

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
10 MAY 1973
25 RUSSELL SQUARE
LONDON W.C.1

No. 17 of 1971

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF HONG KONG
(APPELLATE JURISDICTION)

B E T W E E N :

TAK MING COMPANY LIMITED Appellants

AND

YEE SANG METAL SUPPLIES COMPANY Respondents

10

CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal from the judgment of the Full Court of Hong Kong (Blair-Kerr, Mills-Owens and McMullin JJ.) dismissing the Appellants' appeal against the decision of Pickering J. in the Supreme Court of Hong Kong by which the said judge on the application of the Respondents corrected a judgment (hereinafter referred to as "the original judgment") given by him on 3rd January, 1969 by the inclusion of an order that the Appellants, referred to therein as the 2nd Defendants, should pay interest on the judgment debt of \$332,635.17 at the rate of 8% per annum from the date of commencement of the action to the date of payment and that each party should pay its own costs.

Reference to the Record of proceedings in Appeal No. 38 of 1969 between the same parties are underlined and prefaced "38 of 1969".

2. The original judgment was given in an action in which the Respondents were Plaintiffs and the Appellants were the Second Defendants. In that action the Respondents had claimed for the price of work done by the Respondents for the Appellants in excess of the sum of \$884,000.00 paid by the Appellants to the Respondents. The Respondents' Statement of Claim also included a claim for

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- 38 of 1969
p.2D
- Interest thereon at the rate of 8% per annum from the commencement of this action to payment under Order 15 rule 7 of the Code of Civil Procedure.
- p.10 1.20
3. During the hearing of the action before Pickering J., the learned judge, by consent of all parties, limited himself to a finding of liability, leaving to an expert assessor the determination of the sum due.
- 38 of 1969
p.79 1.22
4. In his original judgment, Pickering J. held in favour of the Respondents, and ordered the Appellants to pay to the Respondents such sum as would be found due by the expert assessor. The original judgment made no reference to the Respondents' claim for interest 10
- p.13 1.35
5. The original judgment was not read, but was handed down in open court.
- 38 of 1969
p.90 B
6. The Appellants appealed against the original judgment to the Full Court of Hong Kong. The Full Court affirmed the original judgment. 20
7. The Appellants further appealed to the Privy Council in case No. 38 of 1969: the Privy Council, in its judgment of 5th October 1971, affirmed the Full Court of Hong Kong and advised Her Majesty to dismiss the appeal.
- p.17 1.38
8. Because the original judgment had left to an expert the assessing of the sum due from the Appellants to the Respondents, the parties on 8th February 1969 applied to Pickering J. in Chambers for the appointment by him of the expert assessor. When thus applying to Pickering J., counsel for the Respondents asked for it to be put on record that he was intending to make an application for interest at the appropriate time. 30
- p.17 1.41
9. On 30th July 1969, the expert assessor appointed by Pickering J. assessed that the sum owing from the Appellants to the Respondents was \$332,635.17.
- p.1
10. On 6th August 1969, the Respondents applied by summons to Briggs J. in Chambers for an order 40

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that interest be paid by the Appellants to the Respondents on the said sum of \$332,635.17 at the rate of 8% per annum from the commencement of the action until payment, namely in accordance with the claim in the Statement of Claim.

p.17 1.27

11. In support of the summons, an affidavit was filed affirmed by Wong Kai Tung, the solicitor acting on behalf of the Respondents.

p.3

10. 12. The summons was solely for interest to be paid pursuant to the original judgment in reliance upon Order 6 Rule 2A of the Rules of the Supreme Court; it was no part of the application that the original judgment of Pickering J. should be corrected. The said affidavit was directed to support the application under Order 6 Rule 2A and did not bring into issue any possible correction of the original judgment.

20 13. Briggs J. on 16th August 1969 dismissed the application with costs.

p.4

30 14. On 26th May 1970, the Respondents issued a Notice of Motion seeking to correct the original judgment by the inclusion of an order that the Appellants pay interest to the Respondents on the judgment debt at the rate of 8% per annum from the commencement of the action, or alternatively from the date of the judgment to the date of payment, pursuant to the claim in the Statement of Claim. The ground of the application was that, owing to an accidental omission, the original judgment did not provide for this part of the Respondents' claim.

p.5

15. At the hearing of the Motion, the Appellants relied on three contentions :-

(i) That by reason of the dismissal of the application before Briggs J. the matter was res judicata.

p.10 1.38

40 (ii) That the Respondents had failed to apply timeously for the correction of the original judgment.

p.12 1.10

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- p.12 1.18 (iii) That the High Court had no jurisdiction to correct the original judgment so as to award interest
- p.10 1.40 16. Pickering J. rejected each of these contentions. On the issue of res judicata he noted that the summons taken out before Briggs J. was a summons under Order 6, Rule 2A of the Rules of the Supreme Court for an order for interest. The Notice of Motion before Pickering J. was brought under Order 20, Rule 11 for the correction of the original judgment. The issue therefore was whether the Slip Rule should be applied. This was a new issue and not res judicata. 10
- p.11 1.9
- p.11 1.16
- p.13 1.31 17. Pickering J. admitted that at the date of the original judgment his mind had been on the issue of liability rather than upon any figures. The learned judge then stated
- "But had I thought the matter through further, as I should have done, I am in no doubt whatever, having a very clear recollection of the case and at the evasiveness of Mr. Chang witness for the Appellants that I would have made an award of interest". 20
- p.13 11.32-35
- p.14 1.19 18. Having satisfied himself that nothing occurring since the date of the original judgment rendered it inequitable for him to correct his original judgment, Pickering J. in a judgment (hereinafter referred to as "the second judgment") delivered on 7th July 1970 corrected his original judgment by including an order that the Appellants should pay interest to the Respondents as asked in the Notice of Motion. 30
- p.15
- p.16 19. The Appellants appealed to the Full Court of Hong Kong against the second judgment.
- p.18 11.20-26 20. During the hearing of the appeal, Counsel for the Appellants abandoned the contention (see Paragraph 15 (iii) above) that the High Court had no jurisdiction to correct the original judgment. 40
- p.19-20 1.48 21. The Full Court held that of the summons heard before Briggs J. it was not possible to say that there must have been such an

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adjudication upon the merits of the application as to raise a barrier of estoppel preventing the Respondents subsequently applying to Pickering J. for correction of the original judgment. Pickering J. was held, therefore, to have been perfectly correct in dismissing the contention as to estoppel

p.19-20 1.48

p.20 1.26-29

p.20 1.45

10 22. Concerning the time for applying for an order for interest, the Full Court noted that Counsel for the Respondents should have asked for such an order at the hearing of the action, but he had to a large extent been deprived of this opportunity by reason of the judgment being handed down and not read. The Full Court noted that at the date of the appointment of the assessor, Counsel for the Respondents announced his intention to claim interest, and this was fair intimation that the point had not been abandoned. Further, it was noted that 20 although no action was taken for 15 months to have the original judgment rectified, nevertheless the proceedings, to which the claim for interest was only a small appendage, were not asleep. The delay, although substantial, was not in the circumstances excessive, and in itself was not enough to deprive Pickering J. of his discretion to correct his original judgment

p.21 11. 1-3

p.21 11.5-7

p.21 11.7-16

p.21 1.16

p.22 11.2-4

30 23. The Full Court therefore affirmed the second judgment of Pickering J. correcting his original judgment.

p.23

24. As to costs of the Notice of Motion seeking the correction of the original judgment, Pickering J. ordered that each party was to pay its own costs.

p.15

25. The Full Court, however, held that it had been the Respondents own default that had necessitated the making of the application to correct the original judgment. The full Court therefore ordered

40 (i) that the costs of the Notice of Motion heard before Pickering J. should go to the Appellants:

p.22 11.15-18

(ii) that the costs of the appeal should be apportioned: one third of the Appellants'

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p.22 11.19-26
p.23

costs to be borne by the Respondents and
two thirds of the Respondents' costs to be
borne by the Appellants

AND THE RESPONDENTS WILL CONTEND

That the Supreme Court of Hong Kong and the
Full Court of the same were right in holding:

1. THAT the Respondents were not estopped
from applying for the correction of the
original judgment;
2. THAT the original judgment should have been 10
corrected so as to include a right to
interest as asked in the Statement of Claim;
3. THAT the order for costs should be that
each party should bear their own costs of
the Notice of Motion; and that the
Appellants should pay the Respondents'
costs here and in the Full Court of the
Supreme Court of Hong Kong.

D. G. VALENTINE

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