VIANINI LAVORI SPA v ATTORNEY GENERAL - [1993] HKCU 0534

High Court (in Chambers)
Kaplan, J.

Miscellaneous Proceedings No. 3333 of 1991

13 December 1991, 10 January 1992

Kaplan, J

The plaintiff and the defendant are respectively claimant and respondent in a building contract arbitration before Sir William Stabb, Q.C. formally the Senior Official Referee. Sir William has made a number of interim awards on liability, and on the 13th May 1991 he delivered an interim award on quantum. The effect of this award is to award the plaintiffs $1,721,462.43 together with a sum to be assessed by the parties in respect of disruption and delay. Not surprisingly the parties are somewhat apart on their respective assessments.

The plaintiff has calculated that interest in excess of $900,000 is due on the interim award when added together with the defendant's assessment of what is due for delay and disruption. Obviously if the plaintiff's higher disruption figure is correct then the interest figure will be higher. On this basis, Mr. Timothy Hill, a solicitor with Masons, has deposed on behalf of the plaintiffs that the total due to the plaintiffs is likely to exceed $2m.

On the evening of 25th February 1991 Masons received a fax from Jewkes & Partners, who were the solicitors for the Attorney General. The fax enclosed a document entitled "Notice of Payment into Court in connection with arbitration proceedings". Masons say that they have never received the original of this document, but it is accepted that on the 11th March 1991 they did receive by hand a letter including a further document entitled "Notice of Payment into Court". Masons contend that the notice of payment in was only given on the 11th March 1991. The notice records that the sum of $2m was paid into Court, and was received by the Court on the 25th March 1991.

The notice expressly states that the payment into Court of $2m "*does not include interest or costs*". It is about these words that this application is concerned.

On 5th November 1991, the plaintiffs issued an Originating Summons containing a claim for a declaration in the following terms:

"

(a) a declaration that pursuant to Order 73, rule 11(6) of the Rules of the Supreme Court (Cap. 4) the defendant's 'Notice of Payment into Court in connection with Arbitration Proceedings' which was duly served on the plaintiff on the 11th March 1991 whereby the defendant gave notice to the plaintiff of a payment into Court of $2 million in satisfaction of the plaintiff's claims under a reference to arbitration in respect of (i) new rates; (ii) Variation Order 28; (iii) 'Other disputed Rates'; and (iv) disruption and delay - shall despite the statement in the notice that the $2 million paid into Court 'does not include interest or costs' be construed as a notice of payment into Court of $2 million in full and final settlement of the plaintiff's said claims together with all entitlements to interest there on up to and including the 11th March, 1991."

Order 73, rule 11 of the Rules of the Supreme Court of Hong Kong has no counterpart in England where a payment into Court cannot be made in an arbitration. The parties as left to make sealed offers or write Calderbank letters. Order 73, rule 11 provides as follows:

"Payments into court (O.73, r. l l)

(HK)11. (1) In any arbitration proceedings any party to the reference may at any time pay into court a sum of money in satisfaction of any claim against him under the reference.

(2) On making payment into court under this rule, and on increasing any such payment already made the party making payment must give notice thereof in Form No.100 in Appendix A to all other parties to the reference; and within 3 days after receiving the notice the recipient parties must send the party making payment a written acknowledgment of its receipt.

(3) A party who has made payment into court under this rule may, without leave, give notice of an increase in such a payment but, subject to that and without prejudice to paragraph (5), a notice of payment may not be withdrawn or amended without leave of the Court which may be granted on such terms as may be just.

(4) Where there are two or more matters in dispute in the arbitration proceedings and money is paid into court under this rule in respect of all, or some only of, those matters, the notice of payment

(a) must state that the money is paid in respect of all those matters in dispute or, as the case may be, must specify the matters in respect of which payment is made, and

(b) where the party makes separate payments in respect of each, or any two of those matters in dispute, must specify the sum paid in respect of that matter or, as the case may be, those matters.

(5) Where a single sum of money is paid into court under this rule in respect of two or more matters in dispute, then, if it appears to the Court that any party to the arbitration proceedings is embarrassed by the payment, the Court may order the party making payment to amend the notice of payment so as to specify the sum paid in respect of each matter in dispute.

(6) For the purposes of this rule, a claim under a reference to arbitration shall be construed as a claim in respect, also, of such interest as might be included in the award if the award were made at the date of the payment into court."

Although there is no English counterpart to the whole of Order 73, rule 11 sub-rule (6) does find a parent in sub-rule (8) of Order 22, rule 1 of the English Rules of the Supreme Court which provides as follows:

"For the purposes of this rule, the plaintiff's cause of action in respect of a debt or damages shall be construed as a cause of action in respect, also, of such interest as might be included in the judgment, whether under s. 35A of the Act or otherwise, if judgment were given at the date of the payment into court."

The English paragraph 8 of Order 22, rule 1 was introduced to counteract the ruling in *Jefford v. Gee* [1970] 2 QB 130 at 149-150. The notes in the *White Book* at p.393 in relation to interest make clear that following the case of **Jefford v. Gee** various procedural devices where used in an attempt to counteract this decision. However, none of them was successful. The note goes on as follows:

"Paragraph (8) follows the recommendation made by the Law Commission in their report on Interest... that interest under s. 3 of the Act of 1934 (now replaced by s. 35A of SCA 1981) should be dealt with by payment into court by amendment of O. 22 in the same way as contractual interest and other kinds of statutory interest are dealt with. Under this proposal, the defendant would have to pay into court a sum in satisfaction to cover not only the debt or damages claimed but also any interest which might be awarded in respect of the period down to the date of payment in. This is in effect what para. (8) provides. *Under this provision, the defendant of course is not bound to pay into court any sum in respect of interest but if he fails to do so and if an award of interest is eventually made he will be at risk on the question of costs having paid into court an inadequate sum.*" [emphasis added]

Mr. Barlow for the plaintiffs submits that there is nothing in the rule which allows for or permits the reservation of interest. He points out that a claim for interest is not a cause of action in itself, and this proposition is not disputed. He submits that this payment has put the plaintiffs in a dilemma. He said that if the plaintiffs accepted the sum paid into court they would lose their right to claim interest. But he accepted that if the plaintiffs declined the offer they would be able to argue before the arbitrator that the claim plus interest was in excess of the sum paid into court, and that they should be awarded their costs. He submitted that this matter should not be left to be dealt with by the arbitrator because the court is given a role in Order 73, rule 11 for example to deal with payments into court said to be embarrassing.

Mr. Clayton for the defendants submits that this matter should be left in the capable hands of Sir William Stabb, Q.C. when he comes to deal with the question of costs. Mr. Clayton points out that even if it is not a valid payment into court, it may still be equivalent to an offer of $2m plus interest, and thus it is a matter which the arbitrator can take into account when exercising his undoubted discretion as to costs. He expressed concern that the grant of the declaration sought might inhibit the arguments that could be addressed to the arbitrator. He submits that the payment in is clear and that interest has to be taken into account later. He submitted that it is inevitable that the plaintiffs will get some interest on their award and this was understood by all parties despite a blanket denial in a pleading.

Mr. Clayton also pointed out the provisions of s. 22A of the Arbitration Ordinance (Cap. 341) which gives to an arbitrator the power to award interest both on a sum paid before the award and on any sum which he does award.

I am quite satisfied that a respondent/defendant may pay into court a sum exclusive of interest but he does so at his own peril. This is indeed made clear in the notes to Order 22 which appear at p. 394 of the *White Book.* I must confess not having understood the fears expressed by the plaintiffs. They were told that the payment into court excluded interest. They could have accepted it on that basis and then asked the arbitrator to award them interest on his interim award sum. If the interim award sum together with such interest as the arbitrator awarded exceeded $2m, the plaintiffs would no doubt argue that they had effectively beaten the payment into court and that costs should follow the event.

Alternatively they could have refused to accept that sum, and when Sir William awarded them $1.7m they could have invited him to award them interest in the absence of any agreement, and if the total exceeded $2m they could argue that costs should also follow the event.

In due course, Sir William will be told about the payment into court, and he will give such weight to it (if any) as he thinks fit in the light of the sum that he awards for interest.

In the light of all of the above, I am not prepared to grant a declaration the effect of which would be to turn a payment into court expressed to be exclusive of interest into one inclusive of interest. The defendants have taken their stand. It is up to the arbitrator to decide how to exercise his discretion on costs when the question of interest has been decided or agreed. I am satisfied that the defendants can, if they so wish, make a payment in exclusive of interest but they have to take the risk of so doing.

I therefore refuse to make the declaration sought on the simple grounds that there is nothing in the rules which preclude the defendants from expressing the payment into court as being one exclusive of interest as they in fact did.

Had I felt any doubt about the matter, I would have refused relief in the exercise of my discretion because there is another Tribunal seized of the matter - the very tribunal who has to exercise the discretion on costs. Sir William has a wide discretion on the question of costs, and I am quite satisfied that he will take all relevant matters into account.

This Originating Summons is therefore dismissed and I make a costs order *nisi* in favour of the Attorney General.