

Universal Express LLC v Jupiter Air Ltd and Another
[2002] SGHC 32

Case Number : Suit 1078/2000
Decision Date : 22 February 2002
Tribunal/Court : High Court
Coram : S Rajendran J
Counsel Name(s) : Deborah Barker SC, Audrey Chiang and Thomas Koshy (Khattar Wong & Pnrs) for the plaintiffs; Stephen Soh and Adeline James (Arthur Loke Bernard Rada & Lee) for both defendants
Parties : Universal Express LLC — Jupiter Air Ltd; Jupiter Singapore Pte Ltd

Judgment

GROUNDS OF DECISION

1. The plaintiff, Universal Express LLC ("Universal") is a company incorporated in the United Arab Emirates. Universal provides courier services. The person who controls Universal is one Brian Wilkie ("Brian"). IFC Dispatch India Pte Ltd ("IFC") is a company incorporated in India. It is also in the courier business and is a close business ally of Universal. The principal person behind IFC is one Pradeep Rege ("Pradeep"). Brian and Pradeep together own a Singapore incorporated company called Universal Courier Express Pte Ltd ("Universal Singapore") which is also in the courier business. As there was close business collaboration between Brian and Pradeep, I will refer to these companies as the "Universal Group".
2. The 1st defendant, Jupiter Air Ltd ("Jupiter Air") is a company incorporate in Hong Kong. Jupiter Air is also involved in providing courier services but on a scale much larger than the Universal Group. The 2nd defendant, Jupiter Singapore Pte Ltd ("Jupiter Singapore") is a wholly-owned subsidiary of Jupiter Air. A subsidiary of Jupiter Air that features in this case is Jupiter Air (UK) Ltd ("Jupiter UK"). I will refer to these companies as the "Jupiter Companies". The principal persons representing the Jupiter companies in these proceedings were Sunny Leung ("Leung") and Jonathan Hearne ("Jonathan").
3. All the companies named above provide wholesale on-board courier services from airport-to-airport ("OBC services") to international courier giants like DHL, TNT, UPS and Federal Express Inc. OBC services involve the use of either full time staff or recruited members of the public travelling on designated airlines accompanying the documents/goods being couriered.
4. Representatives of the Jupiter companies and the Universal Group met in London in June 1995 and again in Singapore in July 1995 to explore the possibility of collaborating and co-operating with each other in the OBC services. At the conclusion of the Singapore meeting, a Memorandum of Understanding ("MOU") was prepared by Pradeep on behalf of the Universal Group and given to the other party for signature. The Memorandum made provision for the signatures of four persons to appear thereon, namely, that of Jonathan and Leung on the one part and Pradeep and Brian for the other.
5. In these proceedings, Jupiter Air and Jupiter Singapore denied being bound by the MOU on the grounds that, after Jonathan and Leung had signed, a copy bearing the signatures of Pradeep and Brian had not been returned to them. I saw no merit in this argument. Jonathan and Leung, by signing the document prepared by Pradeep, were clearly accepting that the document accurately reflected

the terms that had been agreed. Further, there was evidence from Pradeep and Brian, which I accepted, that a fully signed copy of the MOU was in fact sent to Jonathan.

6. The MOU stated that it was an agreement made between Jupiter Air and its associated companies/partners, FB On Board Express of Canada, Micom America Inc of USA and Esquire Express India Pvt Ltd of India ("Esquire") on the one hand (referred to collectively as the "Jupiter Group") and the Universal Group on the other. The MOU itself stated that it was binding on the parties thereto as well as, inter alia, their "successors and their subsidiaries/allied companies".

7. Under the MOU, the Jupiter Group was to operate as the exclusive partner of the Universal Group in Europe, United States of America and Canada while the Universal Group would operate as the exclusive partner of the Jupiter Group in the Middle East and in the Indian Sub-Continent. The *raison d'être* for the MOU appears to have been –

(a) the avoidance of competition with each other in the geographical areas mentioned above in which each had established its stronghold; and

(b) collaboration between them in the running of OBC services.

The MOU spelt out the circumstances in which it may be terminated. Apart from providing for cancellation by reason of bankruptcy or breaches of the MOU, cl 8(d) of the MOU stipulated that the MOU may not be cancelled by either party except with six months' written and receipted notice. This last provision was no doubt intended to apply to a situation where a party sought to terminate the MOU without relying on any breach/breaches of the MOU.

8. Amongst the matters on which co-operation was envisaged in the MOU was the participation by both groups on a 50:50 cost-sharing basis in OBC routes. Except in respect of the Madras/Singapore route which involved Esquire, the MOU did not spell out the routes in which there was to be this joint participation; the parties, however, subsequently commenced joint OBC services in respect of the New York/Delhi, Delhi/London and Bombay/London routes. Although the MOU provided for cost-sharing on a 50:50 basis, the parties, by mutual agreement, from time to time varied their proportionate contributions in respect of the routes.

9. By January 1996, the parties found that the New York/Delhi and the Delhi/London joint OBC services were not profitable. By mutual agreement these two services were suspended. Towards the end of 1996, Jupiter UK also found the Bombay/London route unprofitable. At a meeting in London between Jonathan and Pradeep in December 1996, it was mutually agreed that Jupiter UK would not participate in the operation of this route and that the Universal Group was free to continue operating the Bombay/London route on its own. This agreement was put into effect in early 1997.

10. In his affidavit evidence-in-chief, Jonathan had stated that during the December 1996 discussion with Pradeep he had expressed his concern about the need to give six months' notice in order for Jupiter UK to withdraw from the Bombay/London route but Pradeep had told him that that would not be necessary. In re-examination however, Jonathan, for the first time, claimed that at the December 1996 meeting he had spoken to Pradeep about the need to give six months' notice in order to terminate the MOU and Pradeep had told him that that such notice would not be necessary. It was submitted by Mr Stephen Soh, counsel for the Jupiter companies, that formal notice of termination under cl 8(d) of the MOU was not given to the Universal Group because of this assurance by Pradeep.

11. I accepted the submission of Ms Deborah Barker, counsel for Universal, that this evidence of Jonathan, given for the first time in re-examination, was highly suspect. It was also not a pleaded

defence that Universal had waived the requirement in the MOU to give six months' notice in writing for the termination of the MOU. I accepted the evidence of Pradeep that Jonathan had not, at any time, told him that the Jupiter Group wished to terminate the MOU or that he had, at any time, agreed to waive the six months' written notice required under the MOU for such termination.

12. In its Amended Defence (paragraph 8.5), Jupiter Air took the position that the MOU was intended to be for the financial benefit of both parties via the operation of cost-sharing arrangements over specific routes and as the three routes were the only cost-sharing routes established and as all the cost-sharing arrangements in respect of the three routes had been terminated by early 1997, the MOU was treated by both groups as terminated. In support of this position, the Jupiter Group relied, inter alia, on the fact that Universal appointed someone other than Jupiter UK, namely, a company known as Asia Pacific Ltd, as its London agent in the Bombay/London operation. It was submitted that this appointment would – if the MOU was in force – constitute a breach of the MOU and was evidence that the parties had mutually agreed to abandon the MOU.

13. It was not disputed that for Universal to operate the Bombay/London route, Universal would need the services of a London agent. Jonathan, in re-examination, in fact confirmed that it would not be possible to operate that route without such an agent. The scenario prevailing at that time was that Jupiter UK did not wish to participate anymore in the Bombay/London route and was quite content to let Universal operate that route on its own. As it was not disputed that Universal would need the services of a London agent to operate that route and as Jupiter UK had not offered to be that London agent, I found that Jupiter UK had agreed, at least implicitly, that Universal could operate the Bombay/London route with someone else as its London agent. If, at that time, Jupiter UK had considered the appointment of Asia Pacific Ltd to be a breach of the MOU, or if for any other reason the Jupiter Group wished to terminate the MOU, steps should have been taken to terminate the MOU under cl 8 either by reason of that breach or by giving six months' written notice of termination. This was not done.

14. Mr Soh, in his closing submissions, submitted that both aspects of the MOU – the joint operation of OBC routes and the non-competition clauses – were both fundamental to the MOU. He argued, however (paragraphs 11 and 20 of his submissions) that both these aspects were so interlinked that if one ceased to apply then – at least implicitly – it was intended that the other would similarly cease to apply.

15. I could not accept that submission. The suspension of the two routes and the withdrawal of Jupiter UK from the third route did not preclude the parties from again jointly operating these or some other routes. The cessation of the joint operation of the three routes could not, by itself, give rise to any inference that the parties had, by mutual agreement, decided to treat the MOU as cancelled. Unless there was sufficient evidence (by conduct or otherwise) of a mutual agreement to abandon the MOU or unless the MOU had been terminated under cl 8, the MOU would continue to bind. The non-competition aspect of the MOU was an important protection for both parties and I could see no reason why, if the parties did not for a period operate any joint OBC services, the MOU should not continue to be in force.

16. Mr Soh, in his closing submission, highlighted in great detail various other instances of non-compliance with the MOU which he submitted went towards showing that the parties had mutually agreed to treat the MOU as terminated. I will not go through these instances in detail. Even if it be that in some of these instances Universal had breached its obligations, it again does not necessarily follow that the parties had by conduct abandoned the MOU. I was not satisfied that the alleged breaches, either alone or taken together, were sufficient for me to arrive at the conclusion that the parties had mutually agreed to treat the MOU as cancelled.

17. In early 2000, Jupiter Air, in association with an Indian company known as Global Aviation Services Pvt Ltd ("Global") formed a 50:50 joint venture company in India called Jupiter Air India Pte Ltd ("Jupiter India"). The Managing Director and principal shareholder of Global was one Vithalani. Vithalani was also appointed the Managing Director of Jupiter India. Jupiter India, in conjunction with Jupiter Singapore, then commenced OBC services between Bombay and Singapore. Jupiter India also commenced OBC services between Bombay and Dubai. It was not seriously in dispute that if the MOU was still extant these services by Jupiter Air would be a breach of the MOU.

18. In October 1999, prior to setting up Jupiter India, Leung, had met Pradeep in India. One Harold Pang ("Harold") of Qantas Airways Ltd was with Leung at that time. It was Leung's evidence (supported by Harold) that in the course of his conversation with Pradeep he told Pradeep about Jupiter Air's intention to run OBC services to and from India. According to Leung, Pradeep did not raise any objections to the proposal or make any mention of the MOU at that meeting. It was submitted, on behalf of Jupiter Air, that Pradeep's silence was evidence that the MOU between the two groups was no longer in force.

19. Pradeep, however, had a different version of that discussion. Pradeep told the court that he had heard rumours about Jupiter Air re-entering the Indian market and so, when he met Leung in December 1999, he broached the subject and reminded Leung of the existing agreement between the two groups. Pradeep's evidence was that Leung told him that Jupiter Air was only exploring general possibilities in logistics and air-cargo business in India (which were services not covered by the MOU) and, except in respect of one client, had little interest in the OBC market in India. It was Pradeep's evidence that Leung assured him that should Jupiter decide to re-enter the Indian market he would let Pradeep know.

20. A few days later, Pradeep, on IFC's letterhead, followed up that discussion with a fax (dated 25 October 1999) to Leung wherein he reminded Leung that *"in keeping with our understanding"* IFC had on many occasions rejected requests from other courier companies to operate services in direct competition with the Jupiter Group. In that fax Pradeep also referred to the need *"as was agreed to between yourself, Brian and myself nearly 4 years back"* to avoid competition between their two groups. These were obviously references to the MOU. Although Mr Soh submitted otherwise it was, in my view, implicit in these reference that the MOU was still in effect.

21. There does not appear to have been any response from Jupiter Air to the fax of 25 October 1999. If indeed Jupiter Air was of the view that the MOU had ceased to be binding, one would have expected a response to that effect. It would be relevant to note in this context that Leung, in his affidavit evidence-in-chief, took the position that there was no reference to the MOU in Pradeep's letter of 25 October 1999. Whilst this, in a strictly literal sense, was so, it was – as indicated above – quite obvious that the reference to *"our understanding"* and the reference to an agreement to avoid competition *"between yourself, Brian and myself nearly 4 years back"* were references to the MOU.

22. Pradeep's testimony as to what transpired at the meeting with Leung in October 1999, backed by Pradeep's fax of 25 October 1999, appeared to me to be a more credible version of what was discussed at the meeting than the version given by Leung and Harold.

23. Although Jupiter Air had been put on notice by the fax of 25 October 1999 that the Universal Group expected the Jupiter Group to conform to the non-competition clauses of the MOU, Jupiter Air, without reverting to Pradeep on the matter, proceeded with its joint venture plans with Global and established Jupiter India. In April 2000, Jupiter India commenced OBC services between Bombay and Singapore and in May/June 2000 it commenced similar services from Bombay to Dubai. The Bombay/Singapore service was operated in conjunction with Jupiter Singapore. That the operations of

Jupiter India would be in direct competition with the Universal Group was not in dispute. Indeed, in an e-mail sent by Leung to Vithalani soon after Jupiter India started its operations, Leung states: "*if [the Universal Group] are not hurting now, they will be very soon*".

24. Pradeep discovered that Jupiter India had entered into competition with Universal in April 2000. His evidence was that up to then he had thought – as a result of what Leung told him in December 1999 – that if the Jupiter Group entered the Indian market it would be in the provision of logistics and air-cargo services and that it would, in any event, keep Pradeep informed of its plans. He said that it came as quite a shock to him to find out that Jupiter India was providing OBC services in direct competition with Universal. The operation of such services without the consent of Universal was a breach of the MOU.

25. Pradeep and Brian thereafter called on the Jupiter Group to stop its OBC services from India. In addition, solicitors' letters to that effect – one from M/s Key & Dixon of Dubai to Sakurai, the President of Jupiter Air and two from M/s Khattar Wong & Partners to Jupiter Singapore and Jupiter Air – were sent by the Universal Group.

26. Soon after the solicitors' letters were sent, the parties (namely, Brian and Pradeep representing the Universal Group and Vithalani, Sakurai and Leung representing the Jupiter Group) met in Singapore on 19 and 20 July 2000 with a view to resolving matters amicably ("the two-day meeting"). The Universal Group's position was that it was agreed at the two-day meeting that if the Jupiter Group stopped its India operations, then the Universal Group will not proceed with its claims for breach of the MOU. The possibility of entering into a "new agreement" for mutual co-operation was also discussed and it was agreed that this would be further explored. The matters decided upon at the two-day meeting were set out in Brian's fax to Leung dated 26 July 2000. These were:

"(a) Jupiter and their associates/partners will withdraw immediately from, and not start any new, courier routes into and out of India and the Middle East.

(b) Universal/IFC and Jupiter will wherever possible combine and assist each other in related areas, though Jupiter will be free to make their own arrangements with regard to freight and logistics work.

(c) As part of a new agreement, we will explore ways to work together to exploit current and future non-linehaul opportunities in the express sector, such as airport-to-door."

The Jupiter Group admitted that as a result of discussions a settlement was reached but claimed that that settlement was not reached at the two-day meeting but was reached on 25 July 2000. It was Jupiter Air's case that on that day Leung, in a telephone call, proposed certain terms on behalf of the Jupiter Group to Pradeep which Pradeep accepted.

27. It was Leung's evidence that when he received Brian's fax on 26 July 2000 he telephoned Brian to tell him that the contents of that fax were inaccurate and that the terms of the settlement was as agreed between him and Pradeep on 25 July 2000. Leung testified that upon hearing that Brian went into a rage and told Leung that he (Brian) was the "ultimate boss" and what Pradeep said should be disregarded.

28. Leung told the court that after the conversation with Brian he sent a fax to Brian setting out the terms agreed with Pradeep. These, as stated, in Leung's fax were:

"(1) Jupiter Singapore will withdraw the OBC services to Bombay.

(2) Jupiter Singapore will be given an opportunity to explain to their customers and the withdrawal will not be later than August 14, 2000.

(3) As Jupiter Air Limited owns only 50% in Jupiter Air India Pte Limited and have no absolute control over the business of Jupiter Air India Pte Limited, we will try to request our partner there to withdraw the current OBC operations ex-Bombay as soon as possible. If we cannot do that, we will break our partnership and withdraw our holdings in Jupiter Air India Pte Limited.

(4) We will instruct our lawyer to give you a 6 months notice to terminate the disputed MOU."

Leung ended the fax with the following reservation:

"This letter and our decision on the above does not indicate our acknowledgement on our liability nor our agreement to the validity of the MOU. I am writing this only as an indication to our intention."

29. Leung followed up item (4) of his fax by instructing solicitors to give six months' notice of termination of the MOU. On 3 August 2000, the solicitors of the Jupiter Group, M/s Arthur Loke Bernard Rada & Lee gave the formal six months' notice of termination under cl 8(d) of the MOU to the Universal Group. The notice maintained the reservation in Leung's fax of 26 July 2000 referred to above.

30. It was, in my view, highly unlikely that Pradeep and Leung could, in the course of the alleged telephone conversation, have arrived at a settlement when Brian, Pradeep, Sakurai, Vithalani and Leung over a two-day meeting in Singapore could not. Having heard the testimony of the persons involved in negotiating a settlement, namely, Pradeep, Brian, Sakurai and Leung – Vithalani not having been called to testify – I accepted the evidence of Pradeep and Brian that settlement was reached between the parties at the conclusion of the two-day meeting.

31. I also accepted the position of the Universal Group that Brian's fax of 26 July 2000 reflected what was agreed at the two-day meeting, namely, that "*Jupiter and their associates/partners will withdraw immediately from ... courier routes into and out of India*". I was satisfied that all that was agreed between Pradeep and Leung on 25 July 2000 was that the said withdrawal would be effected by 14 August 2000.

32. Leung claimed that Jupiter Air was unable to procure that Jupiter Air ceased its OBC business because the joint venture partner, Global, would not agree to do so. Jupiter Air, therefore, decided to sell its 50% interest in Jupiter India. It was Jupiter Air's position that once that was done Jupiter India would no longer be an "associate/partner" of Jupiter Air and Jupiter Air would therefore have fulfilled the requirements of the settlement agreement.

33. Ms Barker submitted that this arrangement for Jupiter Air to withdraw from the joint venture agreement ("JVA") had not been envisaged at the two-day meeting – where Vithalani was present – and at which the settlement agreement was concluded. This arrangement for Jupiter Air to sell its holding in Jupiter India, she submitted, was arrived at between Leung and Vithalani after the two-day meeting. It was, she submitted, decided between them that Jupiter Air would go through the motions of selling its holding in Jupiter India to create the impression that it was complying with the

settlement and at the same time give the six months' notice of termination; thereafter Jupiter Air could openly resume its joint venture with Global in the operations of Jupiter India. It was in order to carry out this ploy, she submitted, that Leung tried in his fax of 26 July 2000 to give a different version of the settlement agreement.

34. The party to whom Jupiter Air sold its 50% interest in Jupiter India was a company called Global Airport & Ground Services Pvt Ltd ("Global Airport"): a company connected to Global. To prove that the shares had in fact been sold to Global Airport, Jupiter Air produced the correspondence relating to the sale. I would note at this stage that Vithalani – a person who knew a great deal about the discussions at the two-day meeting and who must have had first-hand knowledge of the circumstances relating to the sale of the shares – was not called as a witness.

35. Ms Barker, in her submissions, had much to say about the way in which the "sale" of the shares was effected and about the failure of Jupiter Air to call Vithalani as a witness. Jupiter Air, she submitted, not only appeared to have accepted Global Airport's offer to purchase the Jupiter Air shares without any negotiations on price and without any valuation being done but also appeared to be unconcerned about when payment for the shares was to be made. Payment, she pointed out, was made only sometime in January 2001 after solicitors for Universal started pressing Jupiter Air to show proof of payment. She also pointed out that Jupiter Air handed over signed transfer forms to Global Airport and Jupiter Air's nominees resigned as directors of Jupiter India without Jupiter Air obtaining payment or even waiting for Reserve Bank approval for the sale. The manner in which this sale was effected, she submitted, showed Jupiter Air to be an "unusually accommodating" vendor.

36. It would be relevant to note that when Jupiter Air purportedly withdrew from its joint venture with Global, no steps were taken to change the name of Jupiter India. Clause 9 of the JVA between Jupiter Air and Global provided that the name "Jupiter" would be used in the name of Jupiter India only for so long as the Jupiter Group held not less than 50% of the total issued equity shares of the company. It was provided in the JVA that in the event the shareholding of Jupiter Air was reduced, steps would immediately be taken to delete the name "Jupiter" from the company name. "Jupiter" was a name well-known in the courier industry and there was, no doubt, considerable goodwill attached to that name. The fact that Jupiter Air took no steps to enforce cl 9 of the JVA was, in my view, significant.

37. It was also significant that Leung, in an e-mail to Vithalani dated 6 January 2000, practically invited Jupiter India to continue using the Jupiter name by stating: "*I agree that the word 'Jupiter' is a generic name and can be used by others.*" No mention is made by Leung of Jupiter Air's rights under cl 9 of the JVA. Not only did Jupiter Air allow Jupiter India to continue to use the name "Jupiter" after its alleged withdrawal from Jupiter India, neither Jupiter Air nor Jupiter India made any public announcement that the Jupiter Group was withdrawing from Jupiter India. Further, the website of the Jupiter Group (until January 2001) continued to show Jupiter India as part of the Jupiter Group. And Jupiter India, to this day, continues to use not only the name "Jupiter" but also the logo of the Jupiter Group.

38. All the above factors suggest that Jupiter Air's arrangement to sell its shares in Jupiter India to Global was not a genuine arrangement. Perhaps the most eloquent confirmation of that comes from a letter dated 2 August 2000 from Global Airport – the purchasers of the shares – to Jupiter Air in which Global Airport assures Jupiter Air that Global Airport is "*confident of making a positive contribution to achieve profitability*" in Jupiter India. Such an assurance from a purchaser to a vendor is most unusual. That letter was, in my view, a clear pointer that although Jupiter Air purported to have sold all its shares in Jupiter India to Global Airport, Jupiter Air was still very much concerned with the commercial viability of Jupiter India.

39. I was satisfied on the evidence before me that the sale of the Jupiter India shares to Global Airport was not a genuine sale: I accepted the submission of Ms Barker that the sale was but a ploy for the Jupiter Group to give the appearance of complying with the settlement agreement but in reality continue the joint venture with Global in the operations of Jupiter India. In the circumstances, I was satisfied that the Jupiter Group had not carried out the terms of the settlement agreement and was consequently liable for having established OBC services from and into India in breach of the MOU.

40. This suit was instituted against Jupiter Air and Jupiter Singapore by Universal Express LLC (Dubai). The other members of the Universal Group, namely, IFC and Universal Singapore, did not join in as plaintiffs. Instead Universal, claimed damages for breach on its own behalf and also sought (in paragraph 25(3) of its Statement of Claim) to claim damages on behalf of IFC and Universal Singapore. IFC and Universal Singapore could, if they had so desired, have been co-plaintiffs in this suit. They, however, elected not to be parties. Not being parties, they would not be entitled to any relief from this court. Accordingly, I gave judgment only in respect of damages suffered by Universal in consequence of Jupiter Air and Jupiter Singapore having, through Jupiter India, having operated OBC services in breach of the MOU for the period April 2000 to 2 February 2001 – the last day of the six months' notice. The damages, as agreed between the parties at the commencement of the trial, were to be assessed by the Registrar.

41. Universal had, in these proceedings, also applied for an injunction to restrain Jupiter Air and Jupiter Singapore from operating OBC services between Singapore and any city in India until after the expiry of six months from the grant of the injunction. Universal had asked for this order on the grounds that the six months' notice ought to be given only when the Jupiter Group was not in breach of the MOU by being in direct competition.

42. The Jupiter Group were entitled, by cl 8(d) of the MOU, to bring the MOU to an end by giving six months' notice in writing. This the Jupiter Group had done. There was nothing in the MOU that precluded a party who was in breach of the MOU from giving that notice whilst the breach was continuing and I could see no good reason to imply such a term. I therefore dismissed the application for an injunction.

43. Universal in these proceedings had claimed damages for breach on behalf of itself and on behalf of IFC and Universal Singapore. Although Universal was successful in its own claim, it failed in respect of the claim made on behalf of IFC and Universal Singapore. In those circumstances, I felt that a fair order as to costs would be for Jupiter Air and Jupiter Singapore to bear 75% of Universal's costs.

Sgd:

S RAJENDRAN
Judge

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