TS WONG & CO LTD v COMPAGNIE EUROPEENNE D'ASSURANCES INDUSTRIELLES SA - [1993] 1 HKC 397

HIGH COURT
KAPLAN J

MISCELLANEOUS PROCEEDINGS NO 683 OF 1993

21 May 1993

Arbitration -- Domestic -- Application to extend time for commencing arbitration -- Whether court to take into account contract sum and plaintiffs' paid up capital -- Arbitration Ordinance (Cap 341) s 29

Arbitration -- Commencement -- Extension of time for commencing arbitration -- Arbitration clause in Scott v Avery form -- Insurers disclaiming liability -- When time for commencing arbitration starts to run -- Whether delay in commencing arbitration significant -- Prejudice to defendants

The plaintiffs entered into a Contractor's All Risk Policy with the defendants in respect of a building contract to the value of HK$122m. The plaintiffs, whose paid-up capital was HK$169.5m, made a claim of HK$1.162m in respect of seven thefts of materials from the site. Clause 5-12 of the policy contained an arbitration clause in *Scott v Avery* form, which provided that 'the making of an award shall be a condition precedent to any right of action against the insurers. If the insurers shall disclaim liability to the insured for any claim hereunder and such claim shall not within 12 months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.' On 28 November 1991, the defendants disclaimed liability in respect of two of the seven thefts but its letters were not received by the plaintiffs until 2 and 3 December 1991 respectively. On 17 December 1991, the defendants disclaimed liability for the thefts on the other four dates but these letters were not received by the plaintiffs until 9 January 1992. On 19 January 1993, the plaintiffs sent a notice of arbitration to Inchcape Insurance as agents for the defendants and 19 days later issued an originating summons seeking an extension of time to commence arbitration.

Held, granting the application:

(1) Time should run from the date when the insured received the letters disclaiming liability, not from the date of the disclaimer of liability.
(2) The delay in this case, being relatively modest, was not a significant factor. *The Jocelyn* [1977] 2 Lloyd's Rep 121 applied.
(3) The small amount of prejudice suffered by the defendants in having to deal with a claim which arose two or three years ago was so commonplace in arbitration and litigation that it ought to be discounted.
(4) It is the sum at stake to which the court must have regard and the size of the paid-up capital is wholly irrelevant.
(5) As the plaintiffs effectively sought the rewriting of a contractual term and in absence of any criticism to be made of the defendants, the plaintiffs were

ordered to pay the defendants' cost on a solicitor and own client basis.*Dragages v Preservatrice Fonciere* [1988] HKC 735 applied.

Cases referred to

Aspen Trader, The [1981] 1 Lloyd's Rep 279

Dragages v Preservatrice Fonciere [1988] HKC 735

Eurotrader, The; Irish Agricultural Wholesale Society v Partenree [1987] 1 Lloyd's Rep 418

Guangdong Water Conservancy and Hydro-power Engineering Development Co Ltd v Ming On Insurance Co [1990] 2 HKLR 557

Jocelyne, The [1977] 2 Lloyd's Rep 121

Pegasus, The [1967] 1 Lloyd's Rep 303

Wenden Engineering Service Co Ltd v Wing Hong Contractors Ltd [1992] HKLD 9 ; [1993] ADRLJ 53 ; [1992]2 HKC 380

Legislation referred to

(HK) Arbitration Ordinance (Cap 341) s 29

(UK) Arbitration Act 1950 [UK] s 27

Application

This was the plaintiffs' application under s 29 of the Arbitration Ordinance (Cap 341) to extend the time for commencing arbitration. The facts appear sufficiently in the following judgment.

Peter Clayton (Kwok & Chu) for the plaintiffs.

*Kenneth Chan (Jesse HY Kwok & Co)*for the defendants..

KAPLAN J

I have before me an application under s 29 of the Arbitration Ordinance (Cap 341) to extend the time for commencing arbitration. I heard argument on 30 April 1993 and announced that I granted this application and I ordered the plaintiffs do pay the defendants costs on a solicitor and own client basis. I said I would reduce my reasons into writing which I now do. On 12 October 1989, the parties entered into a Contractor's All Risk Policy in respect of a building contract to the value of HK$122m. The paid up capital of the plaintiffs is HK$169.5m. The relevance of these two figures will become apparent later. Clause 5-12 of this policy contains an arbitration clause in *Scott v Avery* default form which is quite common in contracts of this nature. It provided as follows:

> All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference or, if they cannot agree upon a single arbitrator, to the decision of two arbitrators, one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties, or in case the arbitrators do not agree, of an umpire appointed in writing by the arbitrators before entering upon the reference. The umpire shall sit with the arbitrators and preside at their meetings and the *making of an award shall be a condition precedent to any right of action against the insurers.* If the insurers shall disclaim liability to the insured for any claim hereunder and such claim shall not within 12 months from the date of such disclaimer have been referred to
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> *[1993] 1 HKC 397 at 399*
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> arbitration under the provisions herein contained, then the *claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder*[Emphasis added.]

Between 26 September 1990 and 18 March 1991, there were alleged to be seven thefts of materials from the site which led the plaintiffs to make a claim on the policy of insurance in the sum of just over $1.16m.

Written notification of the thefts was duly given and the matter seems to have been fully investigated by, or on behalf of, the defendants.

To cut a long story short, on 28 November 1991, claims assessors for the defendants disclaimed liability on behalf of the defendants in respect of two of the seven thefts. These letters were received on 2 and 3 De-

cember 1991 respectively.On 17 December 1991, four further letters were sent for and on behalf of the defendants disclaiming liability for the thefts on the other four dates. For some reason, which has not been explained, these letters were not received until 9 January 1992.

Various letters were then written by the plaintiffs in effect taking issue with the repudiation of liability. On 21 September 1992, Inchcape Insurance wrote to the plaintiffs repudiating liability in respect of all claims on behalf of the defendants.

On 2 December 1992, the plaintiffs wrote to M & G Insurance stating that the repudiation was unacceptable and that it was in the course of consulting its lawyers.

On 2 January 1993, a notice of arbitration was sent to M & G Insurance but Mr Clayton, who appeared for the plaintiffs, frankly conceded that he could not establish that this notice had been received. Had it been received, some of the claims would not have been barred by the arbitration clause. However, it appears that before this date, the plaintiffs had been informed of a merger between M & G Insurance and Inchcape Insurance Agency (HK) Ltd, and because no reply had been received to the notice dated 2 January 1993, a new notice of arbitration was sent to Inchcape on l9 January 1993.

On 1 February 1993, solicitors for Inchcape stated that the disclaimer was still valid and that in any event, all claims were time-barred under cl 5-12 of the policy.

Nineteen days later, on 20 February 1993, the plaintiffs issued an originating summons against Inchcape as defendants seeking an extension of time.

On 9 March 1993, solicitors for the plaintiffs and Inchcape confirmed agreeing that the proceedings instituted on 20 February 1993 should be withdrawn and that the plaintiffs would bring fresh proceedings against the present defendants.

On 10 March 1993, by consent, the 20 February 1993 proceedings were withdrawn and on the same date fresh proceedings were launched claiming the same relief as against the present defendants.

Quite sensibly, the defendants do not take any points about the first proceedings being instituted against their agents.

On 22 April 1993, a fresh notice of arbitration was sent to the solicitors for the present defendants.

The principles to be followed in cases such as this have conveniently been set out by Brandon LJ in *The Jocelyne* [1977] 2 Lloyd's Rep 121 at 129 where he summarized what appeared to him to be the guidelines laid down by the majority judgments in *The Pegasus* [1967] 1 Lloyd's Rep 303. In *The Aspen Trader* [1981] 1 Lloyd's Rep at 279, Brandon LJ repeated his summary from *The Jocelyne*. He put the matter thus:

> (1) The words 'undue hardship' in s 27 should not be construed too narrowly.
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> (2) Undue hardship' means excessive hardship and, where the hardship is due to the fault of the claimant, it means hardship the consequences of which are out of proportion to such fault.
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> (3) In deciding whether to extend time or not, the court should look at all the relevant circumstances of the particular case.
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> (4) In particular, the following matters should be considered:
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> (a) the length of the delay;
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> (b) the amount at stake;
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> (c) whether the delay was due to the fault of the claimant or to circumstances outside his control;
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> (d) if it was due to the fault of the claimant, the degree of such fault;
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> (e) whether the claimant was misled by the other party;
>
> (f) whether the other party has been prejudiced by the delay, and if so, the degree of such prejudice.

Section 29 of the Arbitration Ordinance is in identical terms to s 27 of the Arbitration Act 1950.

The first point I am asked to decide is whether time runs from the date of the disclaimer of liability or from the date when it is received. I have little doubt that it should run from the date when it was received. It would be quite unjust if the 12 month period was to be reduced by 23 days merely because the letters of 17 December 1991 were not received by the plaintiffs until 9 January 1992. Mr Kenneth Chan, who appeared for the defendants, did not seek to challenge the date when the letter was received.

I therefore propose to take the date of receipt of the disclaimer letters as the relevant dates in this case.

There is no doubt that the fault in this case lies solely at the door of the plaintiffs and no criticism can be levelled against the defendants or their agents and advisers. They made their position quite plain and have never departed therefrom.

The periods of delay in this case, whilst not de minimis, are relatively short. A notice of arbitration was sent about 11/2 months late on the first two claims and a few days later on the others. These proceedings were issued 19 days after the receipt of a letter informing the plaintiffs that the time bar point was to be taken.

[1993] 1 HKC 397 at 401

As Mr Clayton pointed out, similar periods of delay to that in this case have led other courts to exercise their discretion in favour of extending time, but I counsel against relying on the periods in other cases because the rest of the factors in those cases may be quite dissimilar to the present. Judges should not fetter their discretion under this section by slavishly following the results in other cases with similar delays.

However, Mr Clayton did point out that in the only Hong Kong case he could find where leave was not granted, the delay was in the order of 15 months which is of course far in excess of the present case. It appears that nine of these 15 months was after the plaintiffs had been informed of the time bar point. (See *Guangdong Water Conservancy and Hydro-power Engineering Development Co Ltd v Ming An Insurance Co (HK) Ltd* 1990 2 HKLR 557 and also see my own decision in *Wenden Engineering Service Co Ltd v Wing Hong Contractors Ltd* [1992] 2 HKC 380 ; [1992] HKLD 9 and in (1993) ADRLJ p 53 (this refers to the *Arbitration and Dispute Resolution Law Journal* published by Lloyd's of London Press Ltd) where under a similar contract to the present case, I refused leave in respect of some of the claims and exercised my discretion in respect of others).

As to the 19-day period after intimation of insistence on the time bar clause, Mr Chan was forced to conclude that he would not have been able to criticize a period of 14 days. I do not think 19 days can be castigated as lingering excessively although I would have expected somewhat more urgency. I bear in mind the observations of Kerr LJ in *The Eurotrader* [1987] 1 Lloyd's Rep 418 where the learned judge emphasized that it must always be a question of degree when considering the delay post intimation of reliance on this clause.

I think the delay here is not such a significant factor as it is relatively modest.

As to prejudice suffered by the defendants, none was really relied upon save that Mr Chan attempted to argue that his clients would be prejudiced by not being able to rely upon the strict terms of cl 5-12. This submission is untenable. The simple fact is that the defendants and/or their agents investigated these matters very fully. I was told by Mr Clayton, and this was not denied by Mr Chan, that police reports and statements were obtained by the defendants and that the reason for the disclaimer was the plaintiffs alleged lax security on site which was said to be a breach of the policy condition. I do not accept Mr Chan's submission when he relies on the hardship of having to deal with claims which go back to 1990 and 1991. The defendants have made their enquiries, they have got their evidence and documents and although I accept that there is a small amount of prejudice in having to deal in 1993 with a claim going back to 1990-1991, this is something which is so commonplace in both arbitration and litigation that I feel able to discount it.

[1993] 1 HKC 397 at 402

I now turn to the size of the claim which has thrown up two arguments with which I should deal.

Mr Chan invited me to consider the size of the claim, $1.162m, in the light of the size of the contract sum, $122,000,000 . Apart from one Hong Kong decision, it does not appear that the size of the claim as a proportion to the contract sum has been considered. This argument is, of course, fraught with difficulties. Say the contract sum was $1b. A claim for $10m is a minute proportion of that, yet it seems impossible to characterize a $10m claim as minimal or inconsequential.

Were it not for the fact that Godfrey J in *Dragages v Preservatrice Fonciere*(MP 2305/88, unreported) appears to have given a similar argument some credence, I would not have thought that the point was arguable. At p 9 of his judgment, after having noted that the contract price was in excess of $140,000,000, the claim, though not trivial, was only for $180,000. He then added this:

> The amount of the contract, and the amount of the claim and the proportion which one bears to the other appear to me to be relevant considerations, but not ones to which undue weight ought to be attached.

The contract sum in a building contract is usually very high as it includes reimbursement for all that the contractor has had to expend on labour, materials, plant, machinery and overheads.As far as the contractor is concerned, he expends a good part of this sum in order to be able to make a profit at the end of the day. No evidence was adduced before me as to the profit margin in this case, but using my experience as a construction list judge, the range must be approximately from 0-30%. Assuming it was 25% in this case, then the profit element would be $35m. On any showing I would have said that $1.162m is not insignificant in the light of a profit of $35m. But the problem does not end there.What if the employer deducts liquidated damages for delay and sets sums off in respect of defects? What if arbitration or litigation has to be commenced with all the attendant costs?

It does not seem to me proper for a judge being asked to exercise his discretion under s 29 to have to be presented with all this sort of material in order to decide whether the proportion that the claim bears to the contract sum is relevant or not. Godfrey J thought that undue weight ought not to be attached to this point. I would go further and say that, generally, the court should only have regard to the size of the claim when it is considering the sum at stake. Speaking for myself, I would not want applications of this nature to be over complicated by a detailed analysis of profit margins and potential claims and cross-claims.

Mr Chan then raised what I believe to be an entirely novel point and that was that I should consider the amount at stake in the light of the fact that the plaintiffs' paid up capital is $169m.

Mr Clayton pointed out that so far as his researches were concerned, he could find no case where this had been considered before. He said that this was not surprising because the point was a bad one. The paid up capital of a company gives no idea as to how much money the company actually has available. As I pointed out in argument, this submission, taken to its logical conclusion, might disentitle the Hong Kong Bank or Cheung Kong, to name but two very substantial companies in Hong Kong, from ever being able to rely on this section save in circumstances where their claim was very substantial indeed. This cannot be right.

I reject the submission and am not surprised that it does not feature in any of the reported cases under this section whether in England or in Hong Kong. It is the sum at stake to which the court must have regard and the size of the paid up capital is wholly irrelevant.

As to the degree of default on the part of the plaintiffs, I think that I am entitled to throw into the scales the fact on 2 January 1993, the plaintiffs did send a notice of arbitration to M & G Insurance albeit one which was not received. This was, of course, an error on their part, but it does indicate that they were partially on the right track and had these been sent to the correct party some of these claims would not have been barred at all.

The period of delay is modest and I should look at the degree of the plaintiffs' fault in the light of these matters.

I have already held that I can see no case of prejudice on the part of the defendants given the time they had to investigate these matters and the steps they took to do so and their conclusion in the light of this investigation. As I extended time on 30 April 1993, there is no reason why, given goodwill and good sense on both sides, this arbitration should not be heard within this year or early next year.

Taking all these factors into account, I decided to exercise my discretion in favour of the plaintiffs. I have not forgotten the observations of Godfrey J in that the section does not confer a discretion on the court to extend time if it seems reasonable to do so. The section requires me to consider whether undue hardship would be caused to the plaintiffs if I refused this application. I believe that it would cause undue hardship to the plaintiffs if I refused to extend time for the commencement of an arbitration claiming $1.162m in the light of the

delay in this case and the other surrounding circumstances. Those then were the reasons why I decided to exercise my discretion in favour of the plaintiffs. ...

The order

I therefore extend the time limit in which to commence these arbitration proceedings until 23 April 1993. No objection was taken to this order once I decided that it was a proper case in which to exercise my discretion.