ICOS VIBRO LTD v SFK CONSTRUCTION MANAGEMENT LTD & ANOR - [1992] 1 HKC 296

HIGH COURT
KAPLAN J

CONSTRUCTION LIST NO 9 OF 1991

26 February 1992

Arbitration -- Stay of proceedings -- Summary judgment -- Deduction for late completion -- Whether penalty clause -- Claim for interest on sums unlawfully withheld -- Striking out application -- Application for dismissal from proceedings -- Unconditional leave to defend -- Arbitration Ordinance (Cap 341) s 6 -- Rules of the Supreme Court O 14, O 15 & O 18

The first defendant was an employer under a building contract with the plaintiffs and the second defendant as joint contractors. The plaintiffs and the second defendant never got around to forming a joint venture company to carry out the building contract but they jointly signed letters of authorization to the architect authorizing them to make payments due by the first defendant to the plaintiffs. Clause 10 of the contract provided that a sum of HK$1.2m would be deducted from the payments to the plaintiffs if the works could not be completed by them on certain targeted dates. The first defendant purported to rely on cl 10 and deducted the sum of HK$1.2m from the payments due to the plaintiffs. The plaintiffs argued that cl 10 was a penalty and that the first defendant had by its own conduct led to the HK$1.2m deduction. The plaintiffs applied to enter summary judgment against the first defendant for the sum of HK$1.2m and also for interest on the liquidated damages, allegedly, wrongfully deducted by the first defendant. However, the first defendant sought a stay of the proceedings against it in favour of arbitration under s 6 of the Arbitration Ordinance (Cap 341).

As to the second defendant, the plaintiffs' claim was solely for a declaration that the plaintiffs were entitled to receive all sums claimed. The second defendant took out two summonses, for the relief that the claim against it be struck out and that it be dismissed from the proceedings because it had improperly been made a party to these proceedings.

Held, dismissing the defendants' applications, granting unconditional leave to defend in relation to $1.2m claim and allowing the claim on interest on liquidated damages:

(1) Applications for summary judgment on the one hand and applications for a stay in favour of arbitration on the other are the opposite sides of the same coin. Several decisions of the English Court of Appeal encourage judges to consider the O 14 summons first. If judgment was appropriate, then, it could not be said that there was a dispute or difference capable of being referred to arbitration.

(2) The decisions in *Hayter v Nelson & Home Insurance Co* 1990 2 Lloyd 's Rep 265 and *Home & Overseas Insurance Co v Mentor Insurance Co (UK)* 1990 1 WLR 153 are not inconsistent. Stays will only be refused where the claimant can show clearly and emphatically that the respondent has no grounds for disputing the claim.

(3) In the present case, cl 10 was not a liquidated damages clause as it was not intended to be a genuine pre-estimate of damage in the event of breach of contract. The court was not prepared to give the plaintiffs summary judgment for HK$1.2m on the grounds that cl 10 was not so clearly a penalty, nor, on the basis that the first defendant might have caused the plaintiffs to be in the position where they had had HK$1.2m deducted. These were all matters which should go to a hearing.

(4) The plaintiffs were clearly entitled to the interest on the moneys wrongfully deducted as liquidated damages and, thus, to summary judgment in respect of such interest claim. Application for a stay in relation to the interest claim by the first defendant was refused. *Royden v Paul Y Construction* default (Con L 2/91, unreported) and *Farrans (Construction) v Dunfermline District Council* default (*The Times*, 25 March 1988, unreported) distinguished.

(5) The court refused to exercise its discretion to strike out these proceedings against the second defendant under O 18 r 19 or to make the order sought under O 15 r 6 because of the following factors: (a) there was no reason for the second defendant to insist on an authorization in relation to the release of moneys due from the first defendant to the plaintiffs; (b) there were common directors and a common legal representative for the defendants; (c) the second defendant failed to extricate itself from this action; and (d) this was a case of joint contractors and the plaintiffs were justified in joining the second defendant in order to prevent it being alleged that these proceedings were improperly constituted.

(6) It would be a somewhat strange result if a stay was to be granted so that the dispute between the plaintiffs and the first defendant went to arbitration and the second defendant, in respect of whom there was no arbitration clause, was left in the proceedings resisting a claim for a bare declaration. *Wharf Properties v Eric Cumine Associates* [1984] HKLR 211 distinguished.

(7) The multiplicity of proceedings and the inconsistent findings of fact arguments ought not in any way to be conclusive in stay applications. The court must have regard to what the parties agreed and what they must have contemplated by way of dispute. The situation in the present case was not contemplated by the parties. It was desirable for the present disputes concerning the plaintiffs' claim for the HK$1.2m to be heard by the same tribunal and that could only be achieved by refusing to grant a stay of the proceedings. *Wharf Properties v Eric Cumine Associates* [1984] HKLR 211 applied.

Cases referred to

Channel Tunnel Group v Balfour Beatty Construction [1993] 1 All ER 664

Dunlop Pneumatic Tyre Co v New Garage & Motor Co [1915] AC 79

Ellerine v Klinger [1982] 1 WLR 1375

Ellis Mechanical Services v Wates Construction [1978] 1 Lloyd's Rep 33

Farrans (Construction) v Dunfermline District Council (The Times, 25 March 1988, unreported) default

Far East Consortium v Airedale (CA 28/91, unreported) default

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

Home & Overseas Insurance Co v Mentor Insurance Co (UK) [1990] 1 WLR 153

John C Helmsing, The; Mayer Newman v Al Ferro Commodities Corp [1990] 2 Lloyd's Rep 290

Johnson v Stevens & Carter [1923] 2 KB 857

Mellstrom v Garner 1970 1 WLR

Northern Regional Health Authority v Derek Crouch Construction Co [1984] QB 644

Pine Hill, The; Halifax Overseas Freighters v Rasno Export [1958] 2 Lloyd's Rep 146

Roberts v Bury Commissioners [1870] LR 5 CP 310

Ryoden v Paul Y Construction (Con L 2/91, unreported) default

Sethia Liners v State Trading Corporation of India [1985] 1 WLR 1395

Taunton Collins v Cromie [1964] 2 All ER 332

Telford Development v Shui On Construction (A1946/87, unreported) default

Walter & Sullivan v J Murphy & Sons [1955] 2 QB 584

Wharf Properties v Eric Cumine Associates [1984] HKLR 211

Legislation referred to

(HK) Arbitration Ordinance (Cap 341) s 6

(HK) Rules of the Supreme Court O 14, O 15, O 16, O 18

(UK) Arbitration Act 1975 [UK] s 1

(UK) Courts & Legal Services Act 1990 [UK] s 100

(UK) Supreme Court Act 1981 [UK] s 43A

Other legislation referred to

Hudson Building & Engineering Contracts (10th Ed) pp 577-578 -

Mustill & Boyd Commercial Arbitration (2nd Ed) pp 123-124

Application

The plaintiffs applied for summary judgment against the first defendant and a declaration from the second defendant that they were entitled to the sums claimed. The first defendant sought a stay of the proceedings in favour of arbitration and the second defendant applied to be struck out and dismissed from the proceedings. The facts appear sufficiently in the following judgment.

Mr Matheou (Lovell White Durrant) for the plaintiffs.

Jill Spruce (Jewkes & Partners) for the first and second defendants.

KAPLAN J

There are before the court a number of summonses in this building contract dispute. The dispute relates to certain foundation works at a large Garden Road site. The first defendant is the employer under the contract. The plaintiff and the second defendant were the joint contractors. I will have to revert to the relationship between the parties but I now set out in chronological order the various summonses before the court.

(1) The second defendant issued a summons dated 29 July 1991 which seeks the striking out under O 18 r l9 of the claim made against it.

[1992] 1 HKC 296 at 299

(2) The first defendant issued a summons seeking a stay of the proceedings against it in favour of arbitration under the Arbitration Ordinance (Cap 341).

(3) The plaintiffs issued a summons under O 14 dated 5 August 1991 claiming final judgment for $2.4m against the first defendant and a declaration against the second defendant.

(4) The plaintiffs issued a summons dated 12 August 1991 seeking leave to file a re-amended statement of claim.

(5) The second defendant issued a summons dated 16 September 1991 seeking under O 16 r 6 that it be struck out of the writ on the ground that it had been improperly made a party to this action.

(6) By summons dated 20 November 1991 the plaintiff sought leave:

(a) to withdraw summons (4) above;

(b) to file a re-amended statement of claim in the form annexed as exh TT10 to the third affirmation of Tom Tang filed on 8 October 1991;

(c)to treat the re-amended statement of claim as having been served on 8 October 1991;

(d)to dispense with formal service of the re-amended statement of claim.

Summons numbered (4) above was withdrawn and replaced by summons numbered (6). I made an order by consent in the terms of summons (6) save that I did not deal with costs. During the hearing, I gave the plaintiffs leave to re-re-amend para 20 of the statement of claim which they immediately did.

As I have said, the plaintiffs and the second defendant were joint contractors and it was their intention to form a joint venture company to carry out this contract but they never got around to forming it. This posed somewhat of a problem in respect of sums due to them by the first defendant. To get around this problem, the plaintiffs and the second defendant jointly signed letters of authorization to the architect authorizing them to make payments due to the plaintiffs. At exh TT4 to the affirmation of Tom Tang filed on behalf of the plaintiffs on 5 August 1991, one finds the third such letter of authorization dated 30 July 1990 in the following terms:

> Dear sirs,
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> IL 8888 Garden Road, Hong Kong
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> We write jointly to notify you that ICOS-Vibro Ltd is authorized by Kong Kee Brothers Construction Co Ltd to receive all payment certificates issued by you in respect of the construction works on the above site undertaken pursuant to the letter of award dated 18 November 1989 from SFK Construction Management Ltd. All payment certificates should accordingly be issued to
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> *[1992] 1 HKC 296 at 300*
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> ICOS-Vibro Ltd until further notice. This arrangement shall continue for a period of one month from the date of issue of this letter.
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> Yours faithfully,: Yours faithfully,
>
> On behalf of : On behalf of
>
> ICOS-Vibro Ltd: Kong Kee Brothers Co Ltd

This was the practice adopted when payments were due under certificate. The present dispute relates to interim payment certificates DW6 and DW7. Payments under this procedure were made to the plaintiffs under interim certificates DW1-5.

The plaintiffs originally sought O 14 judgment for three separate heads of claims:

> (1) $1.2m. This sum is part of the sums certified for payment in certificates DW6 and DW7 which were unpaid by the first defendant. It is alleged that this failure to pay was a breach of contract because there were no proper cl 22 certificates to justify it. This claim for summary judgment has not been pursued.
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> (2) $1.2m being a sum deducted pursuant to cl 10 of the letter of award dated 18 November 1989.
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> (3) A sum by way of special damages in respect of interest on sums improperly deducted and later credited.

I now turn to the letter of award. The contract price was $62,902,954.75. This letter states that the contract works were awarded to a company of joint venture between the plaintiffs and the second defendant but as I have said, this company was never formed. The date of commencement of the contract was 7 November 1989. There were three stages to the work. Stage 1 had to be completed 77 days from commencement date (ie by 23 January 1990). Liquidated damages for failure to meet this date were $100,000 per calendar day. Stage 2 had to be completed 116 days from commencement date (ie by 3 March 1990). Liquidated damages were $75,000 per calendar day. Stage 3 had to be completed 135 days from commencement and liquidated damages were $15,000 per calendar day.

Thus far, the contract was in a standard form. Paragraph 8 of the letter of award provided for a bonus payment of $150,000 if each stage was completed eight days early. Paragraph 9 provided for an additional lump sum of $1m to be paid if these accelerated dates could be beaten by a further five days.

Paragraph 10 of the letter of award provided as follows:

> A lump sum of HK$1.2m (Hong Kong Dollars One Million Two Hundred Thousand only) shall be deducted from the contract sum as valued and adjusted by the quantity surveyor from time to time (excluding the provisional sum for contingencies). If you cannot achieve any one of the target completion/handover
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> *[1992] 1 HKC 296 at 301*
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> dates as described in item 8 above. This amount of money, HK$1.2m, shall be deducted from the payment of the interim certificate issued after day 135 from the date of commencement.

These accelerated dates were not achieved and the sum of $1.2m was deducted from sums due to the plaintiffs and the second defendant. Mr Matheou for the plaintiffs has contended that this sum is a penalty and that I should give summary judgment for that amount. Mrs Spruce for both defendants denies that this sum is a penalty because she says it is not payable in the event of a breach of contract but only on the non-happening of an event by a certain day. Both sides accept that by not meeting these accelerated dates, the plaintiffs and the second defendant were not in breach of contract because the completion dates are those specified in para 7 and do not include the accelerated dates. Further, both sides agree that there is no contractual mechanism for the architect to extend these accelerated dates, whereas, he can, of course, extend the contractual completion dates under cl 23 of the conditions of contract. Mr Matheou also relies on the doctrine of employers prevention. This doctrine, he submits, prevents the first defendant from deducting the sum of $1.2m if they had by their own conduct prevented the plaintiffs from earning the bonus payments and thereby leading to the $1.2m deduction. In this regard, he points out that eventually, the architect did certify an extension of 102 days.

Mrs Spruce invites me not to consider these interesting arguments because there is as between the plaintiffs and the first defendant an arbitration clause. She submits that, there clearly is a dispute or difference between the parties as to this sum of $1.2m and that I should, in the exercise of my discretion under s 6 of the Arbitration Ordinance (the Ordinance) stay these proceedings.

It has often been said that applications for summary judgment on the one hand and applications for a stay to arbitration on the other, are the opposite sides of the same coin. Several decisions of the English Court of Appeal encourage judges to consider the O 14 summons first. If judgment was appropriate, then, it could not be said that there was a dispute or difference capable of being referred to arbitration.

Two cases illustrate the traditional approach. In *Sethia Liners Ltd v State Trading Corporation of India* 1985 1 WLR 1398 at 1401, Kerr LJ put the matter thus:

> The submissions of both parties have proceeded on the basis that the summonses under O 14 and s 1 of the Arbitration Act 1975 (the 1975 Act) are the reverse sides of the same coin and we have been referred to Mustill and Boyd, *Commercial Arbitration*(1982), pp 90-92. Without expressing any concluded view on everything which is stated there, it seems to me that the position can be summarized as follows: If a point of law is raised on behalf of the defendants
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> *[1992] 1 HKC 296 at 302*
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> which the court feels able to consider without reference to contested facts simply on the submissions of the parties, then, it is now settled that in applications for summary judgment under O 14, the court will do so in order to see whether there is any substance in the proposed defence. If it concludes that, although arguable, the point is bad, then, it will give judgment for the plaintiffs. This course will also be adopted where there is a counter-application for a stay of the action. If the contract between the parties contains an arbitration clause to which s 1 of the 1975 Act applies, then, the court is not thereby precluded from considering whether there is any arguable defence to the plaintiffs' claim. If the court concludes that the plaintiffs are clearly right in law, then, it will still give judgment for the plaintiffs. In the same breath, as it were, it will then have decided that in reality there was not in fact any dispute between the parties. If the court is satisfied that the plaintiffs are clearly right in law and that the defendants have no arguable defence, then, it will not avail the defendants to have raised a point of law which the court can see is in fact bad. In those circumstances, the defendants cannot be heard to say that there was a dispute to be referred to arbitration. But if the court concludes that the plaintiffs are not clearly entitled to judgment because the case raises problems which should be argued and considered fully, then, it will give leave to defend and it is therefore, then bound to refer the matter to arbitration under s 1 of the 1975 Act.

More recently in *Home & Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd* default [1990] 1 WLR 153, Parker LJ dealing with the same question said this at p 158:

> The purpose of O 14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. If the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived, the plaintiff is entitled to judgment. If at first sight, the point appears to be arguable but with a relatively short argument can be shown to be plainly unsustainable, the plaintiff is also entitled to judgment. But O 14 proceedings should not, in my view, be allowed to become a means for obtaining, in effect, an immediate trial of an action which will be the case

> of the court lending itself to determine on O 14 applications points of law, which may take hours or even days and the citation of many authorities before the court is in a position to arrive at a final decision.

In cases where there is an arbitration clause, it is in my judgment the more necessary that full scale argument should not be permitted. The parties agreed on their chosen tribunal and a defendant is entitled prima facie to have the dispute decided by that tribunal in the first instance, to be free from the intervention of the courts until it has been so decided and thereafter, if it is in his favour, to hold it unless the plaintiff obtains leave to appeal and successfully appeals.

In the case of a commercial arbitration, the above remarks apply with even greater force, perhaps especially when the dispute turns upon construction or the implication of terms or trade practice. Arbitrators and umpires in the same business or trade as the parties are certainly as well or better able than the court

[1992] 1 HKC 296 at 303

to judge what the parties must be taken to have meant or intended by the words or phrases they have used, to judge what the parties would at once have replied if an innocent bystander had asked what was to happen in a certain event, not dealt with by the contract and to know what are the practices in the trade. Not only is the defendant entitled to have the dispute decided in the first instance by such persons but the court should not in my view, save in the clearest of cases, decide the question without the benefit of their views.

The logic of these two decisions was questioned by Mustill & Boyd's *Commercial Arbitration* default (2nd Ed) at pp 123-124. The learned authors expressed their views in the following terms:

> Whatever might be the position as regards a defence which is manifestly put forward in bad faith, there are strong logical arguments for the view that a bona fide if insubstantial defence, ought to be ruled upon by the arbitrator not the court. This is so especially where there is a non-domestic arbitration agreement, containing a valid agreement to exclude the power of appeal on questions of law. Here the parties are entitled by contract and statute to insist that their rights are decided by the arbitrator and nobody else. This entitlement plainly extends to cases where the defence is unsound in fact or law. A dispute which, it can be seen in retrospect, the plaintiff was always going to win is none the less a dispute. The practice whereby the court pre-empts the sole jurisdiction of the arbitrator can, therefore, be justified only if it is legitimate to treat a dispute arising from a bad defence as ceasing to be a dispute at all when the defence is very bad indeed. The correctness of this approach is not self-evident. Moreover, in all but the simplest of cases, the court will be required not merely to inspect the defence but to enquire into it; a process which may, in matters of any complexity, take hours or even days. When carrying out the enquiry, the court acts upon affidavits rather than oral evidence. The defendant might well object that this kind of trial in miniature by the court is not something for which he bargained when making an express contract to leave his rights to the sole adjudication of an arbitrator.

Whatever the logical merits of this view, the law is quite clearly established to the contrary. Where the claimant contends that the defence has no real substance, the court habitually brings on for hearing at the same time the application by the claimant for summary judgment and the cross-application by the defendant for a stay, it being taken for granted that the success of one application determines the fate of the other.

In *Hayter v Nelson & Home Insurance Co* default [1990] 2 Lloyd's Rep 265, Saville J expressed support for the logical stand taken by Mustill & Boyd. It has to be noted at once that he was there dealing with a non-domestic case to which the 1975 Act applied and thus, he had no discretion unlike the situation before me. At p 267 Saville J said:

> In some cases the suggestion seems to be made that if it can be shown that a claim under a contract is indisputable, ie a claim that simply cannot be resisted on either the facts or the law, then, there is no dispute or difference within the meaning of the arbitration clause in that contract.

[1992] 1 HKC 296 at 304

The learned judge, then, went on to refer to a well-known passage in the judgment of Bridge LJ (as he then was) in *Ellis Mechanical Services Ltd v Wates Construction Ltd* default [1978] 1 Lloyd's Rep 33 at 37 and continued at p 268 thus:

> To the extent that such observations are intended to define what is or is not a dispute or difference within the meaning of an arbitration clause of the kind under consideration, I am respectfully unable to agree with them. More importantly, they seem to me to be in conflict with the decision of the Court of Appeal in *Ellerine Brothers (Pty) Ltd v Klinger* default [1982] 1 WLR 1375. In my view, to treat the word 'disputes' or the word 'differences' in the context of an ordinary arbitration clause, as bearing such a meaning, leads not only to absurdity but also involves giving those words a meaning which (though doubtless, one, the words are capable of bearing) in the context is difficult to support.

The proposition must be that if a claim is indisputable, then, it cannot form the subject of a 'dispute' or 'difference' within the meaning of an arbitration clause. If this is so, then, it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause and that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so. It must further follow that a claim to which there is an indisputably good defence cannot be validly referred to arbitration since, on the same reasoning, there would again be no issue or difference referable to arbitration. To my mind such propositions have only to be stated to be rejected, as indeed, they were rejected by Mr Justice Kerr (as he then was) in *The M Eregli* default [1981] 2 Lloyd's's Rep 169, in terms approved by Lord Justices Templeman and Fox in *Ellerine v Klinger* default . As Lord Justice Templeman put it (at p 1383):

> 'There is a dispute until the defendant admits that the sum is due and payable.'
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> In my judgment, in this context, neither the word 'disputes' nor the word 'differences' is confined to cases where it cannot, then and there be determined, whether one party or the other is in the right. Two men have an argument over who won the university boat race in a particular year. In ordinary language, they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them.

In my view, this ordinary meaning of the word 'disputes' or the word 'differences' should be given to those words in arbitration clauses.

In *The John C Helmsing* default [1990] 2 Lloyd's Rep 290, Bingham LJ in the course of his judgment had occasion to consider the view expressed by Saville J in *Hayter* default . At p 296, he said:

> Mr Berry relied on the established law laid down in *Sethia Liners Ltd v State Trading Corporation of India* default and recognized as such by Mustill & Boyd in the
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> *[1992] 1 HKC 296 at 305*
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> current edition at p 124. He politely but firmly submitted that Mr Justice Saville's judgment was wrong ...

Given the modern attitude to arbitration and if the matter were free from authority, I would for my part be much impressed by the arguments of logic and principle deployed by Mr Justice Saville and Mustill & Boyd. But the matter is not free of authority and the defendants have a body of authority on their side. The courts have treated the plaintiff's demonstration of a clear case under O 14 as a reason for not granting a stay even where the defendant disputes the claim.

In Hong Kong, the pre- *Hayter* default approach has been universally adopted and I myself have had occasion to refer to and rely upon *Home & Overseas Insurance Co Ltd v Mentor Insurance* default in *Ryoden v Paul Y Construction* default (Con L 2/91, 31 July 1991, unreported).

The question I now have to consider is whether the decision in *Hayter* is in any way in conflict with *Home & Overseas* and whether as Mrs Spruce submitted, the effect of *Hayter* is to ensure that a stay will, in virtually all cases, be granted. *Hayter* was considered by the English Court of Appeal in a judgment handed down on 22 January in *Channel Tunnel Group v Balfour Beatty Corporation Ltd* 1993 1 All ER 664. The defendant contractors had threatened to stop work and when Evans J indicated that he was minded to grant an injunction, the contractors gave an undertaking. The contract contained a Brussels arbitration clause and the applicable law was the common principles of English and French law, and in their absence 'such general principles of international trade law as have been applied by national and international tribunals'. Staughton LJ who gave the judgment of the court setting aside Evans J's order, recorded that the judge had followed *Hayter*. In particular, the passage at p 271 in *Hayter* was relied upon, where Saville J had said:

> Only in the simplest and clearest cases, ie where it is readily and immediately demonstrable that the respondent has no grounds at all for disputing the claim, should the party be deprived of his contractual right to arbitrate.

In *Hayter,* the court was concerned with s 1 of the 1975 Act which expressly added into the New York Convention's wording, the words:

> Or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred ...

That is the reason why Saville J concentrated on what was required to be established in order to show that a dispute existed. Unless one existed, Saville J was bound to grant the stay, whereas, in the case before me, I have a discretion given to me by s 6 of the Ordinance.

Having read and re-read both *Hayter* and *Home & Overseas,* I am satisfied that *Hayter* can sit comfortably with the latter. Consequently, I find nothing new or startling in *Hayter*. Saville J's reminder of Templeman LJ's words in *Ellerine v Klinger* default serve only to remind practitioners that

[1992] 1 HKC 296 at 306

stays will only be refused where the claimant can show clearly and emphatically that the respondent has no grounds for disputing the claim. Saville J's judgment is a timely warning for those who try to circumvent the arbitration clause by resort to O 14. Applications where one party seeks a stay and the other judgment under O 14 are commonplace in the construction list. These cross-summonses are usually very heavy with extensive evidence being put in by both sides. Such summonses take a little time to be ready to be heard. When they do come on for a hearing, they frequently last for more than a day as was the case in the present matter. Appeals are unrestricted and commonplace. Much time, energy and money is spent at this stage. If the dispute had immediately gone to arbitration as agreed, the arbitrator could have made arrangements to hear the allegedly indisputable part of the case at an early stage and render an interim award and proceed to hear the remainder of the case. I should add that there has been a recent tendency in the construction list for plaintiffs to launch very ambitious O 14 applications, with the inevitable result that they deflect energy and resources from the substantive hearing whether it be in court or in arbitration.

It follows therefore that, subject to the position of the second defendant which is tied into the question of discretion and to which I will return, I propose to take the position that a stay will only be refused where the plaintiff has shown quite clearly that the respondent has no grounds for disputing the claim.

In this case, there is an additional factor which I must consider. The second defendant is a party to these proceedings and there is no arbitration agreement as between the plaintiffs and the second defendant and thus, if I granted the stay for arbitration, the second defendant would be left in the action with the plaintiffs' claim against the first defendant going to arbitration. Mr Matheou submits that this would result in a most unsatisfactory situation. Mrs Spruce says that I should not be concerned about this point when I note the nature of the case against the second defendant and in any event, if I were with her on her application to strike out the claim against the second defendant or dismiss them from the writ, the problem does not arise. I will therefore, revert to this point when I have considered whether the claim against the second defendant should be struck out.

However, at this stage I must express a view on the O 14 situation. I am not satisfied that cl 10 of the letter of award is a liquidated damages clause. It is not intended to be a genuine pre-estimate of damage in the event of a breach of contract. Although Mr Matheou reminded me of Lord Dunedin's principles in *Dunlop Pneumatic Tyre Co v New Garage & Motor Co Ltd* [1915] AC 79 , I think it eminently arguable that this is not a penalty clause. However, it seems that it is arguable that if it were the actions of the first defendant which prevented the plaintiffs from earning the bonuses,

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the plaintiffs could not complain. There are two cases cited in Hudsons, *Building & Engineering Contracts*(10th Ed) at pp 577-578 which seem to come to different conclusions on this point. However, the plaintiffs in this case are not claiming that they have been prevented from earning the bonus but they are resisting as strongly as they can, the deduction of $1.2m for not making the accelerated dates. It may well be that the plaintiffs can resist this deduction by reason of the doctrine of employers prevention as enunciated in *Roberts v Bury Commissioners* 1870 LR 5 CP 310 and in cases following that case. I did not hear extensive argument on this point because Mr Matheou founded his argument principally on the basis that this was a most obvious penalty clause. I am prepared to hold that it is arguable that by reason of this doctrine, the first defendant might be prevented from deducting this $1.2m, if their conduct or the conduct for those for whom they are responsible prevented the first defendant from earning the bonus sums and thereby put them in the position where they were liable to pay $1.2m. I am not prepared to hold at this stage that the law is powerless to deal with a situation such as this but this is clearly a matter which will have to be gone into very fully in court or in an arbitration depending upon whether I grant the stay.

For these reasons, I am not prepared to give the plaintiffs summary judgment for $1.2m on the grounds that cl 10 of the letter of award is not so clearly a penalty clause nor on the basis that the first defendant may have caused the plaintiffs to be in the position where they have had $1.2m deducted. These are all matters which in my judgment should go to a hearing. There is a clear dispute as to these matters.

Interest

I now turn to that part of the plaintiffs' claim which is for the interest on sums allegedly wrongfully deducted.

Paragraph 15 of the statement of claim refers to cl 22 of the contract which makes a certificate in writing of the architect a condition precedent to the deduction of liquidated damages for delay. On 22 March 1990, the architect purported to give such a notice under cl 22 of the conditions of contract. In this notice, the architect stated that the plaintiffs had not completed stage 3 of the works on 21 March l990 and he notified the plaintiffs of the first defendant's right to deduct liquidated damages. The plaintiffs contend that this letter did not comply with cl 22 because in it, the architect failed to certify that in his opinion the works ought reasonably to have been completed by 21 March 1990. Further, by letter dated 10 May 1991, the architect extended the date for completion of stage 3 of the works by 102 days from 21 March 1990 until 10 May 1991. The plaintiffs contend that there was no right to deduct these liquidated damages in the first place, due to lack of a proper certificate under the contract. Further, they contend that the effect of the extension of time is to oblige the

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architect to issue a further cl 22 certificate before liquidated damages can be deducted in respect of stage 3. The plaintiffs contend that the letter dated 10 May 1991 cannot be an effective cl 22 certificate. Thus, the plaintiffs contend that there was no right to deduct any liquidated damages in respect of stage 3 of the works. In the premises, they submit that they are indubitably entitled to interest on the liquidated damages wrongfully deducted. I should add that on 16 August 1991 (after the issue of the writ), the architect further certified, for the avoidance of doubt, that at the time of writing their letters of 22 March 1990 and 10 May 1991, they were of the opinion that stage 3 of the works ought reasonably to have been completed at the specified date.

I am quite satisfied on the material placed before me that neither the letter dated 22 March 1990 nor the letter dated 10 May 1991, was a proper cl 22 certificate justifying the deduction of liquidated damages. However, that is not the end of the matter. Mrs Spruce submits that the first defendant was entitled to set-off against sums due to the plaintiffs, common law damages for delay which she says are not excluded by the terms of cl 22. Whether cl 22 is wide enough to exclude the first defendant's common law right to set-off is, she submits, a matter of construction. She says that cl 22 expressly preserves that right. Clause 22 provides as follows:

> If the main contractor fails to complete the works or the parts of the works by the date for completion of the works or the dates for completion of the parts of the works stated in the appendix to these conditions or within any extended time fixed under cl 23 (as amended) or cl 33(1)(c) of these conditions and the architect certifies in writing that in his opinion the same ought reasonably so to have been completed, then, the main contractor shall pay or allow to the employer a sum calculated at the appropriate rate stated in the said appendix as liquidated and ascertained damages for the period during which the works or the parts of the works shall so remain or have remained incomplete, or the employer without prejudice to any other method of recovery may deduct such sum from any moneys due or to become due to the main contractor under this contract.

In this case, acting on the basis of a certificate which did not comply with cl 22, substantial liquidated damages were withheld from sums due to the plaintiffs. The first defendant recognized that these liquidated damages should not have been deducted and they were re-credited. It ill behoves the first defendant now to say that they wish to re-characterize this deduction as damages by way of common law set-off and avoid having to pay interest on the sums which they concede were wrongly deducted. While Mrs Spruce relied on my judgment in *Ryoden*, Mr Matheou pointed out the factual differences in the two cases and also the different wording in the two clauses. I did not decide anything in *Ryoden*on this point, other than that the matter should go to trial for full argument. I do not propose to go through all the arguments and cases cited to me on this topic because I

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think it plain that the plaintiffs are clearly entitled to the interest on the moneys wrongfully deducted from sums otherwise due to them. (The cases cited were substantially the same as in *Ryoden.*)

Mrs Spruce's last point on this topic relied upon a Scottish case called *Farrans (Construction) Ltd v Dunfermline District Council* default reported only in *The Times* on 25 March 1988. She submitted that interest can only be awarded where there has been a final determination by the court or arbitrator. She goes on to submit that the architect is not yet functus officio. She submits that her clients are unhappy with the 102 days extension but have not yet decided whether to challenge it nor do they have to, she says, until the final certificate. However, no evidence at all was put in to suggest that the 102 days extension was to be challenged. In this context, I ought to mention that I specifically asked Mrs Spruce to take instructions as to whether or not her clients were suggesting that they would be seeking to open up, revise and review certificates granted because this was relevant to the difference in powers between the court and the arbitrator, and is highly relevant to the exercise of discretion on the application for a stay. Having taken instructions, she was not in a position to put anything concrete before me.

The facts of the *Farrans* case are very different to the facts before me. In that case, the agreed sums had not been certified for payment by the architect and thus, there was no obligation on the part of the employer to make payment until they had been certified. Lord Dunpark specifically said, 'Accordingly, the parties' claims were illiquid claims until the date of the agreement. The sums involved did not become debts due by the employer to the contractor until they were agreed'. In the case before me, payment was due 14 days after certificates DW6 and 7 were submitted. Payments were not made.

I therefore conclude that there is clearly no defence to the claim for interest on the moneys wrongfully deducted as liquidated damages. The plaintiffs are therefore, entitled to summary judgment for items (i), (ii) and (iii) of para 20 of the re-re-amended statement of claim. These sums are $456,904.10, $18,131.50 and $43,686.99 respectively which total $518,722.59. Although credit is offered in sub-para (v) of para 20, this is, I think, on the basis of the plaintiffs also recovering interest on the sum of $1.2m particularized in para 16-18 of the re-re-amended statement of claim which sum I have not awarded. The credit in any event is only for $4,763.34 which I do not propose to give but if I misunderstood the position, I will of course hear the parties as to whether credit should be given for this small sum. I think it follows from what I have just said that I do not propose to award any interest under (iv) of para 20. It follows from this conclusion that I would have refused a stay in relation to the claim for interest.

The claim against the second defendant

I now turn to consider whether the claim against the second defendant should be struck out under O 18 r 19 and whether the second defendant has improperly been made a party to these proceedings.

The claim against the second defendant is solely for a declaration in the following terms:

> A declaration that the plaintiff is entitled to receive all sums claimed herein.

The purpose of joining the second defendant is to ensure that no points are taken against the plaintiffs in respect of their right to receive payment of whatever is due to them in this action. The plaintiffs and the second defendant are joint contractors. They set up a procedure for payment which is pleaded in para 7 of the re-re-amended statement of claim. All worked well for the first five certificates and payments in respect thereof. Trouble arose over the sixth and seventh certificates. It is necessary to consider the contemporaneous correspondence to see how this matter developed in relation to the second defendant.

On l9 September 1990, the plaintiffs wrote to the first defendant confirming that they had been told that payment would not be made under certificates DW6 and 7 on the grounds that liquidated damages were being set-off. The plaintiffs immediately took the point that there was no proper cl 22 certificate to justify this deduction. Proceedings were threatened.

On 20 September 1990, the first defendant wrote to the plaintiffs setting out the deduction of $16,550,000 which they had made which left a balance due of $1,245,000, a cheque for which was enclosed.

On 5 November 1990, the first defendant wrote to the plaintiffs and the second defendant confirming a recent discussion and agreement made between the parties whereby the first defendant agreed to release a portion of the liquidated damages for stage 3 in the total amount of $2,850,000. This reduced the liquidated damages deducted to $12.5m. This letter enclosed a cheque in the sum of $2,850,000 in favour of the plaintiffs.

On 10 May 1991, the architect granted an extension of 102 days for the completion of stage 3 of the works. On 15 May 1991, the plaintiffs wrote to the first defendant pointing out that liquidated damages were still being held against payment in respect of certificates DW6 and 7, and that in view of the architect's current assessment of extension of time this sum was excessive. They therefore, asked for an immediate payment of $4.8m together with interest on that amount.

On 21 May 1991, the first defendant wrote to both the plaintiffs and the second defendant. The second paragraph of which letter reads as follows:

> We would like to inform you that we shall release the liquidated damages as ascertained by the architect within reasonable time subject to your presentation of authorization letter for the amount receivable from the joint venture partners of Icos-Vibro and Hong Kee.

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On 24 May 1991, the plaintiffs wrote to the first defendant and stated:

> The concerned liquidated damages in an amount of $7.1m was deducted from payment certificates 6 and 7 which we have already been authorized by the joint venture of Icos-Vibro and Hong Kee to receive the certified payment.

Hence, we do not consider further authorization as requested in this respect.

Furthermore, you have released a portion of the liquidated damages for phase 3 amounting to HK$2,850,000 directly to Icos-Vibro Ltd on 5 November 1990. This serves as a solid proof that authorization is not necessary for the release of liquidated damages.

On 3 June 1991, the first defendant wrote again to the plaintiffs advising them that payment for release of liquidated damages as ascertained by the architect was under preparation and they added:

> In the meantime, we would like to receive an agreement between you and your joint venture partner Sung Foo Kee (Civil) Ltd in respect of recipient of payment for our completed record.

The plaintiffs, of course, had been maintaining that authorization already existed with regard to the receipt of payment in respect of certificates DW6 and DW7, and all this was unnecessary.

On 3 June 1991, the second defendant wrote to the first defendant in the following terms:

> In view of the situation that our payment application no 8 in respect of architect certificate no 9 is yet to be settled by Icos-Vibro Ltd, you are advised to hold such payment until an authorized letter is presented as mentioned in your letter.

This letter is somewhat surprising because it is in effect, the second defendant telling the first defendant not to pay until the second defendant provides an authorization letter which, at any rate, the plaintiff says is unnecessary because it had already been provided.

On 4 June 1991, the plaintiffs wrote to the first defendant in which they took issue with the need for any further authorization letter before payment could be made to them.

On l9 June 1991, the second defendant wrote to first defendant referring to a letter of 3 June 1991 and confirmed that the plaintiffs were authorized by the second defendant to receive such payment as is mentioned in the letter of 21 May 1991.

There is a letter dated 11 June 1991 which I think must have been collected somewhat later from the first defendant to the plaintiffs and the second defendant confirming that the first defendant thereby released liquidated damages for stage 3 in the total sum of $4.8m and that after the release of that amount, liquidated damages of $7.7m remained deducted. The cheque for $4.8m was made out to the plaintiffs.

The writ was issued on 20 June 1991 and was served with an amended statement of claim on the second defendant on 28 June 1991. In that letter,

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the plaintiffs' solicitors made it clear that the second defendant had been joined because 'in the past, you have instructed SFK Construction Management Ltd not to release sums otherwise due to our client without your authorization. However, should you confirm in writing that our client is entitled to receive all payments

due from SKF Construction Management Ltd, we would, of course, not proceed with our client's action against you, thereby saving both parties unnecessary legal costs'.

On 12 July 1991, Jewkes & Partners' solicitors for both the first and second defendants wrote to the plaintiffs' solicitors in the following terms:

> We are instructed that you commenced the above action against our client without any advance notice. In any event, we have taken our client's instructions on your client's claim against ours and take the view that the claim has no solid foundations. Moreover, the declaration sought shall be declined since there is nothing to suggest that the first defendant is bound to observe the alleged agreement, which is denied, reached between our respective clients. The declaration sought does not, therefore, serve any useful purpose.

On 18 July 1991, the plaintiffs' solicitors expressed the view that it should be in the second defendant's interest, as one of the companies comprising the 'contractor', that all sums due from the first defendant should be recovered. They asked the second defendant's solicitors to explain why the second defendant did not wish to assist in the recovery of the sums which were properly due to the 'contractor' from the first defendant. They made the point that it was unarguable that payment of sums certified should be paid to anyone other than the plaintiffs. They further made the point that further authorization was not required because of the binding agreement evidenced by the letters sent to the architect jointly by the plaintiffs and the second defendant on 30 July and 1 September 1990, and the fact that the architect had issued the certificates in question in the name of the plaintiffs, thus, giving the plaintiffs the right to sue on those certificates. They went on to make the point that the purpose of the declaration was to confirm the plaintiffs' entitlement to receive payments but that it did not preclude the second defendant from seeking reimbursement from the plaintiffs in respect of work and materials carried on site by them, should there be any such work or materials in respect of which payments had not yet been made.

On 25 July 1991, the plaintiffs' solicitors wrote to the first defendant's solicitors indicating that their research showed that to be certain that the first defendant could not defeat the plaintiffs' claim on the basis that the contract was a joint one it was necessary for the second defendant either to be plaintiff or defendant in the action. Accordingly, they offered to discontinue the proceedings against the second defendant in respect of the declaration provided that either (1) the first defendant undertook that it would not rely either on the absence of authorization or on any joint contract point, or (2) the second defendant consented to join as co-plaintiff

in which case the plaintiffs offered to indemnify the second defendant in respect of 'its potential liability to SFK Construction Management Ltd in costs'.

On 29 July 1991, Jewkes & Partners on behalf of both defendants wrote to the plaintiffs' solicitors indicating that the first defendant were going to apply for a stay in favour of arbitration and they further went on to say that they were instructed by the first defendant that it was not prepared to give any undertakings as to how it would conduct its case against the plaintiffs. As to the suggestion that the second defendant should join as co-plaintiff, they pointed out that no such request had been made prior to commencement of the action and they referred to the notes to O 15 r 4 and rejected the proposal. They made a counter-proposal that subject to the plaintiffs giving an indemnity against costs, the second defendant would continue to be a co-defendant in the action and if the disputes are referred to arbitration, the second defendant would agree to be a co-respondent in the arbitration.

Those were, in essence, the parties' respective stances before me.

It should be noted that the first and second defendants are part of the same group of companies and the same five individuals constitute the board of directors of each company. I have already pointed out that the same counsel and solicitors represent both the first and second defendants.

In support of his proposition that the second defendant was properly joined because it was a joint contractor, Mr Matheou referred me to the case of *Johnson v Stevens & Carter Ltd* 1923 2 KB 857. The headnote reads as follows:

> Where one of two joint contractors refuses to join as co-plaintiff in an action for a breach of the contract, it is, as a general rule and in the absence of special circumstances, a condition precedent to the right of the other co-contractor to make him a defendant that he should first, have offered him an indemnity against costs if he would consent to join as

> plaintiff; but there is an exception to that rule where the dissenting contractor has in breach of his duty to the plaintiff colluded with the defendant and brought about the breach of contract complained of.

At pp 860-861 Atkin LJ said:

> It appears to me that at the present day, as a general rule, in the absence of special circumstances, if one of two joint contractors refuse to join as plaintiff in an action for a breach of the contract, the party seeking to sue should offer the other an indemnity and, then, if he still refuses, is entitled to join him as a defendant. That is a great advance on what was the strict rule at common law, according to which, one joint contractor could not join another as plaintiff in an action against his will except where the joint contractor were partners ...

At p 863 Younger LJ put the matter thus:

> The question, then, arises as to the circumstances in which one of two joint contractors is entitled to maintain an action in that form. Now, I think it is clear
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>
> that he has no absolute right to do so and that he is only allowed to take that course as a matter of privilege and upon terms. What then are the terms on which the privilege is to be enjoyed? Speaking for myself, I should prefer not to say that the condition of his being allowed to join the other joint contractor as a defendant is that he shall have offered him an indemnity against costs if he will allow the use of his name as plaintiff but to state the principle rather more widely, and say that before joining his co-contractor as a defendant, he must first have exhausted all reasonable means of obtaining his consent to being joined as plaintiff. No doubt in ninety-nine cases out of a hundred, one of those reasonable means is the offer of an indemnity and the absence of such an offer, unexplained, would in these cases be a reason for saying that the action was not properly constituted if the co-contractor was joined as a defendant. But in the hundredth case, and the present case is an instance, where the co-contractor is alleged in breach of his duty to the plaintiff to have colluded with the other party to the contract and procured a breach of it, it would not be reasonable to require the plaintiff to offer him an indemnity as a condition of being allowed to join him as a defendant.

Mr Matheou explained why the plaintiff did not need to offer an indemnity before starting this action. He relied upon the very close relationship between the two companies. He referred to the correspondence which I have quoted above and which he said shows that the second defendant has wrongfully sought to prevent the first defendant for making payment due under the contract. He further goes on to point out that the plaintiffs have, in any event, offered an indemnity in an appropriate form which has been rejected by the second defendant.

Mr Matheou also puts his case on the basis that the terms of the authorization letter of 30 July 1990 amounted to a binding agreement that the plaintiffs could receive certificates within the terms of that letter, present the certificates for payment and receive payment from the first defendant. The plaintiffs' case, in this regard, takes account of the previous course of dealings between the parties whereby the second defendant and the plaintiffs jointly notified the architect that the second defendant authorized the plaintiffs to receive certificates; that the architect issued payment certificates in the sole name of the plaintiffs; that the second defendant applied to the plaintiffs for payment; that the first defendant paid the full amount due on the certificates issued by the architect; that the plaintiffs paid the second defendant on account of work carried out by the second defendant. He submits that although the letter of 30 July 1990 uses the language of agency, in effect, it is an assignment and in support of this proposition he cites *Walter & Sullivan Ltd v J Murphy & Sons Ltd* 1955 2 QB 584 at pp 587-589.

Mr Matheou therefore, submits that the second defendant was properly joined in the very special circumstances of the facts of this case and that the application under O 18 r 19 and the inherent jurisdiction of the court should only be granted in a plain and obvious case, which this is not.

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Similarly, he argues that an order under O 15 r 16(2)(a) is analogous and should only be made in similar circumstances. On this basis, he submits that the plaintiffs' case against the second defendant and the proposition that the second defendant should remain a party, is strongly arguable on any of the grounds pleaded and he goes so far as to say that it is incontestable on the basis that the second defendant is a joint contractor.

Mr Matheou is, of course, right when he says that the jurisdiction of O 18 r 19 is to be granted only in a plain and obvious case. The Court of Appeal in *Far East Consortium Ltd v Airedale Ltd* default (CA 28/91, unreported) said:

> We accepted that this is a jurisdiction which is very sparingly exercised and only in exceptional cases ...

Mrs Spruce on the other hand, says that it was quite unnecessary to add the second defendant to this action because all the court is being asked to do is to declare that the plaintiff is to receive payments. She submits that if the court orders the first defendant to pay the sum claimed or any sum by way of summary judgment, it is clearly the plaintiffs who will receive that sum under the court order. She goes on to submit that unless the court is being asked to make a declaration that the plaintiffs are absolutely entitled, it makes no sense as the mere receipt of the sum will not take the plaintiffs very far at all, as they would, then, simply hold any sum paid to them under summary judgment on trust for themselves and the second defendant in the same way as they had prior to this dispute. She submits that the second defendant's case is simply that any prior authorization that there had been to the architect was a mere direction or revocable mandate to issue payment certificates to the plaintiff. Although the suggestion made by Mrs Spruce in her written skeleton on behalf of the second defendant was that sums will be received by the plaintiffs on trust for themselves and the second defendant, she appeared to resile from that position somewhat during the course of her oral submissions.

Basically, Mrs Spruce submits that there is absolutely no point in granting this application for a declaration as it adds nothing to the pleadings and has no practical effect whatsoever. She points out that the grant of a declaration is discretionary and she reminds me that Harman LJ in *Mellstrom v Garner* 1970 1 WLR 603 pointed out that:

> Where specific relief, other than a declaration, is not claimed, the jurisdiction to make a binding declaration of right should be exercised with great caution.

I do not propose to overburden this already lengthy judgment by setting out in full the detailed, helpful and thoughtful submissions which Mrs Spruce has placed before me in writing.

My conclusions on this aspect of the case are as follows. This is an unusual situation. Everything went well in respect of payment of the first five certificates. I cannot understand why the second defendant was insisting

on an authorization in relation to the release of moneys due from the first defendant. I cannot ignore the fact that there are common directors and a common legal team. If the second defendant wished to extricate itself from this action, all it had to do was to agree that moneys properly payable by the first defendant should be paid to the plaintiffs and agree with the plaintiffs direct as to what was to happen with regard to any claims which they may have in respect of the sums paid. This is a case of joint contractors and I have come to the conclusion that the plaintiffs were justified in joining the second defendant in order to prevent it being alleged that these proceedings were improperly constituted. I am not satisfied on all the material placed before me that it would be appropriate in the exercise of my discretion to strike out these proceedings under O 18 r 19 or to make the order sought under O 15 r 6. I should add that I gave Mrs Spruce every opportunity to take instructions about the position of the second defendant during the course of the adjournment between the two hearings because it was clear to me that the presence or absence of the second defendant could have a significant effect on the exercise of my discretion in relation to the application for a stay to arbitration.

Despite this invitation, the second defendant's stance has not changed. I must confess to being surprised that the plaintiffs and the second defendant cannot come to sensible terms in relation to the question of receipt of payment and the failure on the second defendant's part to extricate itself from these proceedings has, I am afraid, fuelled the suspicions of the plaintiffs. At the end of the day, the judge or arbitrator will have to decide whether there is anything in any of these points. I am not prepared to strike out the claim against the second defendant on either of the bases sought at this stage of these proceedings.

Should I exercise my discretion to grant a stay

I have already decided that the plaintiffs' claim in respect of the cl 10 deduction of $1.2m should go to a hearing. I now have to decide whether it should be in court or in arbitration. The second defendant is to remain a party and it is common ground that there is no arbitration clause in relation to the second defendant. There are a number of well known cases which indicate that in situations such as this, the court is entitled to take into account the desirability of one tribunal being seized of the dispute in order to prevent inconsistent findings and to prevent duplication of costs. Two of the leading cases are *The Pine Hill* [1958] 2 Lloyd's Rep 146 and *Taunton Collins v Cromie* default [1964] 2 All ER 332. In Hong Kong, there have been several deci-

sions in this area but two are worth noting. In *Wharf Properties Ltd v Eric Cumine Associates* default [1984] HKLR 211, Mantell J granted a stay in favour of arbitration to the main contractor although there was no arbitration clause with the architect who was also a party to the proceedings. Mantell J emphasized that it was for the plaintiff to show a

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sufficient reason why the matter should not be referred to arbitration and by that he meant a very strong reason or a very good reason. He went on to suggest that in applications of this type, the court should consider all the circumstances of the case but consider them with a strong bias in favour of maintaining the bargain between the parties. The court must be vigilant to see that it does not drive either of the parties to a tribunal where it would not get substantial justice but at the same time must not overlook the fact that at the time the parties agreed to arbitration, they had in mind the overriding jurisdiction of the court. In that case, the learned judge recognized that the grant of a stay would give rise to a risk of inconsistent findings of fact and that there would be multiplicity of proceedings. However, he went on to hold that the plaintiffs in that case had entered into the agreements to arbitrate on at least equal terms and they must be taken to have had within their contemplation the very kind of dispute which had arisen. In that case, they had an arbitration clause with the main contractor but none with the architect and none with some of the sub-contractors.

In *Telford Development Ltd v Shui On Construction Ltd* default (A1946/87, 21 February 1989, unreported), Godfrey J refused an application for a stay and he relied very heavily upon the multiplicity of proceedings point.

One point that is frequently raised in applications of this nature is what is known as the *Crouch* point. This is derived from the case of *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] QB 644 which decided that where a contract contained an arbitration clause which gives the arbitrator the power to open up, revise and review certificates granted by the engineer or architect, the court does not have similar powers if the matter is heard in court as opposed to in arbitration. This is frequently a very strong ground indeed for granting a stay and keeping people to their bargain. (It is to be noted that a new s 43A of the Supreme Court Act 1981, recently introduced in England by s 100 of the Courts and Legal Services Act 1990, now provides that where there is such a clause conferring specific powers upon an arbitrator, the High Court may exercise the specific power if the parties agree. Hong Kong has not yet introduced a similar section).

It was because of the *Crouch* point that I specifically asked Mrs Spruce to take instructions and let me know whether a *Crouch* point was going to be taken and if so, to identify it. Apart from saying that her clients were unhappy with the 102 days extension of time, she was not able to take this matter any further.

I think this case is a very different one to the *Wharf*case. In the *Wharf* case, the plaintiffs knew what they were doing and had an arbitration clause with the main contractor but not with their architect, and they must have been taken to have been the authors of their own misfortunes. In the case before me, there was an arbitration clause involving the contractor.

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There is a fairly straightforward dispute as to the rights and liabilities under the building contract in this case. The second defendant has been joined, and in my view it cannot be said improperly joined, at this stage in order to prevent the first defendant from taking any technical points on the absence as a party to these proceedings of the other joint contractor. It would, therefore, be a somewhat strange result if a stay was to be granted so that the dispute between the plaintiffs and the first defendant went to arbitration and the second defendant, in respect of whom there is no arbitration clause, was left in the proceedings resisting a claim for a bare declaration. This is a somewhat unreal situation which the court would not wish to create. It was always open to the second defendant to agree to enter into an agreement to arbitrate and be joined in the arbitration as between the plaintiffs and the first defendant. If that had been agreed, there would be a very strong case in favour of a stay. But the second defendant has not so agreed and they wish the matter to be determined by the High Court.

In my judgment, the multiplicity of proceedings and the inconsistent findings of fact arguments ought not in any way to be conclusive in these matters. I agree respectfully with the approach of Mantell J in the *Wharf* case. In construction cases, there are frequently more than two parties and this point often arises. The court must have regard to what the parties agreed and what they must have contemplated by way of disputes. I think it is clear though, on the case before me, that nobody contemplated the situation which has now arisen and that in these circumstances, I am entitled to take into account the desirability of the present disputes be-

ing heard by the same tribunal. The only way I can achieve the result of one tribunal being seized of all the disputes is to exercise my discretion against the grant of a stay to arbitration. If this matter should go further, it might be helpful if I indicate that had I dismissed the second defendant from the proceedings or struck out the claim against it under O 18 r 19, I would have exercised my discretion in favour of granting a stay as I can see no

other reason not to grant a stay other than the position of the second defendant.

In all circumstances therefore, I decline to grant a stay and dismiss that summons accordingly.

Conclusion

> (1) There will be unconditional leave to defend in relation to the claim for $1.2m under cl 10 of the letter of award.
>
> (2) There will be summary judgment for the plaintiff against the first defendant in the sum of $518,722.59 in respect of interest on sums unlawfully withheld. There will also be a declaration that the plaintiff is entitled to receive this sum.
>
> (3) The summonses seeking the striking out of the claim against the second defendant and the dismissal of the second defendant from the action will both be dismissed.
>
> *[1992] 1 HKC 296 at 319*
>
> (4) The summons for a stay to arbitration will be dismissed.

Before parting with this case, I must express my gratitude to both Mr Matheou and Mrs Spruce for their most helpful and thoughtful written legal submissions which have canvassed much difficult ground and which I have found of great assistance in the formulation of this judgment.