HCA 2354/2012

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

HIGH COURT ACTION NO 2354 OF 2012

BETWEEN

POSSEHL ELECTRONICS HONG KONG LIMITED Plaintiff

and

CHINA TAIPING INSURANCE (HK) CO. LTD. Defendant

Before: Deputy High Court Judge Whitehead, SC in Chambers

Date of Hearing: 9 September 2013

Date of Judgment: 19 December 2013

J U D G M E N T

BACKGROUND

1. On 4th June 2011 a fire broke out on the roof of the 7th Floor of Possehl Building at 14-18 Ma Kok Street, Tsuen Wan, New Territories ("the Premises").

2. The premises were covered by

(i) An Accidental Damage (Property) Insurance Policy issued by the Insurer, China Tai Ping Insurance (HK) Co. Ltd. ("the Insurer") to the Plaintiff, Possehl Electronics Hong Kong Limited ("Possehl"), on the 13th April 2011 covering the period from the 11th April 2011 to 10th April 2012 ("the Property Policy").

(ii) A "Business Interruption Insurance Policy issued by the Insurer to Possehl also on 13th April 2011 covering the period from 11th April 2011 to 10th April 2012 ("the Interruption Policy").

3. There is no dispute that the Premises were covered by the aforesaid policies, nor that the fire took place during the coverage period of the policies.

4. Shortly after the fire, Possehl notified the insurer of the occurrence of the fire and made claim under the policies.

5. Thereafter and up until 1st June 2012 the Insurer's loss adjuster, Cunningham Lindsey (HK) Ltd, carried out investigations in relation to the fire. On 1st June 2012 the Insurer's Solicitors, Messrs Mayer Brown JSM, issued a letter rejecting the claim under the policies on the ground that Possehl was in breach of the A33 Legal Requirements Warranty in the Property Policy.

6. On 28th June 2012 Possehl's solicitors Messrs Y T Szeto & Co wrote to the Insurer's solicitors disputing the grounds of the Insurer's rejection of Possehl's claim.

7. The Insurer maintained its rejection of Possehl's claim and on 26th July 2012 Possehl's Solicitors issued a letter referring to clause 7 of the Property Policy and clause 9 of the Interruption Policy, giving notice that "disputes and differences have arisen" in respect of 8 matters (the Arbitration Notice).

8. On 23rd August 2012 the Insurer's solicitors disputed the validity of the Arbitration Notice, but without prejudice to the dispute proposed the appointment of an arbitrator, and indicated it would ask the arbitration tribunal to determine its jurisdiction.

9. On 11th September 2012 Possehl's Solicitors indicated that as the Insurer disputed Possehl's entitlement to refer the dispute to arbitration it would take the matter to Court for resolution.

10. On 19th December 2012 Possehl commenced the present Action.

11. By Summons dated 27th February 2013 the Insurer seeks to strike out the Action, alternatively dismiss the Action upon the determination of a preliminary issue of law, on the ground that the Action is barred by reason of general condition 12 of the Property Policy and proviso 1 of the Interruption Policy.

12. By another Summons also dated 27th February 2013 the Insurer seeks to strike out the Action, or alternatively dismiss the Action upon the determination of a preliminary issue of law on the ground that the Action is barred by reason of general condition 4(b) of the Property Policy, and proviso 1 of the Interruption Policy.

13. On 5th June 2013 Master Levy ordered that the two Summonses be heard together.

THE POLICIES

14. The Property Policy contains two contractual limitation periods. Condition 12 provided as follows:

> "TIME LIMIT
>
> In no case whatever shall the Company be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."

15. Condition 4(b) of the Property Policy provided as follows:

> "FORFEITURE
>
> All benefit under this Policy shall be forfeited …
>
> (b) if any claim be made and rejected and an action or suit be not commenced within 3 months after such rejection, or (in the case of an arbitration taking place in pursuance of Condition No.7 of this Policy) within 3 months after the arbitrator or arbitrators or umpire shall have made their award."

16. Condition 7 of the Property Policy provided as follows:

> "If any difference shall arise as to the amount to be paid under this Policy, such difference shall independently of all other questions be referred to the decision of an arbitrator … And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this Policy that the award by such arbitrator or umpire of the amount of the loss or damage if disputed shall be first obtained."

17. The Interruption Policy provided that the Insurer would pay Possehl the amount of loss resulting from interruption or inference provided that:

> "At the time of the happening of the Damage there shall be in force an insurance covering the interest of the Insured in the property at the Premises against such Damage and that
>
> (a) Payment shall have been made or liability admitted therefor, or
>
> (b) Payment would have been made or liability admitted therefor but for the operation of a provision in such insurance excluding liability for losses below a specified amount."

THE INSURER'S CASE

18. Mr Douglas Lam of Counsel on behalf of the Insurer, whilst advancing summonses seeking to strike out the action and alternatively a determination to dismiss the action upon a preliminary issue of law, in effect before the Court argued only for a strike out on the basis that Possehl's claims were frivolous, vexatious and an abuse of the process. Mr Barrie Barlow, SC appearing on behalf of Possehl advanced various complaints about the procedural structure of Mr Lam's applications, but in the event I have dealt with this application on the basis that Mr Lam is seeking to strike out the action as noted, on the basis that the claims made by Possehl are frivolous, vexatious and otherwise an abuse of process.

19. I note in this context that in *Kanson Crane Service Company Limited. v. Bank of China Group Insurance Co. Ltd.* [2003] 3 HKC 206 which was an insurance case, Deputy High Court Judge Lam (as he then was) noted at paragraph 13 therein that :

> "… in a case where it is clear that a defendant would rely on a limitation defence and it is plain that the plaintiff could not overcome such plea, the Court can strike out the claim on the basis that it is frivolous, vexatious and an abuse of process of the court."

20. Mr Lam submitted that Condition 12 and Condition 4(b) found in the Property Policy are two separate and independent stipulations as to limitation. He further submitted, and I accept that it is well established that parties may stipulate in a contract that legal or arbitral proceedings shall be commenced within a shorter period of time than provided under the Limitation Ordinance (Cap 347), failing which the right of action may be barred or extinguished.

21. With regard to Condition 12, Mr Lam submitted that the plain meaning of the words found in that Condition were clear and were not open to serious dispute. That a claim must be brought within 12 months from the "happening of the loss or damage" whether by action or arbitration, failing which the Insurer shall "in no case whatever" be liable for any loss or damage.

22. Mr Lam submitted that there is no dispute that the "happening" of the loss or damage was the fire which occurred on 4th June 2011, and that in such circumstances Possehl was required to bring a claim on or before 4th June 2012. This says Mr Lam Possehl failed to do, the arbitration notice having been given on 26th July 2012, and the writ filed on 19th December 2012.

23. Mr Lam thus submits that there is simply no answer to Condition 12 of the Property Policy, and consequently it is appropriate to strike out Possehl's present claim.

24. With regard to Condition 4(b) Mr Lam submits that the only question is whether there was "an arbitration taking place in pursuance of Condition No.7 of this Policy", in which case forfeiture would occur upon the expiry of 3 months from the award in the arbitration.

25. Mr Lam submits that the arbitration notice was invalid and ineffective to commence any arbitration and thus no arbitration was "taking place". He says this because:

(i) The arbitration clause is concerned with questions of amount only, and not questions of liability. Mr Lam further submits that no difference as to the amount to be paid has arisen because his client has rejected the claim in toto.

(ii) None of the 8 matters listed in the arbitration notice is concerned with the "amount to be paid" or the quantum of Possehl's claim.

26. With regard to the Interruption Policy, Mr Lam points simply to the condition precedent to liability under that Policy, being that payment shall have been made or liability admitted, and submits that as there has been no payment or admission of liability, the condition precedent to liability has not been met.

POSSEHL'S CASE

27. Mr Barlow, SC on behalf of Possehl began his submissions by reminding the Court that it was only in plain and obvious cases that the relief sought by Mr Lam should be granted.

28. Mr Barlow submitted that the Insurer had not acted in good faith and by "sharp practice" had tried to evade its obvious contractual

obligations. That in utilizing its "knowledge of the fine print" in the Insurer's policy, that the Insurer had used "a delaying tactic in order to try to trap Possehl." Mr Barlow elaborated that it had taken almost a year, until 1st June 2012, to notify Possehl's solicitors that the claim had been rejected. He further contended for an implied term that his client's claim should have been timeously rejected.

29. Mr Barlow indicated that his client's defence was directed to dispute the construction of the Policy. He further contended that estoppel would be pleaded to meet any case based upon limitation.

30. Mr Barlow stressed that contracts are to be construed as a whole in order to identify the commercial purpose of the contract, and in particular general conditions 4 and 12 are to be read in conjunction with the commercial purpose of the policies, viz to provide indemnity in exchange for payment of premium.

31. With relation to a defence of limitation, Mr Barlow submitted that his client contemplated serving a reply, raising the issue of whether or not the Insurer had waived the procedural provisions that the Insurer now seeks to enroll, and whether by its conduct the Insurer is estopped from relying upon its alleged limitation defence.

32. Mr Barlow concluded that these matters involved disputed issues of fact and law and were thus not amenable to summary determination.

33. With regard to his client's arbitration notice, Mr Barlow's eventual position was that the Insurer had itself engaged in the arbitration

proceedings by proposing the appointment of its own nominated arbitrator, and as such the arbitration proceedings were effective and subsisting. Mr Barlow further disclaimed Mr Lam's assertion that the arbitration notice did not engage matters concerned with "the amount to be paid".

DISCUSSION

Condition 12 of the Property Policy

34. At the outset I have no hesitation in rejecting Mr Barlow's submissions that the Insurer had not acted in good faith, or had embarked upon any form of "sharp practice" in respect of any of the matters concerned with the Action.

35. The Insurer and Possehl are commercial parties and the policies entered into between them contained no markedly unusual or obscure language or conditions. From at least 24th November 2011 Possehl were represented in this matter by Y T Szeto & Co, solicitors. In these circumstances, any suggestion that Possehl was disadvantaged by "the fine print in the Insurer's printed policies" or that Possehl had been "trapped" by "delaying tactics" by the Insurer is without merit.

36. Furthermore, I have read and considered the evidence on affirmation in this case and can discern no discreditable behavior by the Insurer of the type alleged by Mr Barlow.

37. Mr Barlow as noted contended for an implied term that his client's claim should have been timeously rejected, and that if it is shown on the facts that the Insurer had not proceeded in good faith, then, says

Mr Barlow, the Insured has been deprived of that which the contract promised. In my view the terms of the policy are clear such that the term sought to be implied by Mr Barlow into the policy is unnecessary, and in any event as I have found there is no evidence in my view of bad faith on the part of the Insurer.

38. With respect to Condition 12, I accept Mr Lam's submissions that the wording of this Condition is clear and cannot be open to serious dispute. The "happening of the loss or damage" took place on 4th June 2011. In these circumstances, Possehl was required to bring an action or arbitration on or before 4th June 2012. It failed to do so. Condition 12 makes clear that "in no case whatever" shall the Insurer be liable for any loss or damages after the expiration of 12 months from the happening of the loss or damage.

39. I further accept Mr Lam's submission that the timing of the rejection notice on 1st June 2012 is irrelevant. Possehl could have issued a protective writ any time up until 4th June 2012. The timing of the rejection notice, in my view, in no way impacts upon or affects the time limit set forth in Condition 12.

40. Furthermore, no payment having been made, and no liability admitted, I find the conditions precedent in the Interruption Policy have not been met.

41. I have of course had regard to Mr Barlow's submission that a contract is to be construed as a whole in order to identify the commercial purpose of the contract. Having conducted this exercise, I find nothing in

the Property Policy which in any way affects the clear language and intent of Condition 12 (nor indeed Condition 4).

42. I find that it is plain and obvious that Possehl cannot overcome the contractual limitation found in Condition 12, and as such I strike out Posseh's claim on the basis that it is frivolous, vexatious and an abuse of the process of the Court, and dismiss the Action.

Condition 4(b) of the Property Policy

43. Although the Court's determination upon Condition 12 of the Policy is determinative of this application, if the Court's determination is nevertheless wrong, I have considered the position under Condition 4(b).

44. The rejection notice from the Insurer is dated 1st June 2012. The notice of arbitration is dated 26th July 2012 and is thus within the 3-month period required by Condition 4(b).

45. The question then becomes whether there is "an arbitration taking place" in which case it shall be "a condition precedent of any right of action or suit upon this Policy that the award by such arbitrator or umpire of the amount of the loss or damage if disputed shall be first obtained."

46. As noted, in response to the service of notice, the Insurer's solicitors whilst disputing the validity of the arbitration notice proposed the appointment of an arbitrator. They further asserted that the Insurer would challenge the jurisdiction of the arbitral tribunal, by asking the tribunal to determine its jurisdiction. These matters however were

advanced without prejudice to the Insurer's primary position that the notice of arbitration was invalid or ineffective.

47. In response, and by its letter of 11th September 2012 Possehl's solicitors stated:

> "On the strength of your letter, your client clearly is of the position that court is the only proper venue for resolving the parties disputes, **and we take no objection to that**. Unless to the contrary is being heard from you within the next 7 days from the date of this letter **we shall proceed to take the matter to the court for resolution**." [My emphasis]

48. The first question is whether at first instance the Court or only the arbitral tribunal may determine whether a notice of arbitration is an effective notice of arbitration. This is a question of law and construction.

49. In *Kenon Engineering Limited. v. Nippon Kokan Koji Kabushiki (*Unreported) CACV214/2003, 7 May 2004, the Court of Appeal considered whether an arbitrator's jurisdiction to rule on the existence or otherwise of an arbitration agreement required the jurisdictional issue to be decided by the arbitrator first. The Court held at paragraph 21 :

> "Since the arbitrator's jurisdiction to rule on the existence or otherwise of an arbitration agreement is not exclusive under Article 16(of UNCITRAL Model Law) it cannot be said that Article 16 requires the matters to be resolved by the arbitrator first in every case… In my view a clear distinction does exist between the Fung Sang issue which involves making factual findings and the present case which turns on a pure question of construction, i.e. a question of law… Given the concurrent jurisdiction it stands to reason that whether or not the Court should decide the issue will depend on considerations of convenience and what falls to be decided."

50. Although the Court of Appeal was dealing with the existence of an arbitration agreement, in my view the Court's undoubted concurrent jurisdiction extends to determining, in appropriate circumstances, the validity of an arbitration notice. If as asserted here the arbitration notice is invalid, because it does not engage the matters agreed by the parties to be determined by the arbitrator, then a question of jurisdiction arises, and the Court shares a concurrent jurisdiction to determine this issue.

51. As such, this Court may and in this case should, as a matter of construction, decide whether or not an arbitration was "taking place in pursuance of Condition 7 of the Policy".

52. It is plain that the arbitration notice is engaged only if there is a difference as to amount to be paid under the Policy. I accept Mr Lam's submission that upon the Insurer rejecting the claim in toto, on the ground that the Insurer had been discharged from any liability as a result of Possehl's breach of the A33 Warranty, that no dispute has arisen as to the amount to be paid under the Policy. In consequence no arbitration was commenced by service of the notice dated 26th July 2012. I am emboldened in this conclusion by the content of the purported arbitration notice itself. In my view none of the 8 matters set out therein are matters or issues concerning any difference between the parties as to the amount to be paid under the policies.

53. Furthermore, Possehl's solicitors' letter of 11th September 2012 appears to accept the Insurer's solicitors' position that the only proper venue for resolving the parties' disputes was at Court. In my view, such a concession amounts to an acceptance of the invalidity of the purported arbitration notice. Possehl then proceeded to institute the

present Court proceedings which appears to be a further acceptance of the invalidity of its arbitration notice, and also a waiver or discontinuance of its right to proceed by way of arbitration.

54. In the premises, I would also strike out Possehl's claim on the ground that the action is barred by general Condition 4(b), in that the Action is frivolous, vexatious and an abuse of the process of the Court, and dismiss the Action.

CONCLUSION

55. The Statement of Claim in this Action will be struck out on the ground that the claims therein are frivolous or vexatious and otherwise an abuse of the process of the Court, and consequently that the Action be dismissed.

56. Possehl will pay the costs of and occasioned by this Action to the Insurer including the costs of and occasioned by the Insurer's application to strike out the Statement of Claim, to be taxed if not agreed. This costs order is an order *nisi*, to become absolute 14 days after the date of this Judgment unless either party gives notice of objection thereto.

(Robert Whitehead, SC)
Deputy High Court Judge

Mr Barrie Barlow SC leading Mr Anthony Lo, instructed by Y T Szeto & Co, for the plaintiff

Mr Douglas Lam, instructed by Mayer Brown JSM, for the defendant