

HONG KONG / JUDGMENT

PCCW GLOBAL LTD v. INTERACTIVE COMMUNICATIONS SERVICE LTD

COURT

Court of Appeal

DECIDED

1 February 2007

CASE / FILE NUMBER

CACV18/2006

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bjbj CACV 18/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CIVIL APPEAL NO. 18 OF 2006 (ON APPEAL FROM HCA NO. 2826 OF 2004)

BETWEEN PCCW GLOBAL LIMITED (formerly known as BEYOND THE NETWORK, LIMITED)
Plaintiff INTERACTIVE COMMUNICATIONS SERVICE LIMITED (formerly known as VECTONE LIMITED) Defendant

Before: Hon Tang VP and Barma J in Court Date of Hearing: 1 February 2007 Date of Decision: 1 February 2007

DECISION

Hon Tang VP (giving the decision of the Court): This is the defendant's application for leave to appeal to the Court of Final Appeal, on the ground that at least one question which is involved in this appeal is a question which by reason of its great general or public importance or otherwise, ought to be submitted to the Court of Final Appeal for decision. Before turning to the suggested questions, I make two observations. First, we are concerned with a one-off contract albeit, one which is apparently based on a standard form. It was the amendments to the standard form which gave rise to the dispute between the parties. There is no evidence that the standard form was widely used. Secondly, this is not the occasion for re-argument, so I will not rehearse the arguments. I hope counsel will forgive me if I only deal briefly with their arguments. The suggested questions are:

- (1) Whether a permissive arbitration clause, which by its nature only becomes a binding arbitration agreement when an election is made, ought, in the absence of clear words to the contrary, to be regarded as overriding a contractual jurisdiction clause once an election to arbitrate is made;
- (2) Whether the court is justified in construing a permissive arbitration clause expressly applying to any dispute, as not covering a particular class of disputes, in the absence of clear words excluding that class of disputes from the ambit of the arbitration clause;
- (3) Whether, in the absence of ambiguity, the court is justified in referring to deletions or earlier draft contracts as an aid to construing a contract. The first question The permissive arbitration clause is clause 11.3, and I believe the so-called contractual jurisdiction clause is clause 4.3 which deals with billing disputes only. We said in our judgment that any dispute which falls within clause 11.3 must be stayed for arbitration. What we have to decide was whether clause 11.3 covered billing disputes. The law on the test to apply is well-settled and could be found in *Private Company Triple V Inc v Star (Universal) Co Ltd and Anor* [1995] 3 HKC 129, a decision of this court which is followed by Burrell J in *Pacific Crown Engineering Ltd v Hyundai Engineering and Construction Co Ltd* [2003] 3 HKC 659, where he said:
 12. The proper test is therefore is there a prima facie or plainly arguable case that the parties were bound by an arbitration clause. The onus being on the defendant to demonstrate that there is. Applying that test, and on our construction of clauses 11.3 and 4.3, we came to the conclusion that clause 4.3 was a self-contained provision and that billing disputes fell outside of clause 11.3. Our construction turns on the construction of the relevant provisions and no question of law of great general or public importance is involved. The second question This raises the question whether our construction of clause 11.3 is correct. This does not involve a question of great general or public importance. Mr Sussex posed the rhetorical question whether when forming a prima facie view, it was permissible to construe the contract as a whole. As I have said, the proper test to apply in considering clause 11.3 is whether there is a prima facie or plainly arguable case that the parties were bound to arbitrate billing disputes. It is only when it is clear that there was no agreement to arbitrate billing disputes that the stay should be refused. Here clause 11.3 is clearly an arbitration clause. But does it cover billing disputes? The answer turns on the proper construction of clause 11.3 read in its context. Doing that, we have considered the contract as a whole including clause 4.3. Mr Sussex accepted that in clause 11.2, which deals with governing law, the expression any dispute did not cover billing disputes because of clause 4.3, but submitted that any dispute in clause 11.3 covered billing disputes notwithstanding clause 4.3. It is obvious that clause 11.3 cannot be read without regard to other provisions in the contract. So this rhetorical question adds nothing to Mr Sussex's argument. In any event, it is not a point of great general or public importance which ought to be submitted to the Court of Final Appeal for decision. The third question We made it quite clear in our judgment at para. 64 that our view on proper construction of the relevant clauses was fortified by, though it is not dependent on what was in the standard terms. This question does not arise. The

earlier comments in our judgment on the genesis of the provisions were necessary in order to resolve the question whether the provisions should be read contra proferentem against the defendant. For the above reasons, this application is dismissed with costs. Hon Barma J: I agree. Hon Tang VP: The application is dismissed with costs. (Robert Tang) Vice-President (Aarif Barma) Judge of the Court of First Instance Mr Roger Beresford, instructed by Messrs Richards Butler, for the Plaintiff. Mr Charles Sussex, SC, instructed by Messrs Holman, Fenwick & Willan, for the Defendant. 1udk 1udk HCMP.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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