IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1998] SGCA 7

CA 100/1997

Between

Kwan Im Tong Chinese Temple
Another

… *Appellant*

And

Fong Choon Hung Construction Pte Ltd

… *Respondent*

GROUNDS OF DECISION

Civil Procedure — Stay of proceedings; Civil Procedure — Stay of proceedings

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Kwan Im Tong Chinese Temple and Another v Fong Choon Hung Construction Pte Ltd

[1998] SGCA 7

CA 100/1997
Karthigesu JA; L P Thean JA; Yong Pung How CJ
06 February 1998

Judgment:

KARTHIGESU JA

(delivering the grounds of judgment of the court): The appellants, registered as Chinese Taoist temples (hereinafter referred to as `the employers`), engaged the respondents who are building contractors (hereinafter referred to as `the contractors`) to construct their new temple premises on Lot 2101 and 2099 Mukim 23 at Paya Lebar Road. On 4 November 1996, the contractors commenced an action in the subordinate courts for the sum of $55,590.42 being an interim payment duly certified by the architect. The employers applied to the High Court for a stay of the proceedings pursuant to s 7 of the Arbitration Act (Cap 10) on the ground that they had a cross-claim for damages for defective works and for liquidated damages for delay in completion. The High Court held that the court had a discretion under s 7 of the Arbitration Act whether to order a stay of legal proceedings; the discretion would not be exercised in favour of granting the stay where the party opposing the stay had shown cause to the contrary, as indeed the contractors had done in this case. A stay was therefore

refused. The employers appealed against it. We allowed the appeal and now give our reasons. The High Court`s judgment is reported at [1997] 3 SLR 876.

2. **Brief facts**

The contract under which the contractors were engaged is not in the standard form supplied by the Singapore Institute of Architects. In the court below the employers were only able to produce the articles of agreement whereas before us they have sought to produce what is referred to in the articles as the appendix to the agreement. The agreed sum as appears in the articles of agreement is $760,000. The general conditions of the agreement include provisions for extension of completion date and payment of liquidated damages. The agreement also provides for the contractors` duty to make good any defects which appear within six months of the date of completion. Finally, cl 15 of the general conditions provides:

> *If any dispute or difference concerning this contract shall arise between the employer or the architect on his behalf and the contractor such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties or, failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an arbitrator, a person to be appointed on the request of either party by the president for the time being of the Singapore Institute of Architects.*

3.In the court below, the learned judge considered the evidence in relation to both claims. With respect to the employers` cross-claim for damages for defective works, they only produced a letter dated 23 August 1996 from the architect to the contractors. This letter raised a brief list of minor defects which the architect requested the contractors to rectify. As for the employers` other cross-claim for liquidated damages, the learned judge found the particulars to be equally lacking. The employers produced a letter dated 24 November 1995

from them to the contractors wherein they purported to reject the contractors` request for an extension of time and informed the contractors that no further progress payment would be made until the `outstanding` work was completed.

4.The learned judge weighed this against the many detailed reasons submitted by the contractors for the delays, taking into account their two letters dated 18 and 20 December 1995 requesting extension of time to complete. No reply to these requests was produced. As for the defects, the contractors submitted that there is a retention sum from which the employers could deduct any damages that might be payable. The contractors` contention was that there is no dispute fit to go to arbitration.

5.Applying the authority of **Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol)** [1974] AC 689, the learned judge held that the common law right of the employers to raise a set-off in diminution or extinction of the interim payment which has become due under the contract can only be taken away by clear unequivocal words which the learned judge found to be absent in the present case, thereby acknowledging that the employers` remedy of legal and equitable set-off had not been excluded or qualified.

6.The learned judge then proceeded to consider whether the employers had a genuine cross-claim. In doing so, he applied principles exercisable by a court in applications for summary judgment. He was of the opinion that the agreement entitled the contractors to payment within 14 days from the date on which the architect certified the interim payment. It followed that the contractors were prima facie entitled to summary judgment for the sum certified. The learned judge reasoned that for the employers to have a valid defence to the contractors` prima facie valid claim, they should adduce material facts with sufficient

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particularity in support of their cross-claim or set-off to demonstrate that they have a bona fide case. At [para] 13 of his judgment, he explained his approach:

> *However, there is the question whether the owners have shown sufficiently that they have a cross-claim in diminution or extinction of the contractors` claim. In this respect, I think certain principles in court litigation in relation to applications for summary judgments are applicable, if not directly, then at least by analogy. One starts with the premise that, the architect having duly certified the interim payment, the contractors are prima facie entitled to summary judgment for the sum certified, as cl 14 provides for right to payment within 14 days. If there was no arbitration clause and the case was litigated in court, then, on an application for summary judgment by the contractors, the owners could not resist the application by merely stating that he has a set-off or counterclaim without giving particulars of what gave rise to the set-off or counterclaim. He must adduce material facts with sufficient particularity in support of his claim of a set-off or counterclaim. The same principle applies, in my view, where a defendant seeks to refer his cross-claim for arbitration and to persuade the court that the judgment for the plaintiff`s claim should not be entered immediately. The substitution of one tribunal for another should make no difference to the applicability of the principle. The defendant must condescend to particulars so that the court can see that he has a bona fide case.*

7.The learned judge held that the failure to provide for extension of time and the actual grant of extension had the effect of setting time for completion at large in the event that the employer commits act of prevention: **Peak Construction Ltd v McKinney Foundations Ltd** [1971] 69 LGR 1. He was of the view that in the present case, the agreement did not provide for such preventive acts, with the result that the architect does not have the power to extend time to take account of such acts so as to keep alive the employers` remedy of liquidated damages. Therefore the learned judge was of the view that the employers` cross-claim for liquidated damages by way of set-off was open to the most serious doubt.

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8.Turning to the claim for rectification of defects, the learned judge could only rely on the letter of 23 August 1996 wherein the architect had raised a `rather short list`. Due to the employers` failure to provide the learned judge with any further details as to the extent and cost of rectifying the defects, he felt that this cross-claim could not stand as a proper reason to stay the proceedings for arbitration.

9. **The appeal**

Before us, the employers` main grounds of appeal were: (a). Whether the learned judge erred in applying principles applicable to summary judgment proceedings in an application for stay under s 7 of the Arbitration Act.

(b). Whether the learned judge erred in framing the main question to be whether the employers have shown sufficiently that they have a valid cross-claim and in requiring the employers to demonstrate a set-off; and further, in making findings on the points of law as to acts of prevention and the setting at large of time in the building contracts in the present case.

(c). Whether the learned judge erred in finding that the employers had not said what defects remain, and the cost of rectifying such defects.

The contractors submitted that the material issue was whether their claim was a dispute or difference for the purposes of cl 15. To this end, they contended that it was important to distinguish between a `genuine` and a `non-genuine` dispute for the exercise of the court`s discretion in granting or refusing a stay. The contractors relied on Saville J`s observations in ***Hayter v Nelson and Home Insurance Co*** [1990] 2 Lloyd`s Rep 265, at pp 267-268, that -

> *if it can be shown that a claim under a contract is indisputable, ie a claim that simply cannot be resisted on either the facts or the law, then there is no dispute or difference within the meaning of the arbitration clause in the contract.*

10.The learned judge, in determining whether there was a dispute that fell within cl 15 to be referred to arbitration, applied principles used in summary judgment proceedings to examine whether the employers` cross-claim had sufficient validity to resist the contractors` prima facie entitlement to the sum certified by the architect. While the learned judge`s application of the law was not wrong, applying summary judgment principles should not be held to be an exhaustive means of weighing the claims. The learned judge has essentially held that prima facie the contractors are entitled to their claim for $55,590.42 unless the employers can demonstrate a valid set-off. It is in our view that while O 14 summary judgment principles aid the court with determining whether a claim should be immediately allowed in very obvious cases, applications for a stay such as the present one relate to a larger issue of jurisdiction. With respect, it does not appear entirely safe to determine whether parties should be bound by their agreement to arbitrate according to principles established to deal with very obvious claims to which there is no defence. We have found it useful to refer to Parker LJ`s judgment in **Home and Overseas Insurance Company Ltd v Mentor Insurance Co (UK) Ltd** [1990] 1 WLR 153 at p 158:

> *I shall shortly consider the authorities relating to the way in which the court should deal with O 14 applications when countered by an application for a stay based on an arbitration clause. Before doing so, however, I venture to make some general observations on the question of O 14 applications both when standing alone and when countered by a stay application. The purpose of O 14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. But O 14 proceedings should not in my view be allowed to become a means for obtaining, in effect, an immediate trial of an action, which will be the case if the court lends itself to determining on O 14 applications points of law which may take hours or even*

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> *days and the citation of many authorities before the court is in a position to arrive at a final decision.*
>
> *In cases where there is an arbitration clause it is in my judgment the more necessary that full scale argument should not be permitted. The parties have agreed on their chosen tribunal and a defendant is entitled prima facie to have the dispute decided by that tribunal in the first instance, to be free from the intervention of the courts*
>
> *In very clear cases a plaintiff is no doubt entitled to his summary judgment notwithstanding the clause, but when a plaintiff seeks immediate judgment in other than a clear case and resists the submission of the dispute to the tribunal on which he has agreed, one is bound to wonder whether the course which he has taken is prompted by the knowledge that the chosen tribunal with its more intimate knowledge of the trade may reach a conclusion adverse to him in respect of which he might either fail to obtain leave to appeal or if he did obtain leave, fail to demonstrate any error.*

11.Parker LJ`s judgment, referred to by Saville J in his review of these authorities in ***Hayter v Nelson and Home Insurance Co*** [1990] 2 Lloyd`s Rep 265 at p 270, is a timely reminder that the basis on which the application for stay is brought is a contract wherein parties have chosen arbitration over the litigation process as the forum for the resolution of their disputes. Whether or not the present facts constitute a dispute within the meaning of that contract was held by the learned judge to depend on the validity of the employers` claim. The learned judge was undoubtedly of the opinion that this case fell within the category of `clearest cases` of an undisputed claim, especially since the employers were not forthcoming in providing any particulars of set-off. Such a claim was allowed in ***The M Eregli*** [1981] 2 Lloyd`s Rep 169 at p 175 where Kerr J opined:

> *if the claim, is indisputably due, he can either obtain a final or interim award in the arbitration, as the case may be, or summary judgment under RSC O 14 in an action, even though the action and the arbitration are both concurrent. However, if both are concurrent, as here, and the claim is indisputably due, it is obviously far more sensible and convenient to give judgment*

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> *under O 14 then to refer the undisputed claim back to the arbitrator.*

12.This approach was acknowledged by Lord Mustill in **Channel Tunnel Group Ltd and France Manche SA v Balfour Beatty Construction Ltd** [1993] 1 All ER 664 at p 681 where he noted:

> *If the plaintiff to an action which the defendant has applied to stay can show that there is no defence to the claim, the court is enabled at one and the same time to refuse the defendant a stay and to give final judgment for the plaintiff.*

13.However, Lord Mustill in the same case cautioned against the use of such an approach by making the following valuable distinction:

> *I believe however that care should be taken not to confuse a situation in which the defendant disputes the claim on grounds which the plaintiff is very likely indeed to overcome, with the situation in which the defendant is not really raising a dispute at all. It is unnecessary for present purposes to explore the question in depth, but I would indorse the powerful warnings against encroachment on the parties` agreement to have their commercial differences decided by their chosen tribunals, and on the international policy exemplified in the English legislation that this consent should be honoured by the courts,*

14.The jurisdiction to stay an action was discussed in **Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd** [1993] 1 SLR 876 . Although a shipping case and not relied on by either party to the appeal, we have nonetheless found the discussion useful and relevant to our present case. At p 879, GP Selvam JC (as he then was) said:

> *The common form arbitration agreement provides for disputes to be decided by arbitrators. In such a case the court should, save in obvious cases, adopt a holistic and commonsense approach to see if there is a dispute. The justification for this approach is that it is important to hold a party to his agreement and avoid double and split hearing of matters. If the defendant, therefore, makes out a prima facie case of disputes the courts should not embark on an examination of the validity of the dispute as though it were an application for summary judgment.*

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15.It seems clear from the authorities we have discussed above that it is the party resisting the stay of proceedings, ie the plaintiffs in the action, the contractors in this case, who have the burden of showing that the other party, the employers, have no defence to the claim. As we have already observed in [para] 6 above the learned judge proceeded on the basis that the contractors were prima facie entitled to summary judgment for the sum certified. He then reasoned that it was for the employers to show that they had a bona fide defence. This approach may or may not be consonant with the O 14 principles applicable in our courts but it certainly is not consonant with s 7 of the Arbitration Act which guides that the burden shall fall on the plaintiffs in the action (the contractors) to show cause to the contrary to allowing a stay. Be that as it may, the learned judge then went on to evaluate the affidavit evidence before him. In turning first to the cross-claim for liquidated damages, the learned judge believed the contractors and found that the employers had committed acts of prevention. He went further, and held that on the face of the contract, there was no provision to exclude liability for such acts and as such, the date of completion was set at large making any claim for liquidated damages open to great uncertainty. As for the cross-claim for costs of rectification of defects, the learned judge felt that the defects, as specified by the architect in the certificate of completion, were few and, following the contractors` submissions, capable of being reimbursed from the moneys remaining in the retention fund.

16.We were of the view that the attempts to try the claims in the court below were premature. It was clearly a matter of believing one case over another, yet the pertinent question in this appeal remains: is there a question fit to be referred to arbitration. Turning again to the ***Channel Tunnel*** case, Lord Mustill`s observation at p 681 is apposite:

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> *What does seem to me absolutely clear on this is that an English court could not properly conclude in the light of affidavit evidence alone that the appellants` claim is so unanswerable that there is nothing to arbitrate. There would have to be cross examination of the experts, and once one reaches this point it is perfectly obvious that the qualifying words in s 1 (the equivalent of s 7 of our Arbitration Act) do not apply, and that there is no reason to withhold a stay.*

17.We were of the view that this was the position with respect to the present facts and accordingly allowed the appeal. The proceedings are to be stayed and the claims referred to arbitration.

Karthigesu JA
L P Thean JA
Yong Pung How CJ

Khush Chopra (Khush Chopra) for the appellants
Charan Singh (Myintsoe Mohamed Yang & Selvaraj) for the respondents

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