由此

CACV 106/2008 & CACV 197/2008

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NOS. 106 AND 197 OF 2008

(ON APPEAL FROM HCCT NO. 54 OF 2007)

IN THE MATTER of Sections 2GG and 40B of the Arbitration Ordinance (Cap. 341)

and

IN THE MATTER of the Arbitration Award dated 27 October 2006 awarded by China International Economic and Trade Arbitration Commission

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BETWEEN

厦門新景地集團有限公司 formerly known as 厦門市鑫新景地房地產有限公司	Applicant
and	
ETON PROPERTIES LIMITED (裕景興業有限公司)	1st Respondent
ETON PROPERTIES (HOLDINGS) LIMITED (裕景興業(集團)有限公司)	2nd Respondent

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Before: Hon Rogers VP, Le Pichon and Hartmann JJA in Court

Date of Hearing: 22 May 2009

Date of Judgment: 22 May 2009

Date of Handing Down Reasons for Judgment: 11 June 2009

REASONS FOR JUDGMENT

Hon Rogers VP:

1. I agree with the judgment of Le Pichon JA.

Hon Le Pichon JA:

2. These were appeals by Eton Properties Ltd and Eton Properties (Holdings) Ltd ("the appellants") from orders of Reyes J of 31 March 2008 and 24 June 2008 (respectively "the March order" and "the June order"). On 31 October 2007, A Cheung J made an *ex parte* order under sections 2GG and 40B of the Arbitration Ordinance in terms of an arbitration award of 27 October 2006 made by CIETAC ("the award"), thereby enabling the respondent to the appeals ("the applicant") to enforce the award. By the June order, Reyes J refused the appellants' application to set aside the *ex parte* order, having earlier (in March) refused the appellants' application for leave to adduce evidence on PRC law, that refusal being the subject matter of CACV 106 of 2008. At the conclusion of the hearing, the appeals were dismissed with reasons to be handed down which we now do.

Background

3. The applicant is a PRC company. The appellants are Hong Kong companies. The first appellant ("Eton") is wholly-owned subsidiary of the second appellant ("Holdings"). They are companies with the Eton group of companies ("the Eton group").

4. Until November 2005, the appellants were the sole shareholders of Legend Properties (Hong Kong) Co Ltd ("Hong Kong Legend"), each holding one share of that company in trust for Eton Properties International (No. 3) Limited ("International"). Hong Kong Legend had a wholly owned subsidiary

called Legend Properties (Xiamen) Co Ltd ("Xiamen Legend"), a PRC company which is the owner of land in Xiamen ("the land").

5. The applicant and the appellants were parties to an agreement of 4 July 2003. The agreement contained an arbitration clause. The arbitral tribunal described the agreement in these terms:

> "The subject matter of the Agreement is the contractual right to buy and sell the shares in Hong Kong Legend that has an indirect effective control over the [land]. The amount of RMB 120 million is the consideration for the Applicant to obtain the contractual right to acquire all shares in Hong Kong Legend for HK$2, and also the consideration for the [appellants] to obtain the contractual right to sell all the shares in Hong Kong Legend for HK$2
>
> ….
>
> …the true intent of the parties is to progressively transfer the right to develop, operate and make earnings from the [land] and, after all the terms and conditions provided in the Agreement are met, to sign the legal instrument on transfer of shares in the target company and to handle the specific procedures. In other words, the main rights and obligations of the parties in the Agreement in this case do not involve how to transfer the shares in Hong Kong Legend in detail but involve how to perform certain specific obligations to cause the said transfer of shares to be effected ultimately."

6. The appellants never delivered the land to the applicant. Instead, on 14 November 2003, they sought to return the initial deposit on the basis that performance of the agreement would be contrary to PRC law. The applicant did not accept the purported termination and returned the deposit.

7. In March 2005, the Eton group decided to establish a holding company. In May 2005, three months prior to the commencement of the arbitration proceedings, legal advice was obtained on the restructuring of the Eton group.

8. On 8 August 2005, the applicant commenced arbitration proceedings in Beijing before CIETAC, seeking specific performance of the

agreement. The appellants maintained their position that the agreement was contrary to PRC law and, in any event, performance had become impossible because, meanwhile, the appellants had commenced construction work which remained in progress at the time the arbitration was heard.

9. The Eton group proceeded with the restructuring notwithstanding the arbitration. In November 2005, Hong Kong Legend issued 9998 new shares to Holdings. Then in April 2006, one share originally held by Eton in trust for International was transferred to Eton Properties Group Limited ("EPGL") and the one share originally held by Holdings was agreed to be held by Holdings on trust for EPGL.

10. The restructuring of the Eton group which had the effect of diluting and transferring the appellants' shares in Hong Kong Legend to EPGL, their parent company, was implemented during the course of the arbitration. Yet this transfer and dilution were not made known at the time to the applicant or to the tribunal. No explanation for this state of affairs has been forthcoming.

11. The award published on 27 October 2006 ordered that

(1) the appellants pay RMB 1,275,000 to the applicant (representing interest on the initial deposit up to 1 June 2005);

(2) the appellants "shall continue to perform the Agreement"; and

(3) the appellants reimburse the applicant its arbitration fees of RMB 101,875.

The tribunal rejected the appellants' argument of impossibility of performance, stating:

> "…The Arbitral Tribunal considers that an agreement shall be binding upon the parties thereto once the agreement is executed. Even though

> any change in circumstances makes it difficult to perform the agreement during its performance, the parties shall exert reasonable efforts in good faith to perform the Agreement completely and fully other than purely emphasize external causes. In this case, as stated by the [appellants], the Agreement is a framework agreement, whose performance may be difficult due to various uncertainties. This needs close cooperation between the parties and reasonable efforts to seek alternative approaches to meet the purpose of the Agreement. The [appellants'] allegations cannot constitute justifiable reasons for impossibility to perform the Agreement and discontinuing performance of the Agreement without consent of the Applicant."

12. In March 2007, the applicant sought to enforce the award in Xiamen but its application was unsuccessful because the appellants and their assets were not within Xiamen.

13. At about the same time, the appellants sought to set aside the award in an application to the Second Intermediate People's Court in Beijing but subsequently withdrew its application.

Procedural history

14. As mentioned above, the applicant obtained the *ex parte* order in October 2007. The appellants' application to set it aside gave rise to the orders under appeal.

15. The parties were notified on 6 May 2008 that the appeals were fixed to be heard on 23 December 2008 before two judges of this court. On 9 October 2008, the appellants took out a summons for a stay pending the determination of the appellants' application to CIETAC for arbitration ("the second arbitration") made on 18 August 2008. That application had been made apparently "for further determination on the basis that the Agreement could no longer be performed by the parties and sought a ruling that the parties be discharged from the Agreement". As appears from §14 of the affirmation

of Mok Pui Hong filed in support, he acknowledged that the parties were free to refer the dispute back to CIETAC in order to work out the details.

16. The matter came before Rogers VP who dismissed the applications on 20 October 2008. On that occasion, Mr Yu SC appeared for the appellants.

17. At the outset of the appeal hearing on the 23 December 2008, Mr Yu SC raised, for the first time and completely out of the blue, a jurisdictional issue which he said only dawned on him that very morning. He submitted that as the appeal is a final appeal, the court was not properly constituted, consisting only of two members. He sought an adjournment so that the appeal could be fixed for hearing before a panel of three judges. In his skeleton submissions, Mr Yu had invited attention to the fact that the tribunal to hear the second arbitration had already been formed although the date of that arbitration was not yet known.

18. Mr Yu was referred to the procedure section 34(B)(4)(c) of the High Court Ordinance, Cap. 4 which would resolve the problem and he was invited to take instructions as to whether his clients would give written consent, pursuant to that provision, for the matter to be heard by two judges. Having made the stay application in October 2008, Mr Yu must have been well aware of the impending appeal and the constitution of the court. It was surprising, to say the least, that the court had not been alerted to the problem any earlier. Had the court been told even the day before of the problem, a third judge might well have been available and the consequent waste of time and resources avoided.

19. Be that as it may, the appellants refused to give written consent and this court had no choice but to adjourn the appeal to a date to be fixed. The refusal appeared to have all the hallmarks of a ‘filibustering’ exercise, designed

to secure an adjournment at any cost, in the hope that the second arbitration launched by the appellants would produce a favourable result to the appellants and so render this appeal academic.

20. In the event, the second arbitration was heard and the second award made before the adjourned hearing of this appeal. The tribunal notified the parties on the 30 December 2008 that the second arbitration would be heard on 21 January 2009. The applicant submitted its case on 12 January 2009 and the second award was delivered on 22 April 2009. It is pertinent to note that in the second arbitration, the only question the appellants put before the tribunal was whether the conditions for termination of the agreement had been satisfied. The tribunal ruled against the appellants. The appellants never sought directions from the tribunal as to how the parties are to perform the agreement.

This appeal

21. At the adjourned hearing of this appeal, Mr Chan SC appeared for the appellants. The thrust of his submissions was no different from that advanced in Mr Yu's skeleton submissions for the original hearing in December which Mr Chan adopted. The main argument was that it has become impossible to perform the award as the development of the land has been completed and as at 2 January 2008, 99% of the units had been sold to third parties. It would therefore be contrary to the notion of justice to enforce something that was no longer possible to perform. It was said that the order granted by the Hong Kong courts was tantamount to a decree for specific performance and the judge erred in holding the court could exercise its powers to give directions in order to make the order for specific performance work.

22. Mr Chan submitted that the applicant was really looking at the "further stages" remedies such as damages in lieu or an account of profits rather

than the right to develop the land or any interest in the land itself but as those remedies formed the enforcement of the stage 1 award, that would be a matter for CIETAC, the supervisory court, from whom further directions should be sought.

23. In that regard, in the course of the hearing, Mr Chan offered the court the following undertaking on behalf of the appellants:

> "The Appellants undertake to commence within 28 days and to pursue with all expedition further arbitration to CIETAC in Beijing and to take all steps to submit themselves to such arbitration (whether commenced by the Appellants or the Respondent) for a determination on what alternative remedies (including damages) that the Respondent should have in carrying out the purpose of the Agreement and on any further directions as to how the Award should be complied with."

In the alternative, it was said that the court could remit the matter to CIETAC so that directions could be obtained or adjourn the appeal pending such directions.

24. In my view, the appellants have had ample opportunity to raise squarely before CIETAC the issue of impossibility of performance and to obtain all necessary directions flowing from the award had they seen fit to do so. After all, those matters featured in the stay application and one would have expected them to have featured in the second arbitration which, when the stay application was made, was already on foot. Those matters featured again in the appellants' written submissions submitted to this court in December 2008 for the original hearing, at a time when the date of hearing of the second arbitration had not yet been fixed. Plainly, it would not have been too late for the appellants to raise those matters specifically in the second arbitration. In fact, the applicant did not file its response in the second arbitration until 12 January 2009. There is simply no rational explanation for this omission on the part of the appellants except the very obvious one that the omission was intentional. Given the factual matrix, the undertaking is simply meaningless.

25. As regards the suggestion that this court should remit the matter to CIETAC, Mr Chan relied *Margulies Brothers, Ltd v Dafnis Thomaides & Co (UK) Ltd* [1958] 1 Lloyd's Rep 250, 253 where Diplock J (as he then was) held that he had jurisdiction to remit the award to the Board of Appeal to calculate the sum of money due to the applicant who was seeking to enforce the award. But as Ms Cheng SC (who appeared for the applicant) pointed out, the award in that case was a London award made by the Board of Appeal of the Cocoa Association of London, Ltd. The court there, being the supervisory court, was exercising its supervisory jurisdiction and, accordingly, the *Marguiles* case is not an authority that this court has jurisdiction to remit the matter back to CIETAC. I would respectfully agree. Under the provisions of the Arbitration Ordinance, the court may enforce the award or refuse to enforce it; there is no jurisdiction to remit.

26. Ms Cheng SC submitted that the appellants have sought to conflate the execution stage and the registration stage of an award. She submitted that there is a distinction between converting an award into a judgment of the court and execution, which is the second stage. That distinction is set out in the New York Convention. These proceedings only concern the first stage, which is the registration of the award.

27. Section 40E of the Arbitration Ordinance provides, in pertinent part, that:

> "**40E. Refusal of enforcement**
>
> (1) Enforcement of a Mainland award shall not be refused except in the cases mentioned in this section.
>
> (2) …
>
> (3) Enforcement of a Mainland award may also be refused … if it would be contrary to public policy to enforce the award."

28. In considering whether or not to refuse the enforcement of the award, the court does not look into the merits or at the underlying transaction. Its role is confined to determining whether or not grounds exist for refusing to enforce the award because it would be contrary to public policy. As the judge recognized, the court's role should be as "mechanistic as possible".

29. As regards public policy, the only ground the appellants rely on as justifying a refusal to enforce the award is impossibility of performance. It was said that it is now impossible to deliver the land and, further, because of the restructuring, the shares can no longer be transferred. Since the conversion of an award into a judgment of the court does not involve going into the merits, it is difficult to see how impossibility of performance is relevant at the registration stage. No authority has been cited for the proposition that impossibility of performance is sufficient reason to justify a refusal to enforce an award under public policy grounds.

30. I have already referred to the nature of the agreement as determined by the tribunal when making the award. See §5 above. This was also the view of the tribunal in the second arbitration. In the second award, it noted that the mutual intention of the parties to the agreement

> "was the arrangement of the shareholding of Hong Kong Legend which enable the [applicant] to enjoy and possess the right to the profit arising from the development of the [land] ultimately."

It rejected the submission that the objectives of the agreement could not be fulfilled.

31. So far as the shares are concerned, the appellants' impossibility argument is misguided. One share in Hong Kong Legend remains vested in Holdings. Nor is there any insuperable impediment to the transfer of the shares registered in the name of EPGL to the applicant. In any event, the

restructuring cannot be a valid reason since the impossibility (if any) is self-inflicted. The Eton group went ahead with the restructuring notwithstanding that the arbitration had commenced. It took a calculated risk and must bear the consequences.

32. The notion that the appellants would be at risk for contempt proceedings for failing to comply with an order that is impossible to carry out is equally misguided. It was suggested that enforcement of the award is tantamount to an order decreeing specific performance, thereby exposing the appellants to the risk of contempt proceedings with all its consequences, including imprisonment. But the order does not specify any time for performance and committal proceedings may only be commenced against a person who refuses or neglects to do an act within the time specified in the order. Further, a person who genuinely is unable to carry out the order cannot be made liable for the contempt. I agree with Ms Cheng that the risk of imprisonment for contempt is entirely fanciful.

33. In conclusion, not only have the appellants failed to demonstrate any impossibility, as earlier noted, in any event, impossibility is not a sufficient reason to justify refusal on the basis that it would be contrary to public policy.

Hon Hartmann JA:

34. I agree.

(Anthony Rogers)	(Doreen Le Pichon)	(M.J. Hartmann)
Vice-President	Justice of Appeal	Justice of Appeal

Ms Teresa Cheng SC & Mr David Tsang, instructed by Messrs Li & Partners, for the Applicant/Respondent

Mr Chan Chi-hung SC & Mr Richard Khaw, instructed by Messrs JSM, for the 1st & 2nd Respondents/Appellants