HCCT000002/1991

Headnote

Building contract - sub-contract - pay when paid provision - meaning of 'receipt of payment' - no architect certificate of delay - whether set off at Common Law is excluded - application under Order 14 - whether matter should be stayed in favour of arbitration.

Construction List No. 2 of 1991

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

BETWEEN

RYODEN ENGINEERING COMPANY LIMITED	1st Plaintiff
RYODEN (HOLDINGS) LIMITED formerly known as RYODEN ELECTRIC ENGINEERING COMPANY LIMITED	2nd Plaintiff

AND

PAUL Y. CONSTRUCTION COMPANY LIMITED	Defendant

Coram: Kaplan, J. in Chambers

Date of Hearing: 24 June 1991

Date of handing down Judgment: 31 July 1991

JUDGMENT

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1. I have before me two summonses in this construction contract dispute. The defendants were the main contractors for the Hong Kong Polytechnic (HKP) under an agreement in writing made in January 1989. By a sub-contract in writing dated 31st January 1989, the defendant sub-contracted the electrical works to the plaintiffs.

2. The plaintiffs seek summary judgment in the sum of $1,146,500 being the sum total of Certificates 21-23.

3. The defendants deny liability and by their summons seek a stay of these proceedings in favour of arbitration pursuant to s.6 of the Arbitration Ordinance, Cap. 341 on the grounds that clause 22 of the sub-contract provided for arbitration in the event of disputes or differences.

4. The plaintiffs oppose the stay on the grounds that, as they contend, they are entitled to summary judgment there is no dispute or difference to go to arbitration.

5. The plaintiffs' case is simple. Certificates 21-23 in the respective sums of $382,000, $596,500, and $168,000 have been issued by LES Ltd. to the plaintiffs and they say there is no reason in law why they should not receive these sums from the defendants.

6. The defendants say that the plaintiffs are not entitled to payment of the certificates by reason of the terms of Clause 11(b) of the sub-contract which so far as is material provides as follows:

"Within 14 days of the receipt by the Main Contractor of payment from the employer against any certificate from the architect the Main Contractor shall notify and pay to the sub-contractor the total value certify therein in respect of the sub-contract works .... less

(i) retention money ... and

(ii) the amounts previously paid."

7. By letter dated 6th September 1990 HKP wrote to the defendants informing them that because of delays to the completion of the contract works HKP were deducting liquidated damages. Interim Certificate 21 provided for payment of $5.49m. but deducted therefrom by this letter were liquidated damages in the sum of $4.7m. leaving the net sum of $790,000 due under the certificate.

8. The defendants contend that because $4.7m. liquidated damages were deducted from Certificate 21 they have not received payment from HKP of this sum and thus under the provision of Clause 11(b) are not obliged to pay the plaintiffs the sums claimed in this action which are less than $4.7 m. This raises the familiar 'pay when paid' argument which the Courts of Hong Kong have previously grappled with at an interlocutory stage but have never finally decided. It is a source of great debate and arises frequently in this sort of contract.

9. The plaintiffs' answer to this point is that the defendants have received payment by reason of the set off between the liquidated damages and the sums otherwise due to the defendants.

10. It is the defendants case that the reason why they were late in completing the Main Contract works was because of delays by the plaintiffs in the completion of their sub-contract works. Mr. Barlow who appeared for the defendants frankly admitted that the defendants had a problem here because the architect had never certified that the sub-contract works ought reasonably to have been completed within the agreed or extended time.

11. Clause 8 of the sub-contract gives to the defendants the right to set off liquidated damages against sums otherwise due to the plaintiffs. The relevant part of Clause 8 reads as follows:

> "8(a) The sub-contractor shall commence the sub-contract works within an agreed time or, if none is agreed, then within a reasonable time after the receipt by him of an order in writing under this sub-contract from the main contractor to that effect and shall proceed with the same with due expedition.
>
> The sub-contractor shall complete the sub-contract works and each section thereof within the period specified in part II of the appendix to this sub-contract or within such extended period or periods as may be granted pursuant to the provisions hereinafter contained.
>
> If a sub-contractor fails to complete a sub-contract works or any section thereof within the period specified or any extended period or periods as hereinafter provided, he shall pay or allow to remain contractor a sum equivalent to any loss or damage suffered or incurred by the main contractor and caused by the failure of the sub-contractor as aforesaid. The main contractor shall at the earliest opportunity give reasonable notice to the sub-contractor that loss or damage as aforesaid is being or has been suffered or incurred.
>
> PROVIDED that the main contractor shall not be entitled to claim any loss or damage under this Clause unless the architect shall have issued to the main contractor (with a duplicate copy to the sub-contractor) a certificate in writing stating that in his opinion the sub-contract works in the relevant section thereof ought reasonably to have been completed within a specified period or within any extended period or periods as the case may be."

12. It is common ground that the architect has not given the certificate provided for by the provisions of Clause 8. He has been asked to do so but apparently is still requesting further information.

13. Mr. Bell for the plaintiffs submits that the absence of the certificate is fatal to the defendants' contention that they can set off any sums for delay. He also points out that all of the liquidated damages claim against the defendant were in fact a set off against certificate 21 and thus there is no set off against the sums claimed under Certificates 22 and 23.

14. Mr. Barlow submits that Clause 8 does not have the effect of excluding the defendant's Common Law right of set off upon which he maintains the defendants are entitled to rely.

15. In addition to the 'pay when paid' and Common Law set off points he raises two other points. Firstly he submits that the defendants have a defence based upon the ex turpi causa doctrine because the plaintiffs have failed to give the architect the submission he needs to consider granting the certificate of delay. He submits that a party cannot by his own breach of contract put himself into a position to claim damages from a defendant for breach of contract. This, he submits, will permit the plaintiff to benefit from, and take advantage of, his own wrongdoing.

16. Secondy Mr. Barlow submits that leave to defend should be given on the Miles v. Bull principle, namely that there is some other reason for trial. (See 0.14 r. 3)

17. Before considering these points, it is necessary to have regard to the interrelationship of these 2 summonses. Mr. Barlow submits that all these points should be decided by arbitration being the method of dispute resolution chosen by the parties. Both Mr. Bell and Mr. Barlow reminded me of the well known passage in the judgment of Kerr L.J. in Sethia Ltd. v. India Trading Co. Ltd. (1986) 1 WLR 1398 at 1401.

> "The submissions of both parties have proceeded on the basis that the summonses under Order 14 and section 1 are the reverse sides of the same coin, and we have been referred to Mustill & Boyd, Commercial Arbitration (1982), pp.90-92. Without expressing any concluded view on everything which is stated there, it seems to me that the position can be summarised as follows. If a point of law is raised on behalf of the defendants, which the court feels able to consider without reference to contested facts simply on the submissions of the parties, then it is now settled that in applications for summary judgment under Order 14 the court will do so in order to see whether there is any substance in the proposed defence. If it concludes that, although arguable, the point is bad, then it will give judgment for the plaintiffs. This course will also be adopted where there is a counter-application for a stay of the action. If the contract between the parties contains an arbitration clause to which section 1 of the Act of 1975 applies, then the court is not thereby precluded from considering whether there is any arguable defence to the plaintiffs' claim. If the court concludes that the plaintiffs are clearly right in law then it will still give judgment for the plaintiffs. In the same breath, as it were, it will then have decided that in reality there was not in fact any dispute between the parties. If the court is satisfied that the plaintiffs are clearly right in law, and that the defendants have no arguable defence, then it will not avail the defendants to have raised a point of law which the court can see is in fact bad. In those circumstances the defendants cannot be heard to say that there was a dispute to be referred to arbitration. But if the court concludes that the plaintiffs are not clearly entitled to judgment because the case raises problems which should be argued and considered fully, then it will give leave to defend, and it is therefore then bound to refer the matter to arbitration under section 1 of the Act of 1975."

18. I must add 2 points to that quotation. Firstly, the citation to Mustill and Boyd is now to pp.123-4 of the 2nd edition where Sethia is referred to. Secondly, in the case before me I am not dealing with a non domestic arbitration and therefore I do have a discretion under s.6 of the Arbitration Ordinance. However, apart from the points canvassed before me no other reasons were given as to why I should not grant a stay if I considered that there was a dispute and thus a triable issue. Mr. Bell accepted that if I was not with him on the 0.14 summons the stay would follow ineluctably.

19. Mr. Barlow, while accepting the above statement of the law, reminded me that lower down the same page and over on to page 1402, Kerr L. J. said this:

"I should add, for the sake of completeness, that in relation to applications for summary judgment which raise a bare issue of law the parties may of course agree to ask the court to decide this as a preliminary, or as the only, issue in the action. But if they do not do so and the court does not consider that the plaintiff is entitled to summary judgment, then the court should not investigate a clearly arguable defence by going further in order to decide whether the defendant's contention is in fact correct, and then give leave to defend. That course was emphatically rejected by this court in pinemain Ltd. v. Welbeck International Ltd. (1984) 129 S.J. 66; Court of Appeal (Civil Division) Transcript No. 363 of 1984. The proper course, if the court considers that the plaintiff is not or may not be right, is simply to give leave to defend, and accordingly, in cases where there is an arbitration clause, to refer the whole dispute to arbitration. I say that because both counsel before us, without any agreement having been concluded between the parties to abrogate the arbitration clause, told us that they and their clients would wish this court finally to decide the question of construction raised in this case, to which I turn in a moment. That would mean, or could mean, that if the court were not satisfied that the buyers were right, it would give a ruling on the legal position between the parties in favour of the sellers, but would then be bound to refer the remainder of the dispute to the arbitration tribunal in a situation where that tribunal would be bound by what, ex hypothesi, the court would already have decided on the question of construction.

I would say for myself as strongly as I can that such a course would create an impossible position. It would result in a dispute - and by 'dispute' I mean a bona fide and real dispute which is governed by an arbitration clause - being decided as to the law in the court, ant the remainder being referred to arbitration, to be dealt with by an award. That would appear to create problems under section 1 of the Arbitration Act 1975, and possibly also under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It would certainly be contrary to the legislation and practice under the Arbitration Act 1979. In the absence of agreement waiving the right to arbitration, such disputes must prima facie go to arbitration, whether they be disputes as to fact or law, or mixed fact and law. Apart from such 'special cases' as remain under the pre-1979 procedure, it is only in a limited number of cases and situations, governed partly by the Act of 1979 and partly by the decisions of the House of Lords in Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd. (The Nema) [1982] A.C. 724, and Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191, that the court will now be concerned with issues of law arising under contracts containing arbitration clauses, even though the sole dispute may turn on an issue of law."

20. In Home & Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (U.K.) Ltd. (in LIQ) 1989 3 AER 74 the English Court of Appeal without having Sethia cited to them put the matter in the following terms which I quote solely from the headnote:

> "The purpose of the summary judgment procedure under RSC O.14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to his claim. Accordingly, the plaintiff is entitled to the judgment where the defendant's only suggested defence is a point of law which the court can see is misconceived or which although at first sight apparently arguable is shown by relatively short argument to be plainly unsustainable. However the court should not on O.14 applications determine points of law which may take hours or even days and the citation of many authorities before it is in a position to arrive at a final decision, thereby allowing such proceedings to become a means for obtaining, in effect, an immediate trial of an action.
>
> In cases where there is an arbitration clause and a fortiori in commercial arbitration (especially when the dispute turns on construction or the implication of terms or trade practice) the court should not, on an application made to it prior to the arbitration, permit full scale argument on the terms of the agreement between the parties, since the parties have agreed on their chosen tribunal and the defendant is entitled prima facie to have the dispute decided by that tribunal in the first instance, to be free from the intervention of the courts until it has been so decided and thereafter, if it is in his favour, to hold it unless the plaintiff obtain leave to appeal and successfully appeals."

21. So I have to consider the points raised to see whether they are misconceived or can be shown by relatively short argument to be unsustainable. If any one of Mr. Barlow's points meets this threshold test then I should give unconditional leave to defend and in the circumstances of this case grant the stay in the exercise of my discretion.

22. [Since the argument concluded in this case, I have come across 2 cases namely R.G. Carter Ltd. v. Clarke [1990] 2 AER 209 and British and Commonwealth v. Quadrex Holdings [1989] 3 AER 492. In the latter case Sir Nicolas Browne-Wilkinson V.C. warned against devoting too much time to the interlocutory stage by entertaining large or difficult Order 14 applications. This has a knock on effect on other litigants waiting to be heard. In the former case Lord Donaldson MR, while recognising the qualifications stated by the learned Vice Chancellor, appears to be encouraging judges to decide points of law under Order 14 provided they are not dependant on undecided issues of fact. However, neither of these cases had the arbitration element which this does. I have also noted that in England the new Order 14A gives the court wide power to decide issues of law or construction at the Order 14 stage (or at the Order 18 rule 19 stage). On the assumption that a similar provision will be introduced in Hong Kong judges can look forward to a very useful addition to their judicial armoury. I did not feel it necessary to invite counsel back to make further submissions on these 2 cases as neither dealt with arbitration, and neither is, in reality, inconsistent with Sethia.]

23. I can dispose quite quickly with 2 of Mr. Barlow's points which do not impress me. I do not think that the ex turpi causa principle has any bearing here. If this were the only point relied on by.the defendants I would have given summary judgment. I bear in mind the principles cited in Chitty and the recent exposition of the law by Kerr L.J. in Euro-Diam v. Bathurst (1983) 2 WLR 517. There is no suggestion of illegality nor of immorality such that it would be an affront to justice to give judgment to the plaintiffs.

24. There is no suggestion of any illegality here nor is there any suggestion of immorality. I find it difficult to see how it can be contended that it would be an affront to the public conscience to permit the plaintiffs to recover under the certificates.

25. The second of Mr. Barlow's points which does not impress me is that leave to defend should be granted because there is some 'other reason for trial'. In a sense this is tied up with the last point because it is said that the plaintiffs were in breach of Clause 8(b) of the agreement yet nevertheless they relied upon the defendants' failure so far to obtain the necessary architect's certificate. In essence it is argued that by refusing summary judgment and ordering a stay, the Court will be giving the defendants more time for them to obtain the necessary certificate. I do not think that this point adds much to the ex turpi causa point which I have not accepted. I do not think there is anything in this point to justify further consideration.

Pay when paid

26. This point was considered by Hunter, J. (as he then was) in Hong Kong Teakwood Works Ltd. v. Shui On Construction Co. Ltd. (1984) HKLR 235 and by the Court of Appeal in Schindler Lifts (Hong Kong) Ltd. v. Shui On Construction Co. Ltd. (1985) HKLR 118.

27. In Teakwood Hunter, J. expressed the preliminary view that 'receipt of payment' meant exactly what it says, namely that the Main Contractor would only be liable to the sub-contractor, when he had actually received payment from the employer and he was not disposed to conclude that payment was received by reason of the set off of liquidated damages against the sums due. However, these were preliminary views expressed in an 0.14 application. Unfortunately, the case could not go on appeal, but there is no reason to believe that the Court of Appeal would have given any more guidance than they did when the same point came up in Schindler. In that case all the Court of Appeal said was that they were disposed to agree with Hunter, J. in Teakwood although no reasons were given.

28. It is fair to point out that in Teakwood neither Spargo's case (1873) LR8 Ch.407, nor Larocque v. Beauchemin (1897) A.C. 359 (P.C.) were cited. However, they were cited in Schindler and are referred to in the judgment of the Court of Appeal without any analysis of their effect.

29. I would very much like to decide this point so that, if I were with Mr. Bell and in the event of the inevitable appeal from that decision, the point would be clarified once and for all.

30. I am sure that such a course of action would be in the interest of the construction industry in Hong Kong, because this point does crop up very frequently, and it is highly desirable that the point should be decided once and for all. However I must resist the temptation to engineer a result which would have this effect, as I must apply the above stated principles having full regard to all the points made by Mr. Barlow in resisting the 0.14 application and to the fact that the parties have agreed to have their differences resolved by arbitration.

31. I should only embark upon a detailed analysis of the 'pay when paid' argument, if I am satisfied that there is nothing in the other points. It is also necessary to bear in mind that if I refuse this application for summary judgment, all these points will have to go to arbitration and I would not want the arbitrator to be influenced by anything I might say during the course of this interlocutory judgment. So before deciding whether I should embark upon a detailed analysis of the arguments and cases cited under this head of claim, I ought first to consider whether there was anything in the final point raised by Mr. Barlow.

The Certificate and the Common Law Set Off

32. I am quite satisfied that it is a condition precedent to the deduction of liquidated damages against the plaintiffs in this case, that the Architect should have certified under the provisions of Clause 8 that the sub-contract works 'ought reasonably to have been completed within the specified period or in any extended period or periods as the case may be'.

33. Support for this view comes from the English Court of Appeal in Brightside Kilpatrick v. Mitchell Construction (1975) 2 Lloyd 493. The Clause under consideration in that case was identical to the provision containing in Clause 8(a) in the present case. The architect did not certify. Buckley & Orr, L.J.J. held that:

> "Under Clause 8(a) of that form it was clear that the issue of an architect's certificate was a condition precedent to any right in the contractor to claim damages for delay for a sub-contractor."

At page 496 Buckley, L.J. said:

> "Under that sub-clause of the Green Form of contract it is, in my judgment, clear that the issue of an architect's certificate is in truth a condition precedent to any right in the contractor to claim damages for delay from a sub-contractor.
>
> In the present case the architect has hitherto, at any rate, declined to make any certificate of delay relating to delay by the plaintiff company and, consequently, at the present time, in my judgment, the defendants cannot make out the case for saying that they have a good claim in damages against the plaintiff company for delay in completing the sub-contract works."

34. In this jurisdiction Godfrey, J. (without the benefit of having Brightside cited to him) came to an identical conclusion in Pyrock v. Chee Tat Engineering Co. Ltd. (1988) 2 HKLR 472.

35. Whilst not suggesting that either Brightside or Pyrock were wrongly decided Mr. Barlow contended that neither of them dealt with the issue as to whether the effect of the clause in question was, as a matter of construction, wide enough to exclude the defendants Common Law right of set off. Mr. Bell contended that it was wide enough to exclude this right.

36. Mr. Barlow based this argument on various passages in the speeches of the House of Lords in Gilbert - Ash (Northern) Ltd. v. The Modern Engineering (Bristol) Ltd. (1974) A.C. 689. At page 696 F-G Lord Reid said this:

"It is now admitted, and in my view properly admitted, that at Common Law there is a right of set off in such circumstances: but that right can be excluded by contract. So the sole question in the appeal is whether by their contract with the sub-contractors the contractors have agreed that sums which they received from the employers earmarked as due to the sub-contractors on architects interim certificates must be paid over immediately without any right of setoff."

At p.712 A-B. Viscount Dilhorne said this:

"I can see no ground for holding that in those proceedings the contractor cannot seek to deduct from the amount claimed from him the anounts bona fide claimed by him from the sub-contractor. Even if the sub-contract does not give; as it does, an express right to make such deduction, I can see nothing in it exclude the contractor's Common Law and equitable rights to set off and counterclaim. .... there is no doubt that unless the appellants' right to do so was excluded by the terms of the sub-contract they are entitled to set off and to counterclaim the amounts of their cross claims. In my opinion their right to do so is not excluded."

At p.720 E, Lord Diplock said:

"I therefore conclude that there is no provision in a main contract in a standard RIBA form which excludes the common law remedy of the employer to set up breaches of warranty by the contractor in diminution or extinction of any instalments of the price notwithstanding that such instalment has been certified as due from him to the contractor in the certificate issued by the architect."

At p.722 H. Lord Salmon said this:

"This type of contract, however, clearly belongs to the class of contract for the sale of goods and work and labour at a price payable by instalments. In the thousands of cases in which such contracts had been litigated prior to 1971 it had never been questioned that the defendants were entitled to set off any damages which they bona fide claimed to have suffered as a result of the plaintiffs breach of the contract under which the price was claimed.

> The parties to building contracts or sub-contracts, like the parties to any other type of contract are, of course, entitled to incorporate in their contract any clause they please. There is nothing to prevent them from extinguishing, curtailing or enlarging the ordinary rights of set off, provided they do so expressly or by clear implication."

37. It is clear from the above citations that the question comes down to one of construction. In R.N. Douglas Construction Ltd. v. Bass Leisure Ltd. [1990] J.C.T. 638. His Hon. Judge Bowsher sitting as an Official Referee had to consider a similar point. He said this:

> "Notwithstanding the decision in Gilbert Ash, it is perfectly possible for a contract to provide that there shall be set off allowed against any certificate at all but that the paying party must pay up first and then argue about recovery of any counterclaim afterwards: it is common ground that that is not the contractual situation here. It would equally be possible for a contract to provide that no counterclaim shall be set off against any one certificate unless that counterclaim related to that certificate; I have not been shown any contractual term in this contract designed to achieve that effect and I believe that there is none. As a matter of law, it seems to me that if the defendants have a counterclaim arising out of any breach of this contract, the defendants were entitled to set off that counterclaim against any claim made under the contract, even though there is machinery provided by the contract for dealing with that counterclaim in a different way. The point against the plaintiffs is that the contract does not expressly and clearly provide that the contractual machinery is to be the only way of dealing with such a counterclaim although such a result could be achieved by contract and it may well have been the intention of some of the members of the committee which drafted this contract that that should be the effect of the contract."

38. Mr. Barlow also referred me to the case of Acsim (Southern) Ltd. v. Danish Contracting Co. 1989 7-CLD-08-01, a decision at the English Court of Appeal in 1989. This was a building contract subject to the Blue Form, Clause 15 of which read as follows:

> "(2) The contractor shall be entitled to set off against any money (including any retention money) otherwise due under this sub-contract the amount of any claim for loss and/or expense which has actually been incurred by the contractor by reason of any breach of, or failure to observe the provisions of,

> this sub-contract by the sub-contractor, provided: (a) the amount of such set off has been quantified in detail and with reasonable accuracy by the contractor; (b) the contractor has given to the sub-contractor notice in writing specifying his intention to set off the amount quantified in accordance with proviso (a) of this sub-clause and the grounds on which such set off is claimed to be made. Such notice should be given not less than 17 days before the money from which the amount is to be set off becomes due and payable to the sub-contractor ....
>
> (4) The rights of the parties to this sub-contract in respect of set off are fully set out in these conditions and no other rights whatsoever shall be implied as terms of this sub-contract relating to set off."

39. Acsim sent an interim application for £221,018 and that should have been paid under the terms of this contract by the 15th September 1988. It was not so paid and none of the matters required by Clause 15 had been raised 17 days before the money had become due and payable to Acsim. However, on 3rd October 1988 Dancon claimed to be entitled to withhold the sums due on various other grounds including delay on a part of Acsim. Acsim issued a writ claiming that £221,018 and went by O.14. On 14th November 1988 the summons came before His Hon. Judge Lewis Hawser Q.C. at which hearing solicitors for Dancon asked for an adjournment in order that they could file evidence to show that the work carried out by Acsim had not been properly executed and they had a valid defence. The learned judge took the view that, since none of these matters had been raised as a ground of set off within the time specified in Clause 15 such evidence would be irrelevant. He refused the application for an adjournment and gave summary judgment during the course of which he said this:

> "For reasons already stated, namely that because the defendant did not give notice of set off in accordance with Clause 15 of the standard blue form of sub-contract between the parties. I do not consider that the defendants have a defence to the plaintiffs' claim and see no reason to adjourn the hearing to enable further evidence, including expert evidence, to be submitted."

40. Dancon appealed to the Court of Appeal. Counsel for Dancon submitted that Clause 15 did not amount to 'Clear express words' excluding the Common Law Right to set off and that his client had not evinced an intention to abandon a remedy arising by operation of law, to pay no more than the proper value of the work done. The Court of Appeal consisting of Slade, Neill, and Ralph Gibson LJ.J. allowed the appeal on the 27th October 1989 and held;

(1) "The words of Clause 15 .... do not affect the right of a contractor to defend the claim for an interim payment by showing the sum claimed includes sums to which the sub-contractor is not entitled under the terms of the contract or to defend by showing that, by reason of the sub-contractor's breaches of contract, the value of the work is less than the sum claimed under the ordinary right of defence established in Mondel v. Steel" : Per Per Ralph Gibson L.J.

(2) "One starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law and clear express words must be used in order to rebut this presumption" : observation of Lord Diplock in Modern Engineering v. Gilbert Ash 1974 A.C. 689.

(3) Clause 15 of the ... blue form does not contain 'clear express words' excluding the common law right of set off.

(4) There was no term to be implied in the contract that the common law right of set off represented by Mondel v. Steel should be exercised promptly.

(1) "An assertion that the work had not been properly executed is capable of being a matter of pure defence rather than of counterclaim or set off" : Her Neill L.J."

41. Thus in the light of these authorities Mr. Barlow contends that whether or not the defendant can avail itself of the contractual right of set off (and here he recognizes the lack of a certificate is a problem) it can avail itself of the common law right of set off. He says that this has been done in this case. The defendant's affidavit is not really contradicted and had it been so it would have been a matter of fact to be decided by the arbitrator. He makes the point that neither Pyrock nor Brightside dealt with this aspect of the case.

42. In my judgment the question whether the common law right of set off is excluded by the terms of the contract in this case is not an easy point. Initially I was inclined to the view that it must be so excluded or else what was the point of the condition precedent that there must be an architect's certificate. However, the passages from Gilbert Ash make it clear that it is a matter of construction and if Clause 15(4) in the Acsim case did not achieve the required result it seems to me that there is scope for some argument here.

43. This summons was argued succinctly during the course of a morning. This was not the only point canvassed. I do not feel that I have had the sort of detailed argument on this clause which would enable me to decide the point with any confidence. I am sure that there are other authorities which would assist. I would like to consider the commentaries in the relevant text books on clauses such as this. I hasten to add that I make no criticism of counsel for not embarking on such an exercise. Had they done so, it would only have underscored the fact that there was an arguable point which short argument could not show to be unsustainable.

44. I therefore feel obliged to give unconditional leave to defend. The 'pay when paid' point will also have to be considered by the arbitrator and in those circumstances I feel it would be wise to say no more about it. Having concluded that leave to defend should be given it is accepted that the stay in favour of arbitration must follow. I so order.

45. Although I would have liked to have decided these points, with the confidence that my judgment would be appealed. I feel no real dissatisfaction in making an order which has the result of ensuring that all points in controversy between these parties will be decided by the method of dispute resolution chosen by them in their contract. The arbitrator may have to decide who was responsible for delay and he is likely to be better suited for that task, endowed, as he is, with greater powers than the court. If this matter goes its full length and if the arbitrator decides these points there may well be an application for leave to appeal which will be considered on its merits and on the prevailing principles at the appropriate time.

46. I therefore give the defendants unconditional leave to defend. I propose to make a costs order nisi giving the costs of the 0.14 summons to the defendants. I grant the defendants the stay which they seek and I make a costs order nisi in favour of the Defendants in respect of the application for, and the hearing of, the stay.

(Neil Kaplan)
Judge of the High Court

Representation:

Mr. Adrian Bell instructed by Simmons & Simmons for the Plaintiffs

Mr. Barrie Barlow instructed by Mason for the Defendant.