

**IN RE SCHINDLER LIFTS (HONG KOOG) LTD AND DICKSON CON-
STRUCTION CO. LTD AND THE ATTORNEY GENERAL - [1993] HKCU
0592**

High Court (in Chambers)
Kaplan, J.

Miscellaneous Proceedings No. 545 of 1992

5 November 1992, 13 November 1992

Kaplan, J.

This appeal raises an interesting little problem which appears to have escaped the attention of the courts in any reported case.

Dickson Construction applied to me in May 1992 for an order that there be consolidation of two pending arbitrations to which they were parties. On 28th May 1992, I refused an order for consolidation for the reasons set out in a written judgment. I ordered that Dickson should pay Schindler's costs of the application.

Dickson have appealed my order of 28th May 1992 and that is due to be heard by the Court of Appeal on 23rd and 24th February 1993.

However, in the meantime, Schindler obtained an appointment for taxation of their costs pursuant to my order. The preliminary appointment was heard before Master Bokhary on 19th October 1992. Dickson were represented by a law costs draughtsman who sought the adjournment of the taxation pending the hearing of the appeal. The Master adjourned the taxation sine die with liberty to restore but this was clearly on the basis, that that would not be until after the appeal had been disposed of and in Schindler's favour.

The application to adjourn was made under the provision of O. 62, r. 26 of the Hong Kong Rules of The Supreme Court. This rule provides:

"The Taxing Master by whom any taxation proceedings are being conducted, may, if he thinks it necessary to do so, adjourn those proceedings from time to time."

Mr. Watkins who appeared for Schindler submitted that the Master had wrongly exercised her discretion because by adjourning the taxation of costs, she was in effect granting a stay of my order in circumstances where no application for a stay of the costs part of the order had been made to me or to the Court of Appeal. He reminded me of the provision of O. 59, r. 13 of the Rules of The Supreme Court which provide that unless ordered by the court below or the Court of Appeal, an appeal shall not operate as a stay of execution or proceedings under the decision of the court below. It is quite clear that the appeal does not act as a stay of the order without an application being made to that effect. It is also clear from page 1005 of the 1993 *White Book* that the principle that the court does not "make a practice of depriving a successful litigant of the fruits of his litigation and locking up funds to which prima facie he is entitled" pending an appeal applies not merely to execution but to the prosecution of proceedings under the judgment or order appealed from.

Mr. Watkins submits that by adjourning the taxation simply because there was, over 4 months ahead, an appeal against the judgment was, with respect to the Master, a usurpation of the court's function to rule on applications for a stay if applied for. Mr. Watkins further points out that there was no affidavit in support of the application to adjourn and further that no suggestion has or indeed could be made that Schindler would not be in a position to repay any monies received by them from Dickson in the event of Dickson's appeal being successful.

When pressed by me, Mr. Watkins for Schindler undertook to the court not to enforce the costs order if taxed before the appeal until after the appeal.

Mr. Walter Lau, for Dickson, pointed out that the Master was prompted by a desire to save costs. If Dickson won the appeal the costs involved in dealing with the taxation before the Court of Appeal's judgment would be wasted costs and the Master therefore was quite right, he submits, to attempt to avoid this situation. He points out that if Schindler have to wait until after the appeal is dealt with they will be compensated by a payment of interest which at the moment is on a fairly generous basis. Mr. Lau, for his part, was prepared to agree that Schindler should be allowed to fix a date now for a hearing of their taxation, say in mid March, so as to come on, if appropriate, as soon as the Court of Appeal has decided the matter.

On the question of interest Mr. Watkins pointed out that there has been some uncertainty as to whether interest runs from the date of the order, i.e. May 1992 or whether it only runs from the date of the allocatur In *Hunt v. R.M. Douglas (Roofing) Ltd.* [1988] 3 WLR 975, the House of Lord held that interest on costs should run from the date judgment is pronounced, i.e. the incipitur rule. Mr. Watkins very fairly stated that he thought that the better view was that this too was the Law of Hong Kong. However, there were certain differences between Hong Kong and England in relation to costs generally, and he was anxious that Schindler should not find themselves in argument about this matter. Most helpfully, Mr. Lau, on behalf of Dickson, undertook to me that Dickson would not argue that the allocatur rule applies and recognized that his clients would be liable for interest from the date of the order which I made in May 1992.

I can well understand the Master's desire to save costs and this is a wholly commendable course to take. However, the fact remains that the appeal does not act as a stay of the order and no application for a stay was made to me or to the Court of Appeal. In those circumstances, Schindler have a right to go ahead with their taxation and having given this matter careful consideration, I do not see that it would in fact be a proper exercise of discretion to prevent them from doing that by adjourning the proceedings. If the Master's order stands as it is, Schindler will not be able to refix their taxation until after the decision of the Court of Appeal, let us say in early March 1993. Schindler will then have to wait for a number of months before they can get an appointment. They feel aggrieved that they have to wait so long when in fact they have had an appointment which was adjourned even though no application for stay had been made.

I propose to allow this appeal but will do so on the basis of undertakings that both parties very helpfully gave to the court. Firstly, Schindler undertook not to enforce their costs order when taxed until after the determination of the appeal fixed for 23rd and 24th February 1993.

Dickson also helpfully undertook not to argue that the allocatur rule applied and that they would be liable for costs from the date of my order.

I therefore propose to allow the appeal against the order adjourning the taxation on the strength of the undertakings which I have just outlined. Schindler are now free to refix their hearing for the taxation of their costs and if this matter is dealt with before the appeal is determined, they will not execute their costs order until that time. Clearly, if the appeal is successful, there will either be no taxation, alternatively, if there has been a taxation Schindler will have to bear Dickson's costs of that taxation.

Both sides helpfully agreed that the costs of this appeal should follow the event and in those circumstances it seems to me that I should make a costs order *nisi* in favour of Schindler.