L & M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd [2000] SGHC 166

Case Number : Suit 600131/2000

Decision Date : 11 August 2000

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : S Bhaskaran (J Koh & Co) for the appellants/plaintiffs; Ramalingam Kasi (Raj Kumar & Rama) for the respondents/defendants

Parties : L & M Concrete Specialists Pte Ltd — United Eng Contractors Pte Ltd

Arbitration – Agreement – Incorporation of arbitration clause into contract – Main contractor alleging to incorporation of arbitration clause into contract – Whether clause incorporated – Waiver of arbitration clause – Party wanting to rely on arbitration clause previously commencing action in court – Whether right to arbitration waived

Contract – Contractual terms – Arbitration clause – Whether arbitration clause incorporated into contract

: This was an appeal by the plaintiffs (`L & M`) against the order of the assistant registrar dismissing L & M`s application for a stay of the defendants` (`United Eng`) counterclaim. This application was made under s 7 of the Arbitration Act (Cap 10) (referred to as the `Act`). At the material time, L & M were the main contractors and United Eng were the subcontractors for two building projects, namely, the `Hilltop Project` and the `Sinsov Project`. Both projects have since been completed. L & M`s claim against United Eng in this suit is in respect of structural rectification works carried out at Hilltops Apartment (`Hilltop Project`).

This action is a continuing saga in a series of actions in court between the parties. On 2 September 1998 it was United Eng who filed a claim against L & M (in Suit 1523/98) for the unpaid balance sum in respect of the `Hilltop Project`. L & M sought a stay of proceedings on the ground that there was a binding arbitration clause in the `Standard Subcontract` referred to in a Letter of Award dated 11 October 1996 purportedly agreed by parties. The assistant registrar granted the application for stay. United Eng appealed before GP Selvam J who allowed the appeal on the ground that the contract between parties made no reference to the arbitration clause which L & M were seeking to rely on. The Letter of Award which was the purported written agreement between parties and the standard conditions were in such a form that they required the signatures of the parties to signify their agreement to all the terms by signing them. These two documents were never signed by United Eng and they were therefore not bound by them (see **United Eng Contractors Pte Ltd v L & M Concrete Specialists Pte Ltd** [2000] 2 SLR 196).

Subsequently, the matter went for trial and, on 4 February 2000, judgment was entered in favour of United Eng. L & M`s counterclaim was struck out (for want of particulars in their pleadings) with liberty to file a fresh suit. Consequently, to restore that counterclaim, L & M filed this present suit against United Eng. As part of its defence to this claim, United Eng raised a counterclaim for moneys due to them by L & M in respect of the `Sinsov Project`.

For the purposes of this appeal, the relevant contract between parties is that relating to the `Sinsov Project`, namely, the Letter of Award (`LOA`) dated 23 September 1996. It was not disputed that United Eng accepted the LOA with minor amendments and duly signed on every page of the LOA and the accompanying Annexure (detailing the scope of work and the agreed prices) referred to therein. It was also not disputed that although the LOA referred to the `Standard Conditions of Subcontract`,

that document was never given to United Eng. Neither was it disputed that this latter document was not signed or executed by the parties. The arbitration clause relied upon by L & M is found in cl 17 of the `Standard Sub-Contract (Domestic) For Labour and Materials`. This document was also an unsigned document. There is neither any reference to arbitration in the LOA or the accompanying Annexure.

The application by L & M before the assistant registrar to stay proceedings was made under s 7 of the Act which provides that the court has the power to stay any legal proceedings provided that first, there is a valid and binding arbitration agreement between the parties; and, secondly, the applicant had not taken any other steps in the proceedings.

Further, under s 7(2) of the Act, the court has to be satisfied that the applicant was at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration before an order for stay of proceedings can be made.

The two issues before me in this appeal were, first, whether the arbitration clause in L & M`s standard form contract had been incorporated into the contract with United Eng, and secondly, if so, had L & M waived their rights under that clause. Mr, Rama, counsel for United Eng, submitted that United Eng were unaware of the arbitration clause referred to in the `Standard Conditions of the Subcontract` at the material time and cannot therefore be bound by it. He argued that there must be incorporation of the arbitration clause specifically in the LOA, rather than the mere reference of the existence of another document, namely, the `Standard Conditions of Subcontract` as in the present case (see **Manchaster Trust v Furness** [1895] 2 QB 539).

To this end, Mr Rama relied on ***Halsburys` Laws of Singapore `Arbitration`*** , which recites the proposition that a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract. He further added that as an arbitration clause in a contract is considered a separate and independent agreement, words of its incorporation must be specific. An example of specific words to be incorporated, as in the case of **The Merak** [1965] P 223[1965] 1 All ER 230, are as follows

> *`including the arbitration clause` or `all the terms, conditions, clauses, and exceptions including cl 31 ...` (being one which contains the arbitration clause).*

In the English case of ***The Varenna*** ; **Skips A/S Nordheim & Ors v Syrian Petroleum Co Ltd & Anor** [1984] QB 599[1983] 3 All ER 645, the Court of Appeal there held that whilst general words of inclusion may be sufficient to incorporate terms referred to in another document as part of the contract, an arbitration clause being a collateral agreement cannot be so incorporated. This case concerned conditions contained in a charterparty contract which were to be referentially incorporated into a bill of lading and it was held that such conditions to be incorporated were only limited to conditions under which the goods were to be carried and delivered and did not extend to a collateral term such as an arbitration clause. It is also one of the more recent ones in a long line of admiralty cases tracing back to **TW Thomas v Portsea SS Co Ltd** [1912] AC 1.

Mr Bhaskaran for L & M argued otherwise, referring to the case of **Extrudakerb (Maltby Engineering) Ltd v White Mountain Quarries Ltd** [1996] CLC 1747[1996] NI 567[1997] ADRLJ 262. In that case the plaintiff there commenced work pursuant to the defendant`s letter (dated 12 April 1994) which stated, among other things, that the subcontract `will be FCEC form of sub- contract`. Both parties were familiar with this standard form of contract and with the fact that it contained an

arbitration clause. The plaintiff commenced proceedings claiming payment for work done. The defendant sought a stay to arbitration under s 4 of the Arbitration Act (NI) 1937and the master ordered a stay. The plaintiff appealed on the ground that the subcontract did not incorporate an arbitration agreement. Caswell LJ of the High Court of Northern Ireland held at p 269 that the court must be fully satisfied that it was indeed the intention of the parties to incorporate the arbitration clause into the contract, and it would require very clear language to evince that intention. By reason of the requirement that arbitration agreements have to be in writing, the nature of such contracts being self-contained, and that clear language is required for them to be incorporated into a contract, it does not seem to follow that they must be specifically referred to in the contractual documents. Caswell LJ approved the following passage from **The Annefield** [1971] P 168 at p 173:

> *Secondly, it is not necessary, in order to effect incorporation, that the incorporating clause should refer expressly to the arbitration clause. General words may suffice, depending on the terms of the latter clause.*

This passage was also approved by Gibson LJ in ***Aughton Ltd v MF Kent Services*** 57 BLR 1. Caswell LJ clearly preferred the approach by Gibson LJ and Brandon J (in the ***Annefield*** case) to that of Megaw LJ in ***Aughton Ltd*** who, adopting the admiralty cases, held that distinct and specific words are required to incorporate an arbitration clause into a contract. The approach taken by the admiralty courts is founded on two grounds. First, the admiralty cases concerned the incorporation of the arbitration clause contained in a charterparty into the bill of lading. The fact that the bill of lading is akin to a negotiable instrument made it more odious to incorporate a term (using general words) from an unrelated contract between two possibly different parties into such an instrument which is likely to bind third parties who have no knowledge of the charterparty terms. Secondly, as Lord Gorell indicated in his judgment in the ***Portsea*** case (at p 9), the effect of an arbitration clause is to oust the jurisdiction of the court, and `very clear and precise language should be introduced into any contract which is to have that effect`.

Mr Bhaskaran submitted that United Eng have not shown to the contrary that there was any other document that L & M could be referring to other than the one in Chew`s affidavit filed on 11 May 2000 since United Eng never disputed or asked for a copy of the same. L & M`s intention was to incorporate the standard terms of the `Standard Sub-Contract (Domestic) For Labour and Materials`, which have been used for all L & M`s subcontracts in all cases. Counsel suggested that both documents (ie the LOA and the `Standard Sub-Contract (Domestic) For Labour and Materials`) were drafted by the lay clients themselves, they would not have known of the legal implications of not referring to the same documents by specific wordings. This point fails to persuade me. It is no more than the oft-rejected `ignorance of the law` plea.

Mr Bhaskaran submitted that as United Eng have signed the LOA, they were deemed to have accepted the terms contained therein including the `Standard Conditions of Subcontract` which according to L & M was really the `Standard Sub-Contract (Domestic) For Labour and Materials`. He cited the case of **Smith & Anor v South Wales Switchgear Co Ltd** [1978] 1 All ER 18[1978] 1 WLR 165. In this House of Lords decision, the contract was formed by several documents, one of which was a purchase order which made reference to general conditions of a particular contract, obtainable on request from the respondents there. There were three different versions of conditions, which existed at the material time. The original version was headed ` ***General Conditions of Contract (24001)*** ` and the later versions bore the same heading with the addition of ` ***revised January 1969*** ` and ` ***revised March 1970*** ` respectively. It was held that the original (unrevised) version had been incorporated into the purchase order as it was the only one that precisely fitted the description in the purchase order which made no mention of ` ***revised January 1969*** ` or ` ***revised***

March 1970 `. Further, the reference in the purchase order clearly showed that the respondents intended to include the general conditions in the contract. The appellants did not raise any objection to their incorporation, or question the terms. In fact, the appellants proceeded to carry out the work upon receipt of the copy of the January 1969 version. Thus Mr Bhaskaran submitted that L & M`s case presently was even stronger than the ***South Wales Switchgear*** case.

Mr Rama countered by pointing out that the general conditions referred to in the purchase order in the ***South Wales Switchgear*** case did not require execution of any sort unlike the present case. Even if the `Standard Conditions of Subcontract` sought to be incorporated by L & M into the LOA was to be a `standard` subcontract as claimed by L & M`s counsel, then `1996` should not be printed in the so-called subcontract as L & M have been in existence even prior to 1996.

In respect of the second issue, Mr Bhaskaran submitted that L & M have not taken any steps in the proceedings, as notwithstanding that they have filed a reply and defence to counterclaim, they have nonetheless specifically stated in the defence to counterclaim that the defence was filed `without prejudice` to L & M`s right to refer the matter to arbitration.

Further, he submitted that L & M only took out an originating summons (478/98) application but that related to delivery of documents which were not relevant to the present suit since it concerned a claim for (mainly) labour and materials. In addition, he did not think that it was appropriate to appoint an arbitrator solely to resolve the issue of the delivery of documents. Mr Rama responded by saying that the taking out of the originating summons application constituted a step in the proceedings and that L & M have waived their rights to arbitration.

Lastly, Mr Rama submitted that the power to grant a stay is discretionary as s 7 of the Act states that the court `may` order a stay. He urged this court to consider the fact that United Eng are facing a winding up order and 30 to 40 of its creditors have agreed to a stay of those proceedings pending the resolution of this matter. Judgment was received from L & M pursuant to the claim with respect to the `Hilltops Project` in Suit 1523/98 after a trial before Lai Kew Chai J. A scheme of arrangement has consequently been put into place. United Eng want to expedite the matter so that their creditors can be paid and the whole matter concluded. United Eng have also appealed against part of the decision of Lai Kew Chai J in respect of the judgment sum awarded as well as L & M`s counterclaim which ought to have been dismissed rather than struck out with liberty to L & M to commence a fresh suit, which is the present suit. That appeal has yet to be heard.

I now revert to the main issue before me, namely, whether the arbitration clause had been properly and adequately incorporated into the contract. I shall first address the point concerning the conflict of English authorities. In principle it is not easy to disagree with Caswell LJ`s opinion that if general words sufficiently reflect the parties` intention to incorporate an arbitration clause into their contract then those words must be given their full effect. The difficulty comes in putting principle to practice; in determining the adequacy of the words used in each case. Although nowadays other forms of dispute resolutions are no longer perceived as a threat to the court`s jurisdiction, recourse to the courts remain the default route for anyone seeking to assert his legal rights. Any agreement to change or deviate from this avenue must be explicit, and in my view, arbitration clauses like exemption clauses, must be expressly brought to the attention of the other contracting party; or as Lord Denning emphasized (in his usual colourful way) in **Thornton v Shoe Lane Parking Ltd** [1971] 2 QB 163, 170, `In order to give sufficiency of notice, it would need to be printed in red ink with a red hand pointing to it - or something equally startling`. The admiralty courts have come to exact the same degree of strictness where arbitration clauses are concerned. On my part, I prefer this approach (and that of Megaw LJ in the ***Aughton*** case), and respectfully disagree with Caswell LJ.

The position of the appellant in the present case before me is, in any event, far weaker than that of the respective parties in the cases cited to me. Counsel had not satisfied me that the document L & M relied on was the document referred to in the contract. In this case, the contract (LOA) referred to the `Standard Conditions of Subcontract`. The arbitration clause, on the other hand, was in a document called `Standard Sub-Contract (domestic) For Labour and Materials`. There is no evidence before me that these two documents are one and the same. I am, therefore, of the view that the learned assistant registrar was correct in holding that the arbitration clause was not incorporated into the contract.

I turn now to the question of whether L & M had taken a step in the proceedings such as to be taken as a waiver of their right to arbitration. United Eng`s case is that L & M had committed themselves to proceedings in court because on 27 April 1998 they (L & M) had taken out an application by way of OS 478/98 in which they sought various orders including the delivery up of documents pertaining to the `Sinsov Project` which is the subject matter of this current counterclaim by United Eng. That originating summons was heard by Lai Siu Chiu J who made no order on the application but ordered L & M to pay costs of $2,000.

Mr Bhaskaran submitted that the question must be answered with reference to the present proceedings only and taking a step in 1998 in another proceedings, is therefore, irrelevant. In my view, the correct way to consider at this point is to see whether the originating summons taken out in 1998 related to a matter of dispute or reference. If it did, then under the said arbitration clause, the parties must first try and resolve the matter amicably. If they fail, one party may notify the other in writing that in view of the failed settlement attempt, they are proceeding to arbitration. It will be seen, therefore, that if a party disregards the protocol set out in the disputed arbitration clause by commencing an action in court, he is deemed to have waived his right to arbitration. I would rule that once this step is taken, the arbitration clause is no longer binding if the other party accepts it by contesting the action (as United Eng did). It is thus no longer pertinent to enquire whether there is any further step taken by L & M in response to United Eng`s counterclaim. I do not think that parties can invoke the arbitration clause as and when they please. Once an election has been made and accepted, the parties may resort to arbitration again only by a subsequent consensus. Thus, on this ground, L & M`s appeal would also fail.

For the reasons above, the appeal is dismissed. I will hear the question of costs on another date if parties are unable to agree between themselves.

Outcome:

Appeal dismissed.

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