



HONG KONG COURT DECIDES THAT THE 'EXTENDED *FIONA TRUST* PRINCIPLE' CAN BE DISPLACED BY CLEAR LANGUAGE

H v G [2022] HKCU 2213

In *H v G, Chan J* in the Hong Kong Court of First Instance held that the Extended *Fiona Trust* Principle had been displaced by clear language, which showed the parties wished disputes arising out of Contract A and Contract B to be resolved separately. It is the latest in a string of cases in the Hong Kong courts in which parties have tried (and mostly failed) to apply the Extended *Fiona Trust* Principle.

Mini-summary

The *Fiona Trust* principle is that parties, as rational businessmen, should be assumed to have intended any dispute arising out of their relationship to be decided by the same tribunal (*Fiona Trust & Holding Corporation & others v Privalov & others* [2007] UKHL 40). The principle is relied upon most commonly where a party wishes to have a single arbitral tribunal determine multiple disputes arising out of one contract.

The “Extended *Fiona Trust* Principle” is where the *Fiona Trust* principle is applied to a scenario where multiple disputes arise under multiple related agreements between the same parties (per Bryan J in *Terre Neuve Sarl & Others v Yewdale Limited & Others* [2020] EWHC 772 (Comm)).

In *H v G*, Chan J in the Hong Kong Court of First Instance held that the Extended *Fiona Trust* Principle had been displaced by clear language, which showed the parties wished disputes arising out of Contract A and Contract B to be resolved separately. It is the latest in a string of cases in the Hong Kong courts in which parties have tried (and mostly failed) to apply the Extended *Fiona Trust* Principle.

What are the practical implications of this case?

When considering whether an arbitration agreement in Contract A can be said to cover disputes arising from Contract B, the wording of the contracts must be construed in their context. In *H v G*, it was clear from that context that the parties had intended to “carve out” disputes arising under Contract B from the scope of the arbitration agreement in Contract A.

This is the fifth case in Hong Kong this year (2022) to consider the Extended *Fiona Trust* Principle. So far, the court has applied the principle in only one case: *Mak v. La* [2022] HKCFI 285 (notably another decision of Chan J). In *Mak v La*, the court considered Contract A and Contract B “all deal with the same subject matter... [and] are all part of the package” (at [50]).

“The court set aside the arbitrator’s decision and held that he did not have jurisdiction over claims made under the warranty.”

It appears from the decision in *H v G* and the other decisions that preceded it is that Extended *Fiona Trust* Principle has “limited application” in Hong Kong where the Contract A and Contract B contain different dispute resolution provisions.

What was the background?

H and G entered into a building contract whereby H agreed to carry out certain building works for G’s project in Hong Kong. The building contract between H and G contained an arbitration agreement.

The building contract provided for H to give a warranty in respect of a waterproofing system to be installed and produced as a result of the building works. The warranty was to be set out in a specified form of Deed of Warranty appended to the building contract and executed under seal by G, H and H’s subcontractor or supplier. The warranty included a clause stating that the warrantors agreed to submit to the non-exclusive jurisdiction of the Courts of Hong Kong Special Administrative Region. Subsequently, G, H and H’s subcontractor jointly executed the warranty in the form provided.

A dispute arose between the parties in relation to the waterproofing system, among other matters, and G commenced an arbitration against H alleging breaches of the building contract and the warranty. H challenged the jurisdiction of the arbitrator on the basis that disputes arising from the warranty, which involves joint and several liability of a third party, should be determined separately from disputes arising out of the building contract. The

arbitrator dismissed the challenge and said he he did have jurisdiction because the arbitration agreement in the building contract covered matters arising out of the warranty as well.

H challenged the arbitrator’s decision before the court, who was asked to set it aside. In defence of the arbitrator’s decision, G relied on the Extended *Fiona Trust* Principle, which it considered applicable.

What did the court decide?

The court set aside the arbitrator’s decision and held that he did not have jurisdiction over claims made under the warranty.

The court accepted the “forceful arguments” advanced by H that the Extended *Fiona Trust* Principle had no application on the facts of this case. In particular, Chan J was persuaded by H and G’s decision, when they entered into the building contract, to append a form of the warranty to the contract that provided a different manner of resolving claims under the warranty from the resolution of claims under the building contract in arbitration. In so doing, Chan J said they: “expressed the clear intention... that there should be a mechanism different to arbitration, and further agreed to submit to the jurisdiction of the Hong Kong Court for the resolution of those claims under the Warranty”.

Chan J considered the Extended *Fiona Trust* Principle to have “limited application” in a case where the overall contractual arrangements between the parties gave rise to agreements containing different dispute resolution provisions. In this

case, the principle had been “clearly displaced by the language expressed in [the dispute resolution clause] of the Warranty, which formed part of the contract documents agreed to by G and H in the Building Contract.”

Chan J may also have had in mind that the Extended *Fiona Trust* Principle normally applies only where the parties to Contract A and Contract B are the same. In this case a third party, H’s subcontractor, was a party to the warranty, but not the building contract. Chan J referred to the “*mischief*” which would be caused if G was able to pursue claims for breach of the warranty against H in arbitration, but had to proceed with litigation to pursue such claims against H’s subcontractor. In fact, this is a very unlikely scenario given that the warrantors assumed joint

and several liability. Where the Extended *Fiona Trust* Principle is applied to a situation in which the parties to Contract A and Contract B are different, an alternative would be for the court to conclude that it was the Contract A parties’ intention that third parties should be able to rely on Contract A. Such a conclusion was reached by DHCJ Field in *Giorgio Armani Spa v. Elan Clothes Co Ltd (formerly known as Dalian Les Copious Clothes Co Ltd)* [2019] HKCFI 530 where the third parties were affiliates of the contracting parties.

Case details

- Court: Court of First Instance of Hong Kong
- Judge: Hon Mimmie Chan J
- Date of judgment: 10 May 2022

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