IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CIVIL APPEAL NO: 30 OF 2019
(ON APPEAL from GC 139 of 2017)

BETWEEN:

MCALPINE LIMITED

APPELLANT

AND

BUTTERFIELD BANK (CAYMAN) LIMITED

RESPONDENT

Before:

The Rt. Hon Sir John Goldring, President
The Hon Sir Richard Field, JA
The Rt. Hon Alan Moses, JA

Appearances: Mr. Ian Huskisson of Travers Thorp Alberga for the Appellant.
Mr. Kerrie Cox of HSM Chambers for the Respondent.
Mr David Lewis Hall of Priestleys for the Plaintiff in GC 139 of 2017

Date of hearing: **12 November 2019**

Delivery of Judgment: **21 November 2019**

Judgment

Introduction

The background facts

1. On 31 July 2006 the Appellants agreed to design and build an office block and car park for the Respondents in George Town in Grand Cayman. The terms of the contract were contained in

the "*Standard Form of Agreement*" of the American Institute of Architects. The work was completed. On 23 October 2008 the 'Final Certificate of Fitness for Occupation' was issued by the Central Planning Authority. The Respondent made a final payment for the work to the Appellant.

2. The Plaintiff worked for the Respondent. On 2 September 2018, when at work, she was injured as a result of falling down a staircase which the Appellants had constructed. She has brought an action against the Respondents in which she alleges the stairs were defective: that they did not comply with the relevant Cayman Islands regulations. Her application to add the Appellant as a second defendant to the action failed. There is no appeal in respect of that. However, the Respondent seeks an indemnity or contribution from the Appellant, as the builder of the allegedly defective stairs. On 13 July 2018 the Respondent issued a summons seeking leave to add the Appellant as a Third Party to the proceedings. In a judgment of 26 August 2019, the Honourable Justice Mangatal granted the Respondent leave to add the Appellant as a Third Party. The Appellant now seeks to appeal her decision.

The issue in the appeal

3. The Agreement provided for the arbitration of disputes arising between the Appellant and the Respondent. The judge found that the provision for arbitration was limited in scope. It only applied to the resolution of those disputes which arose before final payment. Once final payment had been made, the dispute could only be resolved by a court of competent jurisdiction (which the Grand Court plainly is). The question is whether the judge's construction of the Agreement was right.

The Agreement

4. By Article 3, the contract was substantially to be completed by 29 June 2007. By Article 5.5.1:

> "*Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by [the Respondent]…to [the Appellant]…no later than 30 days after [the Appellant]…has fully performed the Design-Build Contract, including the requirements in Section A9.10 of Exhibit A…except for [the Appellant's]…responsibility to correct non-conforming Work discovered after final payment or to satisfy other requirements, if any, which extend beyond final payment.*"

5. §A9.10.1, which deals with "*final completion and final payment*," provides that:

"*Upon receipt of written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, [the Respondent]…shall promptly make such inspection and, when [it]…finds the Work acceptable under the Design-Build Documents and fully performed, [it] shall…promptly make final payment to [the Appellant]…*"

6. It is agreed that the installation of a defective staircase, as the Plaintiff alleges, would amount to "*non-conforming Work*."

7. §A9.10.4 provides that:

"*The making of final payment shall constitute a waiver of Claims by [the Appellant]…except those arising from:*

.1…Claims…arising out of the Design-Build Documents; or

.2 failure of Work to comply with the requirements of the Design-Build Documents…"

8. §A.3.17.1, under the heading "*Indemnification,*" provides that:

"*To the fullest extent permitted by law, [the Appellant]…shall indemnify and hold harmless [the Respondent]…from any claims, damages, losses and expenses…arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury…other than the Work itself, but only to the extent caused by the negligent acts or omissions of [the Appellant]…*"

9. Article 6 is entitled dispute resolution. Article 6.1 provides for a "*Neutral*" to be selected. The parties selected Maurice Stoppi.

10. Articles 6.2 and 6.3, which are at the heart of this appeal, provide:

"*If the parties do not resolve their dispute through mediation pursuant to Section A4.3 of Exhibit A, Terms and Conditions, the method of binding dispute resolution shall be the following:*

(If the parties do not select a method of binding dispute resolution, then the method of binding dispute resolution shall be by litigation in a court of competent jurisdiction.)

(Check one.)

[X] Arbitration pursuant to Section A4.4 of Exhibit A, Terms and Conditions

[ ] Litigation in a court of competent jurisdiction

[ ] Other (Specify)

§6.3 Arbitration

§6.3.1 If Arbitration is selected by the parties as the method of binding dispute resolution, then any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to arbitration as provided in Section A4.4 of Exhibit A, Terms and Conditions."

11. In short, the parties chose binding arbitration as the means of resolving any dispute "*arising out of or related to*" the Agreement. The present is such a dispute. Not surprisingly, it is that choice which forms the basis of the Appellant's appeal.

12. Article A4 is entitled "*Dispute Resolution*." By §A.4.1.1:

> *"§A.4.1.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Design-Build Contract terms, payment of money, extension of time or other relief with respect to the terms of the Design-Build Contract. The term "Claim" also includes other disputes and matters in question between…[the Respondent]… and [the Appellant]…arising out of or relating to the Design-Build Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim."*

13. There is no doubt but that the Respondent's claim against the Appellant falls within the terms of §A4.1.1.

14. §A4.1.2 sets time limits on claims. It requires, as presently relevant, that a claim be initiated by written notice within 21 days of recognition of the condition giving rise to the claim. As I understand it, the Respondent has given no such notice.

15. By §A4.1.3:

> "*Continuing performance. Pending final resolution of a Claim, except as otherwise agreed…[the Appellant]…shall proceed diligently with*

performance of the Design-Build Contract and [the Respondent]…shall continue to make payments in accordance with the Design-Build Documents."

16. §A4.2.1 provides that where a Neutral has been identified:

> "*…Claims excluding those arising under Sections A.10.3 through A.10.5 [relating to hazardous materials], shall be referred initially to the Neutral for decision. An initial decision by the Neutral shall be required as a condition precedent to mediation of all Claims between [the Respondent]…and [the Appellant]…arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Neutral with no decision having been rendered…*"

17. If a Neutral has not been identified, the Respondent is to provide the initial decision: see §A.4.2.2.

Mediation

18. §A.4.3.1 provides that:

> "*§A.4.3.1 Any Claim arising out of or related to the Design-Build Contract, except those waived as provided for in Sections A.4.1.10, A.9.10.4 and A.9.10.5 shall, after initial decision [by the Neutral] of the Claim…be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable or other binding resolution proceedings by either party.*
> *§.4.3.2 The parties shall endeavor [sic] to resolve their Claims by mediation…*"

19. §A.4.1.10 is a mutual waiver in respect of consequential damages.

20. §A.9.10.4 is set out above (see paragraph 7).

21. §A.9.10.5 states that:

> "*Acceptance of final payment by [the Appellant]…shall constitute a waiver of claims by… [the Appellant] except those previously made in writing and identified by [the Appellant]… as unsettled at the time of final Application for Payment.*"

Arbitration

22. §A.4.4.1 provides that:

> "*Claims, except those waived as provided for in Sections A.4.1.10, A.9.10.4 and A9.10.5, for which initial decisions [by the Neutral] have not become final and binding, and which have not been resolved by mediation, but which are subject to arbitration pursuant to Sections 6.2 and 6.3 of the Agreement…shall be decided by arbitration…*"

The judge's conclusions

23. The judge held that Articles 6.1, 6.2 and 6.3 were general in scope. They had to be interpreted in the light of the specific and detailed provisions set out in §A.4. On a proper reading of §A.4, arbitration was not available once payment was due, or paid. Her reasoning, as I understand it, was as follows.

24. First, it was a condition precedent for mediation under §A.4.2.1 that, prior to the date when final payment was due, the Neutral had reached an initial decision, or 30 days had elapsed without such a decision. Once the date for due payment had passed, no initial decision could be taken. No mediation could therefore take place. It followed that the agreement only provided for mediation in respect of claims arising before final payment.

25. Second, the judge applied similar reasoning to §A.4.4.1 and arbitration. Arbitration was only available under §A.4.4.1 if the Neutral's decision was not resolved by mediation. As was plain from §A.4.2.1, such a resolution could only take place in respect of disputes prior to final payment. It followed that the Agreement only provided for arbitration in respect of claims arising before final payment.

26. Third, §A4.1.3 indicated that the dispute resolution process could only apply when work was continuing; in other words, before final payment.

27. Fourth, the waiver provisions, referring as they do to unsettled claims, suggest the Agreement to arbitrate encompassed only claims arising during the currency of the work and before final payment.

28. Fifth, final payment having been made, the time for arbitration as provided for in the Agreement had long since passed. The dispute therefore had to be resolved by proceedings in court.

29. In short, as Mr Cox on behalf of the Respondents accepted, the judge construed this Agreement as providing for two different ways of resolving what could be two disputes very similar on their facts. The dispute arising before payment was due could be decided by arbitration. The dispute arising some time after final payment had been made, had to be decided in court. In other words, as the judge found, the parties to this Agreement decided that two different tribunals should resolve disputes arising out of it, depending upon when the dispute arose.

How the court should approach the construction of this Agreement

30. As JA Field observed during argument, the seminal decision in the Common Law world on the construction of agreements such as the present, is that of the House of Lords in *Fiona Trust v Privalov* [2007] Bus LR 686 (to which the judge did not refer in her judgment). The House of Lords (as had the Court of Appeal), held that since the introduction of section 7 of the Arbitration Act 1996 (similar in substance to section 4 of the Arbitration Law 2012 in the Cayman Islands), an agreement to arbitrate had to be construed in such a way as to give effect to the reasonable commercial expectations of the parties. In the course of his speech, with which Lord Hope of Craighead, Lord Scott of Foscote, Lord Walker of Gestingthorpe and Lord Brown of Eaton-under-Heywood agreed, Lord Hoffmann "*applauded*" the opinion expressed by Longmore LJ in the Court of Appeal, to the effect that the approach to construction previously taken by the courts, should no longer be followed. He went on to say (pages 1724-5, paragraphs 12 and 13):

> *"12… [Section 7]…was obviously intended to enable the courts to give effect to the reasonable commercial expectations of the parties about the questions which they intended they intended to be decided by arbitration. But section 7 will not achieve its purpose if the courts adopt an approach to construction which is likely in many cases to defeat those expectations. The approach to construction therefore needs to be re-examined.*
>
> *13. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ[1] remarked, at para 17: "if any*

[1] in the Judgment of the Court of Appeal

businessman did want to exclude disputes about the validity of a contract, it would have been comparatively easy to say so.""

31. Lord Hope put it in the following way (page 1727, paragraphs 25 and 26):

> "*25…contracts negotiated between parties in the international market are commonly based upon standard forms, the terms of which are well known. Because they have a well-understood meaning, they enable contracts to be entered into quickly and efficiently…But is must be appreciated that various clauses in these forms serve various functions. In some, a high degree of precision is necessary. Terms which define the parties' mutual obligations in relation to price and performance lie at the heart of every business transaction. They fall into that category. In others, where the overall purpose is clear, the parties are unlikely to linger over words used to express it.*
> *26 Clause 41 [the arbitration clause] falls into the latter category. No contract of this kind is complete without a clause which identifies the law to be applied and the methods to be used for the determination of disputes. Its purpose is to avoid the expense and delay of having to argue about these matters later. It is the kind of clause to which ordinary businessmen readily give their agreement so long as its general meaning is clear. They are unlikely to trouble themselves too much about its precise language or to wish to explore the way it has been interpreted in numerous authorities, not all of which speak with one voice. Of course, the court must do what it can to provide…legal certainty…The proposition that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed promotes legal certainty. It serves to underline the golden rule that if parties wish to have issues as to validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressly. Otherwise they will be taken to have agreed on a single tribunal for the resolution of all disputes.*"

32. As Lord Justice Moore-Bick (with whom Lord Justice McFarlane and Lord Justice Briggs agreed), pointed out in *Transocean Drilling U.K. Ltd v Providence Resources PLC* [2016] EWCA Civ 372, that does not mean the court's task is to re-shape the contract, but is to ascertain the parties' intention, giving the words used their ordinary and natural meaning (see paragraph 23).

My conclusion

33. Although Mr Cox sought valiantly to sustain the judge's construction of the Agreement, he was in my view bound to fail. I say that for several reasons.

34. First, §6.1, §6.2 and §6.3 are perfectly clear. They deal with the resolution of disputes. The parties were given a choice as to how they wished disputes to be resolved. They chose arbitration. They rejected litigation in a court of competent jurisdiction.

35. Second, there is nothing in §6.1, §6.2 or §6.3 to suggest that the parties' choice of arbitration was so restricted as to apply only to those disputes which might arise prior to the due date of payment or payment itself: that disputes such as the present could not be arbitrated.

36. Third, it seems to me almost inconceivable that rational business people, in the context of this single building contract, would choose two different tribunals to resolve their disputes, let alone make the choice of tribunal dependent upon when payment was due or paid. Moreover, were rational business people to make such a surprising choice, they could be expected clearly to spell that out in the Agreement, as Lord Hope said. In other words, §6.1 or §6.2 or §6.3 would say so.

37. Fourth, even when, contrary to the approach suggested by Lord Hoffmann and Lord Hope, one '*lingers*' on the precise wording of §A4.1, I do not find it easy to follow the judge's analysis.

38. It seems to me §A.4.2.1 does no more than provide a process for resolving a dispute which arises before final payment. It does not follow from that, that a dispute arising after it falls outside a dispute resolution process involving arbitration. §A.4.3.1 similarly provides a process in such circumstances in respect of mediation. Again, it does not follow that a dispute arising thereafter falls outside a dispute resolution process involving arbitration. Finally, §A.4.4.1 does no more than provide for what should happen in the circumstances contemplated by §A.4.2.1 and §A.4.3.1.

39. Moreover, it does not seem to me that the waiver provisions provide any support for the judge's interpretation. §A.9.10.4.2 in terms contemplates that claims may arise in circumstances such as the present. §6.1, §6.2 and §6.3 require they be resolved by arbitration.

40. In short, even when seeking closely to construe the provisions, I cannot agree with the judge's conclusions.

41. Be that as it may, it seems to me clear, for the reasons I have set out in paragraphs 34-6, that on a proper construction of this Agreement, this appeal must be allowed.

Field, JA

42. I agree.

Moses, JA

43. I also agree.