FOOTWEAR MANUFACTURERS LIMITED

v.

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NEW INDIA ASSURANCE COMPANY LIMITED

[HIGH COURT, 1998 (Scott J) 4 September]

Civil Jurisdiction

B *Arbitration- stay of proceedings pending adjudication by the arbitrator- no stay to be granted where no defence to all or part of the claim. Arbitration Act (Cap 38) Section 5.*

The High Court HELD: that where there is an application for a stay of all or part of the proceedings pursuant to a *Scott v. Avery* clause in a contract and a cross application for summary judgment it is a sensible practice to hear both applications at the same time since the success of one application will ordinarily determine the fate of the other.

C

Cases cited:

Baltimar Aps Ltd v Nalder & Biddle Ltd [1994] 3 NZLR 129
D *Pitchers Ltd v Plaza (Queensbury) Ltd* [1940] 1 All ER 151
Royal Oak Mall Ltd v Savory Holdings Ltd (C/A 106/89)
S.L. Sethia Liners v State Trading Corporation of India Ltd [1986] 2 All ER 395

Interlocutory applications in the High Court.

E *B.C. Patel* for the Plaintiff
H.K. Nagin for the Defendant

Scott J:

As their names suggest the Plaintiff is a manufacturer of footwear while the Defendant in an insurance company.

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On or about 28 October 1996 there was a fire at the Plaintiff's factory. The buildings, plant and stock, all of which were covered by a policy of insurance with the Defendant suffered extensive damage said by the Plaintiff to amount altogether in value to $544,667.50 which was claimed from the Defendant under the policy.

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In March, April and July 1997 the Defendant made three part payments amounting in all to $150,000 under the policy but the balance of the claim remains unsatisfied.

On 24 December 1997 the Plaintiff commenced proceedings by writ seeking payment of the balance of the claim together with interest.

On 23 January 1998 the Defendant, relying on a Scott v Avery clause in the policy of insurance, a copy of which was exhibited to a supporting affidavit of Jain Prasad filed on the same day, applied for an order that the proceedings be stayed and the dispute referred to arbitration pursuant to the provisions of Section 5 of the Arbitration Act (Cap 38) (the Act).

On 12 August 1998 the Plaintiff filed its own application for summary judgment against the Defendant for the sum of $243,059.00 plus interest. This application, brought under the provisions of RHC O 14 was supported by the affidavit of Upendra Kumar Amin filed on the same day. There was a final affidavit in opposition by Jain Prasad filed on 21 August.

On 25 August both Mr. Patel and Mr. Nagin appeared. The stay application was listed by me for hearing on that day and the O 14 application had been fixed for hearing by the registry on the same day. These details are relevant because at the commencement of the hearing Mr. Nagin told me that he had taken the view that to file any answer to the O 14 application would have amounted to taking "a step in the proceedings" within the terms of Section 5 of the Act and that therefore he was only ready to argue the stay and not the O 14 application. In my opinion although the filing of an affidavit would indeed amount to a step in the proceedings (see Pitchers Ltd v Plaza (Queensbury) Ltd [1940] 1 All ER 151) such a step would have been one taken *after* an application had been made to stay the proceedings and would accordingly not have been caught by the section. Furthermore, as pointed out by Mr. Patel the Plaintiff had indicated on 17 August 1998 (Exhibit G to Jain Prasad's affidavit) that it would not take the point against the Defendant and in addition the wording of the application as issued by the Court on 12 August made it clear that the O 14 application would be heard on 25 August.

In support of the stay Mr. Nagin emphasised that the effect of a Scott v Avery clause is to deprive a claimant of a right of action in respect of any differences between the parties until such differences have been adjudicated upon by an arbitrator (see (1856) 25 LJ Ex 308; 5 HLC 811). Rather than merely asking for a stay the Defendant could have moved to strike out the Statement of Claim in its entirety. Meanwhile, preparations for the arbitration were well advanced and there was everything to be said for allowing them to proceed to fruition.

In answer, Mr. Patel argued that it was clear from the evidence and in particular the part payments made, the final sentence of paragraph 12 of Jain Prasad's second affidavit, paragraphs 11 & 12 and Exhibit E & F to Upendra Amin's affidavit that there was no genuine dispute that at least $195,643.21 was owed by the Defendant to the Plaintiff. He suggested that the only reason that the Defendant was withholding payment of what was undoubtedly due was to exert pressure on the Plaintiff to settle for less than its due. Since there was no genuine dispute as to the sum it was submitted that to that extent the Scott v Avery clause could not avail the Defendant since there was in that regard nothing to arbitrate.

Mr. Patel's general approach (which was set out in a learned comprehensive written submission filed at the date of the hearing) was to invite me to follow the current domestic arbitration practice in England which was referred to in Baltimar Aps Ltd v Nalder & Biddle Ltd [1994] 3 NZLR 129 at 134:

> "Where the claimant contends that the defence has no real substance the Court habitually brings on for hearing at the same time the application by the claimant for summary judgement and the cross application by the defendant for a stay, it being taken for granted that the success of one application determines the fate of the other". (See also S.L. Sethia Liners v State Trading Corporation of India Ltd [1986] 2 All ER 395, 396-397).

As held by Casey J in Baltimar Aps the English practice of enquiring into the reality of the defence on cross applications for stay and summary judgment which was adopted by the New Zealand Court of Appeal in Royal Oak Mall Ltd v Savory Holdings Ltd (C/A 106/89) has no application in international arbitration but otherwise it is really but one consequence of the discretion vested in the Court by the wording of the equivalent New Zealand enactment namely Section 5 of the Arbitration Act 1908 which in all material respects is identical to our own Fiji Act. Although the English decisions cited by Mr. Patel approving this course apparently reflect the slightly narrower form of words in the English Arbitration Act 1975 they, together with the adoption by the New Zealand Courts of the same practice, are in my opinion good authority for the course which should be followed in Fiji.

On the materials before me I was satisfied that there was no *bona fide* dispute that at least $194,643.21 was in fact owed by the Defendant to the Plaintiff. To that extent therefore I refused the Defendant's application for a stay but granted the stay in respect of the balance.

Having delivered this ruling on the stay application Mr. Patel then moved his application for summary judgment. In addition he sought interest on the sum claimed from the date of the assessment relied on (16 July 1997 - Exhibit E to Upendra Amin's affidavit) to date. He also asked for the costs of the applications and invited me to assess them under the provisions of RHC O 62 r 7(4)(b). Given the nature of the application, their subject matter and the legal research involved he asked for $1250.

In answer, Mr. Nagin suggested that the O 14 application should be heard on another day. For reasons already outlined I rejected that submission. Mr. Nagin then advanced no further argument as to the sum of $194,643.21 but suggested that the claim for interest should also referred to arbitration. I do not accept that proposition; in my view the claim for interest is incidental to that part of the claim which I had previously held not to be in dispute and therefore is not subject to stay and arbitration.

In the absence of further submissions or evidence to the contrary it follows

In the absence of further submissions or evidence to the contrary it follows from my finding on the stay application that I am satisfied that there is no arguable defence to the claim for summary judgment for $194,643.21 and there will be an order accordingly. A

I am also satisfied that interest having been claimed in the Statement of Claim the Plaintiff is entitled to interest on the sum agreed. The rate of 11% seems to me to be reasonable.

As to costs (upon which Mr. Nagin advanced no argument) I think the sum claimed, given the applicable scale rates, is a little high. The costs are accordingly assessed at $1,000.00 B

(Stay refused; summary Judgment in favour of the Plaintiff.)