Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd
[2000] SGCA 14

Case Number : CA 85/1999

Decision Date : 21 March 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; L P Thean JA

Counsel Name(s) : Lawrence Teh (Rodyk & Davidson) for the appellants; John Chung and Sharon Tay (Donaldson & Burkinshaw) for the respondents

Parties : Hong Huat Development Co (Pte) Ltd — Hiap Hong & Co Pte Ltd

Arbitration – Award – Leave to appeal against award under s 28 – Appeal against refusal to grant leave – Time limit for applying for leave – Point from which time begins to run – Publication of award – Extension of time for leave to appeal – Principles applicable -Reasons for delay – Prospects of success – SIA standard – Substantial rights affected – Prejudice – ss 28(2), 28(3) & 28(7) Arbitration Act (Cap 10, 1985 Ed) – O 69 rr 2(2) & 4(2) Rules of Court (1997 Rev Ed)

Arbitration – Award – Setting aside – Misconduct of arbitrator – Prolonged delay in delivering award – Deficiencies in award and reasoning

Contract – Contractual terms – Building contracts – SIA standard conditions – Implied term – Employer's duty to ensure proper discharge by architect of certification duties – Nature and extent of implied duty – Whether premised on knowledge that architect was in default

Words and Phrases – "Substantially affect the rights" – s 28(2) Arbitration Act (Cap 10, 1985 Ed) – "After an award has been made and published to the parties" – O 69 r 4(2) Rules of Court (1997 Rev Ed)

(delivering the judgment of the court): This is an appeal against the decision of the High Court refusing to grant an extension of time for the filing of an application for leave to appeal against an arbitration award and refusing to set aside the award on the ground of alleged misconduct on the part of the arbitrator.

The facts

The facts giving rise to the issues forming this appeal are largely undisputed. The appellants were the owners of a six-storey shopping centre development situated along Upper Serangoon Road. The respondents were the main contractors. Building works commenced in 1979 pursuant to a written agreement between them dated 27 January 1979 (`the contract`) at a price of $10,243,091.26. The contract incorporated, inter alia, the 1979 Singapore Institute of Architects Standard Conditions of Building Contracts (`the SIA Conditions`). Clause 34 provides for the reference of any dispute arising under the contract to arbitration.

During the course of and at the conclusion of the building project, disputes arose between the parties over, inter alia,

(a) the proper amounts recoverable under the final certificate;

(b) the delayed issuance and honouring of interim certificates under cl 30(1);

(c) excessive deductions of retention sums in those interim certificates under cl 30(2);

(d) the late release of the retention sums upon practical completion and the expiration of the defects liability period under cl 30(4)(b) and (c);

(e) the late release of the final certificate under cl 30(6).

The disputes were referred to an arbitrator, Raymond Kuah (`the arbitrator`), an architect nominated by the Singapore Institute of Architects in accordance with cl 34(1). The arbitrator accepted his appointment on 4 October 1986. The hearing before the arbitrator was completed by 18 March 1988. Nothing further was heard from the arbitrator despite several requests from the respondents for an indication when the award would be published. Some two years later, on 15 June 1990, the arbitrator requested that a quantity surveyor be appointed to assist him on certain aspects of valuation. The parties agreed to this at a meeting on 29 June 1990, and a quantity surveyor was appointed.

Some three years later, on 30 August 1993, the arbitrator wrote to the parties stating that he had received the final accounts from the quantity surveyor and consequently he would be able to publish his award by the beginning of October 1993 latest. Unfortunately, nothing more was heard from him for more than five years, despite requests and reminders. Eventually, on 24 December 1998, the arbitrator wrote to the parties stating that he had made the arbitration award and that this would be released or delivered to either party upon payment of the balance of his fees amounting to $47,516. The appellants received this letter only on 29 December 1998.

Discussions ensued between the parties as to whether they would share the arbitration fees equally. No agreement was reached. On 8 March 1999, the respondents on their own paid the fees to the arbitrator, obtained the award and forwarded a copy of it to the appellants` solicitors the same day. The award was in favour of the respondents, granting them substantially all the reliefs they had sought, subject to a substantial reduction on the claim under the final certificate.

The appellants did not dispute the award relating to the final certificate and had paid the adjudicated sum of $351,642.06 due to the respondents. One of the other sums which the arbitrator awarded to the respondents was the sum of $397,788.78, being the losses suffered by the respondents on account of the late issue by the architect of the interim certificates and the late honouring by the appellants of the interim certificates. His reasons for holding the appellants liable for the default of the architects in promptly issuing the interim certificates are:

> *Indeed, where an architect`s engagement involves a standard form of building contract with a procedure for the issuing of certificates of payment, there is an implied term between the employer and the architect that the architect will exercise his certification functions according to the terms of the contract; and he would do all things necessary to enable the contractor to carry out the works, and the employer is thus liable for any breach of this duty on the part of the architect. Where the contract provides that an architect has power to certify as to such matters as interim payments, he must be neutral in that he must act fairly and impartially as between the employer and the contractor.*

There are also three other sums awarded by the arbitrator to the respondents which would appear to be based substantially on the same ground. First is an award for $1,799.70, being damages suffered by the respondents because the architect had issued several interim certificates which allowed greater amounts to be deducted as retention money than was permissible under cl 30(3) of the contract. Second is an award of $26,351.40, being the damages suffered by the respondents due to the architect`s failure to issue a certificate under cl 30(4)(b) for one moiety of the total amount

retained by the appellants on the issuance of the certificate of practical completion and to issue a certificate for the residue of the amount retained by the appellants as prescribed in cl 30(4)(c). Third is an award of $176,210.50, being damages suffered by the respondents due to the architect`s failure to issue the final certificate before the expiration of the period of three months from the end of the defects liability period.

In respect of all the sums awarded to the respondents, interest at 8% per annum was ordered to be paid from the commencement of arbitration to the date of payment.

The appellants are dissatisfied with, inter alia, the determination of the arbitrator that they are liable for the default of the architect in not certifying the interim certificates in accordance with the contract. Thus, on 9 April 1999 they filed a notice of originating motion seeking leave to appeal against the award under s 28(2) of the Arbitration Act (Cap 10) (`the Act`) on, inter alia, these questions of law:

(a) whether a term may be implied into the contract that the appellants (as employers) had an obligation to ensure the proper discharge by the architect (appointed by the employer-appellants) of his duties as prescribed under the SIA Conditions of the contract;

(b) whether, consequently the appellants were in breach of this implied term and thus liable for the losses suffered by the respondents as a result of the late certification by the architect; and

(c) whether, if the appellants were liable for the various losses awarded to the respondents, upon a proper exercise by the arbitrator of his discretion, the appellants are also liable for the interest on the sums awarded from the date of the commencement of the arbitration to the date of payment.

The appellants contended that no such term could be implied into the contract in the circumstances. Further, the legal question concerned a clause in the SIA Conditions which are widely used in the construction industry here. The resolution of this question is necessary in the interest of commercial and legal certainty. An alternative remedy prayed for in the Motion was for the entire award to be set aside on the ground of misconduct on the part of the arbitrator. The inordinate delay in the publication of the award demonstrated that the arbitrator was incapable of conducting the proceedings in a competent and expeditious manner. The delay was also seriously prejudicial. However, the respondents refuted all these arguments.

The decision below

The learned judge below appears to deal with the Motion on the basis that it was principally an application for an extension of time to file an application for leave to appeal under s 28(2) of the Act. He therefore considered and applied the following factors as enunciated in **Chen Chien Wen Edwin v Pearson** [1991] SLR 212 [1991] 3 MLJ 208 - the length of delay, reasons for the delay, the chances of the appeal succeeding if the extension were granted and the degree of prejudice to the respondents if this was done.

On the first factor, he considered the delay too long as the prescribed time frame under the Rules was 21 days. Secondly, the learned judge felt that no good reasons were given for the delay. Third, the court considered that it was clear as a matter of law that a term could be implied into the contract that the appellants as employers were liable for breaches on the part of the architect in the discharge of his certification duties, albeit that findings of liability thereupon were rare. In addition, the appellants were themselves also in default when they failed to honour the interim certificates

issued within the specified time. Thus, they had not made out a strong prima facie case that an appeal would succeed. Finally, on the question of prejudice to the respondents, the learned judge observed that that was `very much in the background`. He refused any extension of time to apply for leave and dismissed the whole Motion.

The appeal

The appellants challenged the entire decision of the court below. The issues they canvassed before us fall under the following heads. First, what is the time limit on an application for leave to appeal under s 28(3) of the Act. Second, from which event did that time run. Third, did the learned judge err in exercising his discretion to dismiss the application for extension of time and thus implicitly refusing leave to appeal. Fourth, should the award nevertheless have been set aside on the ground of the arbitrator`s misconduct.

A preliminary objection

A preliminary objection was raised by the respondents on this appeal. They contended that pursuant to s 28(7) of the Act leave must be obtained before this appeal may be brought. Section 28(7) provides that no appeal shall lie to the Court of Appeal from a decision of the court on an appeal under s 28 unless the court or the Court of Appeal (a) gives leave and (b) considers the question of law as one of general public importance or for some other special reason should be considered by the Court of Appeal.

In our opinion this contention is misconceived. By the wording of that subsection, it applies only to a decision on an appeal, and not on an application for leave to appeal. This was the position in England prior to the introduction of s 1(6A) of the Arbitration Act 1979 in 1981, which provided that the latter type of appeal could only be brought with the leave of the High Court. Singapore has not adopted what is in the English s 1(6A). The cases, **The Nema; BTP Tioxide v Pioneer Shipping Ltd** [1980] QB 547 at 564 (CA) and **The Rio Sun; Italmare Shipping Co v Ocean Tanker Co Inc** [1982] 1 All ER 517[1982] 1 WLR 158 (CA), are pertinent.

The time limit within which the application for leave ought to be brought

Section 28(3) of the Act provides that leave of court is required to appeal against an award under an arbitration agreement unless the consent of all the parties to the reference is obtained. The section itself does not provide the time limit within which the leave application or the notice of appeal has to be filed. However, O 69 r 4(2) of the Rules of Court provides that in respect of an appeal under s 28(2), the notice must be served and the appeal entered within 21 days after the award has been made and published to the parties, provided that where reasons material to the appeal are given on a date subsequent to the publication of the award, the time period shall run from the date on which the reasons are given. This rule does not say anything about the time period for filing an application for leave. But in O 69 r 2(2) it is provided that the notice of appeal may be included in the application for leave to appeal, when leave is required. The learned judge relied on this rule to say that the application for leave must also be made within 21 days of the award.

The appellants contended that the judge was wrong to interpret the rules in that way. Rule 2(2) uses the phrase `may be included` and is therefore only permissive. The appellants submitted that s 53 of the Interpretation Act (Cap 1) should apply, namely, the leave application should be made with all

convenient speed, which was the case here. The appellants argued that 21 days were too short to do a proper evaluation to determine whether to appeal against the adverse award and also to seek leave. Indeed, the appellants said that in practice it would be impossible to meet this deadline.

In support of their arguments, the appellants cited **Mebro Oil SA v Gatoil International Inc** [1985] 2 Lloyd`s Rep 235. But the decision in that case rested on the amended O 73 of the English Rules of the Supreme Court which came into operation on 1 October 1983 and which provided two distinct procedures for applications for leave and appeals. We do not think that decision is really of much assistance to us. The English rules before 1 October 1983 were the same as those now prevailing here. However, in ***Mebro Oil*** Bingham J (as he then was) did make some observations on the previous English rules and they are certainly germane to our present case. This is what he said:

> *Under these rules it was plain that both the application for leave to appeal and the appeal itself were to be brought before a single judge in court by originating motion. The rules further showed the intention that challenges to arbitral awards should be made within 21 days of publication of the award ... Some doubt was felt whether the 21 day limit applied to applications for leave to appeal, since the rules did not expressly say so, but this was at that stage* ***an almost entirely academic question: since the application for leave and the appeal had to be brought by originating motion, and since they could be combined in one document, thereby saving an additional fee, and since the appeal was undoubtedly subject to the time limit, the obvious and sensible practice was to include the application and the appeal in one notice of originating motion so that the appropriate time limit, if any, for the application for leave never fell to be decided.*** *[Emphasis added.]*

What was an academic issue in ***Mebro Oil*** is now a real issue before us. In our opinion, the time limit of 21 days applies to the appeal proper as well as the application for leave to appeal. Conceptually, leave must come before the appeal proper may be filed. And if the rules provide that an appeal must be filed within 21 days, we do not see how it can be argued that leave may be applied for even after the period prescribed for the filing of an appeal. We feel it is probably due to this reason that r 2(2) provides for a rather practical and expedient solution to the problem, which is permitting the inclusion of a notice of appeal in the application for leave. Otherwise, it would mean that there would have to be two steps: filing of an application for leave as well as a notice of appeal, which notice would become ineffectual unless leave is granted.

In passing, we have to mention that the appellants have asserted that 21 days were in any event insufficient for them to assess the case in order to determine whether to take the matter further on appeal. Rule 4(2) allows a party the option of asking for an extension of time if he can show grounds for doing so. We shall come back to this a little later.

The point at which time under O 69 r 4(2) begins to run

The next issue concerns the words `after the award has been made and published to the parties` in O 69 r 4(2). Since the case **Brooke v Mitchell** [1840] 9 LJ Ex 269, it has been accepted that an award is made and published when the arbitrator gives notice to the parties that the award is ready for collection. The appellants have urged us not to follow that rule. They contended that `made and published` occurred only when the parties have notice of the actual contents of the award. They submitted that ***Brooke v Mitchell*** does not stand for such authority as Baron Alderson is reported to have said in that case that `publication ... is not publication of the award itself ... but publication to

the parties.` While the later case, ***The Archipelagos and Delfi; Bulk Transport Corp v Sissy Steamship Co Ltd*** , [1979] 2 Lloyd`s Rep 289 reaffirmed the established rule, the appellants submitted that it was based on a misunderstanding of what was decided in ***Brooke v Mitchell*** .

We are unable to accept this line of argument. The attempt to discredit the decision in ***Brooke v Mitchell*** was also made in ***The Archipelagos and Delfi*** . There is some doubt over the accuracy of the reports for the ***Brooke*** case, but Parker J in ***The Archipelagos and Delfi*** comprehensively reviewed these difficulties and came to the conclusion that on the whole, the stronger case was that the dictum of Baron Alderson quoted above was an editorial error. He refused to overthrow a practice `which had been relied on throughout the commercial world for as long as 140 years.`

It is worthwhile noting that in another report in the ***Law Journal*** , the relevant portion of Baron Alderson`s judgment is reported as: `The courts regulate their proceedings in these cases, by the Statute of Will 3, and therefore the award must be published to the parties, which means that it must be so finally settled and notified that they may make themselves acquainted with its contents, and may move to set it aside, if they think proper`. Baron Parke affirmed this formulation of the rule when he said that `the word "published" [is] to be satisfied by the award being made, and notice to the parties that it was within their reach, on the payment of just and reasonable expenses.` There is nothing to indicate that the court was otherwise than unanimous on this view. Furthermore, ***Brooke v Mitchell*** was consistent with several other earlier authorities such as ***Musselbrook v Dunkin*** (1833) 9 Bing 605; 131 ER 741, ***Macarthur v Campbell*** (1833) 5 B & Ad; 110 ER 882, the latter case even held that it was no excuse for extending time that the arbitrator`s charges were exorbitant, for the court could deal with such an arbitrator and any delay of the kind would drag the litigation unnecessarily.

The appellants further argued that delay cannot be an adequate reason for adopting the notice rule. They said that unless the parties have actual knowledge of the contents of the award, they would not be in a position to challenge the award. Furthermore, the notice rule would be too rigid as it would not be able to take into account different circumstances, such as, the parties were away when the notice was given or a party might be incapacitated at the time. In our opinion, the notice rule is to be preferred as it ensures prompt action and does not depend on the will of the parties. To hold otherwise would be inconsistent with the legislative policy underlying the reference to arbitration, namely, the expeditious resolution of arbitrated disputes and the need for finality. In a case where extenuating circumstances exist, the parties are at liberty to apply for an extension of time. Obviously, whether extension should be granted in a particular case would have to depend on how meritorious the grounds are.

Principles governing extension of time for an application for leave to appeal

The next contention of the appellants is that an application for an extension of time for leave to appeal should not have been regarded as if it were an application for an extension of time to file a notice of appeal after trial and that the learned judge was wrong to have applied the principles enunciated in ***Chen Chien Wen Edwin v Pearson*** (supra). The court below should have applied the traditional principles or the guidelines set out in **Mortgage Corp Ltd v Sandoes & Ors** [1996] TLR 751.

It is necessary to bear in mind the nature of the default in ***Mortgage Corp*** . There the plaintiffs, in an action for professional negligence, sought extension of time for the exchange of witness statements and expert reports. At the time of the hearing of that application, neither party had served its witness statements or expert reports in accordance with the rules of court or the direction

of the court. The opening remarks of Millett LJ really encapsulated the reason why in that case an extension of time should be granted:

> *an exchange of witness statements and expert reports was a mutual obligation. If neither party was ready to serve its evidence by the due date, both parties were equally at fault. Why should one party only be penalised?*

In the course of the judgment, Millett LJ also set out the guidelines (approved by the Master of the Rolls and the Vice-Chancellor) which the court in England would adopt in dealing with applications for extension of time. It is quite clear to us that those guidelines do not relate to the time limit for the filing of notices of appeal, but only as to time frames set for various interlocutory matters which have to be attended to in the course of litigation.

In fact, this court had in **The Tokai Maru** [1998] 3 SLR 105 recognised that a more stringent approach applied with respect to applications to appeal out of time as compared with other applications to extend time.

The appellants also sought to distinguish an appeal under s 28(2) from a normal appeal after a trial on the substantive merits because:

(a) the special procedure under s 28(2) does not entail a rehearing of the factual issues;

(b) the relief sought is not a complete substitution of the decision of the arbitrator;

(c) the High Court in such an appeal would only decide on the questions of law raised and remit any consequential factual issues for the arbitrator`s decisions; and

(d) in this case the questions raised were ones which the arbitrator ought to have referred to the High Court in any case in view of his lack of legal expertise.

On this last point, the appellants said there was thus in effect no adjudication on the questions of law put before the arbitrator. Consequently, they submitted that the principles applicable to extensions of time in general, as set out in ***Mortgage Corp Ltd v Sandoes*** (supra), ought to have been applied and not the principles enunciated in Pearson. They contended that the overriding principle must always be the attainment of justice.

Taking the last point first (the arbitrator should refer the legal questions to the court), we would observe that the parties never thought it fit during the arbitration proceedings to ask that the arbitrator refer the questions of law raised to the High Court. They were content to leave them to the arbitrator to decide. They very well knew the nature of those issues. Having taken no steps at all with regard to that, the appellants now complain of the arbitrator`s lack of expertise only after the arbitrator had ruled against them. It is really too late in the day to raise this point. If the arbitrator was really wrong on a point of law, the parties` recourse would be under s 28.

We also do not think that just because the scope of an appeal under s 28 is different from that of an appeal from a trial at the High Court, the principle governing the grant of extension of time to apply for leave under s 28 should be any different from those in relation to an application for extension of time to file a notice of appeal against a decision of the High Court after a trial. Both are in the nature of an appeal. Finality is critical in relation to arbitration proceedings and this was spelt out by Hobhouse J (as he then was) in **The Faith; International Petroleum Refining & Supply Sdad v**

Elpis Finance [1993] 2 Lloyd`s Rep 408 as follows:

> *The court has an unfettered discretion to extend time in any case where it considers it just to do so but the discretion has to be exercised in accordance with the principles and policy applicable to arbitration matters as stated in many cases including* ***The Nema*** *... In England we have a relatively liberal system which allows appeals on questions of law within carefully controlled limits and we entertain a range of grounds for saying that arbitrators have misconducted themselves including what we describe as technical misconduct or procedural mishap.* ***But all this was to be viewed against the fundamental principle that the parties have chosen their tribunal, that is to say, the arbitral tribunal, and have agreed to be bound by the decision of that tribunal. They have agreed that the award is to be final, subject always to any question of jurisdiction. Courts will only interfere with the decision of arbitrators within very carefully controlled limits. One of those limits is the time within which the matter may be brought before the court. If it is not brought before the court within the 21 days then an award made with jurisdiction becomes effectively final for all purposes****. This applies both ways, it applies to both parties. So, following the publication of an award, each party has to make up its mind whether it wishes to take up the award within 21 days. In making that choice they no doubt have regard to both their own position and that of the opposite party. It must be always borne in mind that the purpose of an application to the court is that the party so applying may obtain at the end of the exercise a different award from that which has originally been made by the arbitrators. [Emphasis added.]*

The principles governing the court`s exercise of its discretion to extend time to file a notice of appeal are set out in ***Pearson*** . We do not see any logic why the same principles should not apply to an application to extend time for leave to file a notice of appeal, bearing in mind that Parliament`s intention in enacting s 28 was to limit the right of appeal and promote greater finality in arbitration awards. It would be inconsistent with the object of that section if extensions of time are freely granted.

The reasons for the delay

In the light of the discussion above, the time limit of 21 days ran from the day the appellants received the notice from the arbitrator, namely, 29 December 1998. There is no dispute that that was the day the appellants got the notice. When they eventually filed the motion on 9 April 1999 the time-limit to apply for leave to appeal had long passed. We will now turn to consider the second factor identified in ***Pearson*** : the reason for the delay.

From the evidence it is clear that after receipt of the notice from the arbitrators, both parties were concerned about what they thought was the exorbitant fee demanded by the arbitrator for the release of the award. Initially, they did discuss about each party paying one-half of the fee. In addition, the parties had also discussed about a settlement, notwithstanding that the award was ready for collection. The appellants also averred that the respondents` solicitors had informed the appellants` solicitors that the time for bringing an application for leave could be extended by agreement. There was no denial of this in the respondents` affidavits. It would thus be fair to hold that such a representation was in fact made: see **Ong Chen Leng v Tan Sau Poo** [1993] 3 SLR 137 .

Obviously, the settlement negotiations did not proceed quite so satisfactorily as on 8 March 1999, the respondents decided to pay the full arbitration fee and pick up the award. A copy of the award was

extended by the respondents` solicitors to the appellants` solicitors on the same day. While the learned judge wondered about the need for settlement talk when the terms of the award were unknown, we do not think there should be anything unusual about that. Such a course would avoid the uncertainties of a long overdue award and the need to pay to pick up the award. (This is not to say that the arbitrator could not sue for his fees, subject to whatever defences that may be available because of the grossly inordinate delay, even if the award is not picked up.) In fact, in the reverse situation, where the contents of the award are known, there is probably less likelihood of any settlement talk though here again we would not say that this is impossible. We have seen settlements reached even for appeal cases just days before they were due to be heard.

Taking into account the discussions that were on-going between the parties at the time as well as the representation made by the respondents` solicitors, we think it is reasonable to infer that there was an understanding between the parties that time would not begin to run for the purpose of filing an application for leave to appeal. After all, at the time, neither party knew who was going to win or lose in the arbitral award. Of course, the implicit understanding could no longer be in operation once the respondents, on their own, obtained the award and sent it to the appellants.

Accordingly, the delay for the period until 8 March 1999 was pursuant to an understanding The appellants did not file the motion until 9 April 1999, a delay of only some 11 days, reckoning from 8 March 1999. It does not seem to us that a delay of only that magnitude is in any sense inordinate bearing in mind that the hearing of the arbitration proceedings was concluded more than ten years ago and there was some indication that the person who was handling the arbitration proceedings at the appellants was no longer with them. More time would have been needed by the appellants to review the case in consultation with their solicitors.

The prospects of success in the appeal

We now turn to the third factor: prospects of success. Even though this is an application to extend time for the filing of the application for leave, it seems to us clear that in relation to the question of `prospect of success` that must be in relation to the success of the appeal and not just the success of obtaining an extension of time to file an application for leave. Otherwise, it would make no sense. The object of the extension of time is not to obtain leave per se but to appeal.

In **American Home Assurance Co v Hong Lam Marine Pte Ltd** [1999] 3 SLR 682 , this court traced the development of the guidelines laid down by the House of Lords in **The Nema; Pioneer Shipping Ltd v BTP Tioxide** [1982] AC 724 and **The Antaios; Antaios Compania Naviera SA v Salen Rederierna AB** [1985] AC 191 on how leave should be granted in relation to the UK equivalent provision of our s 28. Under the Nema/Antaios guidelines, which this court and the High Court have consistently applied in other cases, the discretion would be exercised differently according to whether the question of law arises in the context of a `one-off` contract or clause or of a standard form contract or clause. Where the issue concerns a one-off contract or clause, the discretion should be strictly exercised and leave to appeal would normally be refused unless the judge is satisfied that the construction given by the arbitrator is `obviously wrong`. However, where the question of law relates to the construction of a standard form contract or clause, a less strict approach is taken. But two cumulative requirements must nevertheless be satisfied before the court will give leave. First, the judge must be satisfied that the resolution of the question of construction would add significantly to the clarity, certainty and comprehensiveness of the law and secondly, there is strong prima facie evidence that the arbitrator has gone wrong in his construction.

In the present case, it is clear that the matter concerns a standard form contract, namely, the SIA

Conditions. Thus, the appellants need only show a strong prima facie case that the arbitrator is wrong in his determination. It is necessary for us to set out again the basis upon which the arbitrator implied that the appellants as employers were under an obligation to ensure that the architect would diligently discharge his duties prescribed under the contract. He stated:

> *Indeed, where an architect`s engagement involves a standard form of building contract with a procedure for the issuing of certificates of payment, there is an implied term between the employer and the architect that the architect will exercise his certification functions according to the terms of the contract; and he would do all things necessary to enable the contractor to carry out the works, and* ***the employer is thus liable for any breach of this duty on the part of the architect****. Where the contract provides that an architect has power to certify as to such matters as interim payments, he must be neutral in that he must act fairly and impartially as between the employer and the contractor. [Emphasis added.]*

What the arbitrator seems to be saying is that the appellants, as employers, were under an unqualified, though implied, obligation to the respondents, as contractors, to ensure the proper discharge by the architect of his duties of certification as set out in the contract. He made no reference of the need for knowledge on the part of the appellants as to the breach by the architect.

In the grounds of judgment of the learned judge, he held that there were `no identifiable questions of law` to go on appeal. He also stated (at [para] 14 thereof):

> *It was equally clear that as a matter of law, an employer would be held liable if, being aware that the certifier/architect was not discharging his functions properly, he failed to take steps to correct or replace the architect: see Vol 1* ***Emden`s Construction Law*** *(8th Ed), under `C Liability of employer when his agent wrongly withholds approval` at para [992] item (ii) and the quoted dicta of Scott LJ in* ***Frederick Leyland & Co Ltd v Panamena Europea Navigacion Cia*** *[1943] 76 LI L Rep 113, at 124. Admittedly, findings of liability for losses based on a breach of this implied term have been very rare; but their infrequency did not detract from the rule under which the implied duty existed. In the instant case, the arbitrator had found that the applicants were liable to the respondents for failing to prevent the breaches of the architect in his repeated delays to certify payments to the respondents.*

We entirely agree with the learned judge that the employer could be liable for the default of the architect in issuing the interim certificates but only if the employer was aware of such default. This proposition of law is amply supported by authorities: **Frederick Leyland & Co Ltd v Panamena Europea Navigacion Cia** [1943] 76 Lloyd LR 113 and **Perini Corp v Commonwealth of Australia** [1969] 12 BLR 82. The pre-requisite of knowledge is essential before an employer is required to act to ensure that his architect complies with the terms of the building agreement between the employer and the contractor. The standard works on the subject have also reiterated this principle, eg ***Hudson on Building & Engineering Contracts*** , ***Emden on Construction Law*** and ***Keating on Building Contracts*** .

The rationale for this rule is obviously to take into account the special position of the architect in a building contract, even though he is employed and paid by the employer. When an architect acts as a certifier under a building contract for interim payments, he is to act fairly and impartially between the parties, and the employer is not to interfere with the architect`s exercise of this function. The

arbitrator, in fact, recognised this point in his award. Such functions of the architect, among others, must be exercised by him independently as an expert. It would be unreasonable to expect a lay employer to warrant the performance of the architect in respect of such functions without establishing that the employer knew the architect had gone wrong: **Lubenham Fidelities and Investments Co Ltd v South Pembrokeshire District Council & Anor** [1986] 33 Build LR 39 at 58.

From the reasoning of the arbitrator which we have cited above, it is clear that the arbitrator has laid down the duties of an employer in too wide a term when he said that `the employer is thus liable for any breach of this (certifying) duty on the part of the architect.` The issue is not simply whether there could be implied a term under which the appellants as employers could conceivably be liable for the architect`s default, but more specifically, what is the nature and/or extent of that implied obligation.

The respondents do not in substance dispute the foregoing, for they accept that the implied duty was premised on knowledge. However, they submitted that the appellants had failed in their duty, as they knew that no interim certificates had been issued and they did nothing to ensure that the architect issued the certificates on time. The arbitrator must have taken this into account, as had the learned judge (who referred specifically to the need for knowledge on the part of the employer in [para] 14 of his grounds of judgment).

With respect, we think this argument ignores the clear basis on which the arbitrator made his findings. The implied term as formulated by the arbitrator would render the employer liable for any of the architect`s breaches. Thus, the sentences in the award, which followed immediately the passage quoted in [para] 41 above, read:

> *I find it hard to give due consideration to the fact that the act of repeated late issuing by the architect, and late honouring of interim payment certificates by the respondents could possibly have been acquiesced to by the claimants, since such late payment pattern was one that appeared to have been rather consistent. There was clearly no evidence to support the respondents` seemingly inexcusable repeated delays in honouring the interim payment certificates. It is therefore not open to the respondents to deny that they are in breach of cl 30(1) of the building contract.*

The reference to the consistent pattern of late payments on the part of the appellants was to counter the argument that the respondents had acquiesced in the late payment, not the appellants` knowledge of the wrongful delay or decision on the part of the arbitrator in the issuance of the interim certificates. The arbitrator had not made any finding that the appellants knew that the architect had wrongfully delayed the issue of interim certificates or that the architect had wrongfully certified.

Indeed, the mere fact that there was a consistent pattern of late interim certificates does not necessarily imply that the appellants must have known that the architect was in default of cl 30(1). Although the arbitrator has found that the architect was in fact in breach of cl 30(1), it is a separate question whether the appellants were aware of this. There is correspondence to suggest that it appeared to the appellants that the delay in issuing interim certificates was attributable to the respondents` consistently improper submission of claims, resulting in certification delays by the quantity surveyor, or at least because there were disputes between the architect, quantity surveyor and respondents over the sums to be certified.

In the premises, we think that a strong prima facie case has clearly been made out that the arbitrator

was wrong in his determination as to the nature and/or extent of the implied duty of the appellants in relation to the discharge of the certifying obligations of the architect under the contract. As this case concerns a standard form contract, it would be in the interest of architects, employers and contractors in general, as well as their legal advisers, for the court to lay down what is the correct nature or extent of the implied obligation of an employer in relation to the certifying functions of the architect under a building contract. In passing we should mention that in ***Lubenham*** , May LJ stated (at p 58) that where the building contract contained a very wide arbitration clause which expressly permitted arbitration upon interim certificates during the currency of the contract and before practical completion:

> *... we do not think that there is any need or scope for the implication of any further term in it, as there was in the* ***Panamena****. If, as is now common ground, the two challenged interim certificates in our case were not in accordance with the terms of the building contract, there was one simple remedy available to Lubenham needing no implied term, namely to go to arbitration upon them and have them corrected.*

Substantial rights affected

Finally, we would like to refer briefly to s 28(2) which provides that no leave should be granted unless the court considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement. In **The Nema** [1980] QB 547 at the Court of Appeal, Denning MR said that the expression `substantially affect the rights` meant that the point of law must be a `point of practical importance - not an academic point - nor a minor point.`

In the award, the arbitrator adjudicated that the appellants should pay the respondent four sums, namely, $397,788, $1,799.70, $26,351.40 and $176,210.00, as damages, for their breaches of the implied term. Of course, the sum $397,788 also encompassed the losses suffered by the respondents due to the appellants breaches to pay the various interim certificates within the period specified in the contract. He did not separate the two. It seems to us clear that if the appellants should succeed in the appeal on the question of law then, unless it is shown that the appellants had knowledge that the architect was in default in his duties of certification, the four sums awarded (plus interest at 8%) would have to be set aside or reduced. In these circumstances, it is our opinion that clearly the determination of the question of law could substantially affect the rights of the appellants.

Prejudice

We turn now to the last factor: the issue of prejudice. On this, the learned judge only said that `the question of prejudice was very much in the background`. Other than the fact that the respondents would be kept out of their money, no other contention is raised. The fact of being kept out of their money could not constitute irreparable harm since interest continues to run on the sums outstanding under the award. The fact that in this case the arbitrator had delayed for a prolonged period the preparation of his award could not be held against the appellants. The appellants did not contribute to that outcome. The delay was due solely to the arbitrator and it affected both parties. We think it fair to say both parties demonstrated patience, hoping that the award would be released before long. Perhaps, there was also the fear that the appointment of a new arbitrator might not necessarily save time as the case would have to start from square one. So they waited and waited. And ten years

went by. It was not as if they knew from the start that the arbitrator would delay for so long.

Leave to appeal

In the light of our views above on the various factors germane to the grant of an extension of time to apply for leave to appeal, we would accede to the request for an extension of time and would also grant leave to appeal. There is, however, a procedural point we ought to refer to. In para 2 of the motion the appellants prayed for liberty to appeal, which is really the same thing as leave to appeal. The appellants also prayed for:

> *3 That such directions be given for the further conduct of the appeal as the court thinks fit.*
>
> *6 Pursuant to s 28(3) of the Arbitration Act (Cap 10) and the liberty granted to the applicants as aforesaid, that the arbitral award be set aside and, where appropriate, be remitted for the reconsideration of the arbitrator together with the court`s opinion on the questions of law which form the subject of the appeal.*

Under O 69 r 2(2) the notice of appeal may be included in the application for leave. However, it is not entirely clear whether these two prayers constituted the notice of appeal. Rather than going into a technical examination of this question which will be highly unprofitable, and as it is in the interest of both parties that further costs should not be unnecessarily incurred and as neither party would be prejudiced thereby, we order that the hearing of the appeal should proceed in the High Court as if the notice of appeal were set out in the motion. The appeal will be on the question what is the nature or extent of the term to be implied as regards the duties of the appellants as employers in relation to the certifying functions of the architect under the SIA Conditions.

Misconduct

Another relief prayed for by the appellants in the Motion is for the setting aside of the award on the ground of misconduct on the part of the arbitrator. Four broad grounds are advanced to substantiate misconduct. First, the fact of a delay of some ten years from the completion of hearing in rendering an award. Second, after such a prolonged delay the arbitrator would be incapable of rendering a proper award and this is demonstrated in that he had made the award in a callous manner, and did not deal with the issues raised. Furthermore his reasons were deficient. Third, the imposition of interest at 8% pa for a period of twelve years, ten of which were due to the arbitrator`s delay. Fourth, the arbitrator failed to deal with the counterclaim of the appellants.

In his grounds of judgment the learned judge below did not touch on this question of misconduct. Be that as it may, we shall briefly deal with the alleged grounds in turn. Under s 18 of the Act, an arbitrator is required, inter alia, to make an award with all reasonable despatch. A delay of the magnitude as in this case is grossly inordinate and cannot be tolerated. We deplore such a length of delay on the part of an arbitrator. It can only undermine faith in arbitration. The court would have removed the arbitrator for such a cause if an application had been made to the court pursuant to s 18. However, in this instance neither party felt strongly enough about the delay to take that step, though they (mainly the respondents) did send reminders to the arbitrator: see [para] 53 above. Now

that the award had been rendered we do not think the delay per se could be a good ground to set aside the award. It smacks of the appellants saying, set it aside because it is not in our favour. Whatever error the arbitrator made in the award should now be corrected in accordance with the procedure in s 28.

Turning to the second ground, that the issues were not adequately dealt with and/or the reasons in the award are deficient, this is really a ground to appeal against the award, not to set it aside. In raising this ground, it seems to us that the appellants are in substance seeking to side step the restrictions on appeals imposed in s 28. This should not be permitted. Section 28(1) does not allow the setting aside of an award on an arbitration agreement on the ground of errors of fact or law on the face of the record.

Turning to the third ground, the imposition of interest at 8% pa on the damages awarded, it has not been shown how that is wrong other than the fact that the award was rendered so late. But, as between the two parties to the dispute, so long as the award was not rendered the appellants had the use of the money and thus the award of interest is not unjustified.

As regards the last ground, it should be borne in mind that the substance of the counterclaim was that the architect had over-certified payments and the appellants asked for repayment of the same. A perusal of the award shows that the arbitrator had in dealing with the respondents` claim under the final certificate, dealt with this aspect in working out the final accounts of the project. The counterclaim as pleaded was very much a part of the defence. Thus, we find there is no merit in this ground.

One final comment. We note that the appellants have not been consistent in their actions. On the one hand they had accepted part of the award by paying up the sum awarded in respect of the final certificate and on the other hand they now ask that the award as a whole be set aside.

Judgment

In the result, we would extend time to permit the appellants to apply for leave to appeal to the High Court and leave to appeal is also hereby granted on the question of law mentioned in [para] 55 above. We also order that the notice of appeal be deemed to have been set out in the motion.

As the appellants have succeeded in this appeal, they shall be entitled to costs. But as they have not succeeded in all the points raised before us, we would award them only two-thirds of the costs of this appeal. As for the costs of the hearing below, we order that they be costs in the appeal to be heard pursuant to the leave we have herein granted. The security for costs shall be refunded to the appellants or their solicitors.

Outcome:

Appeal allowed.