CHEUNG WING KONG TRADING AS PROFIT EXTEND COMPANY v MA CHAN SHING TRADING AS WING YICK KNITTING FACTORY - [1992] HKCU 237

SUPREME COURT OF HONG KONG HIGH COURT
NEIL KAPLAN, J

1991 NO. A7592

11 August 1992

Arbitration -- Stay of court proceedings -- Application -- Whether any arbitration clause agreed between parties -- Whether defendant ready and willing to do everything necessary for proper conduct of arbitration -- Delay; whether any inference to be drawn from delay -- Arbitration Ordinance s 6

Mr. Frank Lee of D.W. Ling & Co. for Plaintiff.

Mr. Albert Yau inst'd by Lee & Chow for Defendant.

HEADNOTE

Arbitration - Application for a stay - s.6 Arbitration Ordinance Cap. 341 - whether Defendant "ready and willing to do everything necessary for the proper conduct of the arbitration".

[1992] HKCU 237 at 2

The Plaintiff has sued the Defendant for $200,000 being the alleged cost of yarn sold and delivered by the Plaintiff to the Defendant. The writ was issued on 5th October 1991 and on 9th November 1991 the Defendant applied under s.6 of the Arbitration Ordinance, Cap. 341 for a stay of these proceedings in favour of arbitration.

The first point taken by the Plaintiff is that there was no arbitration clause agreed between the parties.

By a document dated 3rd September 1990 entitled 'Confirmation of sale' addressed to the Defendant on the Plaintiff's printed form, the Plaintiff 'confirmed that we have accepted your order and sold to you the under-mentioned good on terms and conditions stipulated as follows and printed overleaf' (sic). The goods, the subject matter of this agreement, were 200,000 lbs. of a specified cotton yarn, 100,000 lbs. being in black colour and 100,000 lbs. being in other colours. Delivery was to take place between September the 3rd 1990 and January the 31st 1991. This document was signed by both parties. Clause 16 on the reverse of this document contained the following arbitration clause:

[1992] HKCU 237 at 3

> "16. ARBITRATION.
>
> If any dispute should arise between the buyer and the seller out of or in connection with the contract or any of these Conditions, the buyer and the seller shall first attempt to agree to arbitration and no legal proceedings shall be instituted in respect of such dispute before negotiating with the other party for an amicable settlement. The proper law of the contract will be the laws of Hong Kong and the Courts of Hong Kong should be deemed to have exclusive jurisdiction to entertain the dispute."

I must make it clear that both parties accepted for the purposes of the argument before me that this was ex facie a proper arbitration clause.

Clause 17 of the same document provided as follows:

> "GENERAL.
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> The above conditions will form part of any contract of sale that by PROFIT EXTEND COMPANY heretofore referred as the seller, unless otherwise agreed in writing between the buyer and the seller, will override any terms or conditions stipulated, incorporated or referred to by the buyer in his order or subsequent negotiations."

Mr. Frank Lee for the Plaintiff attempted to argue that this document was only an invitation to treat and that there was no contract until 5th November 1990 when the

[1992] HKCU 237 at 4

Defendant placed an order for a total of some 20,000 lbs. of yarn.

I am quite satisfied that the document dated 3rd September 1990 was a binding contract containing an arbitration clause. It was an agreement whereby, during a fixed period of time, the Defendant would take delivery of a total of 200,000 lbs. of yarn at the price therein specified. The fact that the 200,000 lbs. was, so to speak drawn down, in smaller quantities is neither here nor there.Mr. Lee attempted to argue that the parties never intended to agree to an arbitration clause and that this fact could somehow be inferred from their subsequent conduct. I found the submission hard to follow and I reject it. I am quite satisfied that the parties agreed to arbitrate any disputes arising out of this contract of sale.

S.6 of the Arbitration Ordinance, Cap. 341 provides as follows:

> "(1) If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there
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> *[1992] HKCU 237 at 5*
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> is no sufficient reason why the matter should not be referred in accordance with the agreement, ***and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.*** " [my emphasis]

The issue in this case is whether the Defendants, as applicants, were at the time when the proceedings were commenced and still remain ready and willing "to do all things necessary to the proper conduct of the arbitration". I accept that I have a discretion in this case as it is a domestic arbitration but I approach the exercise of that discretion with a strong bias in favour of maintaining the parties bargain.The onus on establishing that I should decline a stay is upon the Plaintiff.

In order to appreciate what happened in this case, I have to refer to some correspondence subsequent to the issue of proceedings. I have already noted that the Defendants applied with commendable expedition for a stay by summons dated 8th November 1991. The return date of the summons was 15th November 1991 and by consent of the parties the Defendant's application was adjourned for argument. It appears that the Defendant's application was refixed for the 12th February 1992. Prior to the stay Mr. Lee received instructions from the Plaintiffs that it was prepared to consent to the matter being arbitrated to

[1992] HKCU 237 at 6

enable the merits of its claim to be determined but that this was entirely without prejudice to its contention that there was no arbitration clause. On 31st January 1992, Mr. Lee wrote to the Defendant's solicitors and included the following words:

> "Our client is prepared to go to arbitration so that the issues of substance are addressed sooner and so that there will be an earlier resolution of the dispute. .... We are therefore instructed to propose that your client's application to be heard on 12th February 1992 be adjourned sine die with the question of costs reserved. ... We propose to appoint a District Court Judge as arbitrator and would be pleased if you would let us know whether you are agreeable with this nomination."

Not surprisingly the Defendant's solicitors replied by fax on the same day stating that they had no objection to adjourning their application and asked for a consent summons but were totally silent on the question of identity of the arbitrator.

On 1st February 1992, Mr.Lee wrote to the Defendant's solicitors enclosing a draft consent summons, and he then stated:

> "Please also confirm as soon as possible whether you would agree to our proposal to appoint a District Court Judge to be the arbitrator and if so, whether you have any particular District Court Judge in mind."
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> *[1992] HKCU 237 at 7*

On 15th February 1992, Mr. Lee wrote again referring to his letter of 31st January and noting that he had not yet had a reply. However he noted that he had had a telephone conversation on the 7th February 1992 with a Mr. Yeung who had apparently mentioned that the Defendantmight not now want to proceed to arbitration, notwithstanding their application to have the matter referred to arbitration. Mr. Lee then continued:

> "Our client is simply interested in having the merits of the dispute adjudicated upon as soon as possible. As your client made the application for arbitration, our client agreed. Our client now wishes to press on with that course as quickly as possible as our client will not entertain any further, unreasonable delays in this matter.
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> Concerning the arbitration, we propose the following:-
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> (1) that a District Court judge be appointed - as we previously suggested;
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> (2) that the pleadings filed in High Court Action No. A7592 of 1991 do stand as the points of claim and defence in the arbitration proceedings; and
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> (3) that upon service of a notice of arbitration and completion of other necessary formalities for the appointment of the arbitrator, the parties seek directions from the arbitrator as to the procedure for the future conduct of the arbitration, and in particular as to the date of the arbitration hearing."
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> *[1992] HKCU 237 at 8*

A reply to this letter was requested within the next 14 days.

The next thing which happened was that Mr. Lee received a fax written on a 'without prejudice' basis from the Defendant's solicitors and quite properly he has not referred me to that. However, in response to that fax he wrote on 28th February 1992 to the Defendant's solicitors advising, inter alia, as follows:-

> "In view of your apparent reluctance either to litigate or proceed to arbitration, we advise that our instructions are now to proceed with the appointment of an arbitrator pursuant to the provisions of the Arbitration Ordinance. If we have no response from you with (sic) the time period stated in our letter of 15th February 1992, we shall apply to Court accordingly.
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> We reserve the right to raise this in our previous correspondence with the Court or arbitrator when the question of costs is considered."

In March 1992, Mr. Lee made enquiries with the Registrar of the District Court as to the availability of a District Court Judge to act as an arbitrator. He wrote to the District Court on the 19th March 1992 and received a reply from the Deputy Registrar of the Supreme Court dated 30th March 1992 which declined to offer the services of a District Court Judge as arbitrator.

Mr. Lee forwarded a copy of the letter from the

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Deputy Registrar to the Defendant's solicitors with a letter dated 15th April 1992. He began this letter by noting that he had received no response to his letter of 31st January 1992 and 1st February 1992 concerning the nomination of an arbitrator nor any response to his letters dated 15th and 28th February 1992 concerning the procedures for arbitration. He then stated that it seemed obvious that the Defendant had no serious intention to have the dispute brought to arbitration. He then referred to the letter from the Deputy Registrar of the Supreme Court and continued:

> "We now require you to nominate three alternative arbitrators for our client's consideration. We also require that you respond to our suggestions as to the procedures to be adopted on the arbitration hearing."

This letter concluded with a statement that if Mr. Lee did not hear from the Defendant within 7 days, he would request the Court to re-list the application for a stay for hearing and would seek the dismissal of the application with costs.

The letter of the 15th April 1992 was responded to by the Defendant's solicitors fax dated 21st April 1992 which after referring to the letter of 15th April 1992, simply stated:

> "Please let us have your proposed
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> *[1992] HKCU 237 at 10*
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> arbitrator for our client's consideration."

On 22nd April 1992, Mr. Lee responded to the fax of 21st April 1992 pointing out that it was only the day before that he had heard from the Defendants in respect of the proposed arbitration. He went on in the following terms:-

> "It should not be overlooked that it is ***your client's application*** to have the matter referred to arbitration. Such application was made by you on 8th November 1991. Almost 6 months have passed and you have taken ***no*** steps to have this matter brought to arbitration. It is quite clear that your client only seeks to delay the matter. As it is your client's application, can you please let us have your proposed arbitrator(s) within 3 days from today, failing which we shall apply to Court as outlined in our letter to you of 15th April 1992."

On 26th May 1992, Mr. Lee wrote to the Defendant's solicitors noting that their summons had been re-listed for hearing on 28th July 1992. There was then some irrelevant correspondence and this saga came to an end on 23rd June 1992 when Mr. Lee wrote to the Defendant's solicitors setting out what had happened, referring to the terms of s.6 of the Arbitration Ordinance and making the point that for some 6 months the Defendants and their solicitors had done nothing whatsoever towards instituting the arbitration proceedings. He further made the point that the

[1992] HKCU 237 at 11

Defendant's solicitors had ignored correspondence which he had written to them seeking their cooperation on the procedure to be adopted for the arbitration proceedings. He went on to say:

> "Very clearly your client's raising the arbitration issue has been and is nothing but an unreasonable delaying tactic. For that reason, our client is, not surprisingly, anxious to proceed with the action as that seems the only way the merits of the dispute will be tried."

I think one only has to read this correspondence to appreciate that Mr. Lee on behalf of the Plaintiffs had adopted a very reasonable and sensible course of action which met with absolutely no response whatsoever from the Defendants. Bearing in mind that the Plaintiffs were contending that there was no arbitration clause and for that reason had instituted proceedings in the High Court, the Defendants should have jumped at Mr. Lee's offer to accept arbitration and should have attempted to agree upon the identity of an arbitrator. I accept that Mr. Lee's original idea was to attempt to find a District Court Judge and that the Defendants were justified in waiting to see how that turned out but once they have heard from the Deputy Registrar that a judge would not be forthcoming, I would have expected the Defendants to have showed a little more interest in the arbitration proceedings which they seemed so anxious to enforce by way of their stay.

[1992] HKCU 237 at 12

I note that s.6 (which is in identical terms S.4 of English Arbitration Act 1950) stipulates that the applicant has to be ready and willing to do all things necessary to the proper conduct of the arbitration at the time when the proceedings were commenced, namely October 1991 and remains so ready and willing, namely up until the hearing of this application.

Para. 10 of the Affidavit of the Defendant in support to the application for stay states in fairly common form:

> "At the time this action was commenced, the Defendant was, and the Defendant remains, ready and willing to do all things requisite to enable all the matters in dispute as aforesaid to be determined by arbitration in accordance with the provisions of the said Agreement."

This requirement to be ready and willing to do all things necessary relates to both the time when the proceedings were commenced and to the time when the Court is called upon to exercise its discretion. The affidavit in support was affirmed on 12th day of November 1991 but I am being asked to exercise my discretion some 8 months later, and there is no further evidence put in on behalf of the Defendant in relation to him being ready and willing to do all things necessary.

I note that at p.474 of *Mustill v. Boyd's*

[1992] HKCU 237 at 13

Commercial Arbitration (Butterworth 2nd Ed.) one finds the following passage:-

> "In order to satisfy this requirement, the applicant must show that he does not intend simply to use the arbitration as a means for postponing or preventing the resolution of the dispute. Manifestly, an applicant who intends to block the progress of the arbitration by refusing to appoint an arbitrator in circumstances where the Court has no residual jurisdiction to appoint one on his behalf, cannot obtain a stay. The same result will apply in cases where the delay by the applicant is so great as to justify the inference that he does not really wish the arbitration to be effective.
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> The applicant must show, not only that he genuinely wishes to have the dispute resolved at all, but also that he wishes it to be decided by an arbitration rather than some other means."

A little further down the same page, one finds the following statement:

> "In practice, the plaintiff will usually find it difficult to rebut the commonform statement in the defendant's affidavit that he is ready and willing to arbitrate. At an early stage there is little that the defendant is obliged to do in the arbitration, beyond showing a willingness to appoint an arbitrator so that there is no great opportunity for the plaintiff to show that the defendant is in default of his obligations. Unwillingness to arbitrate usually manifests itself, if at all, when the interlocutory stages of the arbitration are under way. This is too late to prevent the Order for a stay being made, but in an extreme case it
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> *[1992] HKCU 237 at 14*
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> will justify the Court in exercising its residual jurisdiction over the dispute by lifting the stay and taking the dispute into its own hands."

In dealing with the question of delay, I accept that is not mere delay that is relevant, but it is the inference to be drawn from the delay which is of significance. Further it seems to me that the delay which has occurred, which seems to me to be substantially the fault of the Defendant, is a fact which I can take into account when I come to exercise in my discretion.

I have given this matter very careful consideration, but I have come to very firm conclusion that the Defendant has not been able to establish that at the time when I am asked to exercise my discretion in his favour, he is ready and willing to do all things necessary to the proper conduct of the arbitration. For that reason, I propose to decline the application for a stay. In other words, I am saying that I am not satisfied the Applicant was ready and willing to do all things necessary at the relevant time. Even if I had been satisfied that the Defendant was ready and willing to do all things necessary, I would still decline to grant a stay in the exercise of my discretion on the grounds of the considerable delay which has taken place in this matter, and which is almost entirely attributable to the Defendant. A party who seeks a stay of court proceedings in order to be able to take

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advantage of an arbitration agreement has to establish the appropriate readiness or willingness. By his silence and lack of co-operation the Defendant has singularly failed to establish this. Whatever threshold a Defendant has to meet this Defendant has not met it.

It follows, therefore, that this application for a stay under s.6 of the Arbitration Ordinance is dismissed and I propose to make a costs order nisi in favour of the Plaintiff.