HCMP002083A/1996

1996, No. MP 2083

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

IN THE MATTER of Sections 42 and 2H of the Arbitration Ordinance, Chapter 341

and

IN THE MATTER of a Convention Award made in the People's Republic of China dated 29 March 1996

BETWEEN

HEBEI IMPORT & EXPORT CORPORATION — Plaintiff

AND

POLYTEK ENGINEERING COMPANY LIMITED — Defendant

Coram: The Hon Mr Justice Findlay, in Chambers

Date of hearing: 8 May 1997

Date of handing down of judgment: 15 May 1997

JUDGMENT

Background

1. The parties were in dispute regarding some manufacturing equipment supplied by the defendant to the plaintiff. This dispute was the subject of arbitration proceedings in the People's Republic of China. On 29 March 1996, the arbitration tribunal made its award. The important provisions of the award, in translation, read -

> "Upon joint discussions, the Arbitration Tribunal has made the following award:
>
> 1. It is adjudicated that the rubber powder production equipment for recycling vehicle tyres sold to the Claimant by the Respondent shall be returned. All costs arising from returning the goods including the costs of dissembling and transportation, etc. shall be borne by the Respondent. The Claimant shall give its assistance to [the Respondent] regarding relevant procedures such as dissembling work and customs declaration. The Claimant shall be responsible to clean the equipment prior to returning it. The Claimant shall not be liable for returning to the original state of those parts of the equipment which have been modified during the installation and testing process according to the opinion and instructions of the Respondent.
>
> The Respondent shall refund the price of the equipment [already paid] in the sum of US$1,186,910.09 to the Claimant.
>
> 9. All the above-mentioned sums awarded shall be settled within 45 days from the date of this award. In the event of late payment, an annual interest of 9% shall be charged for payment in US dollars, and an annual interest of 14% shall be charged for payment in Renminbi. If there is a delay in the dissembling and loading [of the equipment] to be returned, the Respondent shall keep [the equipment in custody], and such expenses shall be borne by the Respondent.
>
> This arbitration award shall be final."

2. On 23 July 1996, the plaintiff obtained leave ex parte to enforce the award in Hong Kong, and judgment purporting to reflect the award was entered on the same day. I say "purporting" because the judgment paraphrased the translation of the award; in particular, it separated the obligations to return the equipment and return the price into different paragraphs.

3. On 13 August 1996, the defendant applied by summons to set aside the order and the judgment. This is the summons before me.

The Issues

4. There were three issues raised before me -

1. by Mr Tang, that, in the terms used by section 44(2)(c) of the Arbitration Ordinance, Chapter 341, the defendant "was unable to present his case";
2. by Miss Eu, that this point has already been decided by a foreign judicial tribunal of competent jurisdiction against the defendant, and the defendant is thereby estopped from raising it again in these proceedings; and
3. by Mr Tang, that it would be "inappropriate" to enforce the award in Hong Kong because this court cannot ensure performance of the entire award.

Unable to Present Case

5. The defendant's complaint, in practical terms, is that experts appointed by the arbitration tribunal, at the instigation and expense of the defendant, inspected the equipment concerned at the plaintiff's factory, in the presence of the plaintiff's employees, but in the absence of the defendant.

6. Mr Tang argues that, by analogy, this is equivalent to counsel for one side in the matter before me whispering in my ear. In my view, it is not so equivalent. The plaintiff did not whisper in the ears of the arbitration tribunal. It is possible to argue, because the defendant did not hear what the plaintiff's employees said to the experts, that the plaintiff whispered into the ears of the experts. If, following this whispering in the ear of the experts, the experts had whispered what they were told into the ears of the arbitration tribunal, the defendant would have a legitimate complaint. This did not happen. What the experts communicated to the tribunal was contained in a written report, which the defendant saw and on which it had the opportunity of commenting. So nothing got to the ears of the tribunal of which the defendant had no knowledge, and on which the defendant did not have the opportunity of presenting its case.

7. I find there is no substance in this point.

Estoppel

8. A court in the People's Republic of China before which the defendant took the same point also found that there was no substance in the point mentioned immediately above.

9. The matter has taken so long to get before me because, on 1 November 1996, the defendant sought and obtained an adjournment of the hearing of the summons to await the outcome of an application to a court in the People's Republic of China to set aside the award. In that application, the defendant urged that the grounds to be argued before the court in Beijing were "quite similar" to the grounds for setting aside the order and judgment in Hong Kong.

10. The application to the Beijing court was refused on 23 January 1997. It is not easy to discern from the translation of the decision of that court, with precision, the issues considered by the court, and, consequently, not possible from this document alone to say that the defendant is attempting to litigate the same issue before this court. It is so that it appears that the court considered broadly the same kind of complaint advanced before me, and, there is no doubt, if it did not consider precisely the same issue as the defendant now raises on this summons, that is the fault of the defendant; it could easily have raised the matter in the same terms.

11. It does appear, however, from a translation of a written document prepared by the defendant's lawyers in the People's Republic of China, and presented to the Beijing court that it was precisely the same issue that was argued before that court and decided against the defendant.

12. I cannot think of any reason, and none has been advanced before me, why the defendant should be permitted to reopen the same point again; more especially as it was the defendant who obtained an adjournment of the proceedings in this court so that he could argue this point, amongst others, before the Beijing court. However, in view of my finding that there is no substance in the point, this aspect of the argument is academic.

Appropriateness of Enforcing the Award in Hong Kong.

13. This point, Mr Tang says, is novel. But, if it is a good point, it is nothing against it that it is new.

14. The argument, if I may paraphrase it without doing too much injustice to Mr Tang's eloquence, is this: Our courts will not enforce only part of an award, especially if the obligations imposed on the disputing parties are reciprocal; this award does impose a reciprocal obligation on the plaintiff - to return the equipment to the defendant in a particular state; neither the plaintiff nor the equipment are within the jurisdiction of this court; therefore, this court cannot enforce this reciprocal obligation placed on the plaintiff; therefore, the court should not enforce the obligation on the defendant to refund the price.

15. It is undeniable that this argument has its attractions, and, at first blush, it is difficult to see the flaw in Mr Tang's argument.

16. However, it seems to me that the argument is being raised at the wrong stage. The award is being enforced at this stage only in the sense that it being converted into a local judgment. Practical enforcement comes at the stage of execution of that judgment. Enforcement in the sense of translating the award into a judgment may be refused only on the grounds mentioned in Section 44 of the Arbitration Ordinance. When the plaintiff seeks to levy execution on the basis of that judgment, the defendant, if it has grounds to do so, may seek relief. It seems to me that if the plaintiff seeks repayment of the price by some form of execution without fulfilling its reciprocal obligation, our courts would be able to assist.

Result

17. In the result, I find that there is no basis on which the order and judgment should be set aside. The defendant's application is refused, with costs.

JK FINDLAY

Judge of the High Court

Representation:

Miss Audrey Eu, QC, and Mr Horace YL Wong, instructed by Messrs Simmons & Simmons, for the plaintiff.

Mr Robert C Tang QC, and Mr Lee Tung Ming, instructed by Messrs WK To & Co, for the defendant