EURO-AMERICA INSURANCE LTD v LITE BEST CO LTD - [1993] 1 HKC 333

HIGH COURT
KAPLAN J

ACTION NO 5419 OF 1992

11 February 1993

Arbitration -- Stay of proceedings -- Whether any steps had been taken in proceedings -- Whether applicant had been ready and willing to do all things necessary to the proper conduct of the arbitration -- Arbitration Ordinance (Cap 341) s 6

The plaintiffs, who were motor insurers, had insured the defendants' vehicle under a policy of insurance dated 11 July 1991. The plaintiffs claimed against the defendants for the sum of $40,054, together with a declaration that the defendants were liable to indemnify them for all damages which the plaintiff had or would sustain arising out of an accident occurred on 12 September 1991 concerning the defendants' vehicle. The plaintiffs applied for judgment in default against the defendants who did not file an acknowledgment of service nor a defence. The defendants applied for a stay of these proceedings under s 6 of the Arbitration Ordinance. Both summons came before the Master who adjourned both for determination before the court.

Held, entering judgment for the plaintiffs and dismissing the defendants' application:

(1) The defendants' failure to comply with s 6 of the Arbitration Ordinance (Cap 341) and to file affidavit evidence to the effect that they were ready and willing to submit to the proper conduct of arbitration is a serious defect.

(2) In order to fall within the ambit of s 6, the applicant must apply to stay the proceedings before '... taking any steps in the proceedings'. The defendants had filed affirmation evidence to prevent judgment being entered against them and had also appeared before the Master for the default hearing; those steps had the effect of invoking the jurisdiction of the court and they clearly demonstrated an election to abandon any right to stay in favour of arbitration. *Pitchers v Plaza (Queensbury)* 1940 1 All ER 151, applied.

(3) The steps anyone in the position of the defendants should follow are thus:
(a) to take out an application for a stay in favour of arbitration at the earliest opportunity and before appearance before the Master, or filing any evidence in relation to the plaintiffs' summons for judgment; and
(b) only then to file evidence in relation to the plaintiffs' summons without prejudice to the right to claim for a stay. The merits of the dispute could then be properly dealt with.

(4) The defendants here took none of these steps. Their summons for stay must accordingly be dismissed with costs.

(5) The defendants never condescended to any particulars as to the nature of their defence in their evidence, while the plaintiffs had placed before the court all necessary averments and documents in supporting their claim. Thus, the defendants

made no contradiction to any of the plaintiffs' evidence. Accordingly, judgment was entered for the plaintiffs with costs, and also the declaration sought be granted.

Cases referred to

Piercy v Young (1880) 14 Ch D 200

Pitchers v Plaza (Queensbury) [1940] 1 All ER 151

Legislation referred to

(HK) Arbitration Ordinance (Cap 341) s 6

Other legislation referred to

Halsbury's Laws of England Vol 2 para 629 -

Mustill and Boyd Commercial Arbitration (2nd Ed) pp 472-473

Summons

This was the the plaintiffs' summons for judgment in default to be entered against the defendants and the defendants' summons for a stay of the proceedings under s 6 of the Arbitration Ordinance. The facts appear sufficiently in the following judgment.

CY Li (Lee Ng & Lam) for the plaintiffs.

P Hau (PT Yeung & Tang) for the defendants.

KAPLAN J

By writ dated 11 August 1992, the plaintiffs, who are motor insurers and had insured the defendants' vehicle under a policy of insurance dated 11 July 1991, claimed from the defendants the sum of $40,054, together with a declaration that the defendants are liable to indemnify them for all damages the plaintiffs have or will sustain by virtue of an accident to the vehicle which occurred on 12 September 1991. The defendants did not file an acknowledgment of service nor a defence. So on 18 September 1992, the plaintiffs applied for judgment in default. That summons is now before me. Also before me is the defendants' summons for a stay of these proceedings under s 6 of the Arbitration Ordinance (Cap 341). In order to understand how all this came about, I must set out briefly a short chronology:

(17) July 1991 The insurance policy covering vehicle DN8171

(12) September 1991 The accident

(23) January 1992 Charges and convictions

(25) March 1992 Charges and convictions

(11) August 1992 Statement of claim

Personal service of the writ

(17) August 1992 Notice of change of registered address of the defendant

(18) September 1992 Plaintiffs' summons

(21) September 1992 Service of the plaintiffs' summons on the defendant

by post

(25) September 1992 Affirmation of Au Yeung Chak Man (affirmation of service)

(30) September 1992 Notice to act for the defendants

(1) October 1992 First hearing of the plaintiffs' summons

Affirmation of Ho Hin Wah on behalf of defendants

(7) October 1992 Affidavit of Lee Ying Biu on behalf of plaintiffs

(23) October 1992 Affirmation of Wong King Yeung on behalf of defendants

(26) October 1992 Second affirmation of Ho Hin Wah

Defendants' summons

(28) October 1992 Restored hearing of the plaintiffs' summons

Hearing of the defendants' summons

The claim against the defendants is based upon:

(1) Failure to give any notice to the plaintiffs that the driver of the vehicle was charged with careless driving;

(2) Similar failure with regard to a charge of 'using a vehicle with defective tyres';

(3) Pleading guilty to the said charges without the express authority of the plaintiffs;

(4) Failure to take all reasonable steps to safeguard the vehicle from loss or damage or to maintain the same in efficient condition.

It is not necessary to recite details of the charges or the pleas as there is no dispute as to them.

Following the accident and before these matters came to light, the plaintiffs had paid out the following sums consequent upon the said accident:

(a) $31,800 as repair costs;

(b) $660 as survey and search fees;

(c)$7,349 as loss adjuster's fees; and

(d) $245 as fees for police statements and sketch.

The plaintiffs rely on cl 2 of the conditions of the policy which provides as follows:

> The due observance and fulfilment of the terms of this policy, insofar as they relate to anything to be done or not to be done by the insured or any person claiming to be indemnified, and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the company to make any payment under this policy.

Clause 10 provides for all differences arising out of the policy to be referred to the decision of a single arbitrator.

Service

The defendants assert that they were not served with these proceedings. They were, in fact, properly served at their registered office which was still shown as their registered office at the date of service. In fact, the

registered office had been moved as from 6 July 1992; but a notice of change was not given until 17 August 1992 which was six days after service at the address shown at the company's registry.

Mr Hau for the defendants attempted to argue that the rule as to service as applied to companies had not been complied with, but I am satisfied on the basis of the affidavit of service that there was good service by leaving the writ at the defendants' registered office as shown at the company's registry.

I accept that the change of office was unfortunate and I certainly do not think -- nor was it suggested -- that the defendants were deliberately attempting to evade service. However, the service was good.

It is common ground that as soon as the defendants discovered the existence of this action, their solicitors filed a notice to act on 30 September 1992.

However, no acknowledgment of service has yet be filed, nor has a defence been filed.

At the first hearing of the plaintiffs' summons for a default judgment which came before the Master, the defendants put in the affidavit of

Mr Ho. He deposed to the fact that on 28 September 1992, he received a copy of the summons returnable on 1 October 1992. He averred that neither the writ nor the statement of claim had been received by the defendant. It is significant to note that there was no mention of arbitration in this affirmation.

The restored hearing of the plaintiffs' summons was to be heard on

28 October 1992. In the meantime, the plaintiffs filed a further affidavit and on 23 October 1992, the defendants filed the affirmation of Mr Wong to deal with the change of the defendants' registered office. This could only be relevant to the hearing of the plaintiffs' summons for a default judgment.

On 26 October 1992, the defendants filed Mr Ho's second affidavit in support of their summons of like date for a stay of these proceedings in favour of arbitration.

Both summonses came before the Master on 28 October 1992 and both were adjourned for determination by me.

Defect in defendants' affidavit for stay

Section 6 of the Arbitration Ordinance gives the court a discretion to grant a stay in domestic cases if the court is satisfied:

> ... that there 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.
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> *[1993] 1 HKC 333 at 337*

Evidence that the applicant is ready and willing must be furnished by affidavit (see *Piercy v Young* 1880 14 Ch D 200; *Mustill & Boyd on Commercial Arbitration*(2nd Ed), p 473, and *Halsbury's Laws of England*, Vol 2 para 629.

Mr Ho's second affirmation, filed on 26 October 1992, is completely silent on this issue. This is a serious defect in the evidence which I am not prepared to overlook. No application was made to me for an adjournment to put in further evidence, even though, on the issue of the defendants' defence on the merits, I did invite such an application; but, none was made.

The defendants' failure to put in evidence to comply with the requirements of s 6 of the Arbitration Ordinance is sufficient for me to dismiss their summons. However, there is another point which is also fatal.

Step in the action

To avail oneself of the benefits of s 6, it is necessary to make application to the court to stay the proceedings before '... taking any steps in the proceedings'. What is or is not a step in the action is not always clear and the authorities are far from easy to reconcile.

Mustill & Boyd at p 472 identify two requirements to be fulfilled before the court can be satisfied that the applicant has taken a step in the action. They put the matter thus:

> First, the conduct of the applicant must be such as to demonstrate an election to abandon his right to stay, in favour of allowing the action to proceed. Second, the act in question must have the effect of invoking the jurisdiction of the court. An extra-judicial proceeding in the action, such as obtaining by correspondence a consent to the enlargement of time for delivery of pleadings, is not sufficient.

The circumstances which accompany an act may be looked at to see whether the act amounts to an election to give up the right to a stay. Thus, an application to the court which might otherwise amount to a step in the proceedings is deprived of this characteristic if the applicant makes it clear -- by stating that his application is without prejudice to a subsequent request for a stay, or by simultaneously taking out a summons to stay -- but he intends to insist on a reference to arbitration.

In*Pitchers Ltd v Plaza (Queensbury) Ltd* default [1940] 1 All ER 151, the plaintiff issued proceedings for moneys due to them under a building contract. The contract included an arbitration clause. The plaintiffs took

out a summons under O 14. The defendants filed an affidavit, and appeared before the Master, claiming that they had a defence to the action. On the Master giving leave to sign judgment, the defendants appealed against his order, and only then applied for a stay of the action by reason of the arbitration clause included therein. The Court of Appeal held:

[1993] 1 HKC 333 at 338

> (1) The defendants were precluded from relying on the arbitration clause as they had taken a step in the action when they opposed the summons for leave to sign final judgment before the *m* default aster.
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> (2) Goddard LJ held that no step is taken in the action by a defendant opposing a summons under O 14 who not merely raises the matter of the arbitration clause in his affidavit, but also at the same time takes out a summons to stay the action.

At p 154, Slesser LJ said this:

> I entertain myself no doubt whatever that they took a step in the action when they appeared before the Master and asked for leave [to quote their affidavit] to defend the action. It is true that there may be difficult cases where an application to stay is made at the same time as leave is asked to defend, upon which I do not propose, for myself, to pass judgment in this case, and where there may be a question as to whether or not those two matters, taken together, would constitute such a step in the action as to preclude the defendants from relying upon their request for a stay. Here, however, one has an entirely different case. One has a summons under RSC O 14, for final judgment, and one has an affidavit in support of leave to defend the action, with a vague intimation that they might not object, as appears in one of the affidavits, to the matter being referred in the action to the official referee ... In truth and in fact, however, a step in the action was taken when the summons to sign final judgment was answered by affidavit, and no application was made to stay the action on the ground of the arbitration clause.

As I make clear above, Goddard LJ was more positive that opposition to a summons under O 14 which raises the question of arbitration when a summons to stay has been taken out would not amount to a step in the action.

I am quite satisfied that the defendants have taken a step in the action. They appeared at the first hearing of the plaintiffs' summons and put in an affirmation of Mr Ho which could only have been designed to prevent judgment being entered against them. There is no mention of arbitration in that affirmation and no summons had, on that day, been taken out for a stay. On 23 October 1992, they put in an affirmation of Mr Wong which was also designed to show that they had not received the writ and statement of claim, and this could only be relevant to the issue as to whether or not the court was going to grant judgment in default. There was no mention of arbitration in an affidavit, nor had a summons, by that day, been taken out. It was only two days before the restored hearing of the plaintiffs' summons that the defendants took out the summons and supported it with what I have found to be a defective affirmation. I am quite satisfied that the appearance before the Master and the filing of the affirmations were to have the effect of invoking the jurisdiction of the court, namely, to prevent the court from allowing judgment to be signed against the defendants. I am also satisfied that the defendants' conduct is such as to demonstrate an

[1993] 1 HKC 333 at 339

election to abandon any right to a stay which at this time had not even been adverted to by the defendants.

Lest it be thought that this decision places an unnecessary and unfair burden on parties who find themselves in the unfortunate position of these defendants, let me make it clear that the authority which I have just quoted makes it perfectly plain as to what steps these defendants should have taken. Firstly, if they were truly interested in invoking the arbitration clause, they should have taken out an application for a stay in favour of arbitration at the earliest opportunity before they appeared before the Master, and filed any evidence in relation to the plaintiffs' summons for judgment. They would have then been free to put in an affidavit in relation to the plaintiffs' summons for judgment which could have been expressed without prejudice to their right to claim a stay. That affidavit could then quite properly have dealt with the merits of the dispute which would have enabled the court to ensure that not only was there something to go to arbitration, but also that there were good grounds for not granting judgment by default. If, for some reason, they could not have got their summons for a stay heard before the plaintiffs' summons for judgment came on, they should have written to the plaintiffs' solicitors and invited them to adjourn the summons for judgment; alternatively they could

have agreed to have the stay application heard on the date fixed for the default hearing. If the plaintiffs refused either of these requests, then the defendants could apply to the court for a temporary stay of the summons for judgment pending the hearing of their summons for a stay in favour of arbitration.

The defendants in this case took none of these steps and appeared at the hearing of the summons for judgment armed with an affidavit in opposition which made no mention whatsoever of their intention to rely upon the arbitration clause. In my judgment, the defendants' position is quite untenable, and for all the reasons I have given, their summons for a stay in favour of arbitration must be dismissed with costs.

No affidavit on the merits

Neither in opposition to the summons for judgment, nor in support of the summons for a stay have the defendants condescended to any particulars whatsoever as to the nature of their defence. This, too, would have been a ground for exercising my discretion against them on their application for a stay.

However, in relation to the application for judgment in default, the defendants ran a fatal risk in not putting in any evidence at all to show what defence they have. I raised this with Mr Hau and, as I have said above, asked him whether he was applying for an adjournment to file evidence. He declined this invitation, but instead attempted to address me from the Bar as to the defences which the defendants might have. I do not propose to waste any time in dealing with these alleged defences articulated

from the Bar, save to say that they were all unarguable. One such defence was risible. It was submitted that because the policy did not cover simple damage to the tyres unless damage was caused to other parts of the vehicle at the same time, the plaintiffs could not rely on the defendants' failure to inform them of the charge of using a vehicle with defective tyres. I take a similar view of the submission that cl 2 does not cover a case where the plaintiffs seek repayment of moneys paid out before knowledge of the breaches of the policy conditions.

The plaintiffs have placed before the court all the necessary averments and documents to support their claim, and the defendants have not contradicted any of this evidence.

In all the circumstances, I am wholly satisfied that the correct course is to grant the plaintiffs judgment in default of defence, and I, therefore, enter judgment in favour of the plaintiffs in the sum of $40,051, together with interest thereon from 1 March 1992 at the rate of 10% until the date of judgment and, thereafter, at the judgment debt rate. I also grant the plaintiffs a declaration that the defendants are liable to indemnify the plaintiffs in respect of any loss suffered by the plaintiffs arising from, or incidental to, the accident -- the subject matter of these proceedings. I also award the plaintiffs the costs of the action. I also dismiss the defendants' summons for a stay in favour of arbitration together with costs to the plaintiffs.