VIBROFLOTATION AG v EXPRESS BUILDERS CO LTD - [1994] 3 HKC 263

HIGH COURT
KAPLAN J

MISCELLANEOUS PROCEEDINGS NO 1230 OF 1994

15 August 1994

Arbitration -- Building contract -- Uncitral Model Law -- Whether applicable to contracts which did not provide expressly for application -- Application of Model Law to international disputes -- Arbitration Ordinance (Cap 341) s 14

Arbitration -- Building contract -- Uncitral Model Law -- Limitation on application -- Jurisdiction of court to grant interim measure of protection -- Subpoena duces tecum -- Whether subpoena within scope of power granted to court -- Arbitration Ordinance (Cap 341) s 14 -- Uncitral Model Law arts 5 & 9

A dispute arose between the plaintiff, a sub-sub-contractor of a project in the airport core programme, and the defendant, a sub-contractor, resulting in the appointment of an arbitrator. The plaintiff then issued a writ of subpoena duces tecum against the main contractor for the production of certain documents as without these documents, the plaintiff would not be in a position to plead its case based on a fundamental breach of the contract by the defendant. The subpoena was set aside by a Master on the ground that the court had no jurisdiction to issue the same. The plaintiff appealed.

Held, dismissing the appeal:

(1) Although most contracts relating to the airport core programme provided for the opting of the Model Law into the domestic regime, the contract in question did not so provide. However, the court was satisfied that it was an international arbitration to which the Model Law applied because the plaintiff and the defendant had their places of business in different States.

(2) Section 34E was added to the Arbitration Ordinance (Cap 341) to make it clear that s 14(4) (subpoenas), s 14(5) (habeas corpus) and s 14(6) (various orders) applied as much to arbitrations governed by the Model Law as they do to domestic arbitration. However, there was one important restriction in relation to the Model Law, in that s 34E was subject to art 5 of the Model Law. Under art 5, no court should intervene except where so provided in the Model Law. Article 9 provided that it was not incompatible for a court to grant an interim measure of protection. It was thus clear that only those parts of s 14 of the Arbitration Ordinance which could be characterized as interim measures of protection were within the scope of the power granted to the court indirectly under art 9.

(3) A subpoena was not an interim measure of protection and therefore, the court's power to grant the subpoena could not come under art 9. It was a fallacy therefore to contend that the court could grant, under art 9, all the orders set out in s 14(4), (5) and (6) of the Ordinance.

(4) It was clear that the arbitrator's approval was necessary where one party wished to apply to the court for assistance in taking evidence. Where a party wished to seek a subpoena in aid of an arbitration which was governed by the

Model Law, that party should obtain the express written approval of the arbitrator and thus will be in a position to show the court, if necessary, that such approval, as required by art 27, had been specifically provided.

(5) A subpoena duces tecum could only be applied for in relation to an evidential hearing. Although it would be helpful for the arbitrator to fix a date for the production of the documents, this would not be an evidential hearing in the true sense of that phrase. It was a device to produce a date required to be inserted into the subpoena duces tecum. The issues in the arbitration had not yet been formulated through pleadings but the arbitrator was told that full pleadings would be utilized in this arbitration.

(6) There was a lot of good sense in the procedure whereby the court fixes an artificially early hearing date in order for the documents to be produced other than on the first day of a trial, thus avoiding consequential adjournments, etc. However, what happened in the present case went far beyond what was contemplated by such procedure. It was fairly clear that the parties were months, if not years, away from the main evidential hearing in this arbitration.

Cases referred to

Khanna v Lovell White Durrant [1994] 4 All ER 267

Penn-Texas Corp v Murat Anstalt [1964] 1 QB 40 ; [1964]2 QB 647

SL, Re (1987) 2 FLR 412

Straker v Reynolds (1889) 22 QBD 262

Legislation referred to

(HK) Arbitration (Amendment) Ordinance 1991

(HK) Arbitration Ordinance (Cap 341) ss 14, 34E

(HK) Rules of the Supreme Court O 38 r 13

Other legislation referred to

Halsbury's Laws of England Vol 17, para 250 -

Matthews and Malek Discovery pp 75, 79 -

Style and Hollander Documentary Evidence (4th Ed) pp 327, 329 -

Supreme CourtPractice 1993 Vol 1 para 38/13/1 -

Uncitral Model Law arts 5, 9, 27

Appeal from

This was an appeal against an order made by Master Beeson on 20 May 1994 whereby she set aside a subpoena duces tecum issued by the plaintiff on the ground that the court had no jurisdiction to issue the same. The facts appear sufficiently in the following judgment.

Jerome Matthews (Munro & Claypole) for the appellant.

John Scott (Masons) for the respondent.

KAPLAN J

This is an appeal against an order made by Master Beeson on 20 May 1994, whereby she set aside a sub-poena duces tecum issued by the plaintiff on the ground that the court had no jurisdiction to issue the same.

Originally, the plaintiff, a sub-sub-contractor of a project which was part of the airport core programme, commenced an action in the High Court against the defendant sub-contractor. On or about May 1993, a writ of subpoena duces tecum was issued against a Mr Hans Boender of Hollandsche Aanneming Maatschappij (HAM), the main contractor, in respect of certain documents concerning, amongst other things, the performance of vibroflots, that is, machines which compact material used for the purposes of reclamation and which had been supplied to the project by the plaintiff.As a result of this subpoena, some, but not all, of these documents were inspected by the plaintiff at the offices of HAM.

On 24 and 26 May 1993, the High Court action came before me and I stayed those proceedings to arbitration.

Since that hearing and in the absence of a court order, HAM has refused to produce the documents or to allow the plaintiff to continue its inspection of the same.

By 19 April 1994, the parties had agreed on the appointment of Miss Teresa Cheng as arbitrator. On 30 April 1994, the plaintiff issued another subpoena directed to Mr Boender. On 6 May 1994, Miss Cheng held a preliminary meeting, as a result of which a date for production of the documents specified in the subpoena was fixed.

The subpoena dated 30 April 1994 was subsequently set aside by consent for reasons that do not concern me. On 10 May 1994, the plaintiff therefore issued a fresh writ of subpoena duces tecum limited to the documents requested in the subpoena of 30 April 1994 but directed to a Mr Joep Athmer of HAM. The writ stated that he was to appear before Miss Cheng on 23 May 1994 and was served twice on Mr Athmer, firstly, on 13 May 1994 and secondly, on 18 May 1994.

This subpoena was set aside by Master Beeson on 20 May 1994. It is her order to set aside against which the plaintiff now appeals.

At the outset, I must say that it is unfortunate that this application to set aside a subpoena in aid of an arbitration was heard before a Master contrary to the *Practice Direction* that all matters relating to the Arbitration Ordinance (Cap 341) should be heard by the judge in charge of the construction and arbitration list. It was also unfortunate that only 15 minutes were reserved because serious issues were raised by the application. Only the question of jurisdiction was argued below but, of course, I hear the matter de novo.

The contract between the parties was not exhibited but Mr Jerome Matthews, who appeared for the plaintiff, submitted that this arbitration was an international one to which the Uncitral Model Law applied and that, therefore, art 27 of that law was relevant. Mr Scott, for the defendant, was prepared to argue his case on the basis that it was an international arbitration and he said that in the circumstances, it mattered little whether it was an international or domestic arbitration. My understanding of this

matter is that although most contracts relating to the airport core programme provide for the opting of the Model Law into the domestic regime, this contract did not so provide. I am therefore satisfied, on what I have been told and what I know about this case, that it is an international arbitration to which the Model Law applies because the plaintiff and the defendant have their places of business in different States.

It is important to note the jurisdiction of the court to grant a subpoena in relation to an international arbitration to which the Model Law applies. One starts with art 5 of the Model Law which provides:

> In matters governed by this law, no court shall intervene except where so provided in this law.

Article 9 provides:

> It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

Article 27 provides:

> The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request with its competence and according to its rules on taking evidence.

It is also important to note the Arbitration (Amendment) Ordinance 1991 which adds a new section, 34E to the Arbitration Ordinance which provides as follows:

> Subject to Article 5 of the UNCITRAL Model Law, section 14(4), (5) and (6) applies to arbitrations which are governed by the UNCITRAL Model Law.

This section has given rise to a good deal of confusion and I think it might be helpful to set the matter straight as simply and as clearly as possible. The reason why s 34E was required was because it was discovered that s 14, which gives the court various powers in relation to arbitrations, was contained in Pt II of the Arbitration Ordinance which deals solely with domestic arbitration. Section 34E was thus required to make it clear that s 14(4) (subpoenas), (5) (habeas corpus) and (6) (various orders) apply as much to arbitrations governed by the Model Law as they do to domestic arbitration. However, there is one important restriction in relation to the Model Law, that is, that s 34E is subject to art 5 of the Model Law. As can be seen from art 5, no court shall intervene except where so provided in the Model Law. Article 9 says that it is not incompatible for a court to grant an interim measure of protection. It is thus clear that only those parts of s 14 of the Arbitration Ordinance which can be characterized as interim measures of protection are within the scope of the power granted to the court indirectly under art 9. I have little difficulty in concluding that a

[1994] 3 HKC 263 at 267

subpoena was not an interim measure of protection and therefore the court's power to grant the subpoena cannot come under art 9. It is a fallacy therefore to contend that the court can grant, under art 9, all the orders set out in s 14(4), (5) and (6) of the Ordinance.

However, the granting of a subpoena is expressly covered by art 27 and in my judgment it is perfectly plain and, indeed, it is not argued to the contrary that art 27 is the governing article in relation to the issue of a subpoena. Provided the court has jurisdiction to grant a subpoena, that is, provided that the domestic law makes provision for the grant of such an order, then the court can make an order if otherwise within the terms of art 27.

The application for a subpoena in this case was made by a party, but it would not have been a proper request unless made with the approval of the arbitrator. Mr Scott contended that the arbitrator had not expressly given her approval to the application. I have been referred to Miss Cheng's letter to the parties dated 9 May 1994 and in particular, to the third page thereof. Amongst other things, she said this:

> Having heard both parties, these documents at the moment appeared to be relevant to one of the key issues to this arbitration. I therefore fix a return date before me for the production of such documents as may be ordered for production by the court. Taking into account the availability of myself ... the date was fixed at 23 May 1994.

On 22 July 1994, after the hearing before me had been concluded, Mr Scott appeared before me again and asked me to admit into evidence an affidavit of Timothy Hill of Masons. I gave leave for this affidavit to be put in. This affidavit produced an exhibit, namely, an order for various directions made by Miss Cheng and dated 21 June 1994. Mr Scott submitted that this letter indicated that it could not be said that the arbitrator had either expressly or implicitly consented to the application to the court under art 27. In particular, reliance was placed upon a sentence in this letter which stated:

> The claimant contends that I should not embark onto the proprietary of the subpoena as the respondents suggested, as it is entirely a matter for the court. I accept this submission and the court procedures do allow for HAM to set aside the subpoena [sic].

Having given Mr Scott leave to put in Mr Hill's affidavit, I gave Mr Matthews leave to put in an affidavit sworn by Suzan Hellings on behalf of the plaintiff.In this affidavit, Miss Hellings stated that at the hearing before Miss Cheng on 9 June, she had stated to Miss Cheng that it was her position that Miss Cheng's approval would be implicit in the making of the order as requested, namely, the fixing of a hearing in which the documents could be produced pursuant to the subpoena.

[1994] 3 HKC 263 at 268

I am quite satisfied that if one looks at the letters from Miss Cheng to the parties and the action she took, namely, the fixing of a hearing to receive the documents, it must have been implicit that she was approving

the application for the subpoena in accordance with art 27 of the Model Law. If she were not approving the issue of a subpoena, I fail to see why she should have fixed any hearing for the reception of the documents. Accordingly, I am satisfied that the application for the subpoena was made in accordance with art 27 and with the approval of the arbitrator.

I think it helpful, however, to add this. It is clear that the arbitrator's approval is necessary where one party wishes to apply to the court for assistance in taking evidence. It seems to me that where a party wishes to seek a subpoena in aid of an arbitration which is governed by the Model Law, that party should obtain the express written approval of the arbitrator and thus will be in a position to show the court, if necessary, that such approval, as required by art 27, has been specifically provided.

I am thus satisfied that the plaintiff has got over the first hurdle in relation to compliance with art 27.

Also at the hearing on 22 July 1994, Mr Matthews told me on instructions that between 12 July and 22 July 1994, the plaintiff had in fact obtained, from another source, copies of some or all of the documents the subject matter of the subpoena. He told me that these copies were not all good and that accordingly, despite these copies, he maintained the validity and appropriateness of the subpoena.

As I have already noted, Miss Cheng was appointed in April 1994 and since then, the parties have been preoccupied with arguments relating to these documents and to the subpoena. It is crucial to point out that the plaintiff has not yet pleaded its case and obviously, neither has the defendant. I say this because towards the end of the argument, Mr Matthews very frankly told me on instructions that without these documents, the plaintiff would not be in a position to plead its case based upon fundamental breach of the contract by the defendant. Not surprisingly, Mr Scott emphasized that this frank statement exposed this application for what it was, namely, an attempt to get documents from a non-party for the purpose of pleading a case against the defendant. However, the recent obtaining of copies of the relevant documents is likely to have changed all of this, and in the light of the documents it has obtained, the plaintiff may well be able to plead its case fully.

Every practitioner will be aware that a subpoena duces tecum is a writ by which a non-party is required to produce documents to a judge or arbitrator at, as Mr Scott puts it, an evidential hearing. Mr Scott submits that there is no warrant in authority, practice or principle which justifies an order being made at this stage of these proceedings.

It seems to me that the point that Mr Scott has raised is of substantial practical importance not only to practitioners but of course to the plaintiff

in this case. I have every sympathy for the position in which they find themselves. They know that there are in existence documents which they are confident will show that their equipment performed in accordance with their contractual obligations. Those documents are not in the possession of the defendants because, if they were, there would be little difficulty in getting hold of them. They are in the possession of a non-party and there is no doubt that at some stage in the proceedings, all other things being equal, the plaintiff will be able to get an order requiring the non-party, HAM, to produce these documents at the hearing. The issue I have to determine, and it is one of principle, is whether the plaintiff has jumped the gun.

What, therefore, are the principles applicable to the grant of a subpoena duces tecum?

I start with 17 *Halsbury's Laws of England* para 250 where under the heading 'Enforcing production of documents at trial' one finds the following observation:

> The production at the trial of a material document which is in the possession of any person other than the party who desires its production, which that person is not willing to produce voluntarily, is enforced by a subpoena duces tecum. The subpoena must specify the particular documents required, and if too general in language, will not be enforced.

In *Documentary Evidence* by Style and Hollander (4th Ed) at p 327, one finds the following passage:

> First, a distinction must be drawn between provision of particular documents pursuant to a subpoena and an order for discovery. Discovery arises between parties to the action. A subpoena duces tecum requires a non-party to attend at court with specified documents. Discovery could only be ordered against a third party within the principles of *Norwich Pharmacal*... A subpoena may not be used in order to obtain discovery. The documents produced must be required as relevant and admissible evidence.

See further *Discovery* by Matthews and Malek at p 75 which deals with subpoenas issued against non-parties for production of documents at trial:

> The standard forms of subpoena and summons require the recipient to bring the documents concerned to the court on the first day of trial of the action (which is stated). This is far too late for the usual purposes of discovery. Accordingly, it was suggested judicially in*Williams v Williams* default [1988] QB 161, 169 that a subpoena might be made returnable on a day artificially fixed by the court as the first day of trial, although in fact the trial proper would not begin until some time later. In this way, it was suggested, the party seeking the production of documents might have the opportunity of seeing them in advance of the trial, so preventing an adjournment and saving costs.

Although this idea was not new and has been employed on subsequent occasions, it is respectfully submitted that it mistakes the role of the subpoena duces tecum and witness summons. This is not a means of obtaining discovery

whether of the existence or of the contents of documents in the hands of third parties; after all, a subpoena is not to become a 'bill of discovery against a witness'. It is merely a means of putting the court in possession of relevant and admissible evidence, and serves, or should serve, no pre-trial function at all. In *O'Sullivan v Herdmans Ltd* default [1987] 1 WLR 1047, the House of Lords, in comparing subpoena duces tecum with pre-action discovery under the equivalent of ss 33 and 34 of the Supreme Court Act 1981, assumed that a subpoena could not be made effective before the beginning of the trial.

At the hearing on 22 July 1994, Mr Matthews referred me to the report in *Khanna v Lovell White Durrant* default [1994] 4 All ER 267 where Sir Donald Nicholls VC held that a subpoena duces tecum could compel the production of documents on a date prior to the date of the intended trial despite the absence of any authority for that practice in the Rules of the Supreme Court. It is clear from this case that the Vice Chancellor had in mind the fixing of a date in advance of a trial date in order to save costs. It does not appear to me that he had in mind ordering a subpoena to be returnable shortly after the institution of proceedings and before properly formulated pleadings.

The next passage in *Matthews and Malek* makes the point that the production of the documents in answer to the subpoena duces tecum is to the court not to either party or to both parties in the action. (See *Re SL* (1987) 2 FLR 412.)

It seems clear to me that a subpoena duces tecum can only be applied for in relation to an evidential hearing. In my judgment, helpful though it was for Miss Cheng to fix a date for the production of the documents, this would not be an evidential hearing in the true sense of that phrase. It was a device to produce a date required to be inserted into the subpoena duces tecum. The issues in the arbitration have not yet been formulated through pleadings but Miss Cheng was told that full pleadings would be utilized in this arbitration. Mr Scott says that this application is premature because the plaintiff will plead a claim for the return of its equipment and moneys due and it will not be until the counterclaim that the defendant will raise the issue of the poor performance of the plaintiff's equipment and then, and only then, will the documents become strictly relevant.

I see considerable force, however, in the argument to the contrary put forward on behalf of the plaintiff. They wish to rely upon the fundamental breach of the sub-contract by the defendants, and they need these performance records to establish such breach. However, I am satisfied that the plaintiff can still plead a claim, especially now in the light of the recently obtained documents. In all probability, they will get further documents later, and, if necessary, may have to amend in the light of them. They must know whether their equipment worked properly and they must be able to plead a valid cause of action against the defendants. It has to be

pointed out that they have already obtained an interlocutory injunction in the proceedings which I stayed and thus must have a cause of action.

Under our system of civil procedure, parties are not generally allowed to get discovery against non-parties nor are they, as is done in the United States of America, permitted to cross-examine their adversaries at pre-trial deposition hearings. Whether such procedures are useful or desirable is beyond the scope of this judgment. The plain fact of the matter is that subpoenas duces tecum are used for the purposes of getting documents brought to the trial.

I believe that there is a lot of good sense in the procedure referred to above whereby the court fixes an artificially early hearing date in order for the documents to be produced other than on the first day of a trial, thus avoiding consequential adjournments, etc. I have myself been persuaded to utilize such procedure. However, what happened in the present case goes far beyond what is contemplated by such procedure. It appears to me fairly clear that these parties are months, if not years, away from the main evidential hearing in this arbitration.

In the light of the above observations, it seems to me perfectly plain that the Master was correct in setting aside this subpoena on the ground that it was outside the jurisdiction of the court to grant the same at this stage of the arbitration. A written argument had been placed before the Master in which the following statement appears:

> It has always been the proper purpose of a subpoena to enforce production of documents as ancillary to the examination of a witness. To order anything more would, it is respectfully submitted, be beyond the jurisdiction of the court (*Burchard v Macfarlane* default (pp 245-248), approved in *Penn-Texas Corp v Murat Anstalt* default (p 667) and *Wakefield v Outhwaite* default (pp 163-164)).

As I am upholding the Master on issues relating to the jurisdiction to order a subpoena duces tecum, it is not necessary for me to decide the other points raised in this application, for example, an allegation by the defendants that the subpoena was not properly served -- even though the person to whom the subpoena was directed subsequently admitted that he had received the same. Similarly, I do not have to deal with questions such as the time for compliance with the subpoena and the further point raised by Mr Scott relating to the actual form of the subpoena in relation to arbitral proceedings: see Form 29.

In going through the text books and authorities, I have been concerned to see whether there is any route by which a plaintiff in the same circumstances as this plaintiff can obtain discovery against a non-party.

Order 38 r 13 of the Rules of the Supreme Court provides:

> At any stage in a cause or matter the court may order any person to attend any proceedings in the cause or matter and produce any document, to be specified or described in the order, the production of which appears to the court to be necessary for the purpose of that proceeding.

That rule sounds straightforward enough. However, the notes to the *Supreme Court Practice 1993* Vol 1 provide as follows:

> This rule does not enable an order to be made for inspection of documents in the hands of persons not parties (*Straker v Reynolds* default (1889) 22 QBD 262) nor does it confer any additional right of discovery against such persons; the object to the rule is to enable an order to be made at any stage of a proceeding, but it can only be made for purposes of a particular proceeding.

A number of cases are then cited, most of which have been referred to in argument before me. Having read *Straker v Reynolds* default (supra) I think that the reference to that case in the *Supreme Court Practice* default is somewhat misleading. The court in that case made clear that the application to the court was for inspection of the books of a third party not the attendance at court by the third party with the documents.

Matthews and Malek

supra deal with this order at p 79 where they state:

> This provision enables the High Court, at any stage in a cause or matter, to order any person, party or stranger, to attend any proceedings in the cause or matter and produce specified or described documents, where their production appears to be necessary for the purposes of that proceeding. The order cannot compel production of any document which could not be compelled at the trial. It is rather like a subpoena duces tecum, but whereas that requires attendance at trial, this order can require attendance at any earlier proceeding in the cause or matter. Like a subpoena, the order requires production for the purposes of a particular hearing then pending. If there is no hearing for which production is required, the court has no jurisdiction to make the order. Moreover, the production if ordered is not given to the party applying, as if it were general discovery and inspection, but to the court for the purposes of the hearing concerned. The object to the rule was to remove difficulties previously existing in compelling production of documents at the hearing of interlocutory applications, and not to extend discovery against non-parties.

Style and Hollander supra at p 329 states:

> Order 38 r 13 permits the court at any stage of an action to order any person to attend any proceeding and produce any document necessary for the purpose of that proceeding. The order has the effect of a subpoena duces tecum, save that it is not limited to requiring attendance at trial. Accordingly, it is especially useful where documents are required from third parties for use in interlocutory hearings. So directors of a company could be required to attend before an examiner for the purpose of producing the company's documents: *Penn-Texas Corp v Murat Anstalt* default[1964] 1 QB 40 and 2 QB 647.

Fortunately, it is not necessary for me to decide whether O 38 r 13 enables an order to be made against non-parties, nor whether it can be prayed in aid in arbitration proceedings. If, as is suggested by the most recent text books on this subject, such an order can be obtained, then no doubt the plaintiff's advisers will give every consideration to it. Suffice it for present purposes to say, the subpoena route upon which they embarked was not

the correct route, given the stage at which this arbitration had arrived and the nature of the hearing fixed for the production of the documents.

It follows therefore that this appeal is dismissed and I make a costs order nisi to the effect that the plaintiff shall pay the costs of this appeal.