1 of 1 DOCUMENT: Hong Kong Cases/Judgments/1994 1 HKC/MAYERS v DLUGASH - [1994] 1 HKC 755 - 10 June 1994

13 pages

MAYERS v DLUGASH - [1994] 1 HKC 755

HIGH COURT
KAPLAN J

MISCELLANEOUS PROCEEDINGS 342 OF 1994

10 June 1994

Arbitration -- Expert determination -- Whether person appointed as expert or arbitrator -- Relevant factors -- Absence of sufficiently formulated dispute

The plaintiff was the sole beneficial owner of shares in Far East Diversify Investments Ltd (FEDI) and the defendant was beneficial owner of shares in Common Seal Ltd (Common Seal). FEDI and Common Seal were the registered owners of shares in Imcor Ltd (Imcor) in equal proportion. In 1992, the plaintiff and the defendant agreed in principle that the business activities, assets and liabilities of Imcor should be distributed between them. By a deed of submission dated 30 March 1992, the parties agreed to appoint an independent third party to resolve any differences and to determine the manner in which such distribution was to be made. The deed was inconclusive as to whether the third party was appointed as an arbitrator or expert. The plaintiff sought removal of the arbitrator for misconduct under s 25(1) Arbitration Ordinance (Cap 341). Both parties agreed that the judge should decide whether the third party (Mr Dickson) was an arbitrator or expert as a preliminary issue.

Held, dismissing the summons:

(1) The classic features of expert determination were: first, the expert makes a final and binding decision; second, the decision can only be challenged in the most exceptional circumstances such as where the expert answers the wrong question; third, the expert can be sued for negligence in the absence of an agreed immunity; fourth, the expert's determination cannot be enforced as an arbitral award.

(2) From the facts of the case, it did not appear that Mr Dickson was asked to determine a dispute. Rather, he was deciding what to do in all the circumstances. The fact that the plaintiff and defendant had opposing interests and were not agreed as to what to do did not in itself mean that they submitted a formulated dispute to Mr Dickson. A sufficiently formulated dispute is an essential prerequisite of a submission to arbitration, and the absence of such formulated dispute is determinative or virtually determinative of the issue. *Collins v Collins* [1858] 26 Beav 306 ; 53 ER 916 , *Bos v Helsham* (1866) 2 LR Ex 72 , *Re Carus-Wilson & Greene* (1886) 18 QBD 7 and *Sutcliffe v Thackrah* [1974] AC 727 applied.

(3) While an arbitrator is entitled to take legal advice in order to carry out his functions, the mere fact that Mr Dickson was given such a right did not amount to a strong indication one way or the other. The procedure agreed upon by the parties was far more consistent with an intention to appoint Mr Dickson as an expert rather than as an arbitrator.

(4) The appointment of an accountant to carry out the functions specified in the deed was some indication, but by no means a conclusive one, that the parties intended this to be an expert determination rather than an arbitration.

[1994] 1 HKC 755 at 756

(5) An arbitrator is immune from judicial proceedings for negligence whereas an expert is not, and thus, the conferring of immunity is a pointer in the direction of expert determination.

Cases referred to

Arenson v Casson Beckman Rutley & Co [1977] AC 405

Belchier v Reynolds [1754] 3 Keny 87 ; 96 ER 1318

Bos v Helsham (1866) 2 LR Ex 72

Campbell v Edwards [1976] 1 WLR 403

Carus-Wilson & Greene, Re (1886) 18 QBD 7

Collier v Mason [1858] 25 Beav 200 ; 96 ER 1318

Collins v Collins [1858] 26 Beav 306 ; 53 ER 916

Jones v Sherwood Computer Services Inc [1992] 1 WLR 277

Nikko Hotels (UK) v MEPC [1991] 28 EG 86

Sutcliffe v Thackrah [1974] AC 727

Legislation referred to

(HK) Arbitration Ordinance (Cap 341) s 25(1)

(UK) Common Law Procedure Act 1854 [UK]

(UK) Arbitration Bill 1884 [UK]

Other legislation referred to

John Kendall Dispute Resolution (Longman) -

Mustill & Boyd Commercial Arbitration (2nd Ed) pp 48-50 -

VV Veeder QC and Brian Dye Arbitration International (1992)Vol 8 No 4

Summons

This was an originating summons for dismissal of an arbitrator by the plaintiff, alleging arbitral misconduct pursuant to the provisions of s 25(1) of the Arbitration Ordinance (Cap 341). The parties agreed to refer a preliminary question of whether the third party appointed under the deed was an arbitrator or expert, to the judge for determination. The facts appear sufficiently in the following judgment.

Anselmo Reyes (Haldanes) for the plaintiff.

Paul Shieh (Stevenson, Wong & Co) for the defendant.

KAPLAN J

This application raises, I believe for the first time in Hong Kong, the difference between arbitration and expert determination. By the plaintiff's originating summons, he seeks the removal of the arbitrator, Mr Dickson, for misconduct pursuant to the provisions of s 25(1) of the Arbitration Ordinance (Cap 341). Both parties have agreed that I should first decide the issue whether Mr Dickson was in fact appointed as arbitrator or as an expert. If the latter, then, it is common ground that the Arbitration Ordinance can have no relevance to this matter. If that is my conclusion, then, doubtless the defendant will pursue his application for summary judgment based on Mr Dickson's determination. If Mr Dickson was appointed arbitrator, then, on a future occasions, I will have to rule on the question of misconduct.

Arbitration is a tried and tested method of dispute resolution where the parties do not wish to litigate their differences before state courts. Expert determination, although having been used for centuries, is perhaps not so widely known. The classic features of expert determination are:

(1) The expert makes a final and binding decision.
(2) The decision can only be challenged in the most exceptional circumstances such as where the expert answers the wrong question (see *Jones v Sherwood Computer Services Inc* default [1992] 1 WLR 277, *Campbell v Edwards* default [1976] 1 WLR 403 and *Nikko Hotels (UK) Ltd v MEPC* default (1991) 28 EG 86).
(3) The expert can be sued for negligence in the absence of an agreed immunity (*Arenson v Casson Beckman Rutley* default [1977] AC 405).
(4) The expert's determination cannot be enforced as an arbitral award.

Expert determination has been used for years in rent review cases and share valuation cases. In *Belchier v Reynolds* default (1754) 3 Keny 87; 96 ER 1318 at p 91, Sir John Strange MR said:

> Whatever be the real value is not now to be considered for the parties made Harris their judge in that point: they thought proper to confide in his judgment and must abide by it unless they could have made it plainly appear that he had been guilty of some gross fraud and partiality.

Sir John Romilly MR in *Collier v Mason* default (1858) 25 Beav 200; 58 ER 613 at p 204 said:

> This court, upon the principle laid down by Lord Eldon, must act on that valuation, unless there be proof of some mistake or some improper motive ...

In more recent times, in *Campbell v Edwards* default , Lord Denning MR said:

> It is simply the law of contract. If two persons agree that the price of the property should be fixed by a valuer on whom they agree and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake, they are still bound by it. The reason is that they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different, fraud or collusion unravels everything.

(All the relevant cases on expert determination are most usefully collected together in *Dispute Resolution* default by John Kendall published by Longman.)

To decide whether Mr Dickson was appointed as an arbitrator or expert involves my construing the two agreements entered into between the parties and ascertaining the parties' intention therefrom. A classic expert determination clause may state:

> In stating the fair price, the auditors shall be considered to be acting as experts and not as arbitrators, and their decisions shall be final and binding on the parties.

[1994] 1 HKC 755 at 758

Unfortunately, in the present case, such explicit language was not used and hence this dispute.

The basic facts

Far East Diversify Investments Ltd (FEDI) is a Hong Kong company. Imcor Ltd is also a Hong Kong company with an authorized capital of $300,000 divided into 3,000 shares of $100 each, of which 1,530 had been issued and are registered in the names of FEDI and Common Seal Ltd in equal proportions.

Mr Edward Mayers, the plaintiff, is the sole beneficial owner of FEDI and Mr Brian Dlugash, the defendant, is the beneficial owner of the shares of Imcor registered in the name of Common Seal Ltd.

Imcor carries on the business of sourcing, manufacturing, exporting and sale of bags, and other similar items in Europe, USA and elsewhere.

In 1992, FEDI and Mr Dlugash agreed in principle that the business activities, assets and liabilities of Imcor should be distributed between them in a manner equitable to both parties, but differences have arisen or were anticipated to arise in relation to the manner of such distribution.

In order to resolve such differences and avoid any further differences, the parties agreed to appoint an independent third party to resolve any differences and to determine the manner in which such distribution should take place.

In order to achieve these aims the plaintiff, defendant and FEDI entered into a deed of submission dated 30 March 1992 referring all these matters to the final determination of Mr Charles Dickson of Horwath & Co.

As it is the proper construction of this deed which I have to consider and as each party has referred to various indicia which they say can be found from the deed which support their case, I feel it necessary to refer to the complete document. Rather than setting it out verbatim in the ensuing pages of this judgment, I propose to annex it to this judgment although it will form part of this judgment. The annexure does not form part of this report. The parties also entered into an agreement dated 26 June 1992, which I do not propose to set out in this judgment nor annex. If necessary, I will refer to and quote relevant parts of this agreement. However, it is basically the deed of submission which I have to construe.

It is common ground between the parties that the presence or absence of words like 'arbitrator' or 'expert' is not decisive.

Mr Paul Shieh who appeared for the defendant, relied upon the following four factors in support of his submission that Mr Dickson was appointed as an expert and not as an arbitrator:

(1) There was no formulated dispute.
(2) There was no stipulated procedure and no requirement for Mr Dickson to adopt a judicial approach.

[1994] 1 HKC 755 at 759

(3) The fact that Mr Dickson was an accountant, it being suggested that his appointment is consistent with an intention that he should rely on his own expertise in accounting to effect the split between the parties. This, it is submitted, accords more with the role of expert valuer than of arbitrator.
(4) There was an exclusion of liability contained in the deed.

No formulated dispute

Mr Shieh submitted that a procedure is not an arbitration unless there is a formulated dispute in existence at the time when the arbitrator is appointed and unless the arbitrator is called upon to determine such formulated dispute.

In*Collins v Collins* 1858 26 Beav 306; 53 ER 916, Sir John Romilly, Master of The Rolls, had before him a case where parties entered into a contract to purchase a brewery and plant at a price to be fixed by arbitrators, who were to choose an umpire before entering upon the valuation. The arbitrators could not agree on an umpire. It was held that the court had no authority under the Common Law Procedure Act 1854 to appoint an umpire for such a purpose. At p 312, Sir John Romilly asked himself what an arbitration is. He continued:

> Now I fully concur with the observation that fixing the price of a property may be 'arbitration'. But I do not think that in this particular case, the fixing of the price of the property is an arbitration, in the proper sense of the term. An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties.It is very true that in one sense, it must be implied that although there is no existing difference, still that a difference may arise between the parties; yet, I think the distinction between an existing difference and one which may arise is a material one and one which has been properly relied upon in the case.

Collins v Collins default was followed in *Bos v Helsham* default (1866) LR 2 Ex 72. In that case, particulars of sale provided that if there was any mistake in a description of any property offered for sale, such mistake would not annul the sale but compensation should be given to be settled by two referees, one to be appointed by either party to the sale or an umpire. One party applied to the court for an appointment of an arbitrator under the Common Law Procedure Act 1854, but the court held that the reference indicated in the condition, being one of the quantum of compensation only, was not a reference to arbitration of an existing or future difference within the meaning of the 1854 Act.

In *Re Carus-Wilson & Greene* (1886) 18 QBD 7, one of the conditions of sale in a sale of land was that the purchaser should pay for the timber on the land at a valuation and, it was provided, each party should appoint a valuer and they should value. If they disagreed, they should appoint an

[1994] 1 HKC 755 at 760

umpire who should make a valuation. The two valuers appointed being unable to agree, the umpire made the valuation. The Court of Appeal affirmed the judgment of the High Court that such valuation was not in the nature of an award on an arbitration and, therefore, an application to set it aside was refused. Lord Esher MR said this at p 9:

> The question here is, whether the umpire was merely a valuer substituted for the valuers originally appointed by the parties in a certain event or an arbitrator. If it appears from the terms of the agreement by which a matter is submitted to a person's decision

> that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry and hear the respective cases of the parties and decide upon evidence laid before him, then, the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen and where the case is not one of arbitration but of a mere valuation. There may be cases of an intermediate kind where, though a person is appointed to settle disputes that have arisen, still, it is not intended that he shall be bound to hear evidence or arguments. In such cases, it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances. I think that this case was clearly not one of arbitration as it falls within the class of cases where a person is appointed to determine a certain matter, such as the price of goods, not for the purpose of settling a dispute which has arisen, but of preventing any dispute.

Similar observations fell from Lindley and the Lopes LJJ.

In *Sutcliffe v Thackrah* [1974] AC 727 , the House of Lords held that in issuing interim certificates, an architect did not, apart from specific agreement, act as an arbitrator between the parties, and he was under a duty to act fairly in making his valuation and was liable to an action in negligence at the suit of the building owner. At p 735, Lord Reid dealt with the very point in issue in this case:

> The reason must, I think, be derived at least in part from the peculiar nature of duties of a judicial character. In this country, judicial duties do not involve investigation.They do not arise until there is a dispute. The parties to a dispute agree to submit the dispute for decision. Each party to it submits his evidence and contention in one form or another. It is, then, the function of the arbitrator to form a judgment and reach a decision.

In other forms of professional activity, the professional man is generally left to make his own investigation. In the end, he must make a decision but it is a different kind of decision. He is not determining a dispute, he is deciding what to do in all the circumstances. He may go wrong because he has, at some stage, failed to take due care and that may not be difficult to prove. But coming to a wrong but honest decision on material submitted for adjudication is rarely due to negligence or lack of care and it is seldom due to such gross failure to exercise professional skill as would amount to negligence. It is in the vast

[1994] 1 HKC 755 at 761

majority of cases due to error of judgment and there is so much room for differences of opinion in reaching a decision of a judicial character that even the most skilled and experienced arbitrator or other person acting in a judicial capacity may not infrequently reach a decision which others think is plainly wrong.

At p 745, Lord Morris again concentrated on the differences between arbitrators and experts where he said:

> One of the features of an arbitration is that there is a dispute between two or more persons who agree that they will refer their dispute to the adjudication of some selected person whose decision upon the matter they agree to accept. As an example, the dispute may involve an issue as to what a particular article is worth or as to the value of work that has been done. It follows that the task of an arbitrator may, in some cases, be the task of arriving at a valuation. In some circumstances, therefore, someone might be regarded both as a valuer and an arbitrator. But it by no means follows that everyone who has a duty of valuing, a duty which obviously must be fairly and honestly discharged, is an arbitrator. A valuer may not be exercising any judicial function.

Similar observations can be found in the speeches of Viscount Dilhorne and Lord Salmon.

In *Arenson v Casson Beckman Rutley & Co* default , auditors ascertained a fair value of shares in a company. They were sued for negligence and pleaded that they were immune from suit. The House of Lords held that the immunity of the judge and arbitrator was exceptional to the general rule of liability for negligence, that there was no reason of public policy making it necessary to treat a 'mutual' valuer as an exception to that rule and that, therefore, the plaintiff's statement of claim disclosed a cause of action. Lord Simon gave the leading speech and referred to the various observations in *Sutcliffe v Thackrah* default . At p 424, he dealt with the formulated dispute point and said:

> There may well be other indicia that a valuer is acting in a judicial role, such as the reception of rival contentions or of evidence, or the giving of a reasoned judgment. But in my view, the essential prerequisite for him to claim immunity as an arbitrator is that, by the time the matter is submitted to him for decision, there should be a formulated dispute between at least two parties which his decision is required to resolve. It is not enough that parties who may be affected by the decision have opposed interests -- still less that the decision is on a matter which is not agreed between them.

As Lord Wheatley made clear at p 427, each case has to be decided on its own facts and it was not possible to find an all-embracing formula to decide every case. He then said:

> What can be done is to set out certain indicia which can serve as guidelines in deciding whether a person is so clothed. The indicia which follow are, in my view, the most important though not necessarily exhaustive. They are culled
>
> [1994] 1 HKC 755 at 762
>
> from the speeches in *Sutcliffe v Thackrah* default cited by my noble and learned friend, Lord Simon of Glaisdale and from several other passages therein.

At p 428, he set out the following indicia:

> (a) there is a dispute or a difference between the parties which has been formulated in some way or another;
>
> (b) the dispute or difference has been remitted by the parties to the person to resolve in such a manner that he is called upon to exercise a judicial function;
>
> (c) where appropriate, the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute; and
>
> (d) the parties have agreed to accept his decision.

At p 442, Lord Fraser agreed with Lord Salmon that the functions of arbitrators and valuers are in many ways very similar because both are giving decisions which will bind parties with conflicting interests and both have a duty to act impartially. Both can reach their decision by using skill and judgment without hearing evidence and without immunity, both are liable to be sued from opposite sides. He then added this:

> The main difference between them is that the arbitrator, like the judge, has to decide a dispute that has already arisen and he usually has rival contentions before him, while the mutual valuer is called upon before a dispute has arisen, in order to avoid it. He may be employed by parties who have little or no idea of the value of the property to be valued and who rely entirely on his skill and judgment as an expert. In that respect, he differs from some arbitrators. But many arbitrators are chosen for their expert knowledge of the subject of the arbitration and many others are chosen from the legal profession for their expert knowledge of the law or, perhaps, because they are credited with an expertise in holding the balance fairly between parties. It does not seem possible, therefore, to distinguish between mutual valuers and arbitrators on the ground that the former are experts and the latter are not.

Mr Shieh submits that no formulated dispute was referred to Mr Dickson for determination because he was appointed to determine the manner of distribution so as to avoid disputes. In support of this contention, he relies upon paras 4 and 5 of the preamble to the deed and to para 1 of the deed itself. He submits that the fact that differences had arisen between the parties does not necessarily mean that the reference is an arbitration because such differences have not been formulated or referred to Mr Dickson for determination.

Mr Reyes submits that, at the time of Mr Dickson's appointment, the parties were already in dispute.They carried on business together through Imcor and differences had arisen between them. They had decided to break up but were unable to agree on how Imcor's assets were to be distributed between them. They, therefore, appointed Mr Dickson under the deed to resolve their differences. He submits that the issue was how to

[1994] 1 HKC 755 at 763

split the businesses between them and that it is necessary to look at the deed as a whole. He submitted that Mr Dickson was either wholly arbitrator or wholly valuer under the deed and it would be commercially impractical for the court to hold that when discharging certain functions under certain clauses of the deed, Mr Dickson was acting as arbitrator but when discharging other functions under other clauses, he was only acting as valuer or expert.

These rival contentions are, of course, at the very heart of the distinction between the role of an arbitrator on the one hand and the role of the expert on the other. Having considered the rival contentions and having taken careful note of the guidance given by the authorities and, of course, construing the deed and the agreement as a whole, I find it impossible to conclude that there was such a formulated dispute between these parties so as to indicate that they intended Mr Dickson to act as arbitrator as opposed to an expert. One has, of course, to be wary of looking at individual words or phrase or clauses in the deed but must be careful to construe the deed as a whole. I do not think that it is a sufficiently formulated dispute to say that the dispute was: on what terms should the parties bring to an end their commercial relationship? The powers given to Mr Dickson were inquisitorial powers not normally given to an arbitrator. He was empowered to make a thorough investigation of the business. He was given power to determine, compromise or release all claims. He had the power to realize assets and discharge liabilities of the company and he had the general power to determine any matters whatsoever concerning the business of the company or any matter in difference as either party should have given notice to him not less than 14 days after being so requested. The matters that were specifically re-

ferred to him for his final determination were not formulated disputes of a class normally referred to arbitrators. For instance, cl 6.1 refers to Mr Dickson for his final determination, the issue 'whether any party should be at liberty to engage in business activities identical or similar to that of the company and if so, on what terms'.That appears to me to be an invitation to Mr Dickson to impose contractual obligations upon the parties which were not previously there. He was not being asked to rule whether a restrictive covenant was to be enforced, rather he was asked to decide whether a restrictive covenant of some of sort should be imposed upon the parties and if so, upon whom and upon what terms. I find it difficult to characterize that sort of power as deciding a formulated dispute in the sense that that phrase has been used and understood in all the authorities to which I have made reference. The same observations apply to Mr Dickson's determination as to whether either party should be allowed to solicit past or present customers and, if so, on what terms. Clause 6.4 of the deed entitles him to decide whether either party should be at liberty to engage any former or present employees of the company and if so, on what terms.

[1994] 1 HKC 755 at 764

It also appears that the crucial task to be carried out by Mr Dickson is that stated in cl 3 of the deed, namely, to undertake a full valuation of the assets and liabilities of Imcor because the various determinations that he is asked to make have to be made within 30 days from the delivery of such valuation.A valuation of the assets of a company is, of course, a common task undertaken by accountants and it would not be possible to characterize that function as being one of an arbitrator.

At this point, it may be helpful to refer to the agreement entered into by the parties on 26 June 1992. The recitals set out the background. Recitals 5, 6 and 7 state as follows:

> 5 EM and BD having agreed, the effect that both EM and BD shall carry on the business separate and apart from one another through separate corporate entities, the parties did by a deed of submission dated 30 March 1992, appoint Mr Charles Dickson of Messrs Horwath & Co to determine various issues in connection with such restructuring.
>
> 6 By a determination of even date hereof and a copy of which is annexed hereto and marked 'A', Mr Dickson directed the manner in which the said restructuring would be effected and directed, inter alia, that the beneficial interest in Imcor of BD be transferred to EM and that the beneficial interest of EM in WP be transferred to BD.
>
> 7 This agreement sets out the method by which the parties have agreed to implement such transfer and all other directives of Mr Dickson contained in the said determination.

In so far as it is permissible to have regard to the terms of this agreement in construing the deed of submission, I am satisfied that the terms of this agreement are strongly supportive of the conclusion that Mr Dickson was appointed as expert and not as arbitrator. It is not the function of arbitrators to restructure companies. It is their function to determine properly formulated disputes submitted to them.

Having taken full regard of all the points made by Mr Reyes in his written and oral submissions, nevertheless, I am quite satisfied that Mr Shieh is correct when he states that there is no sufficiently formulated dispute referred to Mr Dickson. I do not think that Mr Dickson was asked to determine a dispute. Rather, in the words of Lord Reid, he was deciding what to do in all the circumstances. The fact that they had opposing interests and were not agreed as to what to do does not in itself mean that they submitted a formulated dispute to Mr Dickson. I am satisfied that that is an essential prerequisite of a submission to arbitration and that the absence of such formulated dispute is determinative or virtually determinative of the issue which I have to decide. However, it is essential for me to go on to consider the other relevant factors put forward by Mr Shieh which he submits should confirm that by this deed, the parties referred these various matters to Mr Dickson as an expert for his final and binding determination.

[1994] 1 HKC 755 at 765

Procedure

Mr Shieh submits that a stipulated court-like procedure involving the opportunity to present evidence and arguments is a pointer, albeit not a decisive one, towards someone acting as arbitrator.

Mr Shieh derives this proposition from p 48 of Mustill & Boyd *Commercial Arbitration*(2nd ed) where, under the heading of other relevant factors, they deal with evidence and contentions in the following manner:

> There is high authority for the view that a procedure is not an arbitration unless it is intended that the arbitrator shall perform a judicial function; and this has been explained as meaning that he must hear evidence and contentions brought forward by the parties or, at least, give them the opportunity of bringing them forward. There are, however, serious difficulties in the way of accepting this as a requirement, as distinct from a relevant factor: for a large majority of procedures which are beyond question, arbitrations are conducted without any 'contentions' being addressed to the tribunal, in the sense of a formal reasoned argument.

The learned authors, then, go on to refer to many quality disputes where an expert merely inspects the goods and forms his opinion which becomes an arbitral award. In those circumstances, there is no question of the parties bringing forward their own experts to try to persuade him that his taste or feel or smell is wrong.

In *Sutcliffe v Thackrah* default , Lord Salmon p 763 dealt with this point briefly as follows:

> In *Re Hopper*,Cockburn CJ, with whom Blackburn and Lush JJ agreed, was in effect saying that the question as to whether anyone was to be treated as an arbitrator depended upon whether the role which he performed was invested with the characteristic attributes of the judicial role. If an expert were employed to certify, make a valuation or appraisal or settle compensation as between opposing interests, this did not, or itself, put him in the position of an arbitrator. He might, for example, do no more than examine goods or work or accounts and make a decision accordingly. On the other hand, he might, as in *Re Hopper*, hear the evidence and submissions of the parties, in which case, he would clearly be regarded as an arbitrator. Everything would depend upon the facts of the particular case. I entirely agree with this view of the law.

There are similar statement in *Arenson.*

Mr Shieh submitted that the deed did not provide for such similar procedures. Rather, he submits, the deed gave Mr Dickson wide discretionary and investigatory powers which do not appear to be 'judicial'. He relies on paras 2, 3, 4, 5 and 6 of the deed.

Mr Reyes submitted that the deed contemplated that Mr Dickson would receive evidence and contentions or, at the very least, give the parties the

[1994] 1 HKC 755 at 766

opportunity of putting them forward and he referred, by way of example, to cl 8. I fail to see how cl 8 assists Mr Reyes' arguments.

He further submits that the words used in the deed and the agreement are consistent with the view that it was intended that Mr Dickson should act as arbitrator and he supports this submission by reference to the use of the words 'determine','determination', 'final determination', 'award', 'direct', 'proceed ex-parte' and 'adjudicate'.

I did not find it helpful to refer to individual words used in the deed and the agreement. It is clear that the parties have not made their intention plain by stating either that Mr Dickson was appointed as arbitrator or that the matter was referred to him to decide as an expert and not as an arbitrator. I have to look at the deed and the agreement to ascertain which of those intentions the parties had when they entered into this deed and I have to do so by reference to all of the language which was used in the documents. It could be argued that the use of the word 'determination' is some indication that Mr Dickson was to be an expert. Mr Reyes relies upon the use of the word 'award' but I am not satisfied that the way that word is used in paras 5.4 and 5.5 are helpful in ascertaining the parties' true intention as to the precise nature of Mr Dickson's appointment. Mr Reyes relies upon Mr Dickson's power to obtain legal opinion as an indication that Mr Dickson was intended to be an arbitrator. I do not find that particularly helpful, bearing in mind that one of the powers given to Mr Dickson was to determine, compromise or release all claims and counterclaims the parties may have against one another, because in carrying out such function, it might well be appropriate for a non-lawyer to take legal advice about the strengths and weaknesses of such claims and counterclaims. Merely because he is able to take legal advice does not seem to me to determinative either way. I accept that an arbitrator is entitled to take legal advice in order to carry out his functions, but merely because Mr Dickson is given such a right in this rather complicated matter does not seem to me to be a strong indication one way or the other.

I am quite satisfied that the procedure agreed upon by the parties is far more consistent with an intention to appoint Mr Dickson as an expert rather than as an arbitrator.

Identity of tribunal

Mr Shieh relies upon the fact that Mr Dickson is an accountant and his appointment is consistent with the intention that he should rely on his own expertise in accounting to effect the 'split' between the parties. This accords more with the role of an expert valuer rather than that of an arbitrator.Mr Shieh relies upon a short passage between pp 49 and 50 of *Mustill & Boyd* where they state:

> The identity of the tribunal named in the agreement or the method prescribed for choosing the tribunal may indicate the type of proceedings which are

[1994] 1 HKC 755 at 767

> contemplated. A reference to a tribunal chosen from the arbitral panel of a trade association points in one direction; a reference to a firm of estate agents or accountants may point in the other. The choice of a lawyer as the tribunal suggests that a more formal procedure is looked for and that accordingly, an arbitration is intended.

I agree with Mr Shieh's submission that the appointment of an accountant to carry out the functions specified in the deed is some indication but by no means a conclusive one that the parties intended this to be an expert determination rather than an arbitration.

Exclusion of liability

Both Mr Reyes and Mr Shieh pointed to para 12 of the deed which confers immunity upon Mr Dickson. Mr Shieh submits that the better view now is that an arbitrator is immune from judicial proceedings for negligence and that such view can be ascertained from both *Sutcliffe v Thackrah* default and *Arenson* default . Mr Shieh submitted that as the deed was drafted by solicitors, it would have been completely unnecessary to specifically confer an immunity on Mr Dickson and, thus, para 12 of the deed would have been otiose.

Mr Reyes, on the other hand, suggests that the immunity conferred upon Mr Dickson points to the fact that he was intended to perform the quasi-judicial role of an arbitrator.

When pressed by me, both counsel agreed that the immunity point did not really take the matter much further and my view is that it is a factor pointing toward Mr Dickson having been appointed as an expert and although not a sufficient point on its own, when added to the other points to which I have made reference, it has some minor significance.I accept that the better view is that an arbitrator is immune from judicial proceedings for negligence whereas it is perfectly plain that an expert is not and, thus, the conferring of immunity is a pointer in the direction of expert determination. It is interesting to note in passing that the draft new Arbitration Bill recently put out by the Department of Trade and Industry in England provides for a statutory immunity for arbitrators on the basis that the intention behind the Bill was to give statutory effect to well settled principles of English arbitration law. In this regard, it is interesting to note that a draft arbitration Bill put forward in 1884 by Lord Bramwell, which never became law due to a change of government, also provided in cl 71 for statutory immunity for arbitrators on the basis that this represented the common law position. (On this subject, see the interesting article by VV Veeder QC and Brian Dye in *Arbitration International* (1992) Vol 8 No 4).

Conclusion

Having considered all the very helpful submissions from both counsel and in the light of my conclusions on the various indicia, I am quite satisfied

[1994] 1 HKC 755 at 768

that the parties' intention, as derived from the language used in the deed, was to appoint Mr Dickson as an expert and not as an arbitrator.

I therefore decide the preliminary issue in favour of the defendant. On this basis, I propose to dismiss the originating summons seeking Mr Dickson's removal as an arbitrator and I further propose to make a costs order nisi in relation to these proceedings in favour of the defendant.

Judith O'Hare

---- End of Request ----
Print Request: Current Document: 1
Time Of Request: Monday, March 01, 2010 14:24:48