VIANINI LAVORI S.P.A. v THE HONG KONG HOUSING AUTHORITY - [1992] HKCU 0463

High Court (in Chambers)
Kaplan, J.

Construction List No. 4 of 1992

6 March 1992, 27 May 1992

Kaplan, J.

This matter raises certain issues as to the construction of Order 73, rules 11-18 of the Hong Kong Rules of the Supreme Court which relate to payments into court in pending arbitrations. These rules are clearly based upon the provisions of Order 22 but there are certain important differences. It will be recalled that there is as yet no English equivalent to Order 73, rules 11-18 thus there is no English case law specifically on these rules. These rules were considered by the Court of Appeal in **Hanson Jay & Associates Ltd. v. The Attorney General** Civil Appeal No. 34 of 1989, but there the court was only really concerned with rule 11(5). I had cause to consider these rules in **Vianini v. Attorney General** (MP No.3333 of 1991 judgment handed down 10th January 1992) and in **Humphreys v. Unistress** (MP Nos. 3268 & 3311 of 1991 judgment handed down 16th March 1992).

Mr. McCoy submits that the issues before me indicate a tension between the automatic provisions for costs in favour of a party taking out a payment into court exemplified by O.62, r.10(2) of the Rules of the Supreme Court on the one hand, and the sanctity of arbitration as a separate dispute resolution mechanism on the other.

The plaintiff (Vianini) and the defendant (The Authority) were respectively claimant and respondent in a construction arbitration. The arbitrator was the distinguished and experienced Mr. David Gardam, Q.C.

The relevant chronology is as follows:

11th September 1985 Contract between the parties to construct a public housing state at Tsui Lam Estate Plan II - Junk Bay areas 5 and 6.

12th March 1990 Vianini served notice of arbitration.

28th-31st January 1992 A hearing takes place in London which resulted in an interim award.

3rd February 1992 The Authority paid into court $17m.

7th February 1992 Mr. Gardam publishes a draft interim award giving Vianini $8,875,805.55 and $963,637.48 together with interest thereon calculated at $844,955.00. The two figures of $8,875,805.55 and $963,637.48 were in fact sums admitted in the defence and the dispute appeared to be one solely about interest on such sums.

12th February 1992 The Authority's solicitors confirmed that the payment in of $17m included the interest subsequently awarded by the arbitrator.

17th February 1992 Vianini accepts the sum paid into court.

20th February 1992

(1) Vianini withdraws the sum paid into court.
(2) Vianini issues the originating summons now before mewhich seeks the determination of a number of issues relating to the payment into court, but basically with regard to the question as to what is the appropriate order for costs and whom should make it.

21st February 1992 The Authority's solicitors apply to the arbitrator in relation to the question of costs.

26th February 1992 The Authority issues a cross-summons seeking a declaration that Mr. Gardam has jurisdiction to deal with costs alternatively an order that Vianini's originating summons be struck out or stayed.

27th April 1992 These were dates fixed for the substantive hearing.

Vianini's originating summons seeks the following relief.

(1) A declaration that they are entitled to tax their costs of the reference pursuant to O.62, r.10(2) forthwith;
(2) A declaration that the costs of the reference include the costs of and occasioned by Vianini's application for an interim award, alternatively an order that the costs of and occasioned by the said application shall be paid by the Authority to Vianini such costs to be taxed if not agreed;
(3) An order that the costs of the reference to be paid by the Authority to Vianini shall include the costs incurred by Vianini between the dat**e** of receipt by Vianini of the notice of payment into court, namely 3rd February 1992 and the date of notification by Vianini of its acceptance of the sum paid into court, namely 17th February 1992;
(4) An order that the costs reserved by the arbitrator by his order numbered C and dated 7th February 1992 shall be costs in the reference;
(5) Such direction as may be necessary for the conduct and disposal of this application.

Mr. McCoy, who appeared for Vianini, invited me to make various directions for the hearing of this matter. I heard argument from both sides on their respective constructions of the rules and I decided that I could answer the relevant questions posed without further affidavits or hearings. Mr. McCoy has asked me to fix another hearing to hear the argument as to how in principle the court should approach the exercise of its discretion. That of course depends upon whether I think that the matter has to be decided by the Court or by the Arbitrator and this is a subject to which I will have to return.

One has, I believe, to start with s.20 of the Arbitration Ordinance (Cap. 341) which provides as follows:

"

20. Costs.
(1) Unless a contrary intention is expressed therein, every arbitration agreement shall be deemed to include a provision that the costs of the reference and award shall be in the discretion of the arbitrator or umpire, who may direct to and by whom and in what manner those costs or any part thereof, shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between solicitor and client.
(2) Any costs directed by an award to be paid shall unless the award otherwise directs, be taxable in the Court."

Section 20 of the Arbitration Ordinance is identical to the corresponding section in the Arbitration Act 1950. Mr. McCoy makes the point that when this section was enacted in Hong Kong for the first time, I believe, in 1963, there was no question of any payment in to court provisions which were not themselves enacted until 1982. On the other hand, it must be assumed that the Rules Committee in making provision for payment in to court in pending arbitrations must have known of s.20 which expresses the very sensible notion that the tribunal apprised of a dispute should be the tribunal which decides who should pay what costs to whom. There is of course no doubt that in an ordinary case, an arbitrator will have to decide the issue of costs. The issue in this case is whether that position changes when a party avails himself of the payment in to court procedures and the other party accepts.

O.73, r. 11 permits a party to a reference to pay into court a sum of money in satisfaction of any claim against that party.

O.73, r.l3 provides as follows:

"*Acceptance of money paid into court* (O.73, r.13)

(HK)13. (1) Where money is paid into court under rule 11, then, subject to paragraph (2), *within 14 days* after the receipt of the notice of payment or, where more than one payment has been made or the notice has been amended, within 14 days after receipt of the notice of the last payment or the amended notice but, in any case, *before the hearing of the arbitration proceedings begins,* a party to the arbitration proceedings may:

(a) where the money was paid in respect of the matter in dispute or all the matters in dispute in respect of which he claims, accept the money in satisfaction of that matter in dispute or those matters in dispute, as the case may be, or

(b) where the money was paid in respect of some only of the matters in dispute in respect of which he claims, accept in satisfaction of any such matter in dispute the sum specified in respect of that matter in dispute in the notice of payment,

by giving notice in Form No. 101 in Appendix A to all other parties to the arbitration proceedings.

(2) Where *after the hearing of the arbitration proceedings has begun:*

(a) money is paid into court under rule 11, or

(b) money in court is increased by a further payment into court under that rule,

any party *may accept* the money in accordance with paragraph (1) *within 2 days* after receipt of the notice of payment or notice of the further payment, as the case may be, but, in any case, before the arbitrator publishes his award.

(3) Rule 11(5) shall not apply in relation to money paid into court after the hearing of the arbitration proceedings has begun

(4) *On a party accepting any money paid into court all further proceedings in the arbitration proceedings* or in respect of the specified matter in dispute or matters in dispute, as the case may be, to which the acceptance relates *shall be stayed.*

(5) ...

(6) A party to arbitration proceedings who has accepted any sum paid into court shall, subject to rule 14*,* be entitled to receive payment of that sum in satisfaction of the matter or matters in dispute to which the arbitration proceedings relate." [emphasis added]

Rule 1 covers situations where the sum is paid in before the hearing of the arbitration proceedings has begun. In that situation the other party has a period of 14 days during which he can accept that sum.

Rule 2 covers a situation where the sum is paid in 'after the hearing of the arbitration proceedings has begun'. In that case the other party has 2 days during which he may accept the payment in. It should be noted that this rule uses the phrase 'after the hearing ... has begun' and does not use the word 'commenced' which has a technical meaning ascribed to it by s.31 of the Ordinance which is important for limitation purposes. In due course I will have to consider whether in the present case the hearing of the arbitration proceedings had, in fact, begun when the sum of $17m was paid into court.

I now turn to O.73, rule 14 which I set out in full, although it is rule 3 which is crucial for present purposes.

"*Order for payment out of money accepted required* (O.73, r.14)

(HK)14. (1) Where a party to arbitration proceedings accepts any sum paid into court and that sum was paid into court by some but not all of the other parties to the arbitration proceedings the money in court shall not be paid out except under paragraph (2) or in pursuance of an order of the Court, and the order shall deal with the whole costs of the arbitration proceedings or the matter in dispute to which the payment relates, as the case may be.

(2) Where an order of the Court is required under paragraph (1), then if, either before or after accepting the money paid into court by some only of the other parties the party discontinues the arbitration proceedings against all the other parties and those parties consent in writing to the payment out of that sum, it may be paid out without an order of the Court.

(3) Where after the hearing of the arbitration proceedings has begun a claimant party accepts any money paid into court and all further proceedings in the arbitration proceed-

> ings or in respect of the matter in dispute or matters in dispute, as the case may be, to which the acceptance relates are stayed by virtue of rule 13(4), then, notwithstanding anything in paragraph (2), *the money shall not be paid out except in pursuance of an order of the Court, and the order shall deal with the whole costs of the arbitration proceedings* or with the costs relating to the matter in dispute or matters in dispute as the case may be, to which the arbitration proceedings relate." [emphasis added]

It is I fear necessary also to have regard to some of the provisions of O.62 of the Rules of Supreme Court.

O.62, r.2(1) provides that:

"This Order shall apply to all proceedings in the Court, except non-contentious or common form probate proceedings and proceedings in matters of prize."

O.62, r.2(2) deals specifically with arbitration and provides:

"

> (2) Where by virtue of any Ordinance the costs of or incidental to any proceedings before an arbitrator or umpire or before a tribunal or other body constituted by or under any Ordinance, not being proceedings in the Supreme Court, are taxable in the High Court, the following provisions of this Order, that is to say, rule 7(4) and (5), rule 8(6), rules 14 to 16, rule 17(1), rule 18, rule 21 (except paragraph (3)), rules 22 to 26 and rules 33 to 35, shall have effect in relation to proceedings for taxation of those costs as they have effect in relation to proceedings for taxation of the costs of or arising out of proceedings in the Supreme Court."

It will be noted that this rule deals with the taxation of costs and not the order as to who has to pay the costs. These rules, made applicable to a taxation of costs of an arbitration, are technical matters dealing with the taxation itself.

O.62, r.3(1) provides that:

> (1) Subject to the provisions of this Order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of the Court."

O.62, r.10(2) provides that:

"

> (2) If a plaintiff accepts money paid into court in satisfaction of the case (*sic*) of action, or all the causes of action, in respect of which he claims, or if he accepts a sum or sums paid in respect of one or more specified causes of action and gives notice that he abandons the others, then subject to paragraph (4) he may, after 4 days from payment out and unless the Court otherwise orders, tax his costs incurred to the time of receipt of the notice of payment into court and 48 hours after taxation may sign judgment for his taxed costs."

Rule (4) states:

"

> (4) Where money paid into court in an action is accepted by the plaintiff after the trial or hearing has begun, the plaintiff shall not be entitled to tax his costs under paragraph (2) or (3)."

Finally, it is important to note the terms of O.73, rule 17 which provides as follows:

"Except in arbitration proceedings in which all further proceedings are stayed after the hearing has begun by virtue of rule 13(4), the fact that money has been paid into court under the foregoing provisions of this Order shall not be communicated to the arbitrator until he has published his award, whereupon the arbitrator may

amend his award by adding thereto such directions as he may think proper with respect to the payment of the costs of the reference."

Clearly, it is the arbitrator and not the court who has to take into account what effect a payment into court (which has *not* been accepted) should have on the order for costs which he should make. The issue in this case is whether the arbitrator is also the person who should decide what order should follow after acceptance of a payment into court or whether a different order is appropriate in all the circumstances of the case.

The normal order when a party accepts a sum paid into court is that that party has his costs up to the date of receipt of notice of payment in, and the other party gets the costs thereafter, if any. In this case, Vianini say that they should have the normal order. However, the Authority says that they have frequently criticised the way in which Vianini have conducted this arbitration and, indeed, they suggest that the arbitrator has himself been critical of the way in which the case has been conducted and because of this they seek to be able to argue that the normal order should not follow. Mr. McCoy submits that the normal order should follow, and suggests that, if it does not, then the court, and not the arbitrator, is the proper tribunal to decide what is the appropriate order for costs. Clearly this would be a most unsatisfactory result. Mr. Gardam has been seized of this dispute for some time and has read the pleadings, has made an interim award, and has no doubt read the correspondences and other supporting documents. He, of all people, is in the best position to know whether Vianini have so conducted this arbitration so as to justify something other than the normal order which follows on the acceptance of a payment into court. It would be quite intolerable to expect the court to become acquainted with all the detail of this case in order to rule on this issue. It seems to me clear, from the common sense point of view, and without at the moment looking at the rules in any detail, that the arbitrator should hear argument as to whether the normal order or some different order ought to be made.

It is I think necessary to take the matter by stages.

Does the stay provided for by O.73, r.13(4) relate to costs?

Rookes v. Barnard (No. 2) [1966] 1 QB 176 decided that under the similar provisions contained in O.22 the stay did not extend to the question of costs. I agree with this decision and see no reason why a similar conclusion should not be arrived at in relation to O.73, r.13.

Had the hearing of the arbitration proceedings begun?

There can be little doubt as to the meaning of the phrase "after the trial or hearing of an action has begun" used in O.22. This phrase does not include interlocutory hearings before the Master or the judge. It clearly relates to the hearing of the substantive issues between the parties and not ones leading up to them.

By analogy O.73, r.13 must relate to the hearing of the substantive issues in the arbitration. It cannot have been intended that once an arbitrator had embarked upon any interlocutory hearing it could forever after be said that "the hearing of the arbitration proceedings had begun" within the context of O.73, r.13.

In this case the hearing before Mr. Gardam was not the hearing of the substantive issues. He made an interim award based on admissions in the defence and the real issue was whether interest and, if so, what sum in respect thereof should be awarded on those sums. The main hearing was fixed for April 1992 and I am quite satisfied that I should approach this application on the basis that the hearing of the arbitration proceedings had not in fact begun.

I am supported in this conclusion by the fact that both sides were represented by experienced solicitors and neither of them appeared to be of the view that the hearing of the arbitration proceedings had begun because Vianini took out the sum paid in within 14 days and not within 2 days, no application was made to the court to take the money out and the authority have never contended that this procedure was otherwise than in accordance with O.73.

If a Master had been hearing an application for partial judgment based upon admissions in a defence I do not see how it could be contended that the proceedings had begun for the purposes of O.22.

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(4) An order that the costs reserved by the arbitrator by his order numbered C and dated 7th February 1992 shall be costs in the reference;
(5) Such direction as may be necessary for the conduct and disposal of this application.

Mr. McCoy, who appeared for Vianini, invited me to make various directions for the hearing of this matter. I heard argument from both sides on their respective constructions of the rules and I decided that I could answer the relevant questions posed without further affidavits or hearings. Mr. McCoy has asked me to fix another hearing to hear the argument as to how in principle the court should approach the exercise of its discretion. That of course depends upon whether I think that the matter has to be decided by the Court or by the Arbitrator and this is a subject to which I will have to return.

One has, I believe, to start with s.20 of the Arbitration Ordinance (Cap. 341) which provides as follows:

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by giving notice in Form No. 101 in Appendix A to all other parties to the arbitration proceedings.

(2) Where *after the hearing of the arbitration proceedings has begun:*
(a) money is paid into court under rule 11, or
(b) money in court is increased by a further payment into court under that rule,

any party *may accept* the money in accordance with paragraph (1) *within 2 days* after receipt of the notice of payment or notice of the further payment, as the case may be, but, in any case, before the arbitrator publishes his award.

(3) Rule 11(5) shall not apply in relation to money paid into court after the hearing of the arbitration proceedings has begun

(4) *On a party accepting any money paid into court all further proceedings in the arbitration proceedings* or in respect of the specified matter in dispute or matters in dispute, as the case may be, to which the acceptance relates *shall be stayed.*

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(6) A party to arbitration proceedings who has accepted any sum paid into court shall, subject to rule 14, be entitled to receive payment of that sum in satisfaction of the matter or matters in dispute to which the arbitration proceedings relate." [emphasis added]

Rule 1 covers situations where the sum is paid in before the hearing of the arbitration proceedings has begun. In that situation the other party has a period of 14 days during which he can accept that sum.

Rule 2 covers a situation where the sum is paid in 'after the hearing of the arbitration proceedings has begun'. In that case the other party has 2 days during which he may accept the payment in. It should be noted that this rule uses the phrase 'after the hearing... has begun' and does not use the word 'commenced' which has a technical meaning ascribed to it by s.31 of the Ordinance which is important for limitation purposes. In due course I will have to consider whether in the present case the hearing of the arbitration proceedings had, in fact, begun when the sum of $17m was paid into court.

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(HK)14. (1) Where a party to arbitration proceedings accepts any sum paid into court and that sum was paid into court by some but not all of the other parties to the arbitration proceedings the money in court shall not be paid out except under paragraph (2) or in pursuance of an order of the Court, and the order shall deal with the whole costs of the arbitration proceedings or the matter in dispute to which the payment relates, as the case may be.

(2) Where an order of the Court is required under paragraph (1), then if, either before or after accepting the money paid into court by some only of the other parties the party discontinues the arbitration proceedings against all the other parties and those parties consent in writing to the payment out of that sum, it may be paid out without an order of the Court.

(3) Where after the hearing of the arbitration proceedings has begun a claimant party accepts any money paid into court and all further proceedings in the arbitration proceedings or in respect of the matter in dispute or matters in dispute, as the case may be, to which the acceptance relates are stayed by virtue of rule 13(4), then, notwithstanding anything in paragraph (2), *the money shall not be paid out except in pursuance of an order of the Court, and the order shall deal with the whole costs of the arbitration proceedings* or with the costs relating to the matter in dispute or matters in dispute as the case may be, to which the arbitration proceedings relate." [emphasis added]

It is I fear necessary also to have regard to some of the provisions of O.62 of the Rules of Supreme Court.

O.62, r.2(1) provides that:

"This Order shall apply to all proceedings in the Court, except non-contentious or common form probate proceedings and proceedings in matters of prize."

O.62, r.2(2) deals specifically with arbitration and provides:

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> (2) Where by virtue of any Ordinance the costs of or incidental to any proceedings before an arbitrator or umpire or before a tribunal or other body constituted by or under any Ordinance, not being proceedings in the Supreme Court, are taxable in the High Court, the following provisions of this Order, that is to say, rule 7(4) and (5), rule 8(6), rules 14 to 16, rule 17(1), rule 18, rule 21 (except paragraph (3)), rules 22 to 26 and rules 33 to 35, shall have effect in relation to proceedings for taxation of those costs as they have effect in relation to proceedings for taxation of the costs of or arising out of proceedings in the Supreme Court."

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Rule (4) states:

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> (4) Where money paid into court in an action is accepted by the plaintiff after the trial or hearing has begun, the plaintiff shall not be entitled to tax his costs under paragraph (2) or (3)."

Finally, it is important to note the terms of O.73, rule 17 which provides as follows:

"Except in arbitration proceedings in which all further proceedings are stayed after the hearing has begun by virtue of rule 13(4), the fact that money has been paid into court under the foregoing provisions of this Order shall not be communicated to the arbitrator until he has published his award, whereupon the arbitrator may amend his award by adding thereto such directions as he may think proper with respect to the payment of the costs of the reference."

Clearly, it is the arbitrator and not the court who has to take into account what effect a payment into court (which has *not* been accepted) should have on the order for costs which he should make. The issue in this case is whether the arbitrator is also the person who should decide what order should follow after acceptance of a payment into court or whether a different order is appropriate in all the circumstances of the case.

The normal order when a party accepts a sum paid into court is that that party has his costs up to the date of receipt of notice of payment in, and the other party gets the costs thereafter, if any. In this case, Vianini say

that they should have the normal order. However, the Authority says that they have frequently criticised the way in which Vianini have conducted this arbitration and, indeed, they suggest that the arbitrator has himself been critical of the way in which the case has been conducted and because of this they seek to be able to argue that the normal order should not follow. Mr. McCoy submits that the normal order should follow, and suggests that, if it does not, then the court, and not the arbitrator, is the proper tribunal to decide what is the appropriate order for costs. Clearly this would be a most unsatisfactory result. Mr. Gardam has been seized of this dispute for some time and has read the pleadings, has made an interim award, and has no doubt read the correspondences and other supporting documents. He, of all people, is in the best position to know whether Vianini have so conducted this arbitration so as to justify something other than the normal order which follows on the acceptance of a payment into court. It would be quite intolerable to expect the court to become acquainted with all the detail of this case in order to rule on this issue. It seems to me clear, from the common sense point of view, and without at the moment looking at the rules in any detail, that the arbitrator should hear argument as to whether the normal order or some different order ought to be made.

It is I think necessary to take the matter by stages.

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Rookes v. Barnard (No. 2) [1966] 1 QB 176 decided that under the similar provisions contained in O.22 the stay did not extend to the question of costs. I agree with this decision and see no reason why a similar conclusion should not be arrived at in relation to O.73, r.13.

Had the hearing of the arbitration proceedings begun?

There can be little doubt as to the meaning of the phrase "after the trial or hearing of an action has begun" used in O.22. This phrase does not include interlocutory hearings before the Master or the judge. It clearly relates to the hearing of the substantive issues between the parties and not ones leading up to them.

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In this case the hearing before Mr. Gardam was not the hearing of the substantive issues. He made an interim award based on admissions in the defence and the real issue was whether interest and, if so, what sum in respect thereof should be awarded on those sums. The main hearing was fixed for April 1992 and I am quite satisfied that I should approach this application on the basis that the hearing of the arbitration proceedings had not in fact begun.

I am supported in this conclusion by the fact that both sides were represented by experienced solicitors and neither of them appeared to be of the view that the hearing of the arbitration proceedings had begun because Vianini took out the sum paid in within 14 days and not within 2 days, no application was made to the court to take the money out and the authority have never contended that this procedure was otherwise than in accordance with O.73.

If a Master had been hearing an application for partial judgment based upon admissions in a defence I do not see how it could be contended that the proceedings had begun for the purposes of O.22.

Are the Claimants now entitled to tax their costs?

If this matter had been in court and governed by O.22 Vianani would have been plaintiffs and having accepted the money paid in within 14 days would have been able to take the money out without a court order *and,* unless the court otherwise ordered, tax their costs under O.62, r.10(2).

What is the position then under O.73?

O.62, r.10(2) refers to the "plaintiff" but Vianini are "claimants". Does this rule apply at all? If it does not then there would seem to be no mechanism for Vianini to get an order in relation to their costs unless they could go to the arbitrator. Further, O.62, r.2(1) specifically applies O.62 to "all proceedings in the Court" and does not extend the order, save in so far as taxation is concerned, to arbitrations. It seems clear to me that O.62, r.10(2) cannot be applicable to an arbitration. In any event Vianini are placed in a dilemma because they

have contended that the hearing of the arbitration proceedings had begun and if this be correct (which I held it is not) O.62, r.2(4) would prevent an automatic taxation of their costs.

However it clearly could not have been intended to deprive a claimant who accepted a sum paid in before the hearing commenced from seeking his costs.

How is this impasse to be resolved? I suppose it could be argued that I should give a very wide interpretation to the word "plaintiff" so that it encompasses the word "claimant" but this would appear to conflict with the wording of O.62, r.2(2) which specifically omits arbitration proceedings from "being proceedings in the Supreme Court". I do not feel able to give O.62, r.10(2) such an interpretation as would bring within its net arbitrations proceedings. Mr. McCoy submits that it is indeed unfortunate that the draughtsman of O.73 did not pick up the fact that O.62, r.10 refers to "plaintiff" only. He asks me to construe "plaintiff" as including "claimant" but I do not feel able to reach this conclusion.

It seems to me that I am therefore thrown back to s.20 of the Arbitration Ordinance which deems it an agreement of the parties that the costs of the reference and award should be in the discretion of the arbitrator. That clearly is the position if no payment into court had been made. Why should it be different when a payment into court has been made, absent any rule to the contrary? In my judgment there is nothing that forces me to conclude that the arbitrator's jurisdiction to deal with costs is taken away by the acceptance of money paid into court *before* the hearing of the arbitration proceedings has begun.

Arbitrators will be aware that when money paid into court has been accepted, the usual order is that the accepting party will have his costs up to the date of receipt of notice of payment in and the paying party will have them thereafter (if any). There is an exception to this rule, which one rarely comes across in practice, but to which I will make reference later in this judgment. An arbitrator being asked to deal with the costs of an arbitration where a payment into court has been accepted can be referred to the provisions of the Rules of the Supreme Court and the commentary contained in the *White Book* as well as to this judgment. I see no difficulty whatsoever in this regard. Arbitrators are well used to dealing with the costs consequences of sealed offers and are well capable of applying the same reasoning to payments into court under O.73.

I have therefore come to the conclusion that because the payment into court was accepted before the hearing of the arbitration proceedings began the claimants are entitled to invite the arbitrator to deal with all questions of costs as there is nothing in the Rules of the Supreme Court which provide otherwise. Mr. Gardam will therefore decide all questions relating to costs.

Mr. McCoy attempted to disengage s.20 of the Arbitration Ordinance from the Rules of Supreme Court by submitting as follows:

"By electing to make a payment in, pursuant to the new Rules of the Supreme Court, the Respondent contingently submits, in part, to the jurisdiction of the Supreme Court. A Claimant accepting the payment in affirms a consent arrangement, which is then a novation of the original arbitration agreement, or an implied term of it, so that the orthodox exclusive jurisdiction of the arbitrator in respect of costs, is by common contrary intention, displaced. Alternatively, the Respondent has waived its rights or is estopped in equity from asserting them."

I disagree fundamentally with these propositions. Merely because a party avails himself of the novel Hong Kong rules which permit payment into court in pending arbitrations, I find it impossible to see why that results in some form of contractual variation or novation or estoppel relating to the clear words of s.20 of the Arbitration Ordinance which make it clear that the arbitrator is to deal with the question of costs. I am also unable to accept Mr. McCoy's argument that policy and pragmatic considerations support his analysis. He relies upon the fact that the costs consequences of a payment into court will be diluted if acceptance generates a minute examination of the arbitration reference or action that has just been compromised. I disagree. The arbitrator will be well aware (and if not can easily be made aware) of the normal order for costs consequent upon an acceptance of a payment into court. I have already said that the arbitrator can be referred to O.22, O.62 and the notes in the *White Book* and to this judgment. I will deal later with the exceptional circumstances where a normal order may not follow. I am confident that arbitrators in Hong Kong can be relied upon to apply these provisions in the same way as they are applied day in and day out by the courts.

What would be the position if the hearing of the arbitration proceedings had begun?

If, contrary to my view, the hearing of the arbitration proceedings had begun then the situation is clearly covered by O.73, r.14(3). The money is not to be paid out without an order of the court "and the order should deal with the whole costs of the arbitration proceedings". In a simple case this is unlikely to create a problem. But Mr. O'Sullivan for the Authority tells me that he wishes to argue that Vianini should not have the normal order for costs and he wishes to argue the Vianini's conduct in the arbitration should result in a different order being made. To rule on that question will involve the court going into some detail of the interlocutory stages of this abitration. This would seem a waste of effort and time on the part of the court who would not have been seized of the substance of this dispute whereas Mr. Gardam is ideally placed to deal with all such issues.

During argument I suggested to Counsel that I might be able to deal with the whole of the costs of the arbitration proceedings by ordering that they be in the discretion of the arbitrator. Both Counsel appeared to accept that I could deal with costs in that way. However after considering these arguments I came across two decisions which cast certain doubts on my power to do this and I invited Counsel to address me on these two authorities. I received helpful written submissions from them both.

In *Lambton v. Parkinson* (1887) WR 545, Pollock B. in giving the plaintiff's leave to discontinue their action made the following order:

"That the plaintiff have leave to discontinue the action and the master to allow to plaintiff's such costs as he may think proper."

The Court of Appeal in allowing the appeal held that there was no jurisdiction to make the defendant pay the costs in these circumstances but alternatively, if there was any such jurisdiction, the question of costs was not decided upon, but was delegated to the master and the court had not exercised its jurisdiction at all.

In *Musman v. Boret* (1892) WR 352 the same judge on an application, in effect, to discontinue the action on terms that each party to bear their own costs added to the order the words "unless the master thought that any of the proceedings taken by the plaintiff was unnecessary in which case the defendant's costs so occasioned were to be paid by the plaintiff". The Court of Appeal held that the judge had not delegated his discretion to the master but had exercised his discretion by laying down a rule which the master would carry into effect. The Court of Appeal held that **Lambton v. Parkinson** was clearly distinguishable.

By ordering that the costs of the arbitration should be in the discretion of the arbitrator would I be delegating a discretion rested in me?

Mr. McCoy submitted that neither case, on a true analysis, justified citation under the heading "Discretion not to be delegated" *(White Book* page 994) and no general rule could be discerned from them.

Mr. O'Sullivan sought to distinguish both cases from O.73, r.14(3) by pointing out that in both cases the court was dealing with a situation where it had been given a statutory discretion as to costs whereas O.73, r.14(3) merely states "...the order shall deal with the whole costs of the arbitration proceedings...". He submits that there is a distinction between awarding costs and making an order dealing with them. Dealing with costs, it is submitted, differs from making an order as to the entitlement to them. Mr. O'Sullivan tested the situation by positing the following scenario. Assume that a substantive arbitration hearing had commenced and during the hearing the respondent paid a sum into court which the claimant accepted. The parties could easily argue costs before the arbitrator so that he could make an award in respect thereof. However in order to obtain the sum paid in to court the claimant would have to apply to the court under O.73, r.14(3) and no doubt the court would deal with the costs by reciting the arbitrator's award of costs. Would this, it is asked rhetorically, involve a delegation, given that the word "deal" is the operative word? Mr. O'Sullivan submitted that the above scenario would not violate the terms of O.73, r.14.

Having given this matter careful consideration, I am not persuaded that either of the cases cited precludes me from holding that the court can deal with all the costs of the arbitration by ordering that they be in the discretion of the arbitrator. It seems to me that the draughtsman would have used far clearer language if he had intended to confer upon the court the sole discretion to deal with costs in this situation. I accept that it is strictly not necessary for me to make a finding on this issue because I have held that the proceedings had not begun but this case may go further and in any event these difficult provisions require some consideration for the benefit of users of arbitration who wish to avail themselves of the payment in provisions.

The unusual order

Although the usual order is to award the costs of the action/arbitration to the party who accepts the sum paid into court in satisfaction of his claim, I am satisfied that this is not an inflexible rule and can be departed from in exceptional circumstances. There is clear authority on this point from the Court of Appeal in England in the case of **Glenlion Construction Limited v. Beaverfoam (Moreton) Limited** (G No. 370 of 1980, unreported 3rd November 1983). In that case, His Honour Judge Hawser made an order in the following terms:

"... that the sum of £21,250 in court be paid out to the plaintiff's solicitors. And do make no order as to the costs of this action save that the parties are to have any costs awarded to them on any interlocutory application."

It was agreed on all sides that this was a most unusual order if not, at the time it was made, an unique one. The question raised by the appeal was whether the learned judge had the power or jurisdiction to make the order which he did.

It appears that this was one of those cases where the plaintiff started off by claiming £114,000 and finally agreed to settle for considerably less, and there were difficulties in getting particulars out of the plaintiffs. It is also to be noted that His Honour Judge Hawser had been in charge of the interlocutory stages of the case and was thus fully aware how the case was being prepared by both parties. Stephenson, L.J. (with whom Lord Justices Griffiths and Purchas agreed) dealt with this matter in some detail and referred to the provisions of O.22 which are very similar to our O.73. The learned Lord Justice also referred to O.62, r.10(2) to which I have referred above. In answer to the suggestion of counsel that the court had no jurisdiction to do other than let the plaintiff have his costs and have them taxed, the learned Lord Justice put forward certain absurdities. He pointed out that there might be a case where, say, £1m is claimed by a plaintiff who settles finally for £1,000. Is it to be said that the court has no power to deprive the plaintiff of the costs of the action up to payment in?

The learned Lord Justice summarised his view of the matters as follows:

"But this, as I shall endeavour to indicate later, was an exceptional case and treated as an exceptional case by the judge; it was an order, and the order which he made, and which should only be made, in an exceptional case. Secondly, it was a case in which the plaintiffs from the very early stage had been put on notice by a warning from the defendants that they were going to ask the court to make the order which the judge in fact made. They said from very early days that they were prepared to pay the reasonable costs of the work which had actually been done by the plaintiffs, though on their, the defendants', basis of calculation, and if that was not accepted they would quantify that claim - that is why they wanted particulars - and pay the money into court, and do what they successfully did before Judge Hawser. I would regard it as a wrong exercise of the judge's discretion to make such an order as was made in this case unless there had been a clear warning to the plaintiffs by the defendants that that was their intention - that it was their intention to claim such an order. I agree with what the learned judge said at p.8 of the transcript at letter G that the present situation very seldom arises in practice. I would think the cases in which the plaintiffs have so conducted the action as to disentitle themselves to costs on a proper exercise of discretion would not be many, and the cases where they have not only done that, but have been warned by the defendants that they would be at risk of getting no costs if they did accept a payment into court, would make those cases even fewer."

It is of course true that **Glenlion** deals with payment into court in a court action and not in an arbitration. However, the principle stated must be equally applicable and that is that it would be a most unusual case for a claimant accepting money paid in not to have his costs up to that date. However, he may be deprived of those costs if his behaviour justifies such a course and if he had been warned that such an application would be made. Transposing that principle to the situation which exists in this case, it seems to me obvious from a practicable point of view that the arbitrator is the only person who can decide whether Vianini have in any way misconducted themselves so as to justify an unusual order and he will be able to decide from the correspondence which he has already read and the hearings which he has already conducted, whether or not a warning shot has been given to Vianini. Again I repeat that it would be intolerable in the extreme for a judge to have to decide these issues in this sort of case without having previously been seized of the case. In my judgment Mr. Gardam will have to consider all questions relating to costs including the Authority's application for the unusual order which they tell me they wish to make.

Conclusion

It follows therefore that I have come to the clear view that all the questions raised by Vianini in their originating summons are matters which are within the discretion of the arbitrator and they should all be decided by him in addition to him being able to consider such arguments as are put forward by the Authority.

I am conscious, of course, that the Authority has taken out a summons which seeks the striking out of Vianini's originating summons alternatively an order that it be stayed. It seems to me that the appropriate way for me to deal with this is to dismiss Vianini's summons and to make no order on the Authority's cross-summons. In view of the decision at which I have arrived, it seems appropriate that I should make a costs order *nisi* on Vianini's summons in favour of the Authority. I propose to make no order for costs in respect of the Authority's cross-summons for a strike out, a stay and a declaration on the ground that such summons was not really necessary as it was open for the Authority to contend, as they have successfully, that Vianini's summons should be dismissed on the ground that the arbitrator has jurisdiction to deal with this matter. The parties and the arbitrator will now proceed on the basis of this judgment and the question of costs will be placed before Mr. Gardam for his consideration. I will of course hear the parties on any consequential matters which may arise from this judgment.

The result of Mr. McCoy's argument has been to persuade me that O.73, rr.11-18 could have been better expressed so as to make explicit the conclusions at which I have arrived. It should be possible to amend these rules to make it clear that all questions of costs after acceptance of payment into court, whether before or after the arbitration hearing has begun, should be in the discretion of the arbitrator. If my conclusion was not the one intended by the draughtsman, then further consideration would need to be given to making the contrary view clear and making a consequential amendment to O.62, r.10. No doubt these observations will be considered by the Rules Committee and by the Attorney General. There is some urgency in the matter as this is the fourth case in the last few months upon which I have had to consider these rules, and it appears that increasing use is being made of them, and it is desirable that any uncertainties should be dealt with. A further matter to be considered is that anyone can appear in an arbitration (s.2F of the Arbitration Ordinance) but only locally qualified lawyers can appear before a Judge in chambers. It seems to me undesirable that the advocate before the arbitrator, say a London junior or an American attorney or a layman, would not be able to argue costs if the matter had to be argued in court. This would inhibit the use of the payment in facility. I also observe that under the Domestic Rules of the Hong Kong International Arbitration Centre no account is to be taken of sealed offers where payment into court could have been made and so it will not always be possible to circumvent this problem by a sealed offer.