CANNONWAY CONSULTANTS LTD v KENWORTH ENGINEERING LTD - [1995] 1 HKC 179

HIGH COURT
KAPLAN J

CONSTRUCTION AND ARBITRATION LIST NO 5 OF 1994

25 November 1994

Arbitration -- Champerty -- Whether doctrine of champerty applies to arbitration proceedings -- Doctrine confined to public justice system

Contract -- Champerty -- Whether law of champerty applies in Hong Kong -- Whether consultancy agreement in which claim consultant paid percentage of funds recovered champertous

Building and Construction -- Claims consultant -- Agreement to pay percentage of funds recovered -- Whether champertous

The defendant was a nominated sub-contractor of a major construction project. Being a nominated sub-contractor, the defendant could recover loss and expense caused by delay by the employer of the main contractor by way of an implied term, even though there was no express provision to cover this loss in the nominated sub-contract.

For the purpose of assessing these potential claims and progressing a final account, the defendant entered into an agreement with the plaintiff which was a claims consultant. Two weeks later, the plaintiff submitted to the defendant a detailed claim for additional payments arising from the subcontract on the project. Moreover, the plaintiff advised the defendant to serve a notice of arbitration on the main contractor to preserve the limitation position and to enter into a cooperation agreement with it so that the defendant could recover its claims through the main contractor and not from an arbitration with it.

Pursuant to the agreement, the plaintiff claimed for a sum which it was entitled as a result of the submission of claim. The defendant resisted the claim by alleging that the agreement was void for being champertous. The plaintiff issued a writ and a summons under O 14 and O 14A of the Rules of the Supreme Court.

The issues to be determined were whether the law of champerty applied in Hong Kong and whether it applied when the proceedings envisaged were arbitration proceedings and not litigation. If the first two questions were answered in the positive, the last issue would then be whether the consultancy agreement was champertous. Another issue to be resolved was whether the sum claimed was actually due.

Held, granting summary judgment for the plaintiff:

(1) The law of champerty was introduced in the Middle Ages to curb the activities of powerful noblemen at a time when the judiciary were far from independent and predictable. Such factors had never applied in Hong Kong. In practice, the doctrine nowadays manifested in two forms: as a rule of professional conduct which forbids a solicitor from accepting a conditional fee and as the ground to deny recognition to the assignment of a bare right of action. *Giles v Thompson* 1993 3 All ER 321 considered.

(2) The law of champerty did apply in Hong Kong. If it was part of the law of England that it was contrary to public policy to assign a bare right of action, it could not be said, in the light of s 3 of the Application of English Law Ordinance (Cap 88), that the circumstances of Hong Kong made such a rule inapplicable. Since the doctrine was still being applied in England, it would not be in

the interests of the development of the law in Hong Kong for it to throw up a different result on identical facts to which would be arrived at in England. *Grovewood Holdings Plc v James Capel & Co Ltd* 1994 4 All ER 417 referred to. *Ram Coomar Coondoo v Chunder Canto Mookerjee* 1876 2 AC 186 distinguished.

(3) In the light of the history of champerty, it was not appropriate to extend the doctrine from public justice to a private consensual system, that is, arbitration, especially when faced with the diminution of the role of the court in relation to arbitration and the introduction of the UNCITRAL Model Law which gave supremacy to the doctrine of full party autonomy. Parties chose arbitration to keep out of the public justice system save where some support for the arbitral process was required from the courts.Therefore, the doctrine of champerty did not apply to arbitration proceedings and was confined to agreements about the conduct of litigation.*Giles v Thompson* 1993 3 All ER 321 per Steyn LJ at 331-2 (obita) and *Picton Jones & Co v Arcadia Developments* 1989 3 EG 85 referred to.

(4) Moreover, in Hong Kong, many arbitrations had an international dimension and to subject international parties to a rule of law which was not applicable in many other jurisdictions would be to make Hong Kong a less desirable venue for international arbitration.

(5) Owing to the complexity of construction contracts, it was very common to engage claims consultants and to pay them on a percentage of the amount recovered. However, such practice had not caused abuses. Most claims consultants were members of professional bodies and would be subjected to disciplinary proceedings were any abuses really proved. Further, a claims consultant would be subject to some implied term to put forward claims honestly, in good faith and based on supportable facts. Any breach of such implied term constituted a defence to any claim for fees.

(6) In any event, the consultancy agreement was not champertous, not illegal on the grounds of public policy and was therefore enforceable. There was no warrant at all for any intervention by the court to prevent parties entering into agreements of this nature when they were arms length transactions with a proper commercial purpose with benefit to both parties and which have commonly been entered into in Hong Kong. *Giles v Thompson* 1993 3 All ER 321 applied.

(7) The argument by the defendant that no debt had arisen because no monies had yet been recovered should be rejected. A debt was a sum of money which was now payable or would become payable in the future by reason of a present obligation. The sum claimed was due. *Webb v Stenton* 1883 11 QBD 518 applied.

(9) (obiter) It is appropriate under O 14A of the Rules of the Supreme Court for more than one question to be submitted to the court.

[*Editorial note*: In *R v Wong Chuk Lam & Anor* default (unreported, 6 April 1898, to be reported in the historical volume of *Hong Kong Cases*), a case in which a solicitor was charged with an offence of champerty for seeking a contingency fee,

the Hong Kong Court of Appeal held that the law of champerty and maintenance was applicable in Hong Kong: ' ... on the 5th day of April 1843, when the Colony obtained a local Legislature, champerty and maintenance were offences against the common law of England and such common law was extended to Hong Kong by the Supreme Court Ordinance 1873, as not being inapplicable to the local circumstances of the Colony or its inhabitants': per Carrington CJ.]

Cases referred to

British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd [1908] 1 KB 1006

Giles v Thompson [1993] 3 All ER 321

Grovewood Holdings Plc v James Capel & Co Ltd [1994] 4 All ER 417

Jardine Engineering Corp Ltd & Ors v Shimizu Corp [1992] 2 HKC 271

Jeremy Pickering v Sogex Services UK Ltd 20 BLR 66

Martell v Consett Iron Co Ltd [1955] Ch 363

Picton Jones & Co v Arcadia Developments [1989] 3 EG 85

Ram Coomar Coondoo v Chunder Canto Mookerjee (1876) 2 AC 186

Trepca Mines Ltd (No 2), Re [1962] Ch 199

Webb v Stenton (1883) 11 QBD 518

Legislation referred to

(HK) Application of English Law Ordinance (Cap 88) s 3

(HK) Rules of Supreme Court O 14 & 14A

(UK) Criminal Law Act 1967 [UK] ss 13, 14

Other legislation referred to

Green Paper, Contingency Fees (January 1989, Cmnd 571)

UNCITRAL Model Law Art 1

White Paper, Legal Services: A Framework for the Future (July 1989, Cmnd 740) paras 14.3, 14.4

Application

This was an application for summary judgment under O 14 of the Rules of the Supreme Court whereby the plaintiff claimed fees owing from the defendant under a consultancy agreements entered into on 28 December 1993. The plaintiffs also applied for a determination of point of law under O 14A of the Rules of the Supreme Court. The facts appear sufficiently in the following judgment.

Peter Clayton (Herbert Smith) for the plaintiff.

Peter Graham (Kwok & Chu) for the defendant.

KAPLAN J

To the uninitiated in the law it might seem a little odd that at the end of 1994 a Hong Kong judge is being asked to decide apparently for the first time whether the law of champerty applies in Hong Kong given that this law was introduced in the Middle Ages to curb the activities of powerful noblemen at a time when the judiciary were far from independent and predictable. It is common ground that these factors no longer apply in England and have not done so for some centuries and have never applied in Hong Kong.

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The defendant seeks to meet the claim made against it by the plaintiff in this action by alleging that the agreement sued upon is void on the grounds that it is champertous.

The plaintiff is a claims consultant and the defendant is a contractor.

The defendant was a nominated sub-contractor to Aoki on the Tuen Mun Hospital Project. The Government was the employer and there were issues involved which were similar to those decided by me in *Jardine Engineering Corp Ltd & Ors v Shimizu Corp* [1992] 2 HKC 271 . In the Jardine case it was held that the nominated sub-contractors could claim for loss and expense caused by delay even though there was no express provision to cover this in the nominated sub-contract. The nominated sub-contract differed to the main contract between the Government and main contractor where time as well as loss and expense were available as remedies.

After I had ruled in the Jardine case that the nominated sub-contractors could recover loss and expense on the basis of breach of an implied term the defendant entered into an agreement with the plaintiff on 28 December 1994. As reference has been made to a number of the terms of this agreement I cannot avoid setting out the whole agreement. However, it is clauses 1 and 2 that are most germane to this dispute.

STANDARD TERMS AND CONDITIONS FOR AGREEMENTS BASED ON A SHARE OF MONIES RECOVERED

This Agreement is made between Cannonway Consultants Ltd of 1913 Asian House, 1 Hennessy Road, Wanchai, Hong Kong (hereinafter called 'the Consultant') and Kenworth Engineering Ltd of 18/F Eton Tower, 8 Hysan Avenue, Causeway Bay, Hong Kong (hereinafter called 'the Contractor'), whereby the Contractor wishes to appoint the Consultant to progress and conclude the Contractor's final account (which includes claims for additional payments) arising from his Subcontract on the Tuen Mun Hospital Project ('the Subcontract').

This Agreement is in accordance with the following terms and conditions:

1. The Contractor will pay to the Consultant fees of 20% of all further payments received in respect of the Subcontract. In the event that further payments received exceeds HK$30 million the Contractor will pay to the Consultant only 5% of any amounts in excess of HK$30 million. The calculation of further payments received will, for the purposes of this payment to the Consultant, not take account of retention monies received.

For the avoidance of doubt, the 'further payments received' includes all monies received, whether paid as loss and expense claims, variations, ex-gratia payments, or under any other description.

2.1 Upon any further payments (as defined in 1 above) being made to the Contractor in respect of the Subcontract, whether interim or final, the Consultant's fees on such further payment will immediately become due to the Consultant in accordance with this Agreement and will be paid

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within 14 days of receipt of payment by the Contractor. It is warranted by the contractor that the fees due to the Consultant in accordance with this Agreement will be paid by the Contractor in full whatever financial outcome is achieved.

2.2 On commencement of this Agreement the Contractor will provide to the Consultant a complete copy of the last payment application, and all details of the payment certified against that application together with copies of the certificates. The payment certified therein will be used as the basis for calculating further payments. The Contractor will copy all further payment certificates to the Consultant.

3. On preparation by the Consultant and submission to the Contractor of detailed claims and/or any other submissions of whatsoever nature designed to recover additional payments for the Contractor, then the Contractor shall pay to the Consultant 'on account' payments against fees to be earned of 20% X Total (at face value) of each such submission X 30%. All such payments will be made in two equal instalments, the first at the time of each submission by the Consultant to the Contractor, and the second 30 days later. These'on account' payments shall not be deemed as settlement of any nature and will be deducted from further fees payable in accordance with this Agreement.

4. The Contractor recognises that the Consultant is dependant on the Contractor for supply of all information in respect of the Subcontract and the Contractor will provide any and all files documents and information when required by the Consultant and in the form required by the Consultant (which may require for example, sorting, summarising or re-calculating etc of existing files, documents and information). Whilst it is the duty of the Consultant to prepare and provide the contractual documents in order to progress the Contractor's case, the Contractor recognises that he also has a duty to provide the necessary files and documentation and to make staff available to discuss details of the Subcontract as may be required by the Consultant. The Contractor shall provide all files an documents which are available. No warranty is given by the Contractor that any other information can be provided.

The Consultant will be at liberty to examine any of the Subcontract files during this appointment. From the commencement of this appointment the Contractor will copy all incoming and outgoing correspondence relating to the Subcontract to the Consultant.

5. The Contractor will be responsible for the costs of any other expert (including legal) services which may be required.The Contractor will not be under any obligation to spend in excess of HK$500,000 in respect of such services in pursuance of his case.

6. It is anticipated that the Consultant and Contractor will liaise on all aspects of the claims until agreement. The Consultant will carry out all work which he considers necessary or desirable in order to progress and ultimately settle the final account. The Contractor accepts that decisions such as

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which items to pursue, the degree of detail to be provided for each item, method of presentation, etc, will, after discussion with the Contractor, be made by the Consultant.

7. Arbitration may be recommended by the Consultant. However, if the Consultant wishes the Contractor to proceed into Arbitration the Contractor may if he wishes seek an opinion from a solicitor as to the merits of Arbitration in the circumstances, and should the solicitor advise in writing against Arbitration (which advice will be copied to the Consultant) the Contractor will have no obligation to proceed with Arbitration.

8. Should the Contractor not wish to settle the Final Account at the point(s) at which the Consultant recommends, then the Consultant will have no further obligation to act for the Contractor after such

> point(s) if the Consultant so wishes, and the Contractor will pay to the Consultant his fees calculated on the settlement which could have been achieved at such point(s).
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> 9. The Consultant is at liberty to terminate this Agreement in addition to any other rights he may have if the Contractor is in breach of any of his obligations under this Agreement.
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> 10. The Contractor may terminate this Agreement in the event that the Consultants services are unsatisfactory.
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> 11. In the event of termination in accordance with Clauses 9 or 10 all documentation prepared by the Consultant and which has been paid for by the Contractor will be handed over to the Contractor.
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> 12. The Consultant may assign this Agreement following written notice to the Contractor.
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> 13. In the event of any dispute over the interpretation of this Agreement, the dispute may be referred by either party to Mediation in accordance with the Mediation rules current at that time of the Hong Kong International Arbitration Centre. The Mediators decision will be final and binding on both parties.
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> 14. The Contractor or any of the Contractor's subsidiaries or any part of the same group of companies as the Contractor shall not employ either directly or indirectly any person who has worked for and/or been provided by the Consultant within a period of one year from the completion of work by the Consultant for the Contractor. This applies equally to any person who may have left the employment of the Consultant.
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> Agreed on behalf of the Consultant.

On 12 January 1994 the plaintiff submitted a claim to the defendant in the sum of HK$23,850,570. In accordance with Clause 3 of the agreement, the plaintiff contends that it is entitled to the sum of HK$1,431,034 and it is for this sum that he issued a writ on 12 March 1994.

On 20 June 1994 the plaintiff issued a summons under O 14 and O 14A.

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This summons raised two issues for determination but it was agreed that it was only the first issue which was relevant. This issue has been formulated as follows:

> ... whether the Consultancy Agreement executed by the plaintiff and the defendant in December 1992 ('the Consultancy Agreement') is void for illegality as being a contract for champerty.

A further question was raised at the hearing and that was whether the payment on account can be recovered as a debt, given that, at the moment, no sum has been received from Aoki.

The affirmations go into the background of the events leading to the agreement but I do not consider them relevant nor necessary to go into.

The plaintiff advised the defendant to serve a notice of arbitration on Aoki to preserve the limitation position. This had previously been discussed with Aoki. Subsequently the defendant was advised by the plaintiff to and did enter into a cooperation agreement with Aoki. The effect of this agreement was that the defendant would recover its claims through Aoki and not from an arbitration with Aoki.

Champerty

The following issues require to be determined:

(1) Does the law of champerty apply in Hong Kong?
(2) If yes, does it apply when the proceedings envisaged are arbitration proceedings and not litigation.
(3) If it applies in Hong Kong and does apply to arbitration, is this consultancy agreement champertous?

As I stated at the outset of this judgment the origins of the law of champerty lie in medieval history and some part of its origins may be lost in the mists of time. Despite its ancient origins the scope of the law of champerty has recently been examined by the House of Lords in the case of *Giles v Thompson* default (1993) 3 All ER 321. Giving the opinion of the House, Lord Mustill began his speech with the following helpful history of champerty:

> My Lords, the crimes of maintenance in champerty are so old that their origins can no longer be traced, but their importance in medieval times is quite clear. The mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power. Champerty was particularly vicious, since the purchase of a share in litigation presented an obvious temptation to the suborning of justices and witnesses and the exploitation of worthless claims which the defendant lacked the resources and influence to withstand. The fact that such conduct was treated as both criminal and tortious provided an invaluable external discipline to which, as the records show, resort was often required. As the centuries passed, the courts became stronger, their mechanisms more consistent and
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> *[1995] 1 HKC 179 at 186*
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> their participants more self-reliant. Abuses could be more easily detected and forestalled, and litigation more easily determined in accordance with the demands of justice, without recourse to separate proceedings against those who trafficked in litigation.In the most recent decades of the present century maintenance and champerty have become almost invisible in both their criminal and tortious manifestation. In practice, they have maintained a living presence in only two respects. First, as the source of the rule, now in the course of attenuation, which forbids a solicitor from accepting payment for professional services on behalf of the plaintiff calculated as a proportion of the sum recovered from the defendant. Secondly, as the ground for denying recognition to the assignment of a 'bare right of action'. The former survives nowadays, so far as it survives at all, largely as a rule of professional conduct, and the latter is in my opinion best treated as having achieved an independent life of its own.

That the reasons for the introduction of such a rule of law had long since past was made clear by Jeremy Bentham in 1843 when he said:

> A mischief, in those times it seems but too common, though a mischief not to be cured by such laws, that a man would buy a weak claim, in hopes that power might convert it into a strong one, and that the sword of a Baron, stalking into court with a rabble of retainers at his heels, might strike terror into the eyes of a judge upon the bench. At present, what cares an English judge for the swords of a 100 barons? Neither fearing nor hoping, hating nor loving, the judge of our days is ready with equal phlegm to administer, upon all occasions that system, whatever it be, of justice or injustice, which the law has put into his hands.

By the beginning of the 19th century England had an independent judiciary and, by the latter part of the century, an effective civil justice system.

Despite this, the offences and torts of champerty and maintenance continued to exist until their abolition by ss 13 and 14 of the Criminal Law Act l967. However, s 14(2) of that Act provided:

> the abolition of criminal and civil liability under the Law of England of Wales for maintenance and champerty shall not effect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.

In January 1989 the Government in England published a Green Paper on *Contingency Fees* (Cmnd 571). In July 1989 it published a White Paper entitled *Legal Services: A Framework for the Future* (Cmnd 740). The Government's position was stated as follows:

> 14.3 The Government accordingly proposes to remove the existing prohibitions to enable clients to agree with any or all of their lawyers payment of a conditional fee on the speculative basis already permitted in Scotland. This relaxation will not, however, extend to criminal and family (matrimonial, care, and wardship) proceedings which the Government believes are in appropriate for conditional funding.
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> 14.4 The Government also accepts that it will be reasonable for a lawyer who represents a client on this basis to balance the risk of losing the case and
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> *[1995] 1 HKC 179 at 187*
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> ending up with no costs by charging at a higher rate than would have been appropriate but for the conditional factor. It therefore proposes that power be given to the Lord Chancellor to prescribe by its subordinate legislation, after consultation with the profession, the maximum amount by which a lawyer's costs can be increased when he is working for a conditional fee. That increase will be expressed as a moderate percentage of the normal costs. The legislation will recognise that different levels of increase may be appropriate for different classes of case. A lawyer and his client will be free to agree any lower percentage. The ability to agree this increased fee will not affect the amount to be paid by the losing opponent. There will be no change in the existing rule that costs should follow the event. The Lord Chancellor intends to consult further on a level of a prescribed percentage.

Steyn LJ in reviewing the cases on champerty and in particular the judgment of Danckwerts J in *Martell v Consett Iron Company Limited* default (1955) Ch 363 stated that they spoke with one voice namely:

> That the purpose of this head of public policy is to protect the integrity of public civil justice.

Lord Denning expressed the fears which gave rise to the doctrine in *Re Trepca Mines Limited* default*(No 2)* default (1962) Ch 199 at 219-220 in the following terms:

> The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, if he cannot do otherwise then enforce the law; and I may observe that it has received statutory support, the case of solicitors, in s 65(1)(a) and (b) of the Solicitors Act 1957.

The word champerty comes from the Latin phrase *campi* default *partitio* default which means 'division of the field'.

Does champerty apply in Hong Kong?

Mr Clayton in an ingenious argument suggested that it would be wrong to conclude that champerty was part of the law of Hong Kong because it is absurd to import into Hong Kong law a doctrine introduced into England centuries ago when the purpose behind such a rule ceased to exist even before Hong Kong became a Colony.

I find it impossible to accede to this submission in the light of the terms of s 3 of the Application of English Law Ordinance (Cap 88). That section enacts that:

> 1. The common law and the rules of equity shall be enforced in Hong Kong:
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> *[1995] 1 HKC 179 at 188*
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> (a) so far as they are applicable to the circumstances of Hong Kong or its inhabitants;
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> (b) subject to such modifications as such circumstances may require;
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> (c)... .

If it is part of the law of England that it is contrary to public policy to assign a bare right of action, I find it impossible to conclude that the circumstances in Hong Kong make such a rule inapplicable. Whether the time has come to review this rule is a matter for the House of Lords or Privy Council or in the future perhaps a Court of Final Appeal for Hong Kong. It would not be right for a first instance judge to make a departure from settled law even though, as I accept, the scope of the champerty rule has been narrowed somewhat over the years.

Mr Clayton referred me to the Privy Council decision in *Ram Coomar Coondoo v Chunder Canto Mookerjee* 1876 2 AC 186. Mr Clayton refers specifically to pp 208/9 where in the advice of the Board given by Sir Montague Smith it was stated:

> It is to be observed that the English statutes on the subject were passed in early times, mainly to prohibit high judicial officers and officers of state from oppressing the King's subjects by maintaining suits or purchasing rights in litigation. No doubt, by the common law also, it was an offence for these and other persons to act in this manner. Before the acquisition of India by the British Crown, these laws, so far as they may be understood to treat as a specific offence the mere purchase of a share of a property in suit in consideration of advances for carrying it on, without more, had become in a great degree inapplicable to the altered state of society and of property. They were laws of a special character, directed against abuses prevalent, it may be, in England in early times, and had fallen into, at least, comparative desuetude. Unless, therefore, they were plainly appropriate to the condition of things in the Presidency towns of India, it ought not to be held that they had been introduced there as specific laws upon the general introduction of British law. The principles on which the exclusion from India of special English laws rest are explained in the well-known judgment of *The Mayor of Lyons v The East India Company* default . It appears to their Lordships that the condition of the Presidency towns, inhabited by various races of people, and the legislative provision directing all matters of contract and dealing between party and party to be determined in the case of Mahomedans and Hindus by their own laws and usages respectively, or where only one of the parties is a Mahomedan or Hindu by the laws and usages of the defendant, furnish reasons for holding that these special laws are inapplicable to these towns. There seems to have been always,

> to say the least, great doubt whether they were in force there, a circumstance to be taken into consideration in determining whether if they really were part of the law introduced into them.

It would be most undesirable that a difference should exist between the law of the towns and the Mofussil on this point. Having regard to the frequent dealings between dwellers in the towns and those in the Mofussil, and between

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native persons under different laws, it is evident that difficult questions would constantly arise as to which law should govern the case.

It seems to me that to some extent that case turns upon the rather special circumstances which existed in India at the relevant time which seemed to some extent to depend upon the fact that there were different laws and usages for the different major races or religions. Similar factors cannot be said to apply to Hong Kong.

As an indication of the difficulties which would arise if I were to accede to Mr Clayton's arguments, one only has to refer to the very recent judgment of Lightman J in *Grovewood Holdings Plc v James Capel & Co Ltd* 1994 4 All ER 417.In that case, an action was stayed because it was funded pursuant to a sponsorship arrangement whereby the sponsor agreed to meet the legal costs of the action in return for 50% of the net proceeds of the action. Lightman J commented that the law of champerty was based on public policy considerations designed to protect both the administration of justice and the defendant from the prosecution of such proceedings. That case is the latest in a long line of cases where the law of champerty has been applied under the English common law. If I were to hold that champerty was not contrary to the public policy of Hong Kong, one would have a situation where a sponsorship agreement of the kind referred to in Grovewood would be valid in Hong Kong and invalid in England. I cannot think that it would be in the interests of the development of the law in Hong Kong for it to throw up a different result on identical facts to that which would be arrived at in England. One of the strengths of Hong Kong has been its reliance upon the English common law and the rules of equity and in my judgment it would not be right to create such a difference unless compelled to do so in the light of the special circumstances of Hong Kong as referred to in the Application of English Law Ordinance.

I am therefore quite satisfied that the answer to the first question which has been raised in this case is that the law of champerty does apply in Hong Kong and I come to this decision even though the researches of both counsel have not been able to find any reported Hong Kong case where a contract has been held to be against public policy on the grounds of champerty.

Does the law of champerty apply when the proceedings envisaged are arbitration proceedings and not litigation?

Again, there appears to be no reported case, at least none to which I have been referred, in either England or Hong Kong where the law of champerty has been considered in the context of arbitration proceedings as opposed to civil proceedings as part of the public justice system. However, in *Giles v Thompson* default , above, at pp 331-2 Steyn LJ touched on this subject obviously in an obiter dictum but one which is worthy of careful consideration. He said:

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> The head of public policy, which condemns champerty, has only done so in the context of civil litigation: see *Grant v Thompson* default (1895) 72 LT 264, [1895-9] All ER Rep 1026, *Savill Bros Ltd v Langman* default (1898) LT 44 at 4748, *Trendtex Trading Corp v Credit Suisse* default [1981] 3 All ER 520 at 524, 530 [1982] AC 679 and 694, 702 and *Picton Jones v Arcadia Developments Limited* default [1989] 1 EGLR 43. It would involve a radical new step to extend the doctrine to private consensual arbitration. Yet the court is involved in the arbitral system in as much as the court's coercive power to enforce awards is regularly invoked. While I need not express a firm view on the point, it seems that the boundaries of the doctrine may exclude arbitration and are drawn rather narrowly and possibly even an anomalously.

It is not surprising that Steyn LJ did not descend into further detail in that case which was not concerned with arbitration. However it is necessary for me to consider whether the distinction between arbitration and litigation is a valid one for the present purposes.

It is clear from the observations of both the Court of Appeal and the House of Lords in *Giles v Thompson* default that in the light of the history of champerty it is not appropriate to extend the doctrine. If it were to apply in the present case, it would be extending champerty from the public justice system to the private consensual system which is arbitration. The trend in recent years has all been the other way. The role of the courts in relation to arbitration has been substantially diminished since 1979 in England when provisions requiring leave to appeal an arbitral award were introduced. In Hong Kong, similar provisions were introduced in 1982 and by 1990 Hong Kong had in force the UNCITRAL Model Law which gives supremacy to the doctrine of full part autonomy and substantially curtails the powers of the court in relation to arbitration proceedings. The Model Law has not been introduced in England but it has in Scotland.

It seems to me unwise to make any extension to the law of champerty given that the reasons for its introduction have long since passed.

Parties choose arbitration in order to keep out of the public justice system save where some support for the arbitral process is required from the courts.

Another factor to be taken into account is that in Hong Kong many arbitrations have an international flavour and this has been even more so since the definition of 'international' contained in the Model Law has been in force. The wide scope of that definition set out in Art 1 of the Model Law has turned many previously domestic arbitrations into international ones. To subject international parties to a rule of law which is not applicable in many other jurisdiction will be to make Hong Kong a less desirable venue for international arbitration.

It is very common for construction contracts, which are usually on standard form contracts, to contain an arbitration clause and it is in relation to construction contracts that the activities of claims consultants are seen. Claims consultants are utilised because of the complexity of construction

contracts and, as I understand it, it is standard practice for them to be paid, at least in part, on a percentage of the amount recovered either by way of settlement of by award. There is no evidence before me that the situation has caused abuses. No abuses are alleged in this case. Many contractors, I am sure, prefer to pay for results especially as they do not have the reserves themselves to put forward the claims which can often be costly and time consuming.

Any abuse which payments based on results might create can be dealt with in a number of different ways. Most claims consultants are members of professional bodies who would no doubt consider disciplinary proceedings if abuses were proved by any of its members. Further it seems likely that a claims consultant is subject to some implied term to the effect that the claim he puts forward is made honestly, in good faith and based on facts which are supportable. Any breach of such a term might create a defence to any claim for fees based on an inflated claim.

The fact that Cannonway in the present case have entered into an agreement whereby they get paid by way of a given percentage of monies recovered is not only fairly frequent in the contracting business but it is also not unusual in England for similar types of professional services and these have not been struck down. Some of these cases are helpful in drawing the distinction between litigation as part of the civil justice system on the one hand and other non-litigation processes on the other. In *Jeremy Pickering v Sogex Services UK Limited* default 20 BLR 66, the plaintiffs offered to investigate the level of the rating assessment on the defendant's offices and terms were agreed whereby they were to be paid a sum equal to the amount of rates actually saved in a given financial year. The plaintiffs arranged a settlement with the District Valuation Office and the defendants were saved the sum of £19,943 in the relevant year and they sued for that sum. The defendants contended that the matter went to court, ie, to the local valuation court so that a scale fee was applicable and they alternatively alleged that the agreement was champertous and unenforceable in that it involved the payment of part of the proceeds of the successful pursuit of the legal process. Kilner Brown J held that the agreement was not champertous because negotiation, agreement and formal recording in a district valuation court was not litigation but a process of administration and in any event a district valuation court was not a court of law.

If in that case a district valuation court was not a court of law for the purposes of a champerty rule, I would strongly doubt whether it can be said that an arbitration is a court for the purposes of this rule.

In *Picton Jones & Co v Arcadia Developments* 1989 3 EG 85, the plaintiffs were chartered surveyors and the defendants ran amusement arcades and they were anxious to extend their business by opening further arcades. They employed the plaintiffs to act for them. Part of their fee arrangements provided that for obtaining planning and permit they would

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receive a global fee at £10,000 to be paid in the event of ultimate success. It was alleged that this agreement was champertous.

In respect of one of the applications the plaintiffs attended before the relevant local authority committee to obtain a permit and eventually they obtained planning permission without the need for an appeal. At another site they went through all the procedures up to and including an appeal at a public enquiry before an inspector. Judge J rejected the champertous defence because as he said:

> There is substantial authority that the doctrine of champerty is confined to agreements about the conduct of litigation. In *Savill Bros Ltd v Langnan* default (1898) 79 LT 44 the Court of Appeal was considering whether an arrangement about proceedings before licensing justices could be characterised as champertous. I propose to read from passages in the judgments of the members of the Court of Appeal. The Master of the Rolls, Sir Nathaniel Lindley (as he then was) said, at p 47:
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> 'Champerty, after all, is only one variety, in a gross form, of what is called 'maintenance', and the bottom of maintenance is the fostering of litigation in which people have no interest. Of course there are exceptions in the case of charity. There is no litigation or semblance of it in the present case. The idea does not enter into it at all'.

Chitty LJ said at p 48:

> As to the champerty point, I really have nothing whatever to add. It seems to me that it would be straining the doctrine of champerty to say that it had any relation to this application for a licence.Of course, you I cannot divide the licence between the parties ... There is no litigation about it. As has been very fully explained in the House of Lords, the magistrates do not constitute a court. Their proceedings are necessarily open by virtue of the statute which applies; but it is nothing like a *lis* default relating to the licence.

Finally, from the judgment of Collins LJ a passage to similar effect at p 48:

> The only other question is that of champerty. The short and real answer to that is, that champerty is only, as was put in the old books, among others the *Institutes* default , the most odious species of maintenance. Maintenance at common law is when a man 'maintains a suit or quarrel for the disturbance or hindrance of right'. That is the common law definition; and the statutory definition is practically to the same effect:'People who shall maintain quarrels in the country to the let of the common law'. Here there is no stirring up of suits or quarrels, because the application for a licence is not in any sense litigation. Therefore it is impossible that there can be champerty in relation to the application for the licence.

In the *Picton Jones* default case, Judge J had little difficulty in rejecting the champerty defence because attending at a public enquiry or appearing before a local authority committee is not in any sense litigation.

It follows therefore that having given the matter very careful

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consideration, I agree entirely with Steyn LJ's obiter dictum in *Giles v Thompson* default to the effect that the boundaries of the doctrine of champerty exclude arbitration.

Is this consultancy agreement champertous?

In view of the fact that I have concluded that the law of champerty does not apply to arbitration proceedings, it is not strictly necessary for me to go on and consider whether this consultancy agreement is champertous. However, it may well be that this matter may be taken further and it may be of assistance if I set out the conclusion I would have arrived at had it been necessary for me to do so.

As further reference will be made to *Giles v Thompson* default , it is necessary to have regard to what that case was about. It related to claims involving motorists who were unlikely to be held to blame for an accident which caused damage to their car. Few motorists are ready and willing to go to court on the chance of recovering reimbursement for loss of use of their car from the defendant's insurers. A number of car hire companies put forward arrangements whereby they offer to motorists, with good claims against other parties to collisions, the chance to make use of the car hire company's cars whilst theirs were off the road. Under this

arrangement, the car hire company made its car available to the motorist and the car hire company pursued a claim against the defendant at its own expense. It employed solicitors of its own choice in the name of the motorist for loss of use of the motorist's car. The car hire company made a charge for the loan of the replacement car which was reimbursed from that part of the damages recovered by the motorist from the defendant or his insurers which reflected the loss of the use of the motorist's car. Until this event occurs, the motorist is under no obligation to pay for the use of the replacement car.

In *British Cash and Parcel Conveyors Limited v Lamson Store Service Co Ltd* 1908 1 KB 1006 at 1014 Fletcher Moulton LJ described the policy underlying the former criminal and civil sanctions in relation to maintenance as follows:

> It is directed against wanton and officious intermeddling with the disputes of others in which the[maintainer] has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse.

To make this description fit champerty, one must add the notion of a division of the spoils.

In *Giles v Thompson* default Lord Mustill made clear that this description did not fit the facts of the case before the House. He found that there was no harm in the sort of transaction, the subject of the appeal, and that there was no 'wanton and officious intermeddling'.

At p 360, Lord Mustill said:

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> It is possible, although I believe rather unlikely, that new areas of law will crystallize, win their own fixed rules which are invariably to be applied to any case falling within them. Meanwhile, I believe that the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principal of public policy designed to protect the purity of justice and the interests of vulnerable litigants. For this purpose, the issue shall not be broken down into steps. Rather, all the aspects of a transaction shall be taken together for the purpose of considering the single question whether, in the terms expressed by Fletcher Moulton LJ ... there is wanton and officious intermeddling with the disputes of others in which the meddler has not interest whatever, and where the assistance he renders to one or the other party is without justification or excuse.

Lord Mustill then went on to consider the alleged harmfulness of the intervention and the risks to the administration of justice and to the interests in that case of the motorist. He concluded that there was no realistic possibility that the administration of justice may suffer in the way in which it undoubtedly suffered centuries ago. He concluded having considered the arguments of the insurers that the alleged perils to the proper administration of justice had been much exaggerated.

The point was also made in *Giles v Thompson* default that the car hire company did not divide the spoils but relied upon them as a source from which the motorists could satisfy his or her liability for the provision of a genuine service which on the facts of that case was external to the litigation. In the case before me, the claims consultant gets paid on the basis of a percentage of whatever is recovered. This is the way in which the contractor has decided he prefers to remunerate the person helping him to put together a substantial claim to be made against the main contractor. The contractor in this case is not a weak or vulnerable party. He did not have to enter into this agreement. He will, no doubt, accept with gratitude all monies which may come from the claim that has been made. I can find nothing in this agreement which is so offensive that it should be struck down and I agree that it is one which the court should recognise and enforce. I have already made clear that there are ways in which abuses, if they should occur, can be dealt with and I do not think it is the function of the law to intervene in cases such as this entered into between parties of equal bargaining strength and at arms length.

I think it is also necessary to have regard to clause 7 of the consultancy agreement which envisages advice from Kenworth's solicitor prior to any decision to arbitrate being taken. This shows that Cannonway were not wholly in control of the arbitration. It is also important to note in the present case that it is obvious that the parties intended to settle the dispute and arbitration was only a possibility if legal advice indicated that the claim was considering further. It is very common in situations such as this for the sub-contractor to enter into a co-operation agreement with the main contractor who then makes all the claims against the employer. That is

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precisely what happened in this case and if Aoki's claims go to arbitration they will include Kenworth's claims but they will be made by Aoki and this surely must avoid the risk, if there be one, that Cannonway would infect that arbitration because of their interest in the final outcome.

I am quite satisfied that this agreement is not champertous and is therefore not illegal on the grounds of public policy. I can see no warrant at all for any intervention by the court to prevent parties entering into agreements of this nature when they are arms length transactions with a proper commercial purpose with benefit to both parties and which have commonly been entered into in Hong Kong and no doubt elsewhere. There will always be abuses when it comes to charging and the carrying out of professional duties. Fortunately abuse is rare but it can be dealt with in the manner in which I have already indicated.

Is the money due?

It seems to me that the agreement is perfectly clear. At para 1, Kenworth agreed to pay 20% of all further payments received in respect of the sub-contract. For this purpose I can ignore payments in excess of $30 million. By cl 3 of the agreement, once Cannonway had prepared and submitted to Kenworth a detailed claim or submission designed to recover additional payments for Kenworth then Kenworth became obliged to pay Cannonway on account of fees to be earned, 30% of what would have been earned had the amount of the claim been recovered. The on account payments are to be deducted from further fees payable in accordance with the agreement. It is not necessary for me to conclude whether, if no monies are recovered by Kenworth, they can reclaim the on account monies previously paid. The parties were not agreed on this issue and it does not arise for my determination.

As I understood Mr Graham's submission, he said that there could be no liability to pay, 'no debt' as be put it, in relation to the on account payments because the liability to pay the full sum had not yet arisen because no monies had yet been recovered whether by way of negotiation or arbitration. I regret to say that I fail to see the basis of his argument. As I read cl 3 of the consultancy agreement, it clearly provides an obligation upon Kenworth to make payment based upon a set percentage of the total value of a claim submitted to Kenworth for onward transmission to Aoki. Mr Clayton referred me to a definition of debt given by Lindley LJ in *Webb v Stenton* 1883 11 QBD 518 when he said:

> I shall say, apart from any authority, that a debt legal or equitable can be attached whether it be a debt owing or accruing; but it must be a debt, and a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation... and accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation.
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> *[1995] 1 HKC 179 at 196*

Kenworth entered into an agreement whereby they agreed to pay to Cannonway an on account payment representing one third of the agreed commission of the value of the claim as presented to Kenworth for the purposes of submission to Aoki. I fail to see why that is not an enforceable contract. I can see no defence to this action based on the nature of the on account payment.

Conclusion

Finally I should refer to the fact that Mr Graham attempted to make some points about the nature of these proceedings being as they are under O 14 and under O 14A. I am quite satisfied that it is appropriate under O 14A for more than one question to be submitted to the court and I can see no way in which the procedure adopted by the plaintiffs in this case was in any way inappropriate.

I have been asked to decide as a matter of law whether this consultancy agreement is champertous and I have decided that it is not champertous. I have also been asked to decide whether the sum claimed is actually due and I am quite satisfied that it is. In those circumstance, for the reasons which I have endeavoured to set out, I fear too lengthily, there must be judgment for the plaintiff for the sum claimed with interest on such sum from 1 February 1994 until judgment at 1% above the Hongkong Bank best lending rate and thereafter at the judgment debt rate.

I propose to make a costs order nisi in favour of the plaintiffs.