HCMP000110/1993

The judge has authorised publication of this judgment.

1993, No. MP110

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

_____

IN THE MATTER of the Arbitration Ordinance, Chapter 341, Section 2H

and

IN THE MATTER of an Award dated the 7th day of September 1992

_____

BETWEEN

CHINA XINXING CORPORATION	Plaintiff
AND	
MID-POINT DEVELOPMENT	Defendant

LIMITED

_____

Coram: The Hon. Mr. Justice Kaplan in Chambers

Date of hearing: 26 July 1993

Date of handing down judgment: 4 August 1993

_____

H E A D N O T E

_____

Arbitration - application to set aside ex parte leave granted to enforce award under New York Convention - no evidence filed by applicant - dismissal of summons - abuse of process - indemnity costs.

_____

J U D G M E N T

_____

1. On 7th September 1992, a CIETAC Arbitration Panel rendered an award in favour of the plaintiff against the defendant in the sum of US$655,800.

2. On 23rd April 1993, I granted ex parte leave to enforce the award as a judgment of this court.

3. In accordance with the usual practice and the terms of O.73 of the Rules of the Supreme Court, the order I made contained a provision enabling the defendant to apply to set aside my order within 14 days after service of the order upon them. In the event that such an application was made, the order provided that the judgment should not be enforced until after the application to set aside had been determined.

4. On 11th May 1993, the defendant issued a summons returnable before me on 26th July 1993, seeking an order setting aside my order of 23rd April 1993. The summons contained no grounds whatsoever.

5. At no stage has the defendant filed any evidence in support of its summons dated 11th May 1993 and on 22nd July 1993, Master Cheung gave leave to the defendant's solicitors to cease to act for the defendant.

6. When the matter came on before me on 26th July 1993, with a half day reserved, the defendant did not appear. I therefore dismissed the application.

7. On the application of Mr. Beaumont, who appeared for the plaintiff, I made an order that the defendant do pay the plaintiffs costs of this application on an indemnity basis.

8. I am quite satisfied that it is an abuse of the process of this court to take out an application such as this, reserve half a day of court time and not file any evidence in support of the application. The result has been that the plaintiffs have been delayed for 2½ months from enforcing their judgment and they have had to incur the costs of preparing for this application including briefing counsel. Not only have the plaintiffs been put to quite unnecessary expense but a half a day of court time has been wasted.

9. I think it is a pity that the defendant's former solicitors left it till so late in the day to cease to act. I also think it is bad practice for solicitors to issue applications of this nature without any supporting affidavit. If they have received instructions to apply to set aside the ex parte order, they must have some idea of the grounds upon which such application is based and should so state in a supporting affidavit which can, if necessary, be amplified at a later stage. The grounds upon which such orders can be set aside are very limited indeed and it should not be difficult to identify the ground relied upon, if one in fact exists. [see s.44 of the Arbitration Ordinance]

10. Speaking for myself, as the judge in charge of the Construction and Arbitration List, I will in future expect such applications to be supported by affidavit. I think that there is a very strong case for amending the rules so as to make it mandatory, not only in cases such as this, but also in relation to other summonses which frequently come before me, such as applications for a stay of proceedings in favour of arbitration or on the grounds of forum non conveniens. I hope the Rules Committee will look at this problem because it has been my experience that much court time is wasted by allowing parties to issue summonses unsupported by any evidence and at the same time enabling them to book a day or half a day of a judge's valuable time. If no evidence ever comes, as in the present case, there is a complete waste of time and money. If evidence comes, but late, there is frequently an application to adjourn with resultant waste of court time and an escalation of the costs. This is wholly undesirable.

11. I have no doubt that the defendant's conduct in the present case was an abuse of the process of this court and that justified making an order for indemnity costs. I hope these observations will be of assistance to those practising in this List.

(Neil Kaplan)

Judge of the High Court

Representation:

Mr. Ben Beaumont inst'd. by H.H. Lau & Co. for Plaintiff.

Defendant absent.