HCA014006/1998

HCA14006/98

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO.14006 OF 1998

BETWEEN

FAR EAST STRUCTURAL STEELWORK ENGINEERING LIMITED	Plaintiff
AND	
REESON CRANE & ENGINEERING LIMITED	Defendant

Coram : The Hon Mrs Justice Le Pichon in Chambers

Date of Hearing : 9 March 1999

Date of Handing Down of Decision : 19 March 1999

D E C I S I O N

This is an appeal by the Defendant in Order 14 proceedings against the order of Master Jones granting leave to defend conditional upon the payment of the sum of $1.575 million into court.

The facts

On 28 June 1994, the Defendant entered into a hire purchase agreement with Citicorp for the hire purchase of a 100GMT crane ("the Crane"). On 12 January 1996, the Defendant as lessor and the Plaintiff as lessee entered into a "Leasing Agreement" in respect of the Crane. A deposit of $470,000 was payable, the term was for 18 months from 29 January 1996. There followed the following provisions :

"3(c)Rental : Each monthly rental shall be HK$113,845.00. The Lessee shall issue two cheques, one in the amount of HK$81,667.00 in favour of Citicorp being the instalment payable by the Lessor under the Hire Purchase Agreement and the other in the amount of HK$32,178.00 in favour of the Lessor. The sum shall be paid on the 29th day of each month and the 1st payment is 29th January 1996.

(d) Purchase option:

(i) Upon the expiry of the Lease Term mentioned in 3(b) above, the Lessee shall have an irrevocable option to purchase the goods [save (ii) below mentioned] at a consideration of HK$1.00 and in the event of the Lessee exercising the option, the Lessor shall warrant that the goods shall be free from any mortgage and that all of the goods belongs to the Lessor so that the goods can be sold to the Lessee.

(ii) The Lessee shall lose the purchase option if the Lessee fails to rent the goods up to expiry of the rental period."

For convenience, I will refer to this document as the Agreement.

On 20 September 1996, the Plaintiff entered into an agreement with Kit Shun Crane Company Ltd ("Kit Shun") for the sale of the Crane to Kit Shun for $2.25 million ("the Sub-sale Agreement"). 30% of the purchase price was payable on the contract date and the balance of $1.575 million was to be paid by Kit Shun by a postdated cheque within 14 days thereafter to the Plaintiff. It also provided that :

"(3) The transfer of the [Crane's] title shall be arranged by both [the Plaintiff] and [the Defendant]."

The Plaintiff wrote to the Defendant on the subject of "crane redemption" on 8 January 1997 to the effect that it anticipated that "the matter be settled in accordance with the arrangement noted in the enclosed sheet". The enclosure contained a calculation of the remaining six months instalments payable to the Defendant and to Citicorp in accordance with Clause 3(c) of the Agreement as a lump sum payment. It also envisaged the payment of $1 by cheque being the price of the option after full payment of the instalments. No reply was ever sent to this letter. On 12 February 1997, the Plaintiff requested the return of the postdated cheques in respect of the monthly instalments that were issued at the time of the Agreement in exchange for a cheque for the remaining balance. There was also no reply to this letter. On 4 April 1997, the Plaintiff wrote referring to the sale of the Crane by the Plaintiff to a third party and the Defendant's promise to effect a transfer of title as soon as possible. As the validity of the cheque of the third party had expired (being more than 6 months of the date of issue) the Plaintiff put on record that any loss suffered would be the Defendant's responsibility. Again there was no reply to this letter.

The Lease Term under the Agreement expired on 28 July 1997.

On 11 August 1997, the Plaintiff wrote to the Defendant requesting that the transfer of title be dealt with as soon as possible. This was followed by another letter on 28 October 1997 threatening legal action or damages caused by the delay. All the Plaintiff's letters went unanswered.

On or about 26 February 1998, the parties entered into a sale and purchase agreement ("the February Agreement") relating to the sale of a 50 ton crane (the Tadano crane) to the Plaintiff for $1.8 million, the delivery date being 1 March 1998. The deposit of $300,000 was to be paid before delivery and the balance of $1.5 million to be paid after the Plaintiff had obtained a loan. It also contained the following provision :

"Immediately after obtaining a loan from Citicorp by [the Plaintiff], [the Defendant] shall redeem the [Crane] and obtain from the bank all the relevant documents for delivery to [the Plaintiff]."

So, both the Tadano crane and the Crane were the subject matter of the February Agreement. It would appear that the February Agreement was superseded by a further agreement dated 9 March 1998. There is an invoice of that date to the effect that the price for the Tadano crane would be reduced to $1.5 million. The invoice contained, *inter alia,* the following notes :

"2. In respect of the Crane that [the Plaintiff] has fully satisfied the instalment payments, [the Defendant] agreed to make all transferral arrangements for [the Plaintiff] in consequence of the current transaction not later than the end of March.

3. [The Defendant] will arrange for the [Tadano crane] to be delivered to [the Plaintiff] on 17th March 1998.

4. After [the Plaintiff] has arranged for mortgage of the above [Tadano crane], the HK$100,000.00 deposit which has not yet been refunded will be repaid immediately."

By writ dated 9 October 1998, Kit Shun instituted proceedings in HCA17023/98 against the Plaintiff seeking damages for breach of the Sub-sale Agreement.

It is common ground that the amount ordered to be paid in by Master Jones as a condition for leave to defend reflected the unpaid balance under the sub-sale to Kit Shun, namely the Plaintiff's loss on the sub-sale. As there is no cross-appeal, the question which arises is whether the payment-in of $1.575 million ought to have been ordered.

The issues

Is the Defendant responsible for the Plaintiff's loss on the sub-sale?

It is common ground that if the Plaintiff's interest was purely one as bailee under a bailment contract, it could not have validly entered into the sub-sale. Counsel for the Defendant submitted a triable issue exists as to whether, on its proper construction, the Agreement was a leasing agreement coupled with an option or a hire purchase agreement. For that reason alone, the Defendant ought to have been given unconditional leave to defend.

That approach appears to me to be wrong. The question is not what label one assigns to the Agreement, but to analyze the nature of the Plaintiff's interest under the Agreement. Was the Plaintiff's interest more than that of a mere bailee? The answer has to be in the affirmative given the fact that it was granted an option exercisable at the end of the Lease Term to acquire the Crane for $1. Under the common law, such an interest is plainly assignable : see **Whiteley Ltd v Hill** [1918] KB 808. The question then arises as to whether the sub-sale constituted an assignment by the Plaintiff of its interest under the Agreement to the sub-purchaser. The answer turns on a construction of the Sub-sale Agreement.

Turning to the Sub-sale Agreement in the present case, the sub-purchaser's obligation was to pay $1.575 million, being the balance of the purchase price within 14 days of the date of the Sub-sale Agreement, i.e. by 4 October 1996. This date was during the currency of the Lease Term under the Agreement, in fact more than nine months before the end of that term. Nothing in the Sub-sale Agreement varied the obligation of the vendor i.e. the Plaintiff, to transfer title to the Crane upon payment of the purchase price. Paragraph 3 under "Other terms" of the Sub-sale Agreement does not provide otherwise.

Under the Agreement, the option to purchase the crane was only exercisable "upon the expiry of the Lease Term" which did not occur until 28 July 1997. The Plaintiff was not entitled to and had no right to purchase the Crane during the currency of the Lease Term. It follows therefore that it could not have given good title to Kit Shun under the Sub-sale Agreement on 4 October 1996. I agree with counsel for the Defendant that the Plaintiff's breach under the Sub-sale Agreement would have crystallized on 4 October 1996. That breach had nothing to do with the Defendant and arose because the Plaintiff of its own volition chose to enter into the Sub-sale Agreement.

Counsel for the Plaintiff placed reliance on **Whiteley v Hill** (*supra*), in effect submitting that it was on all fours with the sub-sale in the present case. In that case, the subject matter was a piano which the plaintiffs had let under a hire purchase agreement. Under that agreement, the hirer had an option to purchase the piano by payment of a certain number of instalments but was to remain a bailee until the last of the instalments should be paid, the hirer having the right at any time to terminate the agreement by returning the piano to the plaintiffs. After making several payments, the hirer sold the piano to the defendant. In an action of detinue and conversion, the defendant pay into court the amount of the remaining unpaid instalments and it was held that the defendant had acquired the rights of the hirer under the agreement before anything had been done to terminate it, no instalment being then in arrear, that the measure of damages was the amount of the unpaid instalments and that the plaintiffs were not entitled to recover the piano its full value but only the amount paid into court. The piano was sold as part of the contents of the hirer's flat to the defendant who succeeded her as the occupier of the flat. Unlike the present case, there was no written agreement entered into between the hirer and the defendant.

That case does not assist the Plaintiff. There are material differences between the contractual terms of hire : in that case, the hirer could become the owner by paying the full sum of hire at any time during the currency of the hire. There was no option as

such. In the present case, the terms of the option are specific and it is exercisable only upon the expiry of the Lease Term. **Whiteley v Hill** is thus distinguishable and is not authority for the proposition that the hirer under hire purchase agreement has a right during the currency of the hire to acquire the subject matter of the hire. That would depend on the terms of the particular contract. In my judgment, I can see no basis for concluding that the loss suffered by the Plaintiff under the sub-sale because of the Plaintiff's inability to transfer good title is to be laid at the Defendant's door.

Was the Option duly exercised?

The Plaintiff's alternative argument appears to be that the loss suffered on the sub-sale was caused by the Defendant's inability to perform its obligation to transfer the Crane free from encumbrances to the Plaintiff "at the time when the Plaintiff exercised the option". Implicit in this assertion is that the option was duly exercised by the Plaintiff. Leaving aside the question whether any default by the Defendant as alleged caused the loss, the critical issue is whether the option was exercised in accordance with the terms of the Agreement.

In support, the Plaintiff relies on no less than five different dates : its letters dated 8 January 1997, 12 February 1997, 4 April 1997, 11 August 1997 and 28 October 1997. The relevant terms of these five letters have already been summarized. These letters appear to me to miss the point because as counsel for the Defendant correctly submitted, the option is exercised by payment of the requisite consideration. It would appear on the evidence adduced that the requisite consideration was never tendered. The consideration for the exercise of the option may be nominal but it appears to me that the court is not at liberty to disregard it. If it were, when does consideration cease to be nominal? It would lead to uncertainty which cannot be in the interest of commercial transactions. Whether or not that view is correct, at a minimum, the question whether the option was duly exercised must be a triable issue.

The Defendant submitted that if (which it does not admit) it were in breach, the Plaintiff never accepted the breach : rather, it affirmed the Agreement following the alleged breach and therefore has no cause of action. It would appear that on 26 February 1998, the Plaintiff entered into an agreement with the Defendant in relation to the Tadano crane and as part of that transaction, agreed to the delivery of the Crane by the Defendant as set out in the February Agreement. The February Agreement was varied and superseded by the March Agreement, but that fact is immaterial for the purposes of the Defendant's argument since the critical factor is an agreement on the part of the Plaintiff to accept delivery of the Crane some six months after the expiry of

the Lease Term under the Agreement. This appears to be an additional factor against the Plaintiff's claim.

Conclusion

In my judgment, I can discern no rational basis for ordering that the sum of $1.575 million be paid into court as a condition for obtaining leave to defend. Unless it is probable that the Defendant has no defence to the amount ordered to be paid into court, it would not be right to make that a condition of granting leave to defend. For the reasons given, it is far from clear that the Defendant is likely (much less bound) to be held liable for that sum at the end of the day. Accordingly, the order of Master Jones is to be set aside and the Defendant given unconditional leave to defend these proceedings. The Defendant is entitled to the costs of this appeal and below. I make an order nisi to that effect.

(Doreen Le Pichon)
Judge of the Court of First Instance High Court

Representation:

Mr Vincent Chun, inst'd by M/s Lau, Kwong & Hung, for the Plaintiff

Mr J. Hingorani, inst'd by M/s Liu, Szeto & Partners, for the Defendant