Vix Marketing Pte Ltd v Technogym SpA
[2008] SGHC 99

Case Number : Suit 50/2007, RA 305/2007

Decision Date : 30 June 2008

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : B Ganeshamoorthy (Colin Ng & Partners) for the plaintiff; Lim Yee Ming (Kelvin Chia Partnership) for the defendant

Parties : Vix Marketing Pte Ltd — Technogym SpA

Evidence – Documentary evidence – Blank in preamble of agreement where date of signing to be indicated – Agreement clearly providing for entry into force from date of signing – Parties signing every page of agreement with date indicated in footer – Whether blank in preamble a patent ambiguity – Whether extrinsic evidence admissible to ascertain date of signing of agreement – Section 95 Evidence Act (Cap 97, 1997 Rev Ed)

30 June 2008 Judgment reserved.

Chan Seng Onn J:

1 This appeal arose from the order of the Assistant Registrar Chew Chin Yee ("the AR") dated 19 September 2007 where the AR granted the defendant's application for a stay of proceedings pending arbitration and awarded costs fixed at $2,500 to the defendant.

2 The plaintiff in these proceedings is Vix Marketing Pte Ltd ("the plaintiff"), a Singaporean company which is in the business of selling fitness products. The defendant, Technogym SpA ("the defendant"), is an Italian company which specialises in the design, development, manufacture and sale of hardware and software equipment for gyms.

3 On 10 January 2002, the plaintiff entered into an agreement with Technogym International BV ("Technogym BV") for the exclusive distributorship of Technogym products in Singapore valid from 1 January 2002 to 31 January 2002 which, according to the defendant, was renewed for 2003 and 2004. On 31 December 2004, as part of a reorganisation of the Technogym business, all distributorship agreements under Technogym BV were assigned to the defendant.

4 On or about 10 March 2005 (as evidenced by the date printed on the bottom right of each page), the plaintiff and defendant entered into a distributorship agreement ("the March 2005 agreement") granting the plaintiff rights to sell the defendant's products in Singapore, Indonesia and Brunei.

5 In its statement of claim, the plaintiff alleged that the defendant appointed another company as distributors and thus breached the contract. However, the plaintiff claimed the defendant had breached not the March 2005 agreement but another agreement dated 17 January 2005 ("the January 2005 agreement"), which it nevertheless (oddly) declined to produce to the AR.

6 At the hearing below, the AR asked the parties to clarify what the dispute was all about. They replied that the dispute was whether the March 2005 agreement was in force during the alleged breach of contract. The plaintiff claimed that it was not bound by the March 2005 agreement because the March 2005 agreement was signed, but **not dated**; as a result, the agreement was

invalid due to uncertainty. Article 17.1 of the March 2005 agreement stated:

> This contract comes into force *on date of signing* and terminates three years after (36 months in duration)… [emphasis added]

7 The plaintiff argued that because there was a blank in the preamble of the March 2005 agreement where the date should have been printed, the contract would not be valid on the ground of uncertainty. Further, under s 95 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA"), no evidence could be admitted to fill in the blank where the date ought to have been inserted so as to remove that uncertainty.

8 The defendant contended that the March 2005 agreement was valid since it had been signed on every page by the parties, and as a result, the parties were bound by a clause in the March 2005 agreement to proceed to arbitration in Milan, Italy. The defendant further contended that the March 2005 agreement superseded the January 2005 agreement, and in any event, the March 2005 agreement was the agreement which bound the parties.

9 The issue before the court was whether the March 2005 agreement was valid and as a result, bound the parties to refer the dispute to arbitration according to Art 18.4 which stated:

> Any disputes arising between the Parties as a consequence to and in connection with this Agreement shall be settled definitively by recourse to the UNCITRAL arbitration rules in force at the date the dispute arises. The arbitration shall be held in Milan, Italy.

10 The issue to be determined was whether the blank in the preamble was a patent ambiguity rendering the March 2005 agreement invalid for want of certainty, or whether the blank could be filled in by resort to extrinsic evidence so that the parties were validly bound by the March 2005 agreement.

The law

11 Section 95 of the EA states:

> When the language used in a document is on its face ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.
>
> Illustrations
>
> (a) A agrees in writing to sell a horse to B for $500 or $600. Evidence cannot be given to show which price was to be given.
>
> (b) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

12 In *Tan Hock Keng v L & M Group Investments Ltd* [2002] 2 SLR 213, the Court of Appeal observed in relation to the general principle of law that extrinsic evidence cannot be adduced unless it falls under one of the exceptions set out in s 94 of the EA.

13 In *Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] 2 SLR 759 ("*Citicorp*"), Yong Pung How CJ ("Yong CJ") (delivering the grounds of judgment of the Court of Appeal) analysed the difference between s 94(f) and s 95 at [58]-[59]:

Prima facie, s 95 appears to conflict with s 94(f) since the former bars extrinsic evidence from being used as an aid to interpretation in the face of ambiguity. But, upon closer examination, any inconsistency may be resolved. In this regard, it is necessary to refer to what Lord Bacon had classified as *patent* and *latent* ambiguities. A patent ambiguity is 'that which appears to be ambiguous upon deed or instrument,' and latent ambiguity is 'that which seemeth certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity': *Phipson on Evidence* (14th Ed, 1990) at p 1053.

With this distinction in mind, it becomes apparent that s 95 deals with patent ambiguities, and the two illustrations provided in the section bear testimony to this conclusion. Thus, a document falling squarely into s 95 may well fail, and the admission of extrinsic evidence is disallowed in the face of such a patent ambiguity since this will not be interpreting a contract, but making a new one.

[emphasis in original]

14 Section 95 refers directly to the exclusion of evidence to fill up or remedy patent defects or remove patent ambiguities in the document, the net result of which is the making of a different and new document. The rationale for this principle can be found in the dicta of The Earl of Halsbury LC in *North Eastern Railway Co v Lord Hastings* [1900] AC 260 at 263:

The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous.

So far as I am aware, no principle has ever been more universally or rigorously insisted upon than that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself.

15 In *Citicorp* ([13] *supra*), Yong CJ added that there was an important qualification with regard to the limits of the court's interpretative powers. At [63], he added:

But, while extrinsic evidence may be adduced in appropriate cases, there is an important qualification which has been stated in *Phipson on Evidence* (14th Ed, 1990) at p 1050 in the following manner:

> With regard to the limits of interpretation, it is to be remembered that the function of the court is merely declaratory of what is in the document, not speculative as to what was probably intended to be there. *Moreover the meaning imputed must be one which the words are reasonably adequate to convey: 'All latitude of construction shall submit to this restriction, that the words may bear the sense which by construction is put upon them. If we step beyond this line, we no longer construe men's deeds, but make deeds for them'*. (See *Gibson v Minet* 1 H Bl 615; *Re Lewis's Will Trusts* [1985] 1 WLR 102.)

[emphasis in original]

16 Following the dicta of Yong CJ in *Citicorp* ([13] *supra*), the court's interpretative powers cannot be applied to supply new meaning to documents under the guise of construction to clarify a *patent* ambiguity in a document. Section 95 clearly prohibits that. A plain reading of illustration *(b)* of s 95 indicates that evidence adduced which is meant to fill in blanks in an agreement is to be specifically

excluded. The existence of blanks in an agreement would *prima facie* be a patent ambiguity which the court should not allow to be filled in by resort to extrinsic evidence proving new facts or new terms, which the parties never intended to have, agreed to or even knew about at the time they entered into the contract.

17 Pointing to the blank in the preamble of the March 2005 agreement, the plaintiff argued that this agreement was invalid because there was no stipulated date in the preamble. Indeed, on an examination of the preamble of the March 2005 agreement, there was a blank between the words "has been signed on" and "between [the parties]" where the date of signing should have been inserted.

18 In deciding the issue of the validity of the contract, I first inquired into the common intention of the parties. In *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 ("*Yngvar*"), Lord Wilberforce stated in a passage (at 996) approved by the Singapore Court of Appeal in *Sandar Aung v Parkway Hospitals Singapore Pte Ltd (trading as Mount Elizabeth Hospital) and Another* [2007] 2 SLR 891 (at [30]):

> … When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties.

19 In my view, the fact that the document was signed on every one of the 31 pages was indicative of a clear communication of an acceptance to be bound by the terms of the March 2005 agreement and an acknowledgment by both parties that they had performed an act of signing the document on a particular date, which date they could not possibly dispute. Even if that was disputed, evidence could be led for the court to make a specific finding of fact of the date on which the signatures had in fact taken place.

20 Article 17.1 also made an unequivocal reference to the "date of signing" as the date on which the contract was to come into force. That "date of signing" was a definite and clearly ascertainable fact.

21 In my view, there was no patent ambiguity as a result of the missing date in the preamble. Sarkar, citing Starkie, reasons (*Sarkar's Law of Evidence* (Wadhwa and Company Nagpur, 16th Ed, 2007) at 1554):

> By *patent ambiguity*, therefore, must be understood *an inherent ambiguity*, which cannot be removed either by the ordinary rules of legal construction or by the application of extrinsic and explanatory evidence, showing that expressions *prima facie* unintelligible, are yet capable of conveying a certain and definite meaning.
>
> [emphasis in original]

22 The present case is not one such situation. Granted, there was an omission to write in the date of signing in the preamble of the March 2005 agreement, but on every page of the signed document was the date 10 March 2005 printed in the footer. In fact, the blank in the preamble was to be filled in merely as an *indication* of the exact date on which *the signing* took place. The material fact which needed to be ascertained was the date for which the signing took place, as that was the date when

the contract was to come into force.

23 If Art 17.1 had been without the words "on date of signing" and had instead read:

> This contract comes into force on _____ and terminates three years after (36 months in duration)…

then it would be a case of a patent ambiguity and fresh evidence should not be allowed to fill in the date on which the contract was to come into force. Since the parties had left no clues in the document to show how that date was intended to be derived or ascertained, adding in any date would be arbitrary and would be effectively creating a new agreement for the parties.

24 As Art 17.1 referred to "*date of signing*" and given that the March 2005 agreement was signed on each of the 31 pages, this "date of signing" was a fact that could be positively ascertained without having to delve into the parties' intentions and the circumstances, as would have been the case in, for example, construing a term of the contract. The ambiguity in this case was caused merely by the fact that the date of signing was not indicated on the face of the March 2005 agreement, though the date 10 March 2005 was printed in the footer of every page of the signed agreement. This ambiguity, in my view, was thus a *latent* ambiguity and as a result, s 95 would not apply.

25 In this case, having satisfied both the requirement of a signature and an unequivocal reference to the validity period in relation to the act of *signing* the document, in my judgment, extrinsic evidence could be introduced (without contravention of s 95 of the EA) to add clarity to the actual date of *the signature* (the latent ambiguity) and consequently clarify the validity period. As Lord Wilberforce continued in *Yngvar* ([18] *supra*) at 997:

> … what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were… in the search for the relevant background, there may be facts which form part of the circumstances in which the parties contract in which one, or both, may take no particular interest, their minds being addressed to or concentrated on other facts so that if asked they would assert that they did not have these facts in the forefront of their mind, but that will not prevent those facts from forming part of an objective setting in which the contract is to be construed.

26 Here, the parties clearly intended to be bound for 36 months from the signing of the March 2005 agreement; they might not have remembered to write down the date on which they physically signed the agreement, but this was undoubtedly part of the objective setting in which the contract was formed.

27 Although the plaintiff in its affidavit claimed that there were blanks in the preamble, I chose to look at the construction of the March 2005 agreement as a whole. Article 17.1 specifically referred to the "date of signing" as the effective date the agreement was to come into force, and this led me to conclude that the agreement ran from the day the parties signed the document (*ie*, 10 March 2005, based on the extrinsic affidavit evidence), and not from whatever date (or lack thereof) that was to appear in the preamble. That would be the plain and natural meaning consistent with the construction of the document as a whole.

Conclusion

28 On the face of the documents produced, it was indisputable that both parties had signed the March 2005 agreement and as a result, the March 2005 agreement should be binding on both parties.

Furthermore, the fact that there was no date contained in the preamble did not render the contract uncertain and invalid. Giving effect to Art 17.1, I found that the March 2005 agreement came into force on the date it was signed, *ie*, 10 March 2005, as ascertained from the extrinsic evidence.

29 In my view, the AR was correct in accepting the affidavit evidence to clarify the position on when the March 2005 agreement came into force. As Andrew Phang Boon Leong JC (as he then was) opined in *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd (formerly known as Liberty Citystate Insurance Pte Ltd)* [2005] 2 SLR 509 at [51], "any aid to construction which does not add to, vary or contradict the relevant documents ought to be permitted." This was precisely the case here – in no way could the incorporation of the date of signing vary or contradict any express terms of the signed agreement. Thus, the omission to write in the date in the preamble could not render the contract invalid.

30 For these reasons, I dismissed the appeal with costs. Article 18.4, the arbitration clause in the March 2005 agreement, was valid and binding and ought to be given legal effect. I therefore upheld the decision to stay the action as the parties should proceed to resolve their dispute through arbitration in Milan, Italy in accordance with that arbitration clause and not by way of an action here in Singapore.

31 In fact, I would add here that having requested the plaintiff to produce the January 2005 agreement that it relied on, it became apparent to me why the plaintiff had declined to produce it to the AR below; Art 26 of the January 2005 agreement also provided for arbitration, albeit in Rotterdam, Holland. Even if the parties had indeed been bound by the January 2005 agreement, the action would still have to be stayed in favour of arbitration proceedings.