BIG ISLAND CONSTRUCTION (HONG KONG) LTD v ABDOOLALLY EBRAHIM & CO (HONG KONG) LTD - [1994] 3 HKC 518

HIGH COURT
KAPLAN J

ACTION NO 11313 OF 1993

28 July 1994

Civil Procedure -- Summary judgment -- Lack of evidence as to alleged defects and damages -- Arguable defence to part of plaintiff's claim -- Whether appropriate case for summary judgment

Arbitration -- Stay of proceedings -- Referral of matter to arbitration -- Failure of defendant to raise dispute prior to issuing of writ -- Whether defendant disentitled from relying on arbitration clause -- Arbitration Ordinance (Cap 341) s 6(1)

By a contract, which provided, inter alia, for the resolution of any dispute or difference by means of arbitration (art 4), the plaintiff undertook to refurbish the interior and exterior of the defendant's property. The project overran beyond the contractual completion date. Although the architect issued an interim certificate to the plaintiff, the defendant refused to pay, alleging a set-off by way of liquidated damages for the plaintiff's delays in completion of the works, defects in the building works and a variation of the original contract. The plaintiff sought summary judgment for the sum due under the certificate and the defendant took a cross-summons for a stay under s 6(1) of the Arbitration Ordinance (Cap 341). The issues before the court were whether the defendant had raised an arguable defence to the whole or part of the claim and, if so, whether the proceedings should be referred to arbitration.

Held, dismissing the plaintiff's summons and allowing the defendant's cross-summons:

(1) Upon the evidence available, there was sufficient material to justify the view that there were issues between the parties and an arguable defence to at least part of the plaintiff's claim. Despite the lack of evidence on the matter of the alleged defects in construction and any accompanying loss, there was an obvious dispute as to the defendant's entitlement to liquidated damages for delay in the completion of the building works. This was therefore not an appropriate case for summary judgment

(2) There was sufficient evidence of a dispute between the parties prior to the issuing of the writ by the plaintiff to enable the matter to be referred to arbitration in accordance with art 4 of the contract in any event.

(3) The fact that a defendant had not raised a dispute prior to the issue of proceedings would not disentitle him from relying upon an arbitration clause in the contract. The modern trend is for courts to enforce the party's contractual bargain to arbitrate and it is worth noting that, in relation to international arbitrations, there is nothing in art 8 of the Model Law which would warrant the refusal of a stay merely because the terms of the dispute had not previously been articulated by the defendant. It was accepted that there has to be a dispute or difference to

trigger the operation of the arbitration clause, but that has to be decided by the court asked to grant the stay and the matter has to be decided on the evidence presented at that stage. *Peter Leung Construction Co v Tai Poon Co* [1985] 1 HKC 285 not followed.

Cases referred to

Channel Tunnel Group and France Manche SA v Balfour Beatty Construction [1993] AC 334

de Lasala v de Lasala [1979] HKLR 214

Ellerine Brothers (Pty) v Klinger [1982] 1 WLR 1375

Hayter v Nelson Home Insurance Co [1990] 2 Lloyd's Rep 265

Peter Leung Construction Co v Tai Poon Co [1985] 1 HKC 285

Legislation referred to

(HK) Arbitration Ordinance (Cap 341) s 6(1)

Other legislation referred to

Keating Building Contracts (5th Ed) p 399 fn 46

Uncitral Model Law art 8

Summons

The plaintiff issued a summons for summary judgment in this action and the defendant issued a cross-summons for a stay of this action under the provisions of s 6(1) of the Arbitration Ordinance (Cap 341). The facts appear sufficiently in the following judgment.

Adrian Bell (Vincent TK Cheung, Yap & Co) for the plaintiff.

Kevin Lewis (AB Nasir & Co) for the defendant.

KAPLAN J

I have before me two summonses: the plaintiff's summons, dated 3 January 1994, for summary judgment in this action and the defendant's cross-summons, dated 6 January 1994, for a stay of this action under the provisions of s 6(1) of the Arbitration Ordinance (Cap 341). It would appear that the defendant filed the said cross-summons prior to taking any other step in these proceedings.

The primary issues in this case are as follows:

> (a) whether the defendant has raised an arguable defence to the whole or part of the claim; and, if so,
>
> (b) whether these proceedings should be referred to arbitration under s 6 of the Arbitration Ordinance.

The proceedings arise out of a written contract entered into by the parties on 8 January 1993 (the contract), whereby the plaintiff, a company which undertakes building and construction work, agreed to refurbish the interior and exterior of the defendant's property at Abdoolally House, 20 Stanley

Street, Central, Hong Kong (the property) upon the terms and conditions set out in the contract.

Article 4 of the contract, as exhibited to the affirmation of Li Hung dated 11 January 1994, provided for the resolution of any dispute or difference between the parties by means of arbitration:

> If any dispute or difference concerning this contract shall arise between the employer or the architect on his behalf and the contractor, such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties or, failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an arbitrator, a person to be appointed on the request of either party jointly by the president or vice-president of the Hong Kong Institute of Architects and the chairman of the Hong Kong Branch of the Royal Institution of Chartered Surveyors.

In addition, the following were terms of the revised specification of works as incorporated into the said contract:

> *Programme schedule*
>
> Time is of the essence in this contract ...
>
> > 2.1 *Commencement and completion*
> >
> > The contract period for the works is 96 days and may be commenced on 18 January 1993 and shall be completed by 23 April 1993.
> >
> > 2.2 *Extension of contract period*
> >
> > If it becomes apparent that the works will not be completed by the date for completion inserted in cl 2.1 hereof (or any later date fixed in accordance with the provision of this cl 2.2) for reasons beyond the control of the contractor, then the contractor shall notify the architect who shall make, in writing, such extension of the time for completion as may be reasonable.
> >
> > 2.3 *Damages for non-completion*
> >
> > If the works are not completed by the completion date inserted in cl 2.1 hereof or by any later completion date fixed under cl 2.2 hereof, then the contractor shall pay to the employer liquidated and ascertained damages at the rate inserted in the appendix hereof per day for every day or part of a day during which the works remain uncompleted.
> >
> > 2.4 *Completion date*
> >
> > The architect shall certify the date when, in his opinion, the works have reached practical completion.
> >
> > 2.5 *Defects liability*
> >
> > Any defects, excessive shrinkage or other faults which appear within 12 months of the date of practical completion and are due to materials and/or workmanship not in accordance with the contract shall be made good by the contractor entirely at his own cost unless the architect shall otherwise instruct.
> >
> > ...
> >
> > 4.2 *Progress payments and retention*
> >
> > The architect shall value the work carried out and the materials on site upon the request of the contractor at intervals of not less than four weeks
>
> *[1994] 3 HKC 518 at 521*
>
> and upon completion of the valuation shall issue a certificate for interim payment by the employer within 14 days from the date of the certificate.
>
> *Appendix*
>
> Liquidated and ascertained damages to be assessed in the event of late completion at the rate of HK$4,000 per day.

There does not appear to be, and certainly neither counsel took me to, any provision in the contract which stated that payment of any sums allegedly due from the defendant to the plaintiff under an interim certificate was a condition precedent to the defendant's right to refer any dispute or difference to arbitration in accordance with art 4 above.

The project overran beyond the contractual completion date of 23 April 1993. It would appear to be common ground that although the architect appointed under the contract, Mr Farrance (the architect), never issued a certificate of practical completion, a state of practical completion was in fact reached on 20 July 1993, some 89 days after the said contractual completion date.

Further, it would appear to be common ground that:

> (i) the architect did not certify an extension of time to cover the period between 23 April 1993 and 20 July 1993; and
>
> (ii) the defendant accepted liquidated damages from the plaintiff as recompense for the delay in completion of the works up to 12 June 1993, but not, it would appear, for the period between 12 June 1993 and 20 July 1993.

On 19 October 1993, the architect issued interim certificate No 7, valued at 1 September 1993, for payment of the sum of HK$274,068.50 by the defendant to the plaintiff (certificate No 7).

The defendant has yet to pay the sum of HK$274,068.50 to the plaintiff.

A writ and statement of claim claiming the above sum as a contractual debt was issued on 14 December 1993.

As a preliminary point, Mr TJ Ebrahim, the defendant's full-time director, made a reference in his affirmation sworn on 18 January 1994 to alleged fraud of and/or bribery of the architect by Mr Lee Ping Ben, managing director of the plaintiff company. I was, however, told by Mr Lewis, counsel appearing for the defendant, that the explanation for these allegations provided by Mr Lee Ping Ben in his affirmation sworn on 4 February 1994 was satisfactory and accepted. I was assured that this matter was therefore not being pursued at this hearing and would not be raised again.

At the hearing before me, the defendant raised three lines of defence to the plaintiff's claim:

> (iii) a set-off by way of liquidated damages amounting to $156,000 for alleged delays in completion of the works by the plaintiff;
>
> *[1994] 3 HKC 518 at 522*
>
> (iv) a counterclaim for alleged defects in the building works and alleged claims by the tenants occupying the property arising out of the said defects;
>
> (v) finally, by dint of a variation to the original contract between the parties, the defendant asserted that it was not obliged to pay the plaintiff even in respect of certificates issued until all of the alleged defects had been repaired.

Mr Bell, counsel for the plaintiff, submitted that the defendant had not shown any arguable defence to the plaintiff's claim and that there was therefore no dispute between the parties, either prior or post the issue of the writ, such as to merit a stay of this action and a reference to arbitration.

In support of this submission, Mr Bell stated that there was no cogent evidence that the work to remedy the alleged defects in the building work had actually been carried out; that there was no cogent evidence that the tenants in the property had actually made any claims against the defendant; and that there was no evidence of a binding variation to the contract as alleged by the defendant or at all.

As to the question of liquidated damages, Mr Bell accepted that there had been a delay on the part of the plaintiff in completion of the building works. However, the plaintiff's position was that any such delay was not due to the plaintiff's default. Mr Bell took issue with the proposition that an extension of time could only be granted with the consent of the defendant, as apparently suggested by the architect.

The plaintiff's case appeared to be that the defendant should not be permitted to gain from its refusal to consent to the said extension by claiming liquidated damages for delay, especially as under the contract the defendant's consent was not required.

I found the plaintiff's position somewhat difficult to comprehend. For cl 2.2 of the contract clearly states that it is up to the architect, not the defendant, to grant an extension of time. The defendant's consent is simply not necessary. Since it would appear that the architect believes that there should be such an extension, it is unclear to me why he has not granted such an extension-- and thereby prevented the defendant from claiming liquidated damages at the contractual rate of HK$4,000 per day. The fact remains that, for whatever reason, he has not granted an extension of time.

Finally, Mr Bell submitted that this was a case in which there was no dispute between the parties at the date of the issue of writ. Accordingly, and in line with the Hong Kong Court of Appeal authority of *Peter Leung Construction Co Ltd v Tai Poon Co Ltd* [1985] 1 HKC 285 the defendant had no right to go to arbitration.

Mr Lewis, counsel for the defendant, conceded that the defendant's evidence on the existence of the alleged defects and loss flowing from the alleged defects was thin.

However, he stated that there were plainly valid disputes between the parties; firstly as to the issue of liquidated damages and secondly as to the status of certificate No 7 issued by the architect on 19 October 1993.

As to the question of liquidated damages, Mr Lewis submitted, quite rightly in my view, that it was not up to the defendant, but the architect to certify an extension of time: cl 2.2 of the contract. Since the architect had, for whatever reason, failed to grant the plaintiff the said extension of time and since time was of the essence, the defendant's claim for liquidated damages at a daily rate of HK$4,000 was entirely legitimate and bound to succeed.

As to the status of certificate No 7, Mr Lewis submitted that it was unclear whether it was an interim certificate (as was printed on the certificate itself) or a provisional or final certificate. I was referred to documentation which showed that there had been some confusion in the architect's mind as to the nature of the said certificate. Accordingly, Mr Lewis submitted, this was an issue fit to go to arbitration.

Mr Lewis finally submitted that, were the authority of *Peter Leung Construction* to be binding on this court, the evidence before the court nevertheless clearly demonstrated that there was a dispute between the parties prior to the issue of the writ. Reference was made to minutes of site meetings throughout 1993 and to certain correspondence which, Mr Lewis said, demonstrated that there was clear differences between the parties as to the quality of the works being carried out by the plaintiff prior to 14 December 1993, when the writ was issued.

In my judgment, and upon the evidence available to me, there is sufficient material to justify the view that there are issues between the parties and an arguable defence to at least part of the plaintiff's claim. Despite the lack of evidence on the matter of the alleged defects in construction and any accompanying loss, there is an obvious dispute as to the defendant's entitlement to liquidated damages for delay in the completion of the building works. This is therefore not an appropriate case for summary judgment and I exercise my discretion to dismiss the plaintiff's summons.

The issue whether these proceedings should be stayed under the provisions of s 6(1) of the Arbitration Ordinance (Cap 341) is more complex.

I have given the matter careful consideration and I have come to the conclusion that I am satisfied that Mr Lewis is correct and that there is sufficient evidence of a dispute between the parties prior to the issuing of the writ by the plaintiff on 14 December 1993 to enable the matter to be referred to arbitration in accordance with art 4 of the contract in any event. This case does not therefore come within the principles expounded by the Hong Kong Court of Appeal in *Peter Leung Construction Co Ltd v Tai Poon Co Ltd* [1985] 1 HKC 285 as cited to me by Mr Bell, namely, that

> a case will only be suitable for reference to arbitration when there is a dispute between the parties at the date of the issue of the writ.

If, however, I am wrong on this, then it falls to me to address the authority of *Peter Leung Construction*.

I was helpfully referred by Mr Lewis to footnote No 46 at p 399 of *Keating on Building Contracts* (5th Ed) which suggested that the case of *Peter Leung Construction*was at odds with mainstream legal authority on this point.

I further note that *Peter Leung Construction*is out of line with the authority of *Hayter v Nelson Home Insurance Co* 1990 2 Lloyd 's Rep 265, as followed by myself in Hong Kong on several occasions. In essence, Saville J (as he then was) in *Hayter v Nelson* default stated that stays will only be refused where the claimant can show clearly and emphatically that the respondent has no grounds for disputing the claim. In addition, Saville J quoted, with approval, Lord Justice Templeman in *Ellerine Brothers (Pty) Ltd v Klinger* 1982 1 WLR 1375, 1383:

> There is a dispute until the defendant admits that the sum is due and payable.

Hayter v Nelson default was expressly approved of by the House of Lords in *Channel Tunnel Group and France Manche SA v Balfour Beatty Construction* default [1993] AC 334, 356 per Lord Mustill:

> In recent times, this exception to the mandatory stay has been regarded as the opposite side of the coin to the jurisdiction of the court under RSC, O 14, to give summary judgment in favour of the plaintiff where the defendant has no arguable defence. If the plaintiff to an action which the defendant has applied to stay can show that there is no defence to the claim, the court is enabled at one and the same time to refuse the defendant a stay and to give final judgment for the plaintiff. This jurisdiction ... has proved to be very useful in practice ... I believe, however, that care should be taken not to confuse a situation in which the defendant disputes the claim on grounds which the plaintiff is very unlikely indeed to overcome, with the situation in which the defendant is not really raising a dispute at all. ... I would endorse the powerful warnings against encroachment on the parties' agreement to have their commercial differences decided by their chosen tribunals, and on the international policy exemplified in the English legislation that this consent should be honoured by the courts, given by Parker LJ in *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd* default [1990] 1 WLR 153, 159, and Saville J in *Hayter v Nelson* default [1990] 2 Lloyd's Rep 265.

I am, of course, fully aware of the doctrine of stare decisis. However, I am of the view that the decision of the Hong Kong Court of Appeal in *Peter Leung Construction* default is inconsistent with the observations of Saville J in *Hayter v Nelson* default which, as can be seen from the passage quoted above, was approved by the House of Lords in the *Channel Tunnel Group* default case. Further, Lord Justice Templeman's simple test, which I have quoted above, is quite inconsistent with the defendant having to establish that in

addition to not admitting the claim, he had also specifically denied it prior to the issue of the writ. As both *Peter Leung* default and *Hayter v Nelson* default involve the same issue, namely, whether there was a dispute to go to arbitration, it appears to me that on the basis of *de Lasala v de Lasala* default[1979] HKLR 214, 220, the *Peter Leung* default decision cannot stand with the *Channel Tunnel Group* default decision which affirmed *Hayter v Nelson* default . I do not, therefore, consider that this is a decision binding upon me.

In the absence of any authority on the point, I would have no difficulty in stating that the fact that a defendant has not raised a dispute prior to the issue of proceedings would not disentitle him from relying upon an arbitration clause in the contract. The modern trend is for courts to enforce the party's contractual bargain to arbitrate and it is worth noting that, in relation to international arbitrations, there is nothing in art 8 of the Model Law which would warrant the refusal of a stay merely because the terms of the dispute had not previously been articulated by the defendant. It is accepted that there has to be a dispute or difference to trigger the operation of the arbitration clause but that has to be decided by the court asked to grant the stay and the matter has to be decided on the evidence presented at that stage.

In my judgment, this is clearly not a case where it is readily and immediately demonstrable that the defendant has no grounds at all for disputing the claim nor is it a case in which the defendant has admitted the claim -- quite the contrary.

I therefore order that these proceedings be stayed in accordance with s 6(1) of the Arbitration Ordinance (Cap 341).

As a final point, if the issues in this case are as straightforward as Mr Bell submits, then, once the case has gone to arbitration, the plaintiff can of course invite the arbitrator to consider making an interim award against the defendant.

I propose to make a costs order nisi in favour of the defendant on both the plaintiff's summons for summary judgment and the defendant's summons for a stay of this action.