WENDEN ENGINEERING SERVICE CO LTD v WING HONG CONTRACTORS LTD - [1992] 2 HKC 380

HIGH COURT
KAPLAN J

MISCELLANEOUS PROCEEDINGS NO 1644 OF 1992

30 July 1992

Arbitration -- Time limit -- Clause in arbitration agreement -- Extension of time for commencement of arbitration proceedings -- Date at which time limit in agreement commences -- Whether delay excessive -- Arbitration Ordinance (Cap 341) s 29

The defendants agreed to employ the plaintiffs as sub-contractors to carry out certain works. Clause 29(1) of the sub-contract provided that all disputes would be referred to and settled by the architect and if the architect failed to give a decision within 90 days after request or if either party was dissatisfied with the decision, then it may, within 90 days after notice of such decision or within 90 days after the expiry of the decision period, refer the matter to arbitration in accordance with the provisions of the Arbitration Ordinance (Cap 341). Two disputes arose, namely, an abortive works claim and an insurance claim. On 14 March 1991, the plaintiffs referred the abortive works claim to the architect for a decision. On 30 September 1991, the plaintiffs referred the insurance claim to the architect for a decision. On 13 April 1992, the plaintiffs sent a notice of arbitration, upon receipt of which the defendants raised the time-limit point. By an originating summons, the plaintiffs sought an order for the appointment of an arbitrator and for an extension of time for commencing the arbitration.

Held, allowing extension of time for the insurance claim but not the abortive works claim:

(1) The time limit set out in the arbitration agreement should run from the date of the plaintiffs' letters requesting a decision from the architect.
(2) The plaintiffs were out of time under the arbitration agreement by failing to refer either dispute to arbitration within the period of 180 days.
(3) The plaintiffs' delay in seeking an extension of time for the abortive works claim was excessive. The delay was so substantial that it was not unreasonable for the defendants to destroy its documents, the loss of which would cause the defendants prejudice. *The Aspen Trader* [1981] 1 Lloyd's Rep 273 applied.
(4) If the court were to grant relief for the abortive works claim, it would be approving a state of laxity which would tend to render the effect of s 29 of the Arbitration Ordinance nugatory in most cases.
(5) The total delay in the insurance claims was relatively short and the prejudice relied on by the defendants was insignificant. As the plaintiffs would suffer undue hardship if this claim was barred, the court exercised its discretion to grant extension of time for this claim under s 29 of the Ordinance.
(6) The fact that the remedy under s 29 of the Ordinance is discretionary makes it essential for all applicants to apply for an extension of time as soon as they realize the point is being taken against them. If they think it a bad point they should still apply as a precautionary measure.

Cases referred to

Aspen Trader, The; Libra Shipping and Trading Corp v Northern Sales [1981] 1 Lloyd's Rep 273

Ching Yick Manufactory v Tai Ping Insurance [1987] 3 HKC 583

Dragages v Preservatrice Fonciere [1988] HKC 735

Eurotrader, The; Irish Agricultural Wholesale Society v Partenreederei: MS Eurotrader [1987] Lloyd's Rep 418

Guandong Water Conservancy & Hydro-Power Engineering Development Co v Ming An Insurance Co (HK) [1990] 2 HKLR 557

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

Legislation referred to

(HK) Arbitration Ordinance (Cap 341) s 29

Other legislation referred to

Mustill & Boyd The Law and Practice of Commercial Arbitration in England (2nd Ed) pp 202, 214, 215

Summons

This was an application by the plaintiffs for an order under s 12 of the Arbitration Ordinance (Cap 341) for the appointment of an arbitrator under an arbitration agreement and for an extention of time for commencing their arbitration pursuant to s 29 of the Ordinance. The facts appear sufficiently in the following judgment.

*Anthony Houghton (Simmons & Simmons)*for plaintiffs.

Jonathan Harris (Bateson Harris) for defendants.

KAPLAN J

By their amended originating summons, the plaintiffs seek an order under s 12 of the Arbitration Ordinance that the court appoint an arbitrator to act as such under an arbitration agreement dated 28 March 1988. Further, they seek, if necessary, an extension of time for commencing their arbitration pursuant to the provisions of s 29 of the Arbitration Ordinance.

By a sub-contract dated 28 March 1988, the defendants as contractors agreed to employ the plaintiffs as sub-contractors to carry out certain works. The relevant part of cl 29(1) of the sub-contract provides as follows:

> If any dispute or difference of any kind whatsoever shall arise between the contractor and the sub-contractor in connection with or arising out of the sub-contract or the carrying out of the sub-contract works, including any dispute as to any decision, instruction, order, direction, certificate of the architect or certificate or valuation by the surveyor, whether during the progress of the sub-contract works or after their completion, and whetehr before or after the termination, abandonment or breach of the sub-contract, it shall be referred to and settled by the architect, who shall state his decision in writing and give notice of the same to the contractor and the sub-contractor.Unless the
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> *[1992] 2 HKC 380 at 382*
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> sub-contract shall have already been terminated or abandoned, the sub-contractor shall, in every case, continue to proceed with the sub-contract works with all the due diligence and he shall give effect forthwith to every such decision of the architect given in accordance with this clause unless and until the same shall be revised by an arbitrator as hereinafter provided. Such decisions shall be final and binding upon the contractor and sub-contractor unless either of them shall require that the matter be referred to arbitration as hereinafter provided. If the architect shall fail to give such decision for a period of 90 days after being requested to do so or if either the contractor or the sub-contractor be dissatisfied with any such decision of the architect, then either the contractor or the sub-contractor, within 90 days after receiving notice of such decision, or within 90 days after the expiry of the said decision period of 90 days, as the case may be, may require that the matter shall be referred to arbitration in accordance with and subject to the provisions of the Arbitration Ordinance or any statutory modification thereof for the time being in force, and any such reference shall be deemed to be a submission to arbitration within the meaning of such Ordinance.

Two disputes are said to have arisen which for convenience I will call the 'abortive works claim' and the 'insurance claim'. Each claim has to be considered separately. A short chronology is necessary and I set out below the agreed chronology. I should have added it that it is common ground that the architect for the purposes of the sub-contract is the chief architect I, Architectural Services Department of the Hong Kong government.

15 January 1991 Letter from the defendants to the plaintiffs relating to various claims for payment for damages and abortive works.

14 March 1991 By a letter, the plaintiffs referred the disputes relating to abortive conduit and trunking works to the architect (ASD) for his decision.

22 March 1991 The defendants sent a letter to the architect (Mok) in response to the plaintiffs' letter of 14 March 1991.

undated The plaintiffs sent a reminder to the architect (Mok) referring to its previous letter of 14 March 1991 (there was a typo in the reference in that the date was stated as 14 May 1991).

12 June 1991 90 days after 14 March 1991.

16 July 1991 The plaintiffs sent another letter to the architect (Mok) enclosing correspondence relating to the disputes and referring to its previous undated letter.

23 July 1991 ASD (Minu) requests the defendants to provide all information relevant to the disputes relating to abortive works (copy not received by the plaintiffs).

10 September 1991 90 days after 12 June 1991.

30 September 1991 The plaintiffs sent a letter to the architect (Mok) referring the disputes relating to insurance excesses to him for his decision.

10 October 1991 ASD (Minu) requests the defendants to provide information relevant to the disputes relating to insurance excesses (copy not received by the plaintiffs).

29 December 1991 90 days after 30 September 1991.

16 January 1992 The plaintiffs sent a letter to the architect (Mok) referring to all its previous letters and asking for a decision (this letter was mistakenly dated 16 January 1991).

25 January 1992 Letter to the defendants from the plaintiffs' solicitors requesting payment in respect of the dispute relating to insurance excesses.

18 February 1992 The plaintiffs sent a letter to the architect (Minu).

13 March 1992 The representatives of the plaintiffs and the defendants attended a meeting before the architect (Minu).

18 March 1992 The plaintiffs sent a letter to the architect (Minu) confirming that the architect would not make any decision on the disputes.

28 March 1992 90 days after 29 December 1991.

13 April 1992 The plaintiffs sent a notice of arbitration to the defendants.

25 April 1992 The defendants sent a letter to the plaintiffs raising the time limit point.

30 April 1992 The plaintiffs sent a reply to the defendant's letter of 25 April 1992 stating that the 90-day period did not commence until 13 March 1992.

5 May 1992 The defendants sent a letter in reply to the plaintiffs' letter of 30 April 1992 arguing that the contractual time-limit had expired.

10 June 1992 Originating summons seeking an appointment of an arbitrator.

3 July 1992 Amended summons seeking order for extension of time for service of the notice of arbitration.

There was some discussions as to whether the periods set out in cl 29 began to run from the date the claim letter was sent to '[t]he architect' or only from the time that Mr Minu, the chief architect, received them. I am quite satisfied that the period runs from the date of the two relevant letters requesting a decision, namely 14 March 1991 in relation to the abortive works claim and 30 September 1988 in relation to the insurance claim. The fact that the letters were not addressed to Mr Minu is, in my judgment, irrelevant. There is sufficient in-

formation on each letter to ensure that it arrived in the right department, on the correct file and was to be considered by the person nominated in the sub-contract.

In my judgment, there is nothing in any of the arguments raised by the plaintiffs which seek to contend that later dates are relevant or that the defendants have done something which in some way disentitles them to rely upon the provision of cl 29.

Fortunately, I do not have to decide what juridical label to place on cl 29. Is it a clause that bars the remedy or the right? For an interesting

discussion on this subject reference should be made to *Mustill & Boyd* (2nd Ed) at p 202 *et seq*.

I am satisfied that the plaintiffs have not referred either dispute to arbitration within the 180 day period provided for in cl 29. What I now have to consider is whether, in respect of each claim, I should exercise my discretion under that section to extend the time limit.

The correct approach to a consideration of s 29 was helpfully set out by Brandon LJ (as he then was) in *The Aspen Trader* [1981] l Lloyd's Rep 273 at 279 where he re-iterated his own first instance observations in *The Jocelyne* [l977] 2 Lloyd's Rep 121 at 129. He said this:

> (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, whether hardship is due to the fault of the claimant, it means hardship the consequences of which are out of all proportion to such fault.
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> (3) In deciding whether to extend the 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 matter 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 has 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;
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> > (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, which is the same as s 27 of the Arbitration Act, has been considered several times in Hong Kong and the principles above set out in *The Aspen Trader* have been followed. See in particular *Dragages v Preservatrice Fonciere* [1988] HKC 735 , *Ching Yick Manufactory v Tai Ping Insurance* [1987] 3 HKC 583 and *Guandong Water Conservancy & Hydro-Power Engineering Development Co Ltd v Ming An Insurance Co (HK) Ltd* default [1990] 2 HKLR 557. In *Dragages,* default Godfrey J pointed out that s 29 did not provide, as it could have done, that the court could extend time if it would be just to do so in all the circumstances. The court is exhorted to concentrate on whether 'undue hardship' would be caused to the applicant.

The abortive works claim

The plaintiffs' application for an extension of time was first made by their summons dated 3 July 1992 which I permitted to be heard at the hearing on 8 July 1992.

It follows therefore that the plaintiffs have delayed some nine months after the expiration of the 180 day period from 14 March 1991.

They further delayed some 11/2 months front the date when they were first put on notice by the defendants that the time for commencing an arbitration had expired.

There is a dispute as to the amounts at stake but for present purposes I am prepared to rely on the plaintiffs' figure of approximately $500,000.This is not an insubstantial sum.

As to the fault for the delay, no explanation has been given and I can only infer that it was due to a oversight on the part of the plaintiffs and their advisers. The plaintiffs knew they had made a request for a decision and had sent reminders to the architect. Further the form of clause was in common use in Hong Kong and should be known to sub-contractors and contractors alike.

As to the degree of fault, it seems to me to be a fairly high degree.

I am not satisfied that any blame can be attached to the defendants nor can it reasonably be said that the defendants have acquiesced in the delay or done anything to disentitle them from relying on strict compliance with cl 29.

I now turn to consider whether the defendants will be prejudiced by an extension of time. Mr Liu for the defendants has affirmed that relevant witnesses have left the defendants' employment and that relevant documents have been destroyed in the normal course of business. I think that only the documents point is relevant because there is no evidence that the witnesses have left Hong Kong or are otherwise unobtainable.The destruction of documents in the normal course of business is not unusual. The longer the delay, the less criticism can be levelled against a defendant who does destroy documents to make more room for others. In my judgment the delay here was so substantial that it was not unreasonable for the defendants to destroy their documents. I am satisfied that the loss of the documents would cause the defendants prejudice. What is reasonable, in all circumstances in relation to documents, has to be judged by the time limits laid down in the contract and the extent of the delay.

In my judgment, the plaintiffs' delay in seeking an extension of time in relation to the abortive works claim has been excessive. In my judgment, in relation to this claim, it is not a case for the exercise of the court's discretion under s 29. I have not been persuaded in all circumstances that the plaintiffs will suffer 'undue hardship' by not being allowed to proceed with this claim.

I would only add this. I am exercising my discretion against the plaintiffs in relation to both periods of delay. The first delay is that over and above the 180 day period. The second delay is that which occurred after the plaintiffs were aware that the defendants were taking the time point. The fact that the remedy under s 29 is discretionary makes it essential for all applicants to apply for an extension of time as soon as they realize the point is being taken against them. If they think it a bad point they should

still apply as a precautionary measure (see *Mustill and Boyd* (2nd Ed) at p 214-215).

I confess to finding myself in the same state of mind as Steyn J (as he then was) in *The Eurotrader; Irish Agricultural Wholesale Society v Partenreederei: MS Eurotrader* default [1987] Lloyd's Rep 418 where he said at first instance:

> Further, I have a discretion under s 27 and it is my feeling that if I were to grant the relief under this discretion this would simply promote laxity in the observation of time limits by claimants, and even if there were undue hardship, I would not exercise my discretion differently.

(The Court of Appeal held that he was entitled to say that having regard the arguments presented to him)

I also agree with the approach of Deputy Judge Suttill in *Guangdong Water,*namely, that if I were to grant relief in this case in relation to this claim, I would be approving a state of laxity which will tend to render the effect of cl 29 nugatory in most cases.

Insurance claim

The delay here was only 21/2 weeks. The amount in dispute is not agreed.The defendants sayHK$147,237.25 and the plaintiffs say HKS300,000. Whichever it is, it is not an insubstantial sum. No explanation has been given for the delay but I am prepared to infer that it was oversight. The degree of default must be low in view of the very short period, although I accept that the plaintiffs were receiving legal advice prior to the expiration of the time when this notice of arbitration should have been served.

The plaintiffs were not misled by the defendants.

The prejudice relied on by the defendants is far less impressive when dealing with such a short period of delay. I attach little significance to it under this head of claim.

Under this head of claim the plaintiffs have further delayed a period of 21/2 months since first realizing that the point was to be taken. I have already held that this is a significant factor under the other head of claim. In the insurance claim the total period is 2l/2 weeks plus 21/2 months which is just over three months. The total delay is thus relatively short and I am satisfied that the plaintiffs will suffer undue hardship if this claim is barred and I propose to exercise my discretion under this head of claim.

The alternative argument

I should deal with the alternative argument for the sake of completeness. The plaintiffs contended that a relevant request in respect of both claims under cl 29 was made only by a letter dated 18 February 1992 addressed to the Architectural Services Department. The defendants have disputed this and I have found that the relevant requests were made on 14 March

991 and 30 September 1991. If I were to be wrong and the letter of 18 February 1992 is relevant then the defendants contended that the plaintiffs were not entitled to serve their notice until the 19 May 1992 and thus their notice dated 13 April 1992 was invalid.This, I agree, would seem to follow but I record Mr Harris' sensible approach if this were to be my conclusion. He said that the defendants would accept Mr Peard as arbitrator and would not require the plaintiffs to issue a fresh application although he would want to be heard on the question of costs.

Conclusion

I conclude, therefore, that in relation to the abortive works claim the plaintiffs are out of time under cl 29 and I do not propose in all the circumstances to exercise my discretion under s 29 of the Arbitration Ordinance in their favour.

In relation to the insurance claim, I conclude that the plaintiffs are likewise out of time under cl 29 but in the circumstances of that claim I propose to exercise my discretion in their favour under s 29.

I therefore appoint Robin Somers Peard to arbitrate the dispute (l) contained in the plaintiffs' notice of arbitration dated 13 April 1992.

Costs

The plaintiffs are seeking the indulgence of the court. I see no reason why they should not pay the costs of these proceedings and I make a costs order nisi in favour of the defendants. I see nothing unreasonable in the stance taken by the defendants in approaching this application.