WAH-CHANG INTERNATIONAL (CHINA) CO LTD & ANOR V TIONG HUAT RUBBER FACTORY (SDN) BHD

[1991] 1 HKC 28

CIVIL APPEAL NO 192 OF 1990

COURT OF APPEAL

DECIDED-DATE-1: 18 JANUARY 1991

CONS VP, KEMPSTER AND CLOUGH JJA

KEMPSTER JA

This is an appeal from a judgment of Kaplan J given on 28 November 1990, pursuant to the provisions of the Arbitration Ordinance (Cap 341), as amended by the Arbitration (Amendment) (No 2) Ordinance 1989, whereby he granted Tiong Huat Rubber Factory (Sdn) Bhd (the plaintiffs) leave to enforce nine awards against Wah-Chang International (China) Co Ltd, the first defendant, and eight against Wah-Chang International (Hong Kong) Corp Ltd, the second defendant, and entered judgment accordingly.

The only issue which now arises for our determination, and in relation to which argument has been addressed to us, is whether the terms of the arbitration clause comprised in the five agreements concluded between the plaintiffs and the respective defendants for the sale and purchase of latex -- from which the 17 awards were derived -- were sufficiently wide to embrace the matters in dispute; being the effect of the defendant buyers' failure to establish letters of credit in favour of the plaintiff sellers. The clause in question, being reg 12 of the Malayan Rubber Exchange Contract No 2 for Ordinary (Non-guarantee) Regulations, reads:

> (a) All disputes as to the quality or condition of rubber, or other disputes arising under these contract regulation (sic), shall be settled by arbitration between the seller and the buyer in accordance with bye-law 7, Part C.

Bye-law 7, Part C, was not apt to affect the construction of this clause.

'These contract regulations' must be understood to refer to those in the introductory paragraph of such regulations:

> Contracts for the sale and purchase of rubber in the form set out herein and subject to these contract regulations may be made between members or between members and non-members.

The plaintiffs were, and the defendants were not, members of the Malayan Rubber Exchange. The material agreements were not 'in the form set out herein'. 'These contract regulations' in reg 12 covered provisions as to excess freight (reg 4), to savings in freight (reg 5), to export duty and cess (reg 6) and proof of date of shipment (reg 9) which were liable to give rise to disputes and, thus, gave substance and meaning to that part of reg 12 which reads:

> ... or other disputes arising under these contract regulations ...

In my opinion, the court is not entitled to ignore any of these words. No more is it entitled to write a fresh arbitration clause for the parties on the [*30] footing that to do so would render it more efficacious from a business point of view and enable all disputes arising under one or more of the agreements to be dealt with by the same tribunal. Any presumption that the parties so intended is rebutted by the express language which they have adopted. That parties are entitled to provide for restrictive reference confined, for example, to disputes as to condition or quality, was recognized by the House of Lords in *Falkingham v Victorian Railways Commissioner* default [1900] AC 452. As Lord Davey explained at p 463:

> Their Lordships agree that if a lump sum be awarded by an arbitrator, and it appears on the face of the award or be proved by extrinsic evidence that in arriving at the lump sum, matters were taken into account which the arbitrator had no jurisdiction to consider, the award is bad.

I would, for my part, adopt part of the dissenting speech of Lord Reid in *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* default [1959] AC 133, 173-174, which was fairly cited to us by Mr Ma on behalf of the respondents:

> We are only concerned with interpreting the words which they [the parties] chose to use in their contract. I do not think that we are entitled to assume that they must have had a clear intention and that it must have been a reasonable intention, then to find that the only reasonable intention would have been to apply the Hague Rules to all voyages, and to hold that, even if the words which they have used will not bear that construction, that intention must prevail. A court is often entitled to add to a written contract by implying a term if it is satisfied that any reasonable men, in the position of the parties, would have agreed to it if their attention had been directed to the point and that the term should be implied. But that is supplementing the words which the parties have used -- not contradicting them. It might be the law that a court should be entitled to amend the parties' contract if satisfied that no reasonable men could have meant what it says and is also satisfied as to what they must have intended to do if, being reasonable men, they had directed their attention to the point.

> Perhaps that should be the law. But so far as I am aware, there is no authority for a court having that power. Here, the parties made an express provision which is, in my view, incapable of bearing the construction for which the appellant contends, and, therefore, to give effect to that contention would involve contradicting what the parties have said in their contract and making a new contract for them.

The terms of Kaplan J's judgment on this point suggest that Mr Tang, for the defendants (the appellants in this instance), did not explain at the trial how effect was to be given to the material words in cl 12; alternatively, it may be that for some reason, the judge merely failed to refer to that submission. The judge said:

> Mr Tang submits that the phrase 'or other dispute arising under these contract regulations' is not wide enough to cover claims for non-payment by reason of a failure to open the requisite letter of credit, in some cases for the whole [*31] shipment, and in other cases, for part of it. In effect, what he is saying is that these regulations, if they apply at all, only apply to claims based on quality, size and weight. These claims are obviously covered by the phrase 'all disputes as to quality or condition of the rubber'. But I have to assume that the draftsman intended something by adding the words 'or other disputes arising under these contract regulations'. Payment is a crucial element in all contracts for the sale of goods and I cannot conceive that it was intended that quality claims should be arbitrated but that claims for non-payment should be litigated with all the delay that this can entail in certain jurisdictions.

Whatever the explanation, he failed to appreciate the significance of regs 4, 5, 6 and 9 and, in consequence, erred. The arbitrators made their purported awards in excess of jurisdiction and such awards should not be enforced here.

I would allow the appeal and set aside the orders made on 28 November 1990.

CONS VP

I agree with what my Lord has said and I, too, would allow the appeal and set aside all the orders made below.

CLOUGH JA

I agree that this appeal should be allowed. As I indicated in the course of argument, I was initially attracted by the argument advanced in support of the plaintiff respondent's notice. After

giving the matter further consideration during the adjournment, I have accepted the conclusion of the other members of the court that the words 'under these contract regulation[s]' in reg 12(a) refer only (as do the same words in the preliminary words in the regulations governing the Malayan Rubber Exchange Contract No 2 and in the Contract Form No 1) to the regulations numbered 1 to 13. As a matter of construction, I do not, therefore, consider that a dispute arising from non-acceptance of the goods or failure to open the required letter of credit falls within the ambit of the provision for arbitration in reg 12(a). I agree with the reasoning of Kempster JA on this issue.

I add that I am left with misgivings about the outcome of this appeal because the decision below and in this court have been made without regard (save for a passing reference by the judge at p 26 of his judgment) to the International Contract for Technically Specified Rubbers to which the contracts in question were also expressed to be subject. Clause 12 of the International Contract, whatever may be its obscurities on other matters, contains provision for arbitration in terms sufficiently wide to cover the defendants' defaults alleged by the plaintiff in this case. However, evidently after due deliberation, the plaintiff placed no reliance on cl 12 of the International Contract, below or in this appeal. Accordingly, on the arguments we have heard, I agree that this appeal should be allowed.