HCCT000020A/1999

1999, No. CT 20

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

BETWEEN

CHINA OCEAN SHIPPING CO. OWNERS OF THE M/V FU NING HAI	Plaintiff

AND

WHISTLER INTERNATIONAL LTD. CHARTERERS OF THE M/V FU NING HAI	Defendant

Coram: The Hon Mr Justice Findlay, in Chambers

Date of hearing: 19 May 1999

Date of handing down of judgment: 24 May 1999

JUDGMENT

The Background

1. This matter last came before me on 22 April 1999. I repeat what I said then about the matter. The parties are involved in an arbitration brought by the defendant against the plaintiff. The plaintiff is seeking security for costs from the defendant and information regarding the defendant's place of incorporation and registration and its address. The plaintiff applied for this relief to the arbitral tribunal but, because, perhaps, the tribunal did not think it had jurisdiction to order this relief because the arbitration commenced before the coming into force of the 1996 Ordinance, the relief was refused. The plaintiff now seeks this relief from this court.

2. The matter is now before me again for me to decide if the defendant should provide security and supply details about itself.

The Costs Order Nisi

3. But before I proceed to deal with that issue, I will deal with the matter of my order nisi relating to the costs of the application on 22 April 1999.

4. That matter concerned the plaintiff's substituted service of the summons and the defendant's application to set aside my order allowing that substituted service. As to costs, I said -

> "As to costs, I have already indicated, and I said to Mr Mak during the hearing, that I am very unhappy with the defendant's attitude in this matter. I am inclined to order that the defendant pay the costs of its summons on an indemnity basis forthwith. I am also inclined to make the same order in respect of the matters I have set aside on the basis that these were brought about by the defendant's unreasonable attitude. I make an order nisi accordingly."

5. Mr Mak now argues that I should vary this order. He accepts that I have the jurisdiction to make such an order, but says that, in the circumstances of this case, I should not make it. I have considered what Mr Mak has to say, and I have read again my judgment of 26 April 1999. Nothing Mr Mak has said persuades me to change my mind about what I thought then.

6. Mr Mak has now given an undertaking on behalf of his client and his instructing solicitors that the plaintiff's solicitors will be told by letter, before the close of business on 19 May 1999, the defendant's place of incorporation and registration and its address. That should have been done a long time ago, and, if it had been done then, none of the proceedings with which I dealt in my judgment of 26 April 1999 would have been necessary.

7. The fact that the defendant has now undertaken to give the information concerned says clearly that the defendant had no good reason not to have given the details before. The only reason could have been to frustrate the plaintiff in its efforts to get the defendant into court. That is precisely why I made the order nisi in the terms I did, and there has been advanced no good basis for changing that. In fact, the justification for the order is stronger now than it was then. The court makes an order for indemnity costs to indicate its displeasure at the conduct of a party in litigation, and this is the kind of case where that displeasure should be expressed in this way.

8. Accordingly, the order nisi is made absolute, and the defendant's summons of 12 May 1999 is dismissed with costs to the plaintiff.

Security for Costs

9. Mr Mak opposes the order for security for costs on the grounds that such an order should be made only where there are special circumstances, and there are none here, and on the basis that there has been undue delay in making the application.

10. Mr Mak does not dispute that I have jurisdiction to order security, and he does not dispute that I have jurisdiction to stay the arbitration until the security is provided. It is, however, important to recite the basis on which I have jurisdiction to order security. This can be done, not only on the basis that the defendant is ordinarily resident outside the jurisdiction, but also on the ground that it has not stated its address, and this failure is deliberate. The defendant has not attempted to say that the failure was not deliberate; in fact, its refusal to supply the address when it was requested to do so indicates that it was deliberate.

Non-residence

11. Mr Mak cites **Bank Mellat v Hellinki Techniki** [1984] 1 QB 291 for the proposition that the court will not order security on the grounds on non-residence where both parties are non-resident and the venue is chosen by mutual consent "unless there are special circumstances that warrant it." This case was considered by the House of Lords in **SA Coppée Lavalin v Ken-ren Chemicals** [1995] 1 AC 38 in which it was held that it was important to consider the kind of arbitral process that the parties had contemplated and whether it was inconsistent with that process to make an order for security. Where the arbitration incorporated a comprehensive set of procedural rules, such as the ICC Rules, and there was a very limited connection with the seat of the arbitration, it would rarely be right to order security.

12. In the case before me, no procedural set of rules was expressly agreed. The arbitration clause provided only that ". . . any dispute . . . shall be referred to three persons at Hong Kong . . . for the purpose of enforcing the award, this agreement may be made a rule of Court. The Arbitrators shall be commercial men who should be conversant with shipping matters." That indicates to me that, in the absence of an agreed comprehensive set of procedural rule, the parties contemplated that the legal order in which the arbitration would be conducted would be that of Hong Kong. That means, as I see it, that the parties had in mind that Hong Kong procedural rules on matters such as security for costs would apply. Accordingly, I find that the kind of arbitral process contemplated by the parties was not inconsistent with a party being ordered to provide security for costs.

13. And, I believe, this arbitration has more than "a very limited connection" with Hong Kong. The charterparty was negotiated in the Beijing office of the plaintiff by agents of the defendant which has a registered office in Hong Kong. In the charterparty, the plaintiff is described as being of Beijing, which, of course, is in the same country as Hong Kong. The evidence is that the plaintiff has a fleet of over 500 vessels. The plaintiff's vessels regularly call at Hong Kong. The plaintiff owns substantial assets in Hong Kong. It is the sole shareholder in Cosco (Hong Kong) Group Limited, which is the majority shareholder in Cosco Pacific Limited, a Hong Kong listed company.

14. These considerations lead me to conclude that the plaintiff has a reasonably close connection with Hong Kong.

15. All I know about the defendant, because it has chosen not to tell me more, is that it is not a Hong Kong company.

16. It must also be recognised that Hong Kong is a major port for the mainland, and the place frequently chosen by the parties in this region in maritime contracts as the place for arbitration.

17. These factors, it seems to me, take this case out of the category of cases mentioned in **SA Coppée Lavalin** in which security for costs should rarely be ordered. On the contrary, I believe that the parties in this case must have contemplated that the arbitration would be conducted against a background of Hong Kong procedural rules, including the liability to provide security for costs in the appropriate case.

Deliberate Non-disclosure

18. There is, of course, the additional factor in this case, beyond the defendant not being ordinarily resident within the jurisdiction, that the defendant has deliberately concealed its address.

19. That is, to my mind, a very weighty factor. I have been given no explanation for this behaviour, but I can think of only one reason for the defendant wishing to conceal its whereabouts; that, if it becomes liable to the plaintiff as a result of the arbitral award, it does not wish to be pursued by the plaintiff for payment. There may be other reasons, but I cannot think of an innocent one.

20. That makes the plaintiff's anxiety to have security for its costs a very reasonable attitude to adopt.

21. I have already mentioned that the defendant has now undertaken to supply its details, but this change of heart is not something that should be taken as a reason to lessen the plaintiff's lack of trust in the defendant. I still have no explanation for its failure to do this before, and no explanation for its change of mind. The defendant's conversion to the light comes too late for the plaintiff to investigate the defendant's status, standing and financial position. For all I know, it may be that, if the defendant had disclosed its whereabouts earlier, the plaintiff might have been able to investigate and show that the defendant was a mere shelf company without assets. The fact that it has failed to produce evidence of its financial standing indicates that it has nothing to be proud of in this area.

Delay

22. The other argument raised by Mr Mak is that the plaintiff has unreasonably delayed making its application for security, and the defendant has been prejudiced by this.

23. It was in January this year that the plaintiff realised that the defendant was not a Hong Kong registered company. The plaintiff's solicitors then wrote to the defendant's solicitors saying this, and asking for details about the defendant. The defendant's solicitors replied on 1 February 1999 saying that they were taking instructions. At the same time, the defendant's solicitors said that the arbitral tribunal had no jurisdiction to order security for costs. On 5 February 199, the defendant's solicitors also said that the tribunal had no jurisdiction to order the defendant to supply details about its whereabouts. On 5 February 1999, the defendant's solicitors wrote saying that they had "not received any instructions from our clients on their place of incorporation/registration." On 24 February 1999, the plaintiff's solicitors provided a breakdown of the costs and asked for security in the sum of $730,000. On 4 March 1999, the plaintiff issued the summons seeking security and disclosure.

24. On the face of this chronology, there does not appear to have been any undue delay by the plaintiff. But Mr Mak's argument, as I understand it, is that the plaintiff should have realised that the defendant was not within the jurisdiction and was deliberately concealing its whereabouts long before January this year. I am not at all impressed by this argument. In my view, it ill lies in the mouth of the defendant to say, in effect - "You should have detected my deliberate concealment of my whereabouts long before January 1999, and then applied for security." Acceptance of this argument would allow the defendant to take advantage of its own wrong and to punish the plaintiff for being naive in assuming that the defendant was being straightforward in the arbitral proceedings. I find that the plaintiff has not been responsible for any delay that the defendant can be allowed to use.

25. In these circumstances, it seems to me, that this is an appropriate case for ordering security.

Quantum

26. There remains the question of quantum.

27. The plaintiff estimates the costs of the arbitration to be $730,000. The defendant challenges some of the figures, and I believe that there is a sound basis for much of this challenge. It is impossible, of course, for me to fix a figure that it is precisely the amount that would be recovered on taxation. Doing the best I can with the material available to me, I estimate a reasonable amount as $500,000.

28. The plaintiff, however, claims security also for the costs of this application in the sum of about $300,000.

29. As to this amount, the first point made by Mr Mak is that I do not have jurisdiction to order such security. My jurisdiction is found in section 14(6) of the Ordinance as unamended by the 1996 Ordinance. This says that I "have, for the purpose of and in relation to the reference, the same power of making orders in respect of . . . security for costs . . . as [I have] for the purpose of and relation to an action or matter in the Court . . ."

30. If the arbitration were "an action or matter in the Court", clearly I would have jurisdiction to include, in an order for security to be provided made under Order 23, the estimated amount of the costs involved in making the application for security. Mr Mak does not challenge this. That being so, I do not see any difficulty in including these costs on this ground.

31. Mr Mak's other point has more validity. He says that the defendant has not had the opportunity of dealing with the plaintiff's estimate of these costs, and this is undoubtedly so. He wants an adjournment to answer this aspect. This, I think, is not sensible. Enough costs have already been wasted in this exercise. What I propose to do is to take a rough and ready figure, and give leave to both parties to apply to vary the figure if they think fit. The figure I think is reasonable under this head is $200,000.

Order for Security

32. Accordingly, I order that the defendant furnish security for the plaintiff's costs in the sum of $700,000 by payment into court or a bank guarantee by a leading commercial bank in Hong Kong.

33. Mr Mak asks that I give the defendant time to provide the security and not order a stay of the arbitration proceedings in the meantime. I cannot accede to that. The whole purpose of my order is to ensure that the defendant does not have the advantage of considering its position in the light of an award until it has provided security. If it is liable to the plaintiff under that award, the defendant may decide to walk away and not to provide the security.

34. Accordingly, I order that, until the defendant provides the security ordered, the proceedings in the arbitration are stayed.

The Defendant's Particulars

35. An order that the defendant supply the information about its registration and whereabouts is, in the light of Mr Mak's solemn undertaking, no longer necessary. However, Mr Mak still wishes to argue that I would have had no jurisdiction to make such an order because this may have some impact on the matter of costs.

36. The argument commences with article 5 of the Model Law, which says - "In matters governed by this Law, no court shall intervene except where so provided in this Law." Article 9 says - "It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for the court to grant such measure."

37. There is nothing in the Model Law that governs the matter of a party giving sufficient details about itself to enable the other party to know who it is and its whereabouts, and, therefore, the restriction in article 5 does not apply in this case. Nor am I not satisfied that an order requiring a party to supply such details is an "interim measure of protection". As far as I know, there is no express provision of any law that speaks about the situation here. So, I am left with a clean slate, and must decide this matter on the basis of the inherent jurisdiction of this court. I take it that this court has inherent jurisdiction to regulate the way in which proceedings are conducted before it, and before tribunals over which it has a supervisory jurisdiction, to prevent an abuse of process. To take an extreme example, if a person sought to commence proceedings in this court, or an arbitration, under the name of "Mickey Mouse" when that person was not the Mickey Mouse and his name was not Mickey Mouse, I cannot believe that this court would be helpless in the face of such behaviour, and that must be so even if our Rules do not cover the situation. I believe that it is a fundamental principle that a person may not take any kind of proceedings in this jurisdiction anonymously or pseudonymously, or partly so. The other party to those proceedings is entitled to know the essential particulars of the person taking the proceedings. And, in the case of a person that purports to be a corporation, that other party is entitled to know in which country that corporation is registered, so that he can check that it is indeed a corporation with the right to take the proceedings, and its whereabouts, being its registered office, so that the other party can pursue the corporation there if it is necessary to do so and investigate its financial standing. It cannot be fair or just that a corporation is entitled to take proceedings from behind an opaque curtain. Where a corporation is registered is something that can have practical consequences. For example, in this case, if the defendant is situated in a country that is not a party to the New York Convention, this would be a powerful additional argument for security for costs to be provided.

38. For these reasons, if it had been necessary to do so, I would have ordered the defendant to give the details sought.

The Costs

39. The matter of costs of the plaintiff's summons of 8 May 1999 has not been argued, but there seems no obvious reason why costs should not follow the event. Again, I do not think that the defendant has resisted this application on any grounds that could be classified as reasonable. Only at the last minute, and only after some pressure from me, did the defendant agree to give its address and place of incorporation. I do not regard it as fair that the plaintiff should bear any part of its costs here. Accordingly, I am inclined to order that the defendant pay the plaintiff's costs on an indemnity scale forthwith. I make an order nisi in those terms.

JK FINDLAY

Judge of the High Court

Court of First Instance

Representation:

Mr Clifford Smith, instructed by Messrs Healy & Baillie, for the plaintiff.

Mr Bernard Mak, instructed by Messrs Ince & Co, for the defendant.