YIELDWORTH ENGINEERS v ARNHOLD & CO. LTD - [1992] HKCU 0366

High Court (in Chambers)
Kaplan, J.

Miscellaneous Proceedings No. 2710 of 1991

11 September 1991, 12 September 1991

Kaplan, J.

On Wednesday 11th September 1991, I had before me an application for security for costs in this arbitration.

This is a judicial arbitration pursuant to s. 13A of the Arbitration Ordinance (Cap. 341).

This arbitration was due to commence on Thursday 19th September 1991 on the question of liability. On the 12th September 1991, I refused to order security for costs for reasons which I will briefly state later.

The reason for this written judgment is because Mr. Hill on behalf of the claimants took a jurisdictional point, which I think it is necessary to resolve.

As I have said, this application was made to me as a judge-arbitrator in the arbitration. No originating summons was issued before the 11th September 1991. Mr. Hill submitted that when one considers the provision of the 4th Schedule of the Ordinance (which relate to judge-arbitrators) in conjunction with s. 14(6) of the Ordinance, one finds that such an application should be made to the judge-arbitrator in chambers and thus an originating summons was necessary.

In order to protect the position, Mr. Carey for the respondents immediately issued an originating summons seeking security for costs which was returnable on Thursday 12th September. All that remains for me now is to decide whether I should dismiss the application in the arbitration or whether I should dismiss the originating summons.

The point is not of mere academic interest because its resolution could be said to affect the position relating to appeals.

In an ordinary arbitration, absent any rules which provide to the contrary (such as the Domestic Rules of the Hong Kong International Arbitration Centre) an arbitrator has no power to order security for costs. There are various things that an arbitrator cannot do and these are set out in s. 14(6) of the Ordinance and are given expressly to the court. This subsection provides that "the court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of" security for costs and granting injunctions (to name but two) "as it has for the purpose of and in relation to an action or matter in the court."

Sub-section (5) of s. 13 of the Ordinance provides:

"

> (5) The Fourth Schedule shall have effect for modifying, and in certain cases replacing, provisions of this Ordinance in relation to arbitration by a judge as a sole arbitrator or umpire and, in particular, for substituting the Court of Appeal for the Court in provisions whereby arbitrators and umpires, their proceedings and awards, are subject to control and review by the Court."

Paragraph 5 of the 4th Schedule to the Ordinance provides:

"

> 5. (1) The powers conferred on the Court or a judge thereof by s. 14(4), (5) and (6) (summoning of witnesses, interlocutory orders, etc.) shall be exercisable in the case of a reference to a

judge-arbitrator or judge-umpire as in the case of any other reference to arbitration, but shall in any such case be exercisable also by the judge-arbitrator or judge-umpire himself.

(2) Anything done by an arbitrator or umpire in the exercise of powers conferred by this paragraph shall be done by him in his capacity as judge of the Court and have effect as if done by that court; but nothing in this paragraph prejudices any power vested in the arbitrator or umpire in his capacity as such."

Paragraph 8A of the 4th Schedule provides as follows:

"

8A. (1) In the application of:

(a) section 23 (appeal on a question of law) to the award of a judge-arbitrator or judge-umpire; and

(b) section 23B (exclusion of certain agreements), other than sub-s. (5) thereof, to proceedings under s. 23 relating to the award of a judge-arbitrator or judge-umpire,

the Court of Appeal shall be substituted for the Court.

(2) Where sub-paragraph (1) applies, s. 23 shall have effect as if:

(a) sub-section (7) thereof were omitted; and

(b) in s. 23B(5) references to the Court included references to the Court of Appeal."

Paragraph 8B of the 4th Schedule provides as follows:

"

8B. Section 23A (determination of a preliminary point of law by Court) shall not apply to a reference to a judge-arbitrator or judge-umpire."

Paragraph 9 of the 4th Schedule provides as follows:

9. In ss. 24 and 25 (remission and setting aside of award, etc.) in their application to a judge-arbitrator or judge-umpire, and to a reference to him and to his award thereon, the Court of Appeal shall be substituted for the Court."

It is clear therefore that in an ordinary arbitration an application for security for costs goes to the High Court by originating summons under s. 14(6). The judge's decision is subject to appeal without leave to the Court of Appeal. Two recent cases show that the right to appeal a single judge's exercise of discretion in relation to security for costs is freely exercised (see *China Underwriters v. B.B.M.B. Finance (Hong Kong) Ltd.* [1991] 1 HKLR 617 and *Extramoney Ltd. v. Chan, Lai, Pang & Co.* [1990] 2 HKLR 268).

If the application to the judge-arbitrator for security for costs is made within the arbitration and not under s. 14(6) of the Ordinance, the question of an appeal is very different. Section 23A of the Ordinance which deals with preliminary points of law does not apply to a judge-arbitrator. The s. 23 appeal on a question of law would go to the Court of Appeal (paragraph 8A of the 4th Schedule). That, therefore, brings in the *Nema* [1980] 1 Lloyd's Rep 519) guidelines. An application for leave to appeal against a judge-arbitrator's decision on security for costs is unlikely to involve a point of law but even if it did, the **Nema** guidelines would make it difficult indeed to obtain leave. In any event, the question would have to be decided whether an order for security for costs was an 'award' to which s. 23 applied.

If I am correct in demonstrating a substantial difference in relation to appeals concerning security for costs depending on whether it is from a judge, under s. 14(6) of the Ordinance, or from a judge-arbitrator, does this distinction force me to conclude that a judge-arbitrator makes his decision on security for costs under s. 14(6) in court as opposed to within the arbitration.

The key to the solution of this matter is clearly paragraph 5(2) of the 4th Schedule. Does this deem acts done by a judge-arbitrator as done in court for the purpose of enforcement? In my judgment, it clearly does. For instance, in applications for security for costs, it is usual to stay the arbitration pending compliance with the order. (See **Yee Sang Metal & Building Supplies Co. Ltd. v. Shanghai Jian Jiang Shipping Corporation**

Ltd. MP No. 4010 of 1990, judgment delivered on 30th January 1991.) An ordinary arbitrator cannot stay the arbitration, but a judge-arbitrator can. Section 14(6) enables judge-arbitrators to grant injunctions Paragraph 5(2) clearly has the effect of giving teeth to such an order. The injunction takes effect as if done by the court and no doubt the order issued will be sealed by the court and disobedience to the order will attach the usual sanctions. If the injunction is made within the arbitration, the problem with appeals, which I mentioned earlier, would also apply.

But this still does not answer the question whether the application is in the arbitration or in court, even if it has effect as if done by that court.

It seems to me that in the situation posed by this case there is a distinction to be made between whether the application is made in the arbitration or by originating summons on the one hand, and the effect of an order made by a judge-arbitrator on the other. Having given this matter very careful consideration I can find nothing in the Ordinance or any rules of court (including Order 73) which forces me to conclude that an application under s. 14(6) to a judge-arbitrator has to be made by an originating summons. I am satisfied that such an application can properly be made in the arbitration and that paragraph 5(2) of the 4th Schedule has the effect of turning such an order into one made by a judge of the court and takes effect as if done by that court. That provision ensures that orders have to be obeyed and brings into play the usual sanctions for disobedience of an order of the court. By reason of the wording of paragraph 5(2) I would expect that the judge's clerk and the appropriate person in the Registry would ensure that, for example, when an injunction was granted under s. 14 by a judge-arbitrator, the court's seal was affixed to the order so as to make clear that the order was one by a judge of the court and should be treated as such. The order will have to be especially carefully drafted in any event, and reference ought to be made to the effect of paragraph 5(2) of the 4th Schedule of the Ordinance.

Because the order takes effect as if done by a judge, an appeal therefrom will go, in the usual way, to the Court of Appeal. I can find nothing which indicates a statutory intention to take away the right of appeal or restrict the right of appeal from any order made under s. 14, and indeed it would be absurd to contemplate that a single judge could make unappealable, or at any rate, virtually unappealable, orders for injunctions, let alone orders for security for costs. It would also be absurd if a party could appeal from a decision of a judge granting security for costs under s. 14(6) and not be entitled to appeal against the decision of a judge-arbitrator acting under the self-same section.

This distinction satisfies two, at times conflicting principles. Firstly, it ensures that an application under s. 14(6) can be made to a judge-arbitrator in the arbitration, thus minimizing costs by obviating the need for an originating summons. Secondly, it ensures confidentiality to the parties because the title of the case should not appear in the cause list. A judge-arbitrator's list should merely show that he is dealing with a judicial arbitration without mentioning the parties. On the other hand it preserves the undoubted right of appeal against orders made under s. 14. Further, to ensure that the details of a confidential arbitration do not fall into the public domain unless the parties wish it, s. 2D of the Arbitration Ordinance entitles any party to apply to the court or Court of Appeal to hear the matter otherwise than in an open court and the court and Court of Appeal have no discretion in the matter. [See s. 2E for restrictions on reporting proceedings heard otherwise than in open court.]

Before leaving this judgment, dealing with the 4th Schedule of the Ordinance, it appears that the power contained in s. 29A, namely of dismissing an arbitration for want of prosecution which has by that section to be made by the court is not a power given to a judge-arbitrator by reason of the provisions of the 4th Schedule. This seems a surprising omission bearing in mind that in England, where this power has now been given for the first time, it has been given, not to the court, but to the arbitrator himself. [See s. 13A of the 1950 Act introduced by s. 102 of Courts & Legal Services Act.] One cannot imagine a better person to decide whether there has been inordinate delay in the arbitration than the judge-arbitrator himself, and it seems unnecessary to require another judge to go into the matter afresh and consider this question. It may be that this was an unintentional omission, and if so, some thought might be given to correcting it in due course.

I, therefore, dismiss this application for security for costs and the order I make is in the arbitration. The issue of the originating summons was therefore unnecessary in the event, but was a wise precaution lest Mr. Hill's submissions turned out to be correct.

This arbitration has been going on for about two years. The hearing on liability was fixed for last year and re-fixed for April this year following an application for an adjournment by the respondents. It was adjourned again from April at the respondents' request in order to apply to take the evidence of a witness in London. This was granted and I heard the evidence on 19th & 20th August 1991. The hearing on liability commenced on Thursday 19th September. Although an application was made without any notice to the claimants on the 20th August in London, I adjourned it for my return to Hong Kong in order that the claimants might have time to consider it and to enable the claimants to put in proper evidence which they duly did.

On any basis, this is a very late application. Had I ordered security for costs on 12th September, the claimants would have been placed in great difficulties. Firstly, they would not have been able to appeal my order if minded so to do, before the hearing started, and thus they would have been faced with either accepting my order or seeking yet a further adjournment. Secondly, they would have had very little time indeed to make arrangements to comply with the order which itself might have necessitated a further adjournment. Any further adjournments in this matter are clearly undesirable.

Although I can understand the respondents' suspicions about the claimants' financial position, I cannot be satisfied on the material before me that there is credible evidence of the claimants' inability to pay the costs if ordered to do so.

Had I been so satisfied, I would still have exercised my discretion against awarding security for costs due to the lateness of this application and the extreme difficulties which an order would have placed the claimants.

As to costs, clearly the respondents would have to pay the claimants' costs, but I order that the respondents should be entitled to set off against those costs the cost of issuing the originating summons which in the event turned out to be unnecessary.