Privy Council Appeal No. 17 of 1971

Tak Ming Company Limited – – – – – *Appellants*

v.

Yee Sang Metal Supplies Company – – – – *Respondents*

FROM

THE SUPREME COURT OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH DECEMBER 1972

Present at the Hearing:
LORD WILBERFORCE
VISCOUNT DILHORNE
LORD PEARSON

[*Delivered by* LORD PEARSON]

On the 7th July 1970 in the Supreme Court of Hong Kong Pickering J. made an order under the " Slip Rule " correcting his own earlier judgment in favour of the present respondents (plaintiffs in the action) against the present appellants (second defendants in the action) by including in it an award of interest on the sum found to be due. His order was affirmed (except as to costs) by the Full Court. In the present appeal the questions raised are (1) whether Pickering J. was precluded from making the order by a decision of another judge on a previous application relating to such interest (2) whether Pickering J.'s discretion was wrongly exercised when he decided to make the order, having regard to the relevant events and circumstances including the respondents' delay in applying for the order.

It will be convenient first to trace the sequence of events, then to refer to the relevant procedural provisions and then to consider the two questions raised in this appeal.

In October 1964 Defag Construction Company contracted with the appellants to erect for them a 16-storey building, and Defag Construction Company engaged the respondents as sub-contractors to carry out steel work. For the work which they did the respondents received payments on account amounting to $884,000, but there was still a large balance due to them. On the 16th November 1966 they brought an action against Defag Construction Company as first defendants and the appellants as second defendants claiming $367,645·75 as the balance due. The respondents recovered judgment against Defag Construction Company but the judgment was not satisfied. The respondents proceeded with their action against the appellants, claiming that the appellants had by an undertaking given in correspondence assumed liability to the respondents. In their Statement of Claim against the appellants dated the 13th March 1967 the respondents claimed the balance of $367,645·75 and interest thereon at the rate of 8% per annum from the commencement

of the action to payment under Order 15 rule 7 of the Code of Civil Procedure. The appellants denied liability.

The action was tried by Pickering J. in the Supreme Court of Hong Kong. At the request of both parties he agreed to determine the issue of liability before evidence was adduced on the issue of quantum. On the 3rd January 1969 he gave a judgment, dealing at length with the issue of liability and deciding it in favour of the respondents. He held that the appellants were liable to the respondents for the balance, if any, of the price of work done on the site by the respondents in excess of the sum of $884,000·00 already received by the respondents. He said, " The amount of any such balance is a matter for future determination and, at counsel's request, there will be liberty to either side to apply for directions regarding the manner of such determination ". He awarded costs to the respondents. The learned judge did not in this judgment award interest and he was not then asked to do so. The judgment was not read but was handed down in open Court.

On the 8th February 1969 the learned judge in response to an application by the parties appointed an expert to determine the amount of the balance owing. At the hearing of this application counsel for the respondents asked for it to be put on record that he was intending to make an application for interest at the appropriate time.

The appellants had appealed against the judgment on the issue of liability but their appeal was dismissed by the Full Court of the Supreme Court of Hong Kong on the 2nd June 1969. On the 20th June 1969 the Full Court granted leave for the appellants to appeal to Her Majesty in Council.

On 30th July 1969 the expert assessed the balance owing to the respondents at $332,635·17.

On the 6th August 1969 the respondents applied by a summons inter partes for an order that interest should be paid by the appellants to the respondents on the sum of $332,635·17 at the rate of 8% per annum from the commencement of the action on the 16th November 1966 until payment of the judgment debt. The summons was supported by an affirmation of the respondents' solicitor. On the 16th August 1969 it was heard by Briggs J. in Chambers and was dismissed with costs. On the 23rd August 1969 final judgment was entered for the amount assessed.

Then about nine months later, on the 26th May 1970, the respondents applied by notice of motion for an order that Pickering J.'s judgment of 3rd January 1969 should be corrected by the inclusion of an award of interest pursuant to the claim in the Statement of Claim, the ground of the application being that owing to an accidental omission the said judgment did not provide for this part of the plaintiff's (the respondents') claim. At the time when this application was made the appeal to Her Majesty in Council on the issue of liability was still pending: it was ultimately dismissed by Order in Council dated the 27th October 1971. The application for correction of Pickering J.'s judgment of 3rd January 1969 was heard by him on the 7th July 1970 and he decided that the correction should be made. On appeal his decision was affirmed, except as to costs, by the Full Court on the 1st December 1970. The present appeal is from that decision of the Full Court.

As to costs, Pickering J. had directed on the 7th July 1970 that each party should pay their own costs of the application to him for correction of the judgment, but the Full Court substituted a direction that the

respondents should pay the appellants' costs of that application and also directed that one-third of the appellants' costs of the appeal to the Full Court should be borne by the respondents and that two-thirds of the respondents' costs of that appeal should be borne by the appellants.

Now it is necessary to refer to certain procedural provisions.

The claim for interest in the Statement of Claim dated the 13th March 1967 was made under Order 15 rule 7 of the Code of Civil Procedure, which was then in force and provided that:—

> " When the action is for a sum of money due to the plaintiff the Court may in the judgment order interest at such rate as the Court may think proper to be paid on the principal sum adjudged from the commencement of the action to the date of the judgment, in addition to any interest adjudged on such principal sum for any period prior to the commencement of the action; and further interest, at such rate as may for the time being be fixed by the Court, shall be recoverable on the aggregate sum so adjudged, from the date of the judgment to the date of payment."

The Code of Civil Procedure was repealed and replaced by the Rules of the Supreme Court 1967 coming into force on the 1st September 1967. By an amendment coming into force on the 1st May 1968 those Rules included Order 6 rule 2 (*a*), and this was identical with the former Order 15 rule 7, which has been set out above. Consequently, when Briggs J. gave his decision in August 1969, the relevant provision was that " . . . the Court may in the judgment award interest . . . . ". There was then no power to make an award of interest separate from the judgment.

New provisions were introduced in January 1970. Order 6 rule 2 (*a*) was repealed on the 6th January 1970, and on the 9th January 1970 the Supreme Court Ordinance (Cap. 4 of the Laws of Hong Kong) was amended by the addition of sections 30 A and 30 B. Sections 30 A and 30 B included the following provisions:—

> " 30 A. (1) Subject to subsection (2), the Court may, in any proceedings brought in the Court for the recovery of any debt or damages, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.
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> (3) The powers conferred by subsection (1) may be exercised:—
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> (*a*) whether or not interest is expressly claimed;
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> (*b*) at any time after judgment is entered in any case in which it appears that the failure to apply for or to award interest was through inadvertence; . . . .
>
> . . . . . .
>
> 30 B. (1) A judgment debt shall carry interest at the rate of eight per cent per annum, or at such other rate as may be prescribed by rules of Court, on the aggregate amount thereof, or on such part thereof as for the time being remains unsatisfied, from the date of the judgment until satisfaction."

There was thus in 1970 the possibility of making an application under section 30 A (3). But the respondents, presumably for tactical reasons—seeking to avoid a plea of *res judicata*—did not adopt this course and

preferred to apply under the " Slip Rule " for correction of Pickering J.'s judgment of 3rd January 1969. The " Slip Rule ", in Hong Kong as in England, was at all material times contained in Order 20 rule 11 and worded as follows: —

> " Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court on motion or summons without an appeal ".

The requirements for acting under the Slip Rule were satisfied. Pickering J. said, " A most important matter for me to consider is what I would have done at the time I gave judgment had this matter of interest been in my mind. After a lengthy trial, in the course of which both sides asked me to confine my decision to the issue of liability, and having written a long judgment which occasioned to me no small difficulty, my mind was on the issue of liability rather than upon any figures. But had I thought the matter through further, as I should have done, I am in no doubt whatever, having a very clear recollection of the case and at the evasiveness of Mr. Cheng, witness for the second defendant company, that I would have made an award of interest. Unfortunately for the plaintiff firm, I did not read the lengthy judgment in court but handed it down so that the omission was not obvious to counsel for the plaintiff before I had left the court." On the basis of that explanation it can be said both that there was an accidental omission by the judge to order interest in his judgment of 3rd January 1969 and that there was an accidental omission by counsel to ask for it. Under the Slip Rule an accidental omission by counsel can suffice to bring the Rule into operation. *In re Inchcape* [1942] Ch. 397, 399, *per* Morton J.

The first question raised in this appeal is whether Pickering J. was precluded from making the order of 7th July 1970, correcting his judgment of 3rd January 1969, by the decision of Briggs J. on the 16th August 1969. The answer must depend very largely on what Briggs J. decided. This was considered both by Pickering J. and by the Full Court. According to the judge's notes of the arguments the respondents' counsel said he was instructed that Briggs J.'s reason for dismissing the application was that he had no jurisdiction—that an order for interest must be made in the judgment and it was too late for interest to be awarded after delivery of the judgment—and appellants' counsel said " Briggs J. refused as having no jurisdiction ". Pickering J. said in his judgment, " My brother Briggs refused the application being, I am informed by counsel, of the view that he had no jurisdiction to make the order sought and that a successful plaintiff could either obtain an order for interest at the time of his judgment or not at all ". Counsel who appeared on the appeal to the Full Court had not appeared on the application before Briggs J. but one of them had been informed by counsel who did appear on that application that the entire proceedings took only three minutes. There was produced to the Full Court the endorsement on counsel's brief, reading as follows: —" Briggs J. in Chambers 16/8/69 at 10 o'clock. Application refused with costs. Certificate for counsel. Court said it had no power to grant interest at this stage of proceeding and it should have been done at time of judgment." The Full Court consulted Briggs J., but he, understandably, owing to the lapse of time, was not able to say what arguments were presented to him on the application. The Full Court's conclusion was " From the brief note of the proceedings set out above the preferable view would seem to be that the learned judge came swiftly to the conclusion that he had simply no jurisdiction to deal with the matter at all."

On the materials available that was a reasonable conclusion. In effect there is a finding of fact by both Courts below that Briggs J.'s reason for rejecting the application was that he had no jurisdiction to entertain it. He did not decide whether on some different application—*e.g.* an application for correction of the judgment—he would have had jurisdiction to decide whether interest should be awarded. There was no adjudication on the merits of the claim for interest. In principle this case resembles *Pinnock Bros. v. Lewis and Peat Ltd.* [1923] I K.B. 690, where the arbitrator held that he had no jurisdiction to entertain the claim, and differs from *Ayscough's case* (1923) 39 T.L.R. 206, where the arbitrator considered and dismissed the claim. The distinction on the facts between these two cases may seem tenuous, but the principle is quite clear. In *Pinnock Bros. v. Lewis and Peat Ltd.* Roche J. said at p. 695, referring to *Ayscough's case*—

> "In that case the arbitrator decided—whether rightly or wrongly is immaterial for the present purpose—that by reason of a clause as to time contained in the contract, the plaintiffs had no claim, and therefore he dismissed it. In the present case the arbitrator merely decided that he had no jurisdiction, and that being so the award does not and cannot determine the substance of the plaintiff's claim."

On p. 696 Roche J. said—

> "The mere presence of an arbitration clause is no defence to an action on the contract. An award following on the arbitration clause may be an answer to the claim, and it will be an answer where it deals with the claim. *Ayscough's case* is an authority for that. But where, as in this case, the award does not deal with the claim but merely with the jurisdiction of the arbitrator, it is no answer."

In the present case there was no *res judicata*. The claim for interest had not been adjudicated by Briggs J.

There is, however, also a wider principle to be considered. In *Ord v. Ord* [1923] 2 K.B. 432 Lush J. said at p. 443:

> "It remains for me to deal with the other, the wider principle to which I have referred and which is often treated as falling within the plea of *res judicata*. The maxim '*nemo debet bis vexari*' prevents a litigant who has had an opportunity of proving a fact in support of his claim or defence and chosen not to rely on it from afterwards putting it before another tribunal. To do that would be unduly to harass his opponent, and if he endeavoured to do so he would be met by the objection that the judgment in the former action precluded him from raising that contention. It is not that it has been already decided, or that the record deals with it. The new fact has not been decided; it has never been in fact submitted to the tribunal and it is not really dealt with by the record. But it is, by reason of the principle I have stated, treated as if it had been."

That wider principle is not properly applicable in the present case. It would have applied if Briggs J. had adjudicated on the claim for interest and respondents' counsel, having omitted to rely in the proceedings before Briggs J. upon some fact or argument, had afterwards sought in other proceedings to rely on that fact or argument. In the present case there was simply a refusal to adjudicate on the ground of lack of jurisdiction.

The appellants have placed some reliance on the case of *Reichel v. Magrath* (1889) 14 App. Cas. 665. In that case Mr. Reichel had, in an action against the bishop and the patrons of a benefice from which he

had resigned, failed to prove that he was still the vicar of the benefice, and he afterwards refused to give up possession of the parsonage house and glebe lands, and in defence to an action by his successor he sought to raise the same case as he had unsuccessfully put forward in his own action against the bishop and the patrons. An order that the defence be struck out was affirmed by the Court of Appeal and the House of Lords. Lord Halsbury said at p. 668:

> "I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again. It cannot be denied that the only ground upon which Mr. Reichel can resist the claim by Mr. Magrath to occupy the vicarage is that he (Mr. Reichel) is still vicar of Sparsholt. If by the hypothesis he is not vicar of Sparsholt and his appeal absolutely fails, it surely must be in the jurisdiction of the Court of Justice to prevent the defeated litigant raising the very same question which the Court has decided in a separate action. I believe there must be an inherent jurisdiction in every Court of Justice to prevent such an abuse of its procedure and I therefore think that this appeal must likewise be dismissed".

The principle in that case does not apply here, because the claim for interest was not considered and decided and disposed of in the earlier proceedings, there being only a denial of jurisdiction.

Finally there is the question of discretion. Even though the requirements of the Slip Rule are satisfied, and the Court is not precluded from making an order under it by any *res judicata* in the narrow or the extended sense, there is nevertheless a discretion in the Court to refuse an order under the Slip Rule if something has intervened which would render it inexpedient or inequitable to do so. *Moore v. Buchanan* [1967] 1 W.L.R. 1341 (Court of Appeal) following Lord Watson in *Hatton v. Harris* [1892] A.C. 547, 560.

In this case there was considerable delay by the respondents before they made their application under the Slip Rule. It does not appear, however, that the delay caused the appellants to take any step which they would otherwise have refrained from taking or to omit any step which they would otherwise have taken. The liability for interest was of course dependent on the liability for the principal sum, the balance due to the respondents, and there was no final decision as to the appellants' liability for the principal sum until the appeal to Her Majesty in Council was dismissed by Order in Council on the 27th October 1971. There were also factors in favour of making the order under the Slip Rule. The respondents had been kept out of their money—the balance due to them, for which the appellants have been held responsible—for several years, and it is just that they should have interest on it. Also they had asked for interest in their Statement of Claim, and had indicated when directions were given on the 8th February 1969 that they intended to apply for interest "at the appropriate time", and they had made the application for interest on the 6th August 1969, which was rejected by Briggs J. for want of jurisdiction on the 16th August 1969, and they made their application under the Slip Rule on the 26th May 1970. Thus they had taken several steps with a view to recovering interest. This question of discretion was carefully considered by both Courts below, and no sufficient ground has been shown to their Lordships for interfering with the exercise of the discretion which was made by Pickering J. and affirmed by the Full Court.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs of the present appeal. The special orders made by the Full Court with regard to the costs of the application and the costs of the appeal to the Full Court remain unaltered.

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In the Privy Council

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