1995 M.P. No. 2765

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

MISCELLANEOUS PROCEEDINGS

BETWEEN

ZHANJIANG CITY QIMING INDUSTRIAL CORPORATION (also known as ZHANJIANG QI MING INDUSTRIAL AND TRADE CORPORATION) Plaintiff

and

FUMEI LIMITED Defendant

Before : The Hon. Mr. Justice Keith in Chambers

Date of Hearing : 11th November 1996

Date of Delivery of Judgment : 11th November 1996

J U D G M E N T

INTRODUCTION

On 22nd March 1995, a tribunal appointed by the China International Economic and Trade Arbitration Commission ("CIETAC") made an award in an arbitration to which the Plaintiff and the Defendant were the Claimant and the Respondent respectively. By that award, the tribunal awarded various sums to the Plaintiff. On 16th March 1996, Leonard J. granted the Plaintiff ex parte leave to enforce the award as a judgment of the High Court of Hong Kong. The Defendant now applies for that leave to be set aside.

THE RELEVANT STATUTORY PROVISION

The leave granted by Leonard J. was granted under the provisions of Part IV of the Arbitration Ordinance (Cap.341) ("the Ordinance"), which is the means by which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which both Hong Kong and China are parties, is given statutory effect in Hong Kong. It is common ground that the award was a "Convention award" within the meaning of the Ordinance. Accordingly, the court's power to refuse the enforcement of the award was limited by section 44 of the Ordinance. The relevant provisions of section 44 are sections 44(1) and 44(2)(c). Section 44(1) provides:

> "Enforcement of a Convention award shall not be refused except in the cases mentioned in this section."

Section 44(2) provides:

> "Enforcement of a Convention award may be refused if the person against whom it is invoked proves - ...
>
> (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."

The burden of proving the existence of grounds which might justify the court in refusing to enforce the award is thus on the Defendant. That is important in this case. What it means is that if the existence of such grounds depends on facts which are in dispute, it is for the Defendant to prove those facts.

THE FACTS

In March 1993, the Plaintiff agreed to purchase from the Defendant a quantity of steel wire rods. The terms of the agreement were varied on a number of occasions. The Plaintiff alleged that the Defendant had failed to comply with the terms of the agreement, and in October 1993 the Plaintiff purported to terminate the agreement. The Plaintiff's claim for the losses it sustained as a result of the termination of the agreement was submitted to CIETAC as required by the arbitration clause in the agreement. CIETAC appointed an arbitration tribunal to hear the claim.

An oral hearing took place on 6th June 1994. At the end of the hearing, the tribunal indicated that it was unable to reach a decision. It directed the parties to lodge supplementary submissions within ten days of the date of the hearing, and indicated that a second hearing would take place if necessary. Both parties lodged supplementary submissions to the

tribunal. The Plaintiff's supplementary submissions were dated 20th June 1994. They were clearly lodged outside the time limit, but no point has been taken about that by the Defendant. The point which the Defendant takes is that its lawyers, the Law Office of Guangdong International Commerce ("LOGIC"), never received a copy of the Plaintiff's supplementary submissions. Indeed, it was not until after the tribunal had rendered its award on 22nd March 1995 that LOGIC became aware that the Plaintiff had submitted supplementary submissions.

THE PLAINTIFF'S SUPPLEMENTARY SUBMISSIONS

The Plaintiff's supplementary submissions are said by the Defendant to have been particularly important for the following reasons. The Defendant had argued that the Plaintiff had exceeded the scope of its business in purporting to import steel products into China, and had done so without a proper licence or import permit. Indeed, the Defendant had submitted evidence to the tribunal to the effect that the Plaintiff had applied to the relevant Chinese authorities for permission to expand the scope of its business, but that that application had been rejected. The point being made by the Defendant was that no claim could be made by the Plaintiff under its agreement with the Defendant as the agreement had been beyond the scope of the Plaintiff's business. The argument was that the agreement was therefore an invalid economic contract under Chinese law (an argument which resembled the "ultra vires" doctrine in English law).

Included with the Plaintiff's supplementary submissions were three documents. They were relied upon by the tribunal in reaching its decision. The Defendant's case is that had LOGIC been aware of the Plaintiff's supplementary submissions and the three documents, they would

have drawn the tribunal's attention to various legal materials and arguments which would have shown that the Plaintiff's reliance on the three documents and on the arguments in its supplementary submissions was misconceived. That was the case which the failure to send LOGIC the Plaintiff's supplementary submissions prevented LOGIC from presenting, and it is that which triggered the court's discretion under section 44(2) of the Ordinance to refuse to enforce the award.

THE ISSUE OF FACT

The issue of fact which this application raises is whether LOGIC received a copy of the Plaintiff's supplementary submissions. CIETAC asserts that its secretariat sent a copy of the Plaintiff's supplementary submissions to LOGIC. Service on LOGIC as opposed to on the Defendant itself was permitted because the Defendant had notified CIETAC that LOGIC were authorised to accept service on its behalf as its agents. CIETAC sent the submissions by registered post on 29th June 1994. The truth of that assertion cannot seriously be questioned. The documents produced by CIETAC point overwhelmingly to its accuracy. Those documents were (a) the office copy of the covering letter dated 28th June, (b) a domestic registered post receipt no. 0333 dated 29th June, and (c) a register of outgoing correspondence which records that on 29th June a document with that post no. was sent to LOGIC. I do not overlook the point that when the Defendant wrote to CIETAC on 10th June 1995 (which was well over two months after LOGIC had received the award) complaining that LOGIC had never received the Plaintiff's supplementary submissions, CIETAC did not claim that the submissions had been sent to LOGIC previously. I do not regard that point as a telling one, as CIETAC's own

records show that the Plaintiff's supplementary submissions had been sent to LOGIC.

The real issue, therefore, is whether LOGIC received the Plaintiff's supplementary submissions. LOGIC have produced the office's register of incoming mail, in which the details of all incoming mail, whether sent by registered post or otherwise, is recorded. That register does not record the receipt of a letter from CIETAC in connection with this litigation at the relevant time.

I confess to being sceptical as to how complete that register is. I say that for two reasons:

(i) The register records 92 letters as having been received by LOGIC in the period between 29th June 1994 and 23rd May 1995. By the standards of firms of solicitors in Hong Kong, that would be an astonishingly small number of letters received in the space of almost 11 months. That may be a reflection of the size of LOGIC's practice or the frequency with which lawyers in Guangdong Province engage in correspondence, but the fact is that no explanation has been given for the extraordinarily low level of incoming mail.

(ii) Although there is evidence of LOGIC's practice as to the way in which the register is supposed to be compiled, there is no evidence as to the existence of any system to monitor the consistent enforcement of the practice. I do not know

> whether LOGIC's internal procedures are sufficiently thorough to ensure that every letter which is received is in fact recorded in the register, but for all I know, the receipt of this letter from CIETAC might not have been recorded in the register simply as a result of an oversight.

In any event, I am sceptical about LOGIC's assertion that the Plaintiff's supplementary submissions were not received by them. I say that for two reasons. First, since both parties had been directed to lodge supplementary submissions, LOGIC must have realised that it was at the very least possible that the Plaintiff's lawyers would have submitted supplementary submissions themselves. LOGIC would in those circumstances have been very interested to know what the Plaintiff's supplementary submissions said. Apart from anything else, they might want, in the light of those submissions, to ask the tribunal to convene the second hearing which the tribunal had envisaged might be necessary. And yet, despite as they say not having received the Plaintiff's supplementary submissions, they do not suggest that they got in touch with CIETAC or with the Plaintiff's lawyers to get a copy of those submissions. It is not, I think, good enough for Mr. Horace Wong for the Defendant to say that that must have been because LOGIC assumed that if the Plaintiff's lawyers had submitted supplementary submissions, those submissions would automatically have been sent to them. I would have thought that LOGIC would have wanted to check whether any submissions had been submitted by the Plaintiff's lawyers. The fact that LOGIC did not make any such enquiry suggests that they did not need to do so because they had already received the Plaintiff's supplementary submissions.

Secondly, the award was received by LOGIC on 29th March 1995. However, it was not until 10th June 1995 that the Defendant wrote to CIETAC asking for copies of the Plaintiff's supplementary submissions. It may be that that was because by then other Chinese lawyers had been instructed by the Defendant in connection with the arbitration in place of LOGIC, but it is surprising that so long had elapsed between the date when LOGIC first knew about the Plaintiff's supplementary submissions, and the date when a request was made by the Defendant for a copy of them.

However, although I am extremely sceptical about LOGIC's assertion that they did not receive the Plaintiff's supplementary submissions, I have decided, not without hesitation, that I cannot decide whether the Defendant has proved that on affirmation alone. The Defendant is entitled to have the issue determined properly on oral evidence. I appreciate that that may be inconvenient to the parties, but issues of fact cannot be decided on paper unless the assertions made are simply not credible. I cannot go so far as to say that LOGIC's assertions are so incredible that there is no chance of them being believed even if oral evidence was given. I therefore propose to adjourn this application to a date to be fixed, after consultation with counsel's diaries, for the parties to call such evidence as they wish on the issue. I will hear the parties on such directions which I should give for discovery, the exchange of witness statements if necessary, and the like, though before doing so there are three other topics I should mention.

"UNABLE TO PRESENT HIS CASE"

Mr. Kenneth Chan on behalf of the Plaintiff, in a submission as comprehensive and as succinct as that of Mr. Wong, argues that even if

LOGIC did not receive the Plaintiff's supplementary submissions, that did not mean that the Defendant was unable to present its case within the meaning of section 44(2)(c) of the Ordinance. If that submission is correct, there would have been no point in adjourning the application. As it is, I reject Mr. Chan's argument. I have already explained why the Plaintiff's supplementary submissions are said to be so important. The effect of LOGIC not receiving them would have been that the tribunal did not have the benefit of such submissions as LOGIC would have wanted to make. The unchallenged evidence is that LOGIC had the right under the 1991 Civil Procedure Law and the Supreme Court's Opinion on Certain Questions Relating to its Application to comment on the submissions made by the Plaintiff's lawyers. I am sceptical about that, because if a party always has a right to comment on the other party's submissions, there might never be an end to the process. But even if LOGIC had not had a right to file further submissions responding to the Plaintiff's supplementary submissions, there is nothing in CIETAC's Arbitration Rules which would have prevented LOGIC from filing further submissions, and it would then have been a matter for the tribunal to decide whether it wanted to consider those submissions. I accept that that would have been an indulgence on the part of the tribunal, but that does not, in my view, make the Defendant's inability to present the case which it wanted to present any the less. Whether LOGIC would in fact have availed themselves of that indulgence is a matter which I shall deal with shortly.

THE COURT'S DISCRETION

As I have already said, if the Defendant proves that it was unable to present its case, that triggers the court's discretionary power under section 44(2) of the Ordinance to refuse to enforce the award. If I was not

prepared to exercise my power to do so, there would again have been no point in adjourning the application. It is well established that the court's power to exercise its discretion to set aside the award should be exercised if the result could have been different if the procedural irregularity had not occurred: see Paklito Investment Ltd. v. Klockner East Asia Ltd. [1993] 2 HKLR 39 and Apex Tech Investment Ltd. v. Chuang's Development (China) Ltd. [1996] 2 HKC 293. I cannot exclude the possibility that the result in this case would have been a different one if the procedural irregularity had not occurred, provided that the submissions which the Defendant says ought to have been made would have been made. The question is whether LOGIC would in fact have made those submissions. If it is only then that the result could have been different. The result could not have been different if further submissions by LOGIC had not been submitted. The evidence before me is that the Defendant's new lawyers would have done that, but there is absolutely no evidence before me as to what LOGIC would have done. I cannot assume that LOGIC would have done what the Defendant claims LOGIC would have done, simply because that is what the Defendant's new lawyers would have done.

However, it may be that in the course of preparing for this application, the Defendant's solicitors did not address their mind to the question of what LOGIC would have done if they had received the Plaintiff's supplementary submissions. I do not think that it would be right for me to determine this issue finally without giving the Defendant a further opportunity to file evidence on the topic if it wishes. The adjournment which I have given will enable it to do that. It follows, therefore, that I have not in this judgment decided the way in which I would exercise my discretion in the event of my being satisfied by the Defendant at the

adjourned hearing that LOGIC did not receive from CIETAC the Plaintiff's supplementary submissions.

ART. 40 OF CIETAC'S ARBITRATION RULES

Mr. Chan relied on Art. 40 of CIETAC's Arbitration Rules. Art. 40 provides:

> "Any written communication from the Arbitration Commission to the parties is deemed to have been received if it is delivered to the addressee personally or it is delivered at its place of business, habitual residence or mailing address; or if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it."

I do not think that Art. 40 helps the Plaintiff one way or the other. Mr. Wong accepts that if the Defendant does not prove that LOGIC received the Plaintiff's supplementary submissions, the Plaintiff does not need to rely on Art. 40: the Defendant's application will have to be dismissed anyway. On the other hand, Mr. Chan accepts that if the Defendant proves that LOGIC did not receive the Plaintiff's supplementary submissions, the Plaintiff cannot realistically rely on Art. 40. That is because a communication sent by registered post will be deemed to have been received only "if [actual delivery cannot] be found after making a reasonable inquiry". I think that those words must mean "if reasonable inquiries do not establish, one way or the other, whether the communication was actually delivered". A finding of fact that the Plaintiff's supplementary submissions were not received by

LOGIC will prevent the circumstances in which the deeming provision applies from arising.

(Brian Keith)
Judge of the High Court

Mr. Kenneth Chan, instructed by Messrs. Livasiri & Co., for the Plaintiff.

Mr. Horace Y. L. Wong, instructed by Messrs. Johnson Stokes & Master, for the Defendant.