Foundation Contractor & Engineering Sdn Bhd … Appellant

AND

Cosmic Insurance Sdn Bhd … Respondent

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 11 of 2009)

Before: Mortimer, P.; Davies and Rogers, JJ.A.
27th May, 2010.

Arbitration. Insurance policy containing standard arbitration clause. Originating summons issued by insured directed to obtaining payment under the policy. Defendant filing affidavits in response directed to demonstrating that the insured's claim was unsustainable. Insurance company taking step in the action. No jurisdiction to stay proceedings in favour of arbitration.

Mr B Balasingam and Ms S. M. Veerasamy of Messrs. Veerasamy Associates for the Appellant.
Mr Rudi Lee Boon and Ms Shamila Subramaniam of Messrs. Fathan Rudi Lee Annie Kon & Associates for the Respondent.

Cases cited in the Judgment:

Roussel-Uclaf v. G. D. Searle and Co. Ltd and G. D. Searle and Co. [1978] 1 Lloyd's Law Reports 225.

Rogers, J.A.:

1. This was an appeal from a decision of Datin Paduka Hajah Hayati, J. given on 17 December 2008. The matter before the judge was an appeal from the decision of the Senior Registrar that these proceedings should be stayed pending the outcome of an arbitration between the parties. At the conclusion of the hearing of the appeal before this court, the appeal was allowed with costs here and below in favour of the appellant to be taxed if not agreed.

Background

2. These proceedings were commenced on 18 December 2007 by the appellant seeking a declaration that its liability to one of its employees, Muniyandi Balakrishnan (referred to previously in these proceedings as "MB"), who had been injured in the course of his employment, be wholly covered by the Workmen's Compensation Policy issued by the respondent. That policy ran from 22 July 2001 to 21 July 2004. The policy was issued initially to M/S Foundation

Engineering but, by an endorsement dated 13 November 2002, the insured's name was amended to Foundation Contractor & Engineering Sdn Bhd, the appellant. The insurance was expressed to cover all employees whilst engaged in connection with the insured's business and was to cover liability under the Workmen's Compensation (Amendment) Enactment 1978 (State of Brunei) or at common law in respect of, amongst other things, personal injury suffered by accident.

3. Clause 8 of the conditions of the policy provided that:

> *" All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do …. If the Corporation shall disclaim liability to the Insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder "*

4. Unfortunately, on 4 June 2003, MB suffered serious injuries. On 22 August 2003 he brought a claim against the appellant and, on 28 February 2008, after trial, he was awarded judgment on liability against the appellant with 15% contributory negligence. Initially, the respondent took responsibility for the defence of that action on behalf of the appellant. Solicitors were appointed by the respondent to act on behalf of the appellant. Those solicitors not only prepared the appellant's defence but also undertook discovery. It was only on 4 July 2005, after approximately 18 months, that solicitors acting on behalf of the respondent wrote to the appellant informing them that the respondent wished to obtain a

> *" …Court Declaration to ascertain whether the insurance policy issued by our client is to cover the Defendant's common law liability to the Plaintiff or whether such liability is covered by another policy issued by Asia Insurance Co. Ltd…."*

5. The respondent was advised that the solicitors that had been previously appointed by the respondent had discharged themselves nearly 2 months previously and that they should arrange for representation at a pre-trial conference that had been fixed to take place 14 days later.

6. The respondent then caused Originating Summons No. 91 of 2005 to be issued on 15 August 2005 naming The Asia Insurance Co. Ltd as the defendant to that summons. By that summons the respondent sought a declaration that the appellant's liability to MB was covered by the insurance policy issued by The Asia Insurance Co. Ltd. That summons appears to have been adjourned sine die on the basis that the appellant had instituted third party proceedings against the

respondents. In respect of that matter, on 15 September 2005 the appellant issued third party proceedings, in the original action by MB, naming both the respondent and The Asia Insurance Co. Limited as third parties. The respondent filed an affidavit strenuously defending those proceedings, both on procedural grounds and, particularly, on the merits. Those third party proceedings were eventually dismissed, seemingly, on the ground that they had been commenced at a late juncture.

7. Both parties to these proceedings filed evidence and, in particular, the respondent filed affidavits in reply to the summons. When the matter came before the Senior Registrar the respondent sought as a preliminary matter that the proceedings be stayed in favour of arbitration. The Senior Registrar acceded to that application.

8. When the matter came before the judge in the court below, she came to the conclusion that there was a dispute between the parties as to the extent of the liability of the respondent, if any, under the terms of the policy which constituted a "difference" between them on the matter and that had to be referred to arbitration. The judge also considered that the respondent was entitled to argue that under the terms of clause 8 of the policy the appellant must be deemed to have abandoned its claim as the respondent had indicated that it was disclaiming liability and the appellant had not, within 12 months after that disclaimer, referred the "matter" to arbitration. The judge considered that the respondent was entitled to seek a stay under the provisions of section 7 of the Arbitration Act, Cap. 173 which reads:

> *"If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."*

9. The judge considered that the affidavits filed on behalf of the respondent in reply to the originating summons were necessary to "parry a blow" by the appellant's own affidavits. The judge considered that the respondent had not taken any "active" step in these proceedings so as to preclude it from applying for stay. In referring to the statement of "positive step" and "parrying a blow" the judge was referring to the decision of Graham J in the case of *Roussel-Uclaf v. G. D. Searle and Co. Ltd and G. D. Searle and Co.* [1978] 1 Lloyd's Law Reports 225.

This Appeal

10. On this appeal the appellant sought to argue that a stay should not have been granted for a number of reasons. Those reasons included the argument that there was not a dispute or difference between the parties which fell within clause 8 of the policy. It was also said that the respondent could not rely upon section 7 of the Arbitration Act for a number of reasons and in particular that the respondents had only relied upon condition 8 of the policy as a basis for saying that the appellant could no longer seek arbitration. The arguments also ranged on the conduct of the respondent in relation to the previous proceedings including its conduct in taking over the defence of the personal injuries action brought by MB, its defence of the third-party proceedings in that action and its own action in respect of the proceedings brought against The Asia Insurance Co. Ltd.

11. Mr Balasingam, who appeared on behalf of the appellants, drew this court's attention specifically to the affidavits which had been filed on behalf of the respondent in these proceedings. The first affidavit of Ronnie D.H. Wong was filed on 21 February 2008. It was an affidavit in reply to the evidence of the appellant in support of the originating summons. That first affidavit of Mr Wong was directed entirely to defending the respondent in respect of the appellant's application and demonstrating that the claim made was unsustainable. There were a number of matters raised as part of the respondent's defence to the proceedings but for the purposes of this appeal it is only necessary to refer to the reference made to the provisions of the policy relating to arbitration. The point made, in what can best be described as section 12 of the affidavit, was that the appellant had abandoned any claim under the policy and any claim was irrecoverable because no arbitration had been commenced within 12 months of the respondent's disclaimer. The final sentence of condition 8 of the policy, quoted above, was cited, the fact that there had been no reference to arbitration was averred followed by an assertion that the appellant must be taken to have abandoned any claim and finally there was a citation of condition 9 of the policy which required the insured to comply fully with all requirements of the policy. The affidavit concluded:

> *"I humbly pray that the Plaintiff's application be dismissed"*

12. The respondent's second affidavit in reply, also by Mr Wong was to the same effect. The only reference to arbitration was in paragraph 26 which read:

> *"With reference to paragraph 63 of the Plaintiff's Affidavit in Reply, I verily aver that while stating that the Cosmic Policy is not liable, the Plaintiff has not, in any event, complied with the requirements of the Cosmic Policy, in particular with respect to the requirement of arbitration. Accordingly, the Plaintiff's Originating Summons application must be dismissed without more. The Plaintiff has clearly failed to comply with the policy provisions in any event."*

13. The affidavit concluded with a similar prayer as the first. In neither of the affidavits was there any suggestion that the respondent wished the matter to be referred to arbitration, still less was there any indication that the respondent wished the proceedings be stayed in favour of arbitration. It emerged in the course of argument that the first time there was any suggestion that the proceedings should be stayed in favour of arbitration was at the hearing of the originating summons before the Senior Registrar.

14. In these circumstances it is clear that the respondent had indeed taken a step in the proceedings. The affidavits filed in an originating summons procedure take the place of pleadings. They contain not merely the allegations which the parties wish to make but they serve the purpose of defining the issues and presenting the evidence. The respondent had taken all the steps necessary to defending the proceedings, attacking the appellant's case, presenting the respondent's case and preparing for the hearing of the summons. When Graham J. referred to parrying a blow, in the *Roussel-Uclaf v. G. D. Searle and Co. Ltd and G. D. Searle and Co.* case he was referring to taking steps to ensure that a party's position could not be undermined before the matter went to arbitration. Specifically he had in mind defending an application for an interlocutory injunction which he considered might well have been granted at the same time as staying the proceedings in favour of arbitration. Filing the equivalent of pleadings and the evidence directed to seeking an order that the proceedings be dismissed is something quite different. It is useful to refer to the full quotation of what Graham J said. In that case the judge was dealing with a situation where one of the parties seeking a stay had successfully resisted an application for an interlocutory injunction prior to making a formal application for a stay of the proceedings. Graham J said at page 231:

> *"Again, the arguments on both sides can be shortly stated, and the decision seems to be somewhat arbitrary. On the whole, I think that the statute is contemplating some positive act by way of offence on the part of the defendant rather than merely parrying a blow by the plaintiff, particularly where the attack consists in asking for an interlocutory injunction. Such a remedy against a defendant might well be necessary where the whether the action was ultimately stayed or not, in order to preserve, for example, the property the subject of the action in the meantime; and, as a practical matter, in such a case it would not be of importance whether the application to stay was made before, at the same time as or after the application for an injunction. Here it is not suggested that the plaintiffs were in any way embarrassed or taken by surprise by the making of the application to stay at the date at which it was made and I see no reason to penalise Searle (UK) in that respect."*

15. In these circumstances, since the respondent had taken one or more steps in these proceedings it was not open to it to apply for a stay under section 7 of the Arbitration Ordinance. There was no jurisdiction for the court to make such order, since the jurisdiction only applies if no step has been taken.

16. It was thus unnecessary for this court to consider the arguments that the appellant had raised in the submissions.

Mortimer, P.

Davies, J.A. **Rogers, J.A.**