Privy Council Appeal No. 67 of 1984

Tan Tong Meng (Pte) Ltd. *Appellants*

v.

Artic Builders & Co. (Pte) Ltd. *Respondents*

FROM

THE COURT OF APPEAL OF SINGAPORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND MAY 1986

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD BRIGHTMAN
LORD MACKAY OF CLASHFERN
LORD ACKNER
LORD GOFF OF CHIEVELEY

*[Delivered by **Lord Ackner**]*

The appellants were the respondents in an arbitration, and the plaintiffs in two originating motions relating to that arbitration. The respondents were the claimants in that arbitration and the defendants to those two motions. The subject matter of the arbitration was a building contract dated 15th November 1975 made between the appellants and the respondents by virtue of which the respondents agreed to erect and complete for the appellants a nineteen-storey apartment block in Singapore. Work commenced on 26th September 1976 and continued until the appellants, by letter of 2nd June 1978 written by their solicitors, terminated the agreement purportedly pursuant to clause 25(1). The respondents contended that such termination was wrongful, but accepted the same as wrongfully repudiating the contract and claimed for the work which they had done and materials supplied on a *quantum meruit* basis.

The dispute was referred to arbitration, the arbitrator being Mr. H.E. Cashin. At the commencement of the arbitration it was agreed that as the matters submitted to the arbitration comprised several distinct issues, the first of which was whether the

[27] termination of the contract was lawful, the

arbitrator should hear all the evidence, contentions and arguments of the parties in regard to that issue and should make an interim award. That interim award was made on 9th May 1979 and was in favour of the respondents in this appeal who, as previously stated, were the claimants in the arbitration. The arbitrator found that the appellants had not given the notices required by clause 25(1)(c) and further, on the facts, the appellants had not established that the respondents failed to comply with their obligations under clause 25(1)(c).

On 20th June 1979 the respondents applied to Mr. Justice A.P. Rajah for an order that the interim award be set aside or remitted to the arbitrator for reconsideration on the ground that it was ambiguous or unclear in that it only dealt with the appellants' liability under clause 25(1)(c) and not with the appellants' liability under clause 25(1)(a) or (b). The motion was contested, the respondents contending that the appellants had at the arbitration only relied upon clause 25(1)(c). However Mr. Justice Rajah ordered that the matter be remitted to the arbitrator "on the question of whether the respondents [the appellants] had made clause 25(1)(a) and clause 25(1)(b) of the building contract dated 15th November 1975 part of their case, and if so, the arbitrator do make his findings on the respondents' case under these clauses".

On 10th April 1980 Mr. Cashin stated, with reasons, his finding namely that the appellants had relied only on clause 25(1)(c). The matter came back before Mr. Justice Rajah on 8th June 1981 on a further motion by the respondents to set aside the interim award on the grounds, *inter alia*, "that the learned arbitrator had misconducted himself by showing bias against the plaintiffs [the appellants] and failing to observe the rules of natural justice during the remission hearing ...". Mr. Justice Rajah set aside the award, but his decision was reversed by the Court of Appeal on 11th May 1984.

The issue raised by this appeal - to quote the words of paragraph 2 of the appellants' case - "is whether the arbitrator misconducted himself by failing to observe the rules of natural justice during the remission hearing". For the proper consideration of that issue it is now necessary to go into further detail.

The Contract.

Clause 25 reads as follows:-

"25.(1) If the Contractor shall make default in any one or more of the following respects, that is to say-

(a) If he without reasonable cause wholly suspends the carrying out of the Works before completion thereof, or

(b) if he fails to proceed regularly and diligently with the Works, or

(c) if he refuses or persistently neglects to comply with a written notice from the Architect requiring him to remove defective work or improper materials or goods and by such refusal or neglect the Works are materially affected or

(d) If he fails to comply with the provisions of clause 17 of these Conditions then the Architect may give to him a notice by registered post or recorded delivery specifying the default, and if the Contractor either shall continue such default for fourteen days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated or not) then the Employer without prejudice to any other rights or remedies, may within ten days after such continuance or repetition by notice by registered post or recorded delivery forthwith determine the Employment of the Contractor under this Contract provided that such notice shall not be given unreasonably or vexatiously."

The Notice of Determination given by the appellants.

On 17th May 1978 the appellants' architect wrote to the respondents in the following terms:-

"We have repeatedly pointed out to you the defects in your work, the deliberate delay and from time to time the total suspension of work by you and to properly and diligently carry out the works by you.

The Employers, Tan Tong Meng Co Pte Ltd would now give you formal notice that you are to forthwith carry out our instructions as already been given to you. In particular the instructions are:-

(a) To hack off and re-plaster the portions of walls and ceilings pointed out to you as defective and to re-paint them in accordance with our letter of 27th April 1978 (copy of which is attached). In this respect although we have asked you to attend to these defects, first of all in Units A and B on the first floor, you have not up to date satisfactorily and completely done so.

You have therefore to forthwith attend to all the defects in Units A and B on the first floor in accordance with the second paragraph of our letter of the 27th April 1978 and let us give our approval before you may proceed with the other units.

(b) At all times you shall have a sufficient number of workers attending to the works at the site so that there will be a maintenance of the progress of work that will meet with our satisfaction. In other words therefore there shall be no further delay or suspension of work and that all the works relating to repairing or rectification of defects and completion of the construction of the whole building must be carried out properly, regularly and diligently.

Please take notice that if you should fail to comply with this notice the Employers Tan Tong Meng Co Pte Ltd will exercise their right to determine the contract under Clause 25(1)."

It is common ground that paragraph (a) above related to the respondents' obligations under clause 25(1)(c) and paragraph (b) above was capable of relating to paragraphs 25(1)(a) and (b).

As previously stated, it was on 2nd June 1978 that the appellants' solicitors gave notice of termination of the contract. The material terms of their letter read as follows:-

"We are instructed that your clients have failed to complete the project which should have been completed by the 25th July 1977 as provided in the Contract. Under Clause 22 of the Contract, your clients are therefore liable to our clients the sum of $500/- for each and every day of the delay. Our clients' architects Messrs. Ong & Ong have written to your clients on the 27th May 1978 claiming the sum of $153,000/- being the liquidated damages provided for at $500/- a day for the delay of completion for the period from 26th July 1977 to 27th May 1978 (a period of 306 days). Please note that this claim for liquidated damages is not final and it is accruing day by day until the project is completed.

We are further instructed to refer to the architects' notice to your clients dated the 17th May 1978 under Clause 25(1) of the Contract. The architects have requested your clients to attend to certain things as stated in the notice. However up to date your clients have failed to comply with them. Therefore as provided by the Contract, our clients now exercise their right to forthwith terminate the Contract."

The terms of the second paragraph quoted above appear to be more appropriate to clause 25(1)(c) than to clauses 25(1)(a) or (b).

The Arbitration.

As previously stated the respondents were the claimants in the arbitration. It is common ground that in the course of his opening speech, Mr. Wu, counsel for the respondents, asked Mr. Karthigesu, then counsel for the appellants, if he would confirm that three notices were in fact required under clause 25(1)(c). Mr. Karthigesu agreed, and stated that he would be asking leave to amend his particulars of defence, so as to rely on the minutes of a meeting held on 21st March 1978 as being the first of the three notices required. There is no dispute that the amendment for which he in due course obtained leave related solely to clause 25(1)(c).

Mr. Wu, in the course of his opening, stated that he needed to know whether the appellants were relying only upon clause 25(1)(c) since this would affect the extent of the evidence which he would be calling. Again it is common ground that Mr. Karthigesu at no stage relied on clause 25(1)(a).

The correspondence following the publication of the interim award.

Shortly after the award was published the appellants changed their solicitors and determined Mr. Karthigesu's retainer. On 18th June 1979 the appellants' new solicitors, Messrs. Rodyk & Davidson, wrote to the arbitrator with a copy to the respondents' solicitors, complaining that the appellants had not limited their case to clause 25(1)(c) and asking the arbitrator to state a special case to the court "on the question of whether you were right in considering the effect in law of clause 25(1)(c) only and not the entire clause 25(1) of the contract". In his reply of 20th June, the arbitrator pointed out it had been agreed that he should not make his award by way of case stated but that it should be given in the form of a "speaking" award. Accordingly he could not now agree to state his award in the form of a special case. He then went on to deal with the merits of the complaint. Their Lordships quote from his letter:-

> "1. ...
>
> 2. My note on this reads 'K states no need for case stated if I give 'speaking' award. FW agrees.' I should explain that Mr. C.S. Wu is also known as Mr. Fred Wu hence the reference to FW.

3. At the opening of his case Mr. C.S. Wu referred to the notices allegedly sent under Section 25(1) by the Respondents and as a result on the 24th of January 1979, Mr. Karthigesu applied to amend the particulars in order to rely upon the minutes of a meeting held on 21st March 1978. The minutes themselves were dated 23rd March. Both Counsel during the course of Mr. Wu's opening agreed that it was sub-clause (c) of Clause 25(1) on which the Respondents were relying. If further clarification was needed, in his opening, I have recorded Mr. Karthigesu as saying 'Confine F's evidence to the issue as to whether determination of contract was justified. Rely on amendment made -

25(2)(c) of Contract

3 documents

(1) Minutes 23.3.78
(2) Letter 17.5.78
(3) Letter 2.6.78'

Mr. Karthigesu then went on to direct his entire case towards these issues and in his closing address once again limited his argument to 25(1)(c)."

On 6th October 1979 he wrote again to the parties' solicitors in these terms:-

" I understand that a query has been raised as to the last line of the first page of my letter of the 20th June 1979 addressed to M/s. Rodyk & Davidson ... The line reads -

'have recorded Mr. Karthigesu as saying 'Confine F's evidence ...'

I have looked at my notes again and I see that there is a typographical error in that line. What I have actually recorded is -

'Karthigesu. Confine ev to the issue as to whether determination of contract was justified. Rely on amendment made - 25(1)(c) of Contract ...'

I enclose a photostat copy of the relevant page on the understanding that it does not form part of my Award. The error I think is that while dictating to my stand-in secretary, I pronounced 'ev' as 'ev' and no doubt she heard it as 'F' and then asked me what this meant and I said 'evidence' and so she recorded it as 'F's evidence'. I should of course have noticed the error before the letter was sent out."

The copy of the arbitrator's notes which he sent to the parties read as follows:-

"Tuesday 24th April 1979

Parties as before

Karthigesu. Confine as to the issue as to whether determination of contract was justified.

Rely on amendment made -

25(1)(c) of Contract
3 documents

1) Minutes 23/3/78 Resqd E59
2) " 17/5/78 A23
3) " 2/6/78 D39

or then [in contract].

1) I say that E59 is written notice sufficient to satisfy 25(1)(c)

2) then Architects may etc = A23 is sufficient to satisfy the terms required for 2nd notice by registered post

3) then termination - D39 - more than 14 days - termination was given 10 days of the 14 days.

the complaint was in relation to the plastering work in Unit A.

says it is not necessary to state that the minute should specify or make reference to 25(1)(c)."

On 15th October 1979, the respondents' solicitors wrote to Mr. Karthigesu enclosing copies of the correspondence referred to above and asked for confirmation that "the factual representations made in the arbitrator's letter of 20th June 1979 as regards the confinement of the owners' case at the arbitration hearing to clause 25(1)(c) of the building contract is correct". They stated "We seek this confirmation, as Messrs. Rodyk & Davidson are now contending that according to their clients' instructions, their clients' case at the arbitration hearing placed reliance on sub-clauses (a) and (b) and (c) of clause 25(1) ...".

On 15th October, Mr. Karthigesu replied stating *inter alia*:-

" On the other point I am not so sure whether I agreed that the Respondents were relying solely on Clause 25(1)(c) during Mr. Wu's opening address. I remember and my notes bear me out that when Mr. Wu opened his case he appeared to me to be dealing with Clause 25(1)(c) as being the principle issue on the question of determination and referred to the particulars furnished. I then made an application to amend the particulars on the morning of the second day (24.1.79) ...

I can however confirm that as the case progressed and in my opening and concluding addresses I confined myself to the notices and the facts and circumstances to bring the case solely within clause 25(1)(c)."

On 16th October the respondents' solicitors wrote again to Mr. Karthigesu in the following terms:-

" We should be glad if you could let us have your clarification as regards your penultimate paragraph, in which you confirmed that as the case progressed, and in your opening and concluding addresses, you confined yourself to the notices and the facts and circumstances to bring your case solely within Clause 25(1)(c).

According to Mr. Cashin's Notes (as disclosed in his letter of 20th August 1979), you had stated when opening your case that you would be confining your clients' evidence to a case of determination under Clause 25(1)(c) of the Building Contract. Mr. Cashin's letter then went on to say that 'Mr. Karthigesu then went on to direct his entire case towards these issues and in his closing address once again limited his argument to 25(1)(c)'.

We seek your confirmation that Mr. Cashin's Notes correctly stated your opening, and his following remarks in his letter correctly represented the evidence that was adduced before him."

On the same day Mr. Karthigesu replied stating:-

"I have already confirmed that in my opening and closing addresses I confined myself to the notices and facts and circumstances to bring the case solely within clause 25(1)(c). I cannot now positively state whether the evidence that was adduced was solely confined to this issue, although it may well be the case."

Understandably enough the respondents' solicitors, some two days later, wrote to the appellants' solicitors sending them the correspondence which they

had had with Mr. Karthigesu and enquiring whether they were now prepared to withdraw their contention made before Mr. Justice Rajah on their motion to remit, which motion had been adjourned, that the appellants had relied at the arbitration hearing on clauses 25(1)(a) and (b). The appellants' solicitors did not reply until 12th January when they stated that:-

> "... a reading of the record of evidence, both documentary and oral, that was tendered and given at the arbitration would tend to show that, far from restricting themselves to the circumstances envisaged in sub-clause (c) of clause 25(1), our clients were relying upon the entire circumstances that came within the purview of clause 25(1)(a), (b) and (c)."

They further stated that they were instructed that during the progress of the arbitration after listening to Mr. Wu's arguments, their clients:-

> "... categorically instructed Mr. Karthigesu that their case was not limited to sub-clause (c) of clause 25(1)".

The remission hearing.

This took place on 2nd April 1980 pursuant to the order of Mr. Justice Rajah made on 4th March 1980. Mr. Selvadurai appeared on behalf of the appellants, and Mr. Wu for the respondents. In addition Mr. Karthigesu appeared in order to assist the arbitrator and counsel on both sides. Both counsel were free to ask Mr. Karthigesu any questions which they thought were appropriate. In addition the parties also were present. Their Lordships were told by Mr. Desmond Wright Q.C., after he had taken instructions from Mr. Wu, that Mr. Karthigesu's letters to the respondents' solicitors referred to above were drawn to the attention of the arbitrator. Mr. Cresswell Q.C., appearing for the appellants, after taking instructions from Mr. Selvadurai said this was not so. Their Lordships do not consider that they need resolve this issue, although on the balance of probabilities it would seem to be most improbable that Mr. Karthigesu, who attended for the purpose of answering questions, and questions were indeed asked of him, would not have had these letters put to him.

Mr. Cresswell, in the course of his submissions, maintained that his clients, relying upon the arbitrator's letter of 20th June 1979 referred to above, came to meet the suggestion that Mr. Karthigesu had, during the course of Mr. Wu's opening of his case, agreed that clause 25(1)(c) was the only clause upon which Mr. Karthigesu was relying. Accordingly the suggestion that it was at a later stage, namely in or following the opening of

Mr. Karthigesu of the appellants' case, that he confined his submissions and evidence to clause 25(1)(c) and thereby impliedly abandoned reliance on clause 25(1)(b), took them by surprise. This submission is clearly untenable in the light of Mr. Karthigesu's letters referred to above, copies of which, as previously stated, were sent to the appellants' solicitors, long before the remission hearing.

At the remission hearing, the arbitrator decided that Mr. Wu should address him first. Mr. Wu in his submissions stated:-

> "... that in his opening it was his distinct recollection that Mr. Karthigesu stated that his case for determination [of the agreement] was only on under 25(1)(c)."

At this stage Mr. Karthigesu interjected and said that he had placed particular emphasis on clause 25(1)(c) but he did not think that in doing so he had abandoned clause 25(1)(b). In giving the reasons for his decision, the arbitrator said that he was completely satisfied that from the manner in which Mr. Wu had presented his case and as a result of the answers given by Mr. Karthigesu to queries raised by Mr. Wu with regard to which particular sub-clause of clause 25 he was relying upon:-

> "Mr. Karthigesu, although originally he was not completely satisfied that he would rely on clause 25(1)(c), in fact never cross-examined in sufficient breadth to indicate that he was relying on clause 25(1)(b) as well."

He went on to say, as is accepted, that the amendment for which Mr. Karthigesu asked during the course of Mr. Wu's opening and which had a direct bearing on the notices on which he was relying, related entirely to clause 25(1)(c).

Mr. Cresswell has complained, although this point was not taken in the appellants' case, that his clients were taken by surprise by the arbitrator's reference to the inadequate cross-examination by Mr. Karthigesu. This he submits is a further justification for the main complaint referred to in detail hereafter. In their Lordships' judgment there is no substance in this complaint. Because the arbitration took place in two parts, from 23rd January 1979 to 2nd February 1979 and from 23rd April 1979 to 4th May 1979, the arbitrator most helpfully, in order to assist the parties in continuing with the arbitration, provided them with his notes of what had taken place during the first part of the arbitration. During the first part of the arbitration, four out of the five witnesses called by Mr. Wu had given evidence, and had been cross-examined by Mr. Karthigesu. There were thus available to

Mr. Selvadurai, and this is not disputed, the arbitrator's notes of the cross-examination of those four witnesses. Significantly enough, neither before Mr. Justice Rajah, when he heard the second motion to set aside the interim award, nor before the Court of Appeal was any attempt made to refer to these notes. Indeed in correspondence the parties through their solicitors expressly agreed that they should not be made part of the record. During the course of the hearing of this appeal, Mr. Cresswell sought leave to put in those notes, which application their Lordships refused, not only because of the agreement referred to above but because in their Lordships' view the matter was irrelevant and for the following reasons. The arbitrator, having made the observations quoted above then continued:-

> "Much more important, in his [Karthigesu's] opening I have recorded him as saying as follows."

He then quoted from his note, a copy of which, as previously stated, he had sent to the parties in October 1979 and continued:-

> "It was quite clear that when Mr. Karthigesu said that he had confined his evidence to the issue as to whether the determination of the contract was justified, he meant exactly what he said and that was tantamount to his reliance only on clause 25(1)(c). It is interesting to note that the evidence lead by him related only to the issue. The only notices he referred to again related only to this issue and at no stage of his address was clause 25(1)(b) ever mentioned.
>
> As I have already pointed out, it is common ground that no one relied on total suspension of the contract or termination under clause 25(1)(a).
>
> I therefore find that the respondents [appellants] relied only on clause 25(1)(c) on the question of termination in presenting their case to me."

The alleged misconduct.

From the facts which their Lordships have so far recounted, there can be not the slightest justification for any suggestion of misconduct by the arbitrator, either by his failing to observe the rules of natural justice during the remission hearing or at all. The basis for the complaint made arises in these circumstances. During the course of the remission hearing, Mr. Selvadurai maintained that he was handicapped in that, as he had not appeared as counsel at the earlier hearing before the arbitrator, the only notes which he had of the evidence were the

notes, to which their Lordships have earlier referred, of the first part of the arbitration. He therefore applied to the arbitrator for the arbitrator to make available to him the balance of his notes. The arbitrator following the appropriate practice, (see *Tersons Limited v. Stevenage Development Corporation* [1965] 1 Q.B. 37) had not exhibited his notes of evidence to his interim award. He therefore felt, and so stated, that he was precluded from complying with Mr. Selvadurai's request. In forming this view he was clearly wrong.

The issue at the remission hearing was directed to whether or not the appellants had limited their case to clause 25(1)(c). This depended upon what had taken place before him during the arbitration. In their Lordships' judgment he was clearly at liberty, if he had been so minded, the matter being entirely for him to decide, to provide the parties with copies of his notes in order to assist in the resolution of that issue. He was under no duty to supply copies of his notes. However the fact that he misunderstood his entitlement to show the parties his notes, does not of itself result in any unfairness or in any failure to observe the rules of natural justice, this being the basis of the misconduct asserted. He had already provided the parties with a note of what he viewed as the most important aspect of what had occurred before him when the arbitration took place, namely a note of Mr. Karthigesu's opening. The balance of the notes he had withheld not merely from the appellants but from both parties. He had thus acted even-handedly. He had allowed the appellants to mitigate their self-induced difficulties caused by changing counsel so to speak "in mid-stream" by allowing Mr. Karthigesu to be present and to provide any information and assistance which could advance the appellants' contentions. Moreover, if Mr. Cresswell's instructions are correct, and Mr. Karthigesu's letters referred to above were not put before the arbitrator, then the appellants enjoyed a significant advantage to which they were not entitled. As to the merits of his decision their Lordships can detect no hint of unfairness, it being entirely consistent with Mr. Karthigesu's own statement in his letter of 15th October that as the case progressed and in his opening and concluding addresses he confined himself to the notices and the facts and circumstances to bring the case solely within clause 25(1)(c).

For the reasons they have given, their Lordships dismiss the appeal with costs.