Tiger Airways Pte Ltd v Swissport Singapore Pte Ltd
[2009] SGHC 178

Case Number : OS 298/2009

Decision Date : 06 August 2009

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Edwin Tong and Colin Chow (Allen & Gledhill LLP) for the plaintiff; Anthony Lee Hwee Khiam and Pua Lee Siang (Bih Li & Lee) for the defendant

Parties : Tiger Airways Pte Ltd — Swissport Singapore Pte Ltd

Contract – Contractual terms – Admissibility of evidence – Parties were relatively new companies when they entered into contract – Whether such fact could be admitted to interpret contractual term under contextual approach

Contract – Contractual terms – Rules of construction – Clause providing for termination if licence was revoked, cancelled or suspended – Whether such clause allowed party to voluntarily cancel its own licence and then terminate contract

6 August 2009

Judith Prakash J:

1 The plaintiff, Tiger Airways Pte Ltd, commenced this action by way of originating summons against the defendant, Swissport Singapore Pte Ltd, alleging breach of contract for wrongful termination of an agreement (the "Agreement") dated 16 January 2006, between them.

The facts

The Agreement

2 The plaintiff is a low-cost airline that serves a number of destinations from Singapore Changi Airport ("Changi Airport") and the defendant is a ground handling services provider that used to operate at Changi Airport. Under the Agreement, the defendant contracted to provide the plaintiff with ground handling services at Changi Airport for 5 years, from 26 March 2006 until 25 March 2011.

3 When the parties entered into the Agreement, the defendant held a licence (the "Licence") to provide ground handling services at Changi Airport. This Licence was granted to the defendant by the Civil Aviation Authority of Singapore ("CAAA") pursuant to Clause 2 of a Ground Handling Services Agreement ("GHSA"), dated 26 August 2004, between the defendant and CAAA. This Licence allowed the defendant to operate at Changi Airport.

4 However, due to continuing losses amidst the global economic downturn, the defendant decided to exit the Singapore market. It gave notice to CAAS on 15 December 2008 to terminate the GHSA. That notice was accepted by CAAS and it was agreed that the GHSA would be terminated on 31 March 2009, which meant that the Licence would, effectively, also be terminated on 31 March 2009.

5 It was against that background that, on 12 January 2009, the defendant gave the plaintiff notice to terminate the Agreement on 1 April 2009 in reliance of Clause 9.3 of the Agreement

("Clause 9.3"), which reads:

> 9.3 In the event of Tiger's or the Handling Company's permit(s) or licences or other authorisation(s) to conduct its air transportation services, or to perform the Services, as applicable, wholly or in part, being revoked, cancelled or suspended, that party shall notify the other party without delay and either party may terminate the Agreement (or the Services in respect of which the permits, licences or other authorisations have been so revoked, cancelled or suspended), upon the giving to the other party of at least 24 hours written notice.

The dispute and the decision

6 The issue was whether a proper construction of Clause 9.3 allowed the defendant to serve notice to terminate the Agreement after the defendant had effectively terminated its own Licence.

7 Although counsel for the defendant disagreed with the way the issue was framed, it was not disputed that it was the defendant who had requested that the Licence be terminated and that CAAS had acceded to the defendant's request.

8 Counsel for the plaintiff maintained that the defendant was not entitled to terminate the Agreement because Clause 9.3 did not apply to a situation where the licence was voluntarily terminated by the holder of the licence itself.

9 Counsel for the defendant contended that Clause 9.3 was not concerned with the reasons why or the circumstances in which the licence was cancelled. It was argued that Clause 9.3 was an "exit" clause that gave either party the right to terminate the Agreement unilaterally.

10 I accepted the plaintiff's interpretation of Clause 9.3 as correct. I also agreed that the Licence was, in substance voluntarily terminated by the defendant. Therefore, I ordered that the defendant pay damages for breach of the Agreement, and that the damages, if any, be assessed by the Registrar. I now set out the reasons for my decision.

The law

11 The law in the area of the interpretation and construction of contracts has received a fair bit of attention lately, and was comprehensively examined in the recent Court of Appeal decision of *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 ("*Zurich Insurance*").

12 As both parties urged this court to consider the surrounding circumstances and the object of the Agreement to advance their respective interpretations of Clause 9.3, it is necessary for me to set out the law in Singapore regarding the admissibility of extrinsic evidence when interpreting and construing contractual documents.

13 The Court of Appeal summarised the contextual approach to extrinsic evidence (*Zurich Insurance* at [132]):

> 132 To summarise, the approach adopted in Singapore to the admissibility of extrinsic evidence to affect written contracts is a pragmatic and principled one. The main features of this approach are as follows:
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> (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 [50] 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).

The requirements for admissibility of extrinsic evidence

14 The parol evidence rule lives on in s 94 of the *Evidence Act* (Cap 97, 1997 Rev Ed). However, the parol evidence rule only operates where the contract was intended by the parties to contain all the terms of the contract. If the contract is one to which the parol evidence applies, then no extrinsic evidence is admissible to contradict, vary, add to or subtract from a contract (*Zurich Insurance* at [111] –[113]).

15 Notwithstanding the parol evidence rule, extrinsic evidence may still be admissible for the purpose of *interpreting* a contract (*Zurich Insurance* at [122]):

> 122 One qualification to our endorsement of the contextual approach, must, however, be made. *In the light of the continued robustness of the parol evidence rule in our law, the courts must remain ever vigilant to ensure that, in interpreting a contract, extrinsic evidence is only employed to illuminate the contractual language and not as a pretext to contradict or vary it*. The courts are allowed to depart from the plain and ordinary meaning of the contract to some extent. The very recognition that surrounding circumstances may create ambiguity about the language used in a contract involves acceptance that words do not have fixed and clearly delineated meanings. Rather, words are sometimes penumbral; the context of the contract breaks down the rigidly-defined boundaries of meaning, introduces hues and shades, and defines the contours and limits of the penumbra. Thus, even in its ostensibly conservative reasoning in *Citicorp Investment Bank (Singapore)* ([82] *supra*), the Court of Appeal only required that the meaning imputed by the court be one which "the words are reasonably adequate to convey" (*id* at [63] (see the passage quoted at [83] above)). The question of whether this restriction has been breached is one of degree.
>
> [emphasis added]

16 *Zurich Insurance* is significant in its pronouncement that there is no absolute rule that excludes extrinsic evidence from being admissible for the purpose of interpreting a contract. Crucially, ambiguity is no longer a prerequisite for admitting extrinsic evidence to assist the courts in construing contractual documents. There are still, however, a number of hurdles for the party that seeks to admit extrinsic evidence for the court's consideration.

17 The first requirement is that the evidence must be relevant. Secondly, the evidence must have been reasonably available to all the contracting parties (*Zurich Insurance* at [125]):

> 125 Turning to the first issue, we endorse Lord Hoffmann's view that extrinsic material is admissible if:
>
> (a) it is relevant – ie, it would affect the way in which the language of the document would have been understood by a reasonable man (see *BCCI v Ali* ([57] supra) at [39] (reproduced at [57] above)); and
>
> (b) it was reasonably available to all the contracting parties (see *Investors Compensation Scheme* ([56] supra) at 912 (reproduced at [56] above)).
>
> Such material is not confined to conventional empirical facts (such as the existence of an object or the occurrence of an event), but can include the state of the law, as in cases in which the court takes into account that parties are unlikely to have intended to agree to something which is unlawful or legally ineffective (see *BCCI v Ali* at [39]). However, it must always be borne in mind that the purpose of interpretation is to give effect to the intention of the parties as objectively ascertained. Objective ascertainment of the parties' intentions (known as "the

objective principle") is the cornerstone of the theory of contract and permeates our entire approach to contractual interpretation.

Relevance

18 First, the evidence must be relevant to determining the context of the contract. In *Bank of Credit and Commerce International SA v Ali* [2002] AC 251 Lord Hoffmann clarified that (at [39]):

> I should in passing say that when, in *Investors Compensation Scheme Ltd v West Bromwich Building Society, [1998]* 1 WLR 896, 913, I said that the admissible background included 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man', I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as *relevant*.
>
> [emphasis in original]

19 The test of relevancy is an objective one that asks whether a reasonable man would have regarded the extrinsic evidence as relevant to determining the context of the contract. In applying the test of relevance, the courts are, in effect, being more sensitive to all available material that might assist the court in arriving at the correct interpretation of the contract.

Reasonably available to all parties

20 The second requirement is a straightforward one. The extrinsic evidence that is being relied on must have been reasonably available to all the contracting parties. Actual knowledge is irrelevant as this is an objective inquiry.

Relates to a clear or obvious context

21 Additionally, in *Zurich Insurance*, the Court of Appeal added a threshold requirement and cited its earlier decision of *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR 891 ("*Sandar Aung*") with approval (at [128]-[129]):

> 128 Crucially, the context of the contract must be clear or obvious. This was emphasised in *Sandar Aung* ([105] *supra*), where the court stated (at [29]) that it would:
>
> > … go so far as to state that even 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* …
>
> The court added that (*ibid*):
>
> > It might well be the case that if a particular construction placed on the language in a given contract is inconsistent with what is the ***obvious context in which the contract was made***, then *that* construction might *not* be as clear as was initially thought and might, on the contrary, be evidence of an ambiguity.
>
> 129 We have already emphasised the importance of contractual certainty (see [111] above). In our view, the benefits of adopting, via proviso (*f*) to s 94, the contextual approach to contractual interpretation (*viz*, flexibility and accord with commercial common sense) will be maximised and its costs (*viz*, increased uncertainty and added litigation costs) minimised if, as a

threshold requirement for the court's adoption of a different interpretation from that suggested by the plain language of the contract, the context of the contract should be clear and obvious. This is not a call for a retreat to literalism. In our view, this threshold requirement to some extent addresses the central weakness of contextualism – uncertainty. It is necessary and desirable to lay down this threshold requirement in order to achieve the right balance between commercial certainty and the imperative of giving effect to the objective intentions of the contracting parties.

[emphasis in original in bold italics]

22 This means that the extrinsic evidence that is tendered before the court must point to a clear or even obvious context before the court can say with any certainty that such evidence is of assistance to the court. This makes logical sense because if the extrinsic evidence points to a context that is far from clear or obvious, then the court would be acting within the realm of speculation.

23 If the context is found to be clear and obvious, extrinsic evidence might well lead to an interpretation that is different from the construction placed on the plain language of the contract. In such circumstances, any inconsistency between the clear and obvious context and the language of the contract may be evidence of ambiguity (*Sandar Aung* at [29], cited in *Zurich Insurance* at [106]).

The objective principle

24 The objective approach is employed throughout the entire process in determining whether extrinsic evidence should be admissible for the purpose of ascertaining the parties' intentions (*Zurich Insurance* at [125]):

> Objective ascertainment of the parties' intentions (known as "the objective principle") is the cornerstone of the theory of contract and permeates our entire approach to contractual interpretation.

Relevance of canons of construction

25 The usual canons and techniques of contractual interpretation have been endorsed and continue to be relevant in Singapore. The Court of Appeal endorsed the summary of principles from Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2007) ("*McMeel*") (*Zurich Insurance* at [131]). The principles relevant to this case are reproduced here:

> *The aim of construction*
>
> First, the aim of the exercise of construction of a contract or other document is to ascertain the meaning which it would convey to a reasonable business person.
>
> ***The objective principle***
>
> Secondly, the *objective principle* is therefore critical in defining the approach the courts will take. They are concerned usually with the expressed intentions of a person, not his or her actual intentions. The standpoint adopted is that of a reasonable reader.
>
> ***The holistic or 'whole contract' approach***

Thirdly, the exercise is one based on the *whole contract* or an *holistic approach*. Courts are not excessively focused upon a particular word, phrase, sentence, or clause. Rather the emphasis is on the document or utterance as a whole.

The contextual dimension

Fourthly, the exercise in construction is informed by the *surrounding circumstances* or *external context*. Modern judges are prepared to look beyond the four corners of a document, or the bare words of an utterance. It is permissible to have regard to the *legal, regulatory, and factual matrix* which constitutes the background in which the document was drafted or the utterance was made.

Business purpose

Fifthly, within this framework due consideration is given to the *commercial purpose* of the transaction or provision. The courts have regard to the overall purpose of the parties with respect to a particular transaction, or more narrowly the reason why a particular obligation was undertaken.

…

Avoiding unreasonable results

Eighthly, a construction which leads to very unreasonable results is to be avoided unless it is required by clear words and there is no other tenable construction.

…

[emphasis in original]

Construction of Clause 9.3

26 The defendant argued that because its Licence was issued by CAAS, only CAAS had the authority to cancel its Licence. Thus, when read literally, Clause 9.3 gave the defendant the right to serve notice within 24 hours to terminate the Agreement because the Licence *was in fact cancelled* by CAAS. The defendant suggested that the proper interpretation to be placed on Clause 9.3 was that the clause was not concerned with the reasons why the Licence was cancelled. It claimed that Clause 9.3 was, in effect, an "exit" clause that allowed a party who could no longer continue its operations in Singapore to prematurely terminate the Agreement by giving notice of at least 24 hours.

27 To support its argument, the defendant submitted that both the plaintiff and the defendant were new companies and faced "various uncertainties and imponderables". Therefore, it made good business sense to include an exit clause that allowed either party to prematurely terminate the Agreement if it turned out that it would be unprofitable to continue with the Agreement. I was unable to accept this argument. First, the plain and ordinary language of Clause 9.3 itself did not lend itself to being read as an exit clause. Also, it must be recalled that extrinsic evidence must be relevant, reasonably available to both parties, and point to a context that is clear or obvious (see [22] – [24] above).

28 In *Zurich Insurance*, the Court of Appeal held that the correspondence between two insurance agents ("Lee" was procuring insurance on behalf of the respondent and "Long" was under the

employment of the appellant) was not precise enough to point to a clear or obvious context. Therefore, the Court of Appeal held that it was legally impermissible for the High Court judge to have taken that correspondence into account in determining what the insurance policy in question covered. The Court of Appeal's reasons, found in paras [135] and [139] of the judgment, are as follows:

> 135 Even if we accept that the Judge was relying on proviso (*f*) to s 94 and applying the contextual approach to interpretation, he ought not to have referred to the context of the Policy as that context was not clear or obvious. *There is a patent lack of clarity as to what precisely was communicated between Lee and Long*. As mentioned above (at [14]), Lee averred that he had contacted Long to ask if AIG could provide "the kind of insurance coverage required by [B-Gold]" and Long had replied in the affirmative. *There is no evidence as to what details Lee gave of the "kind of insurance coverage" required, or, indeed, whether he gave any details at all*. As it turned out, Lee later requested specifically for insurance cover in respect of "Contractor All Risks" and "Public Liability" (see the Undated Note (reproduced at [15] above)). It is unclear to us why and how he decided to make this request, given that the Contract did not specifically require B-Gold to obtain a CAR policy (see [10] and [16] above).
>
> …
>
> 139 *Accordingly, we conclude that the context of the Policy was not clear or obvious, given the obscurity surrounding the exact communications which took place between Lee and Long, as well as the circumstances under which Lee decided to request for and/or under which Zurich Insurance decided to provide a CAR policy specifically*. Even if the Judge had managed to cross the hurdle posed by s 94 of the Act, he would have run afoul of the requirements of the contextual approach as elucidated above (at [125]–[129]). As such, it was plainly legally impermissible for the Judge to allow the genesis of the Policy to affect his interpretation of that policy.
>
> [emphasis added]

29 Similarly, the defendant was unable to point to any evidence or circumstance that would objectively show that both parties were concerned with preserving an exit clause that allowed either one of them to unilaterally escape from a bad bargain. The defendant could not show any supporting evidence that the parties had intended specifically for Clause 9.3 to address that alleged concern. Contrary to the defendant's argument, it might even be possible for one to counter-argue that, as new companies, both parties would have been interested in securing a long-term relationship in an attempt to reduce the inherent uncertainties in the market. The mere fact that both parties were new companies when they entered into the Agreement was not sufficient, in itself, to point to a clear or obvious context that would allow it to be taken into account as part of the relevant background matrix.

30 It was argued by the plaintiff that because of the scale and complexity of ground handling services and the significant costs involved in switching service providers, it would have been unthinkable for them to have agreed to an exit clause. In fact, the plaintiff was able to point towards the Agreement itself to find support that both parties had intended to contract on a long-term basis. The law is clear that the courts will construe a contract as a whole document. The Court of Appeal emphasised this in *Travista Development Ltd v Tan Kim Swee Augustine* [2008] 2 SLR 474 (at [20]):

> 20 The law on documentary construction is clear. *It is an established principle of documentary interpretation that a clause must not be considered in isolation, but must instead be considered in the context of the whole document* (see Kim Lewison, *The Interpretation of Contracts* (Sweet

& Maxwell, 3rd Ed, 2004) ("*Lewison*") at para 7.02, p 193). In addition, in construing a contract, all parts of it must be given effect where possible and no part of it should be treated as inoperative or surplus. This means, as explained in *Lewison* at para 7.03, p 198, that, in general, "each part of the document is taken to have been deliberately inserted, having regard to all the other parts of the document, with the result that there is a presumption against redundant words". The courts should not adopt an interpretation of a contract which would render the language of a particular clause redundant.

[emphasis added]

31 Clause 9.1 of the Agreement ("Clause 9.1") expressly provided for a five-year term for the Agreement subject to a probation period for the first six months. During the six-month probation period, the plaintiff would have had the right to terminate the Agreement by giving two months' notice if the defendant's performance was deemed to be in material breach of the Agreement and if the plaintiff could demonstrate evidence that it made reasonable efforts to resolve the problems in good faith. Clause 9.1 reads:

9.1 This Agreement shall come into effect on 26th March 2006 and continue for a period of 5 (five) years until 25th March 2011. There shall be a 6-month probation period with a fair, objective and transparent review based on reasonable assessment criteria at the end of the probation period. If, within the probation period, the Handling Company's performance is deemed to be in material breach with the provisions of this Agreement, then Tiger shall have the right to terminate this Agreement prematurely by giving 2 months' written notice. Such notice must be given by Tiger latest 4 weeks following the expiration of the probation period. In order to be eligible for a premature termination, Tiger must, at the very minimum, demonstrate a paper trail evidencing reasonable efforts to work out any Service shortcomings to the attention of the Handling Company, which shall immediately take all reasonable efforts to correct such problems and inform Tiger where rectification has been effected. If the Handling Company fails to provide a consistently satisfactory level of service by failing to meet repeatedly the agreed standards, then Tiger shall be entitled, in accordance with the provisions of this paragraph, to give notice by latest 4 weeks following the expiration of the probation period.

32 Clause 9.1 clearly worked against the defendant's argument that there was an intention to preserve an exit clause. Since it listed, in detail, the events that were required to have transpired before the right to terminate could arise during the probation period. First, the defendant would have to be in *material* breach of the Agreement. The parties were then required to attempt to resolve any problems in good faith. Finally, the Agreement could only be terminated by serving two months' written notice. All these requirements in Clause 9.1 were inconsistent with the idea that Clause 9.3 would operate as a unilateral exit clause. The probation period would be completely unnecessary if the parties could unilaterally terminate the Agreement by serving notice within 24 hours.

33 Clause 9.2 of the Agreement set out the other situations in which the Agreement could be terminated:

9.2 Either party (the "innocent party") may terminate this Agreement immediately on written notice to the other party upon any of the following events occurring:

9.2.1 the other party becomes insolvent, compounds with its creditors or shall have distress or execution levied upon its property or is wound up or goes into liquidation (except for the purposes of a bona fide reconstruction) or shall have a receiver, administrative receiver or administrator appointed for the whole or any part of its assets or shall suffer the appointment of any similar

officer; or

9.2.2 the other party fails to observe or perform any of its obligations under this Agreement and/or its schedules, and fails to remedy such breach (if such breach is capable of remedy) within 30 days of the innocent party giving written notice requiring such remedy; or

9.2.3 if an Event of Force Majeure prevents either of them from performing its obligations, or any part thereof, under this Agreement for a consecutive period of 20 days or for 30 days aggregate in any 12 month period.

Again, it would have been unnecessary to list the circumstances that gave rise to a right to terminate if Clause 9.3 was truly an exit clause that was indifferent as to the reasons for termination.

34 The recitals of the Agreement also accorded with the plaintiff's submission that the business purpose of the Agreement was to secure a long-term relationship:

…

(C) Tiger and Handling Company wish to commit to *an open and transparent long-term relationship at Changi Airport*. The Handling Company commits to continued transparency with Tiger regarding operational cost information and sharing of information between the two parties. The Handling Company acknowledges Tiger's decision that it will actively manage Tiger's handling activities at Changi Airport and act as Tiger's representative and take managerial responsibility for all aspects of airport, aircraft, passenger and ground handling matters in accordance with this Agreement.

[emphasis added]

While recitals do not impose legal obligations on the parties, they can often be of assistance to the courts in the construction of contractual terms. *McMeel* explains that (at para 4.25):

The recitals have some role to play in the construction of the operative provisions of the deed or contract. They are an obvious source of readily accessible 'background' or 'factual matrix'.

It was also stated in the Court of Appeal decision of *Management Corporation Strata Title Plan No 1933 v Liang Huat Aluminium Ltd* [2001] 3 SLR 253 (at [7]):

… First, a recital in an instrument can only assist in the construction of the substantive terms thereof; it cannot override or control the operation of the substantive terms, where such terms are clear and unambiguous. In *Walsh v Trevanion* [1850] 15 QB 733 at 751, Patteson J laid down the following rule of construction on the recital in relation to the operative part of a deed:

> [W]hen the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the deed. On the other hand, when those words are of doubtful meaning, the recitals and other parts of the deed may be used as a test to discover the intention of the parties, and to fix the true meaning of those words.

…

35 Construing the Agreement as a whole and reading Clauses 9.1 to 9.3 together with the recitals,

I found that it was a reasonable interpretation that the defendant and the plaintiff had intended to contract for a fixed term of five years subject only to the satisfactory performance of the defendant within the first six months and the occurrence of the specific events listed in Clauses 9.2 and 9.3 (insolvency, force majeure, breach of the Agreement, and cancellation of licence by the relevant authority). This interpretation was consistent with the business purpose of the Agreement to create a long-term relationship between the parties. I found nothing in the evidence that could have led to any other conclusion. The defendant's argument that Clause 9.3 was an exit clause was patently unsustainable. Once the defendant had asked for the cancellation of its own Licence, the defendant could not rely on Clause 9.3 because it could not have been reasonably intended by the parties for Clause 9.3 to apply in such an event.

36 The defendant argued that the plaintiff's interpretation was illogical. Its argument was that if Clause 9.3 gave rise to a right to terminate the Agreement in the event that the Licence was cancelled by CAAS due to the defendant's misconduct or breach of the GHSA, then similarly, it ought to give rise to the same right if the defendant voluntarily terminated the Licence. This was because, defendant contended, a cancellation of the Licence due to misconduct or breach would be analogous to a cancellation due to voluntary termination. In both situations, the defendant's own conduct would be the reason why the Licence was cancelled.

37 The defendant submitted that Clause 9.3 should be interpreted to allow the defendant to terminate the Agreement for voluntary termination of the Licence as well as for situations where the Licence was cancelled due to the defendant's own misconduct or breach. I found this interpretation to be inconsistent with the business purpose of the Agreement which was to preserve a long-term relationship.

38 Further support to the interpretation I adopted was given by Clause 2.1 which reads:

> Clause 2.1 General
>
> *The Services shall be performed by the Handling Company in accordance with all mandatory rules, regulations, and procedures*. Both Tiger and Handling Company acknowledge their mutual aim to co-operate in developing a partnership approach to their mutual benefit. To that the end they agree to consult each other on a regular and on going basis to facilitate long term planning of such a relationship in terms of flights and destinations. The Handling Company shall, to the extent covered by this agreement, perform effective management of Tiger's third party suppliers concerned with Turnround.
>
> …
>
> [emphasis added]

Clearly, this clause envisaged the need for the defendant to perform its obligations in accordance with all mandatory rules, regulations, and procedures. Any breach or misconduct on the defendant's part that resulted in its Licence being cancelled might very well result in a breach of Clause 2.1 by the defendant. The defendant's interpretation would render clauses like Clause 2.1 completely superfluous. I thought that it was unlikely that parties would contract on the basis that a licence holder would be entitled to escape its part of the bargain through misconduct or by being in deliberate breach of its licensing requirements. Nevertheless, the issue of misconduct or breach of the GHSA did not arise on the facts. It is sufficient for me to say that Clause 9.3 did not entitle the defendant to voluntarily terminate its Licence.

Conclusion

39 In summary, I found in favour of the plaintiff's interpretation of the Agreement and held that the defendant was not entitled to terminate the Agreement pursuant to Clause 9.3.

40 Following that, I ordered the defendant to pay the plaintiff damages, if any, for breach of the terms of the Agreement and for such damages to be assessed. I also ordered costs for the plaintiffs, fixed at $5,000 plus reasonable disbursements.

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