parties, the Court may, on the application of a party to the arbitration proceedings who has given notice to the other parties, determine any question of law arising *in the course of the proceedings* which the Court is satisfied substantially affects the rights of one or more of the parties.
>
> [Emphasis added]

This is a linguistic argument, and ordinarily the court will not engage in fine linguistic distinctions when construing commercial contracts – a relevant example being the construction of the scope of arbitration agreements. In this case, however, the Act draws a distinction between a party's right to apply to court to "determine any question of law arising *in the course of* the proceedings", contained in s 45(1), and a party's right to appeal to court "on a question of law arising *out of an award* made in the proceedings", contained in s 49(1). The precise language adopted by the parties is therefore important. On the facts, cl 21.7 only relates to "questions of law arising *in the course of* any arbitration" (emphasis added). This, in my view, is referable only to s 45(1) and is insufficient to exclude the right of appeal in s 49(1).

Section 49(5): Merits and public importance, *etc*

7 I turn now to s 49(5), which lays down the requirements to be satisfied before leave can be granted. There is no serious dispute that s 49(5)(a) and (b) are satisfied. The main issue is s 49(5)(c), which lays down the threshold of merit which must be met. There are two alternative thresholds: either (i) on the basis of the findings of fact in the award the decision of the arbitral tribunal is obviously wrong, or (ii) on the basis of the findings in the award the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt. As is apparent, the threshold is lower when the question of law sought to be presented on appeal is of general public importance.

8 On the facts, there were three questions of law put to the learned arbitrator. It is not necessary to rehearse them here. Essentially they come to this. The SPA computed the purchase price for the Vendor's business via the commonly used mechanism of applying a multiplier to the Vendor's EBIDTA, *ie*, earnings before interest, depreciation, tax and amortisation. The EBIDTA was not based simply on the relevant audited financial statements. Instead it was to be derived from the agreed completion accounts jointly prepared by the accountants of both parties. See Robert

Thompson, gen ed, *Sinclair on Warranties and Indemnities on Share and Asset Sales* (Sweet & Maxwell, 7th Ed, 2008) at para 13-04. There is, in the SPA, no warranty as to the final EBIDTA, and quite naturally so since the Purchaser participated in the completion accounts process which yielded the EBIDTA. The purchaser takes the EDIBTA which he agreed to and to which was then applied the agreed multiple to arrive at the purchase price. The underlying business approach reflected here is one of *caveat emptor*.

9 The Vendor is alleged to have breached a number of warranties in the SPA. Under the general law of contract the Purchaser would be able to recover its expectation losses, measured either by the cost of cure or by the diminution in the value of the Vendor's business. But the Purchaser is arguing that the alleged breaches of warranty would diminish the EBIDTA and correspondingly the purchase price which is a multiple of the EDIBTA. On this basis it is claiming the difference between the purchase price it paid and the purchase price computed on the basis of the (allegedly) reduced EDIBTA multiplied by the multiplier. However, the Purchaser is not challenging the EDIBTA agreed to by the parties, and indeed it could not have done so as there were no warranties as to the EDIBTA, nor fraud or patent error in the completion accounts. In these circumstances, it seems to me that if the Purchaser's claim was allowed to proceed, it would have the effect of subverting a commonly used mechanism for determining the purchase price in acquisitions of businesses and shares. In my view, therefore, the decision of the learned arbitrator that the Purchaser is allowed to pursue his claim as described is at least open to serious doubt. I am further of the view that the issue, relating as it does to a commonly used commercial pricing mechanism, is one of general public importance. Section 49(5)(c)(ii) is therefore satisfied. I am fortified in my conclusion by the decision of Judith Prakash J's to strike out the Purchaser's claims to substantially similar effect against the Vendor's directors in connection with the same acquisition: see *Metalform Asia Pte Ltd v Ser Kim Noi* [2009] 1 SLR(R) 369. The record shows that, on appeal, the Court of Appeal only disagreed with Prakash J to the extent that it thought that leave to amend the untenable claim should be granted.

10 For similar reasons, I think it is just and proper in all the circumstances for an appeal to lie to the court.

Section 49(6): identification of question of law to be determined

11 The Purchaser argued that the Vendor has not formulated or identified any question of law arising from the Decision by the learned arbitrator, and therefore failed to satisfy s 45(6) of the Act. Again I am unable to accede. It is first of all doubtful that s 49(6) of the Act is a condition precedent to the grant of leave (as opposed to a mere procedural requirement), since it is not placed in s 49(5). In any case, the Vendor is clearly disputing the effect of a contractual term, and it is beyond controversy that the true construction of contractual terms is a question of law: *Permasteelisa Pacific Holdings Ltd v Hyundai Engineering Construction Co Ltd* [2005] 2 SLR(R) 270.

Conclusion

12 In the result, I grant leave to the Vendor to appeal against the Decision of the learned arbitrator. Costs in the cause.