HO KWOK HUNG TRADING AS KIM KWOK COMPANY v HUNG DAT TRADING COMPANY, HING FAI TRADING COMPANY AND WONG YAT WAI ALIAS BENJAMIN Y. WONG - [1992] HKCU 25

SUPREME COURT OF HONG KONG HIGH COURT
NEIL KAPLAN, J

1991 NO. A9219

24 February 1992

Civil Procedure -- Stay of proceedings -- Stay sought in favour of arbitration -- Breach of contract for sale of goods -- Plaintiff sought summary judgment against first defendant -- Uncertainty over defendants contractual position -- Whether judge should exercise discretion to refuse stay

Mr. Nigel Kat instructed by Hastings & Co. for Plaintiff.

Mr. M.K. Kwan of Michael Cheuk, Wong & Kee for 1st Defendant.

JUDGMENT

I have before me two summonses. The first is by the Plaintiff against the 1st Defendant for summary judgment under Order 14 for damages to be assessed. The second summons is by the 1st Defendant seeking a stay of these proceedings in favour of arbitration. I heard argument on the 22nd January 1992 and both sides were good

[1992] HKCU 25 at 2

enough to provide me with some written arguments.At the end of the oral hearing, I indicated that I was going to dismiss the summons for a stay but wished to consider my decision on the Order **14.**

The Plaintiff's claim is for damages for breach of a contract dated the 12th March 1991 whereby the Defendant agreed to sell to the Plaintiff a thousand metric tons of Insulated Scrap Copper Cable Wires made in the United States of America with a copper content of 50-55%. The total price was US$1,110,000. It is common ground that the Contract contains the following clause.

> "Arbitration: all disputes arising from the execution of/or in connection with this Sales Confirmation shall be settled amicably through friendly negotiation.In case no settlement can be reached through negotiation, the case under dispute shall then be submitted to the Hong Kong Government for arbitration in accordance with its Provisional Rules of Procedure. The arbitral award is final and binding upon both parties."

Mr. Kat for the Plaintiff said this clause made no sense whatsoever and that I should ignore it. Mr. Kwan for the 1st Defendant said that I should do my best to make sense of it as it was a clause in a commercial agreement. It seems to me fairly clear that by this clause the parties were agreeing to resolve their disputes by arbitration. It

[1992] HKCU 25 at 3

is true that the Hong Kong Government does not arbitrate disputes and it does not have any provisional rules of procedure. I think that this clause can be construed as an agreement to arbitrate. If the parties were not able to agree on an arbitrator or a panel of arbitrators then the Court would have power to appoint under the Arbitration Ordinance. I would be very loath to construe this clause in such a way as to give it no meaning whatsoever. I am, of course, conscious of the observations of Maule J. in *Cockburn v. Alexander* (1848) 6 CB 790 in relation to the construction of a charterparty where he said:

> "It is to be borne in mind that we are here dealing with a mercantile instrument, in the interpretation of which we must look at the substance of the matter, and are not restrained to such nicety of construction as is the case with regard to conveyances, pleadings and the like."

Similar observations were made by Lord Wright in *Hillas v. Arcos* [1932] 147 L.T. 503 & 514.

However, Mr. Kat also submitted that even if I was satisfied that this clause was an arbitration agreement, I should nevertheless exercise my undoubted discretion to refuse the stay. As between the Plaintiff and the 1st Defendant, this is clearly a domestic arbitration and I have a discretion under s.6 of the Ordinance.Mr. Kat

[1992] HKCU 25 at 4

submits that I should exercise that discretion against granting a stay because of the existence of the other Defendants. The 2nd Defendant is an American Corporation and it would seem, although I have not had much argument on it, that any arbitration between the Plaintiff and the 2nd Defendant (there being an arbitration clause in similar terms) would be one covered by the UNCITRAL Model Law which appears as the 5th schedule to the Arbitration Ordinance. So on this basis one of the arbitrations would be international and one would be domestic, and there might well be serious problems in hearing them together because the consolidation provision which applies to domestic arbitration does not apply to international ones under the Model Law. Further in relation to the 3rd Defendant, there is no arbitration clause at all. It is obvious that great inconvenience would be caused by granting a stay in respect of the claim against the 1st Defendant. There might be a risk of inconsistent verdicts and there would be multiplicity of proceedings. All these factors strongly indicate that I should exercise my discretion against granting a stay, and that is why I indicated at the end of the oral argument that I would dismiss the application for a stay with costs even if I came to the view that the 1st Defendant should have leave to defend.

I now turn to consider the Order 14 summons.

[1992] HKCU 25 at 5

Three points are taken. The main point is that the 1st Defendant contends that she was merely a middle person, and that all she was going to earn out of this was a commission being the difference between the two Contracts. What the 1st Defendant says is that the 1st Contract signed by the Plaintiff and her was a Contract under which she agreed to arrange the Plaintiff to sign the Contract with the ultimate-supplier and all differences between this Contract, and the ultimate-suppliers Contract would be 'acted as commission to me'. The 1st Contract was a 'commission contract'. She goes on to say that the 2nd Defendant was the ultimate-supplier and the 2nd Contract was signed by the Plaintiff as buyer and the 2nd Defendant as seller. She says that the 2nd Defendant was the actual supplier of the goods to the Plaintiff and she goes on to say that before and at the time of signing the 1st Contract, she had not agreed to bear liability for the quality of the goods sold by the ultimate-supplier to the Plaintiff. In the Contract between the Plaintiff and the 1st Defendant, there is a clause which says:

> "Seller will arrange the buyer to sign contract with ultimate-supplier and all difference between this contract and ultimate-suppliers Contract will be acted as the commission to the seller. And buyer is obliged to pay the seller the above commission. Commission will be paid to seller by buyer 15 days after the arrival of the cargo to China with quality approval."

[1992] HKCU 25 at 6

At the end of the contract, there is a provision which states that "If the quality is disapproved, all conditions of this contract would be invalid and buyer has reserved the right to claim back all necessary loss from seller". Mr. Kat says that this clause is quite inconsistent with the argument that the 1st Defendant was merely a middle person acting on commission.

I must confess to finding the contractual relationship somewhat more difficult than Mr. Kat would have me accept. The simple fact of the matter is the 2nd Defendant entered into a Contract for the purchase of this copper cable wire with the Plaintiff.This is not a case of the 2nd Defendant entering into Contract with the 1st Defendant, and then the 1st Defendant in a back to back Contract selling it onto the Plaintiff at a profit. It is also noteworthy that the Statement of Claim itself is not drafted as if this were a simple claim under a written contract, where the goods delivered did not comply with a specification. The Statement of Claim is full of references to representations and understandings and intentions and in paragraph 2, it states specifically that it

was the understanding and intention between the Plaintiff and the 3rd Defendant that ". ... the 1st Defendant would bear liability for, inter alia, the quality

[1992] HKCU 25 at 7

of the said goods". Paragraph 3 says it was the intention and understanding between the Plaintiff and the 1st Defendant, that the 1st Defendant would obtain the said goods from its own supplier and re-sell to the Plaintiff for profit. Later it is alleged that at the request of the 3rd Defendant and in consideration of the 1st Defendant entering into the 1st Contract, the Plaintiff agreed to enter into a 2nd Contract direct with the supplier, namely the 2nd Defendant but at a reduced price, so that the difference in the price between the 1st Contract and 2nd Contract became the profit and/or commission earned by the 1st and 3rd Defendant.

It seems to me that this is not a clear Order 14 situation. It may well be that the Plaintiff is right at the end of the day, but there is ample scope for argument here, and I do not propose to shut out the 1st Defendant from putting forward to the Court her contention that under this tripartite arrangement, she was not to incur any personal liability for defects in the goods. On that ground alone, I would give leave to defend.

The second ground relied upon related to the evidence of breach of specification. I am quite satisfied that the Plaintiff has made out a case as to this. There is an expert's report. That was in June of 1991. The 1st

[1992] HKCU 25 at 8

Defendant was invited to attend.She did attend. The criticism that she now makes was made some 6 months after the report was sent to her, and I find it difficult to give that part of the case any credence.

Finally, Mr. Kwan relies upon the fact that the affidavit in support of the Order 14 summons is defective in so far as it does not comply with the rules. The point here is that the evidence is given by Mr. Michael Ho, who was the manager of the Plaintiff company whereas the 1st Defendant says that the Contract was negotiated with another person, therefore Mr. Ho cannot have the necessary personal knowledge and does not depose to the fact that he has been informed of anything by the gentleman concerned. I do not think there is much in this point. The claim is a very simple one. A contract is produced. The contract contains a specification. An expert report is then produced which shows that the specification was not complied with and it is alleged that there was in breach of contract. I fail to see how Mr. Ho's affidavit fails to comply with the rule in relation to that point. However, I do think that the affidavit does fail to verify the Statement of Claim because as I already said that the Statement of Claim is full of references to understanding representation etc. which are not mentioned at all in Mr. Ho's affidavit, let alone within his personal knowledge.

[1992] HKCU 25 at 9

It seems to me if a Plaintiff chooses to plead a fuller Statement of Claim than is usual for a simple claim for damages of breach of a contract for the sale of goods then it is incumbent upon him in his Order 14 affidavit to verify the factual matters which he recites in the Statement of Claim. I therefore think there is some merit in the argument which Mr. Kwan has put forward in relation to the affidavit, but this is really of no moment as I have decided that this is a case which really ought to go to trial because there are elements of uncertainty about the 1st Defendant's contractual position which justify a trial. I therefore propose to give unconditional leave to the 1st Defendant to defend this action. I propose to make a costs order nisi being that the costs of the Order 14 summons be in the cause.