I. COURT OF FIRST INSTANCE

A. MEDISON CO., LTD. v. VICTOR (FAR EAST) LTD. [2000] HKCFI 684; HCCT4/2000 (8 April 2000)

HCCT000004/2000

HCCT4/2000

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION

PROCEEDINGS NO.4 OF 2000

IN THE MATTER of the Arbitration Ordinance, Chapter 341, Section 2GG and Section 42

and

IN THE MATTER of an Award No.99113-0003 dated the 24th day of June 1999

BETWEEN

MEDISON CO., LTD Plaintiff

AND

VICTOR (FAR EAST) LIMITED Defendant

Coram: Hon Burrell J in Chambers

Date of Hearing: 3 April 2000

Date of Judgment: 8 April 2000

J U D G M E N T

On 1 February 2000, the plaintiff was granted leave ex parte to enforce an overseas arbitral award. Judgment was entered on the same day for the sum awarded in the arbitration plus interest and costs. The award had been made following proceedings between the parties in Korea and is dated 24 June 1999. The defendant now seeks to set aside the ex parte leave to enforce the judgment.

In support of the applications to set aside, the defendant through its counsel, Mr Anthony Chan, raises four issues :-

i) Section 43 of the Arbitration Ordinance, Cap.341 has not been properly complied with and therefore the ex parte orders cannot stand.

ii) The plaintiff's 3rd affidavit contains hearsay evidence and does not comply with Order 41 rule 5(2). It is therefore inadmissible.

iii) The orders of 1 February 2000 were made following a failure by the plaintiff to make full and frank disclosure on an ex parte application. They must therefore be set aside.

iv) The arbitral award is contrary to public policy and should be set aside.

I will deal with each of these points in turn.

1. Section 43 of Cap.341

The section states :-

"43 The party seeking to enforce a Convention award must produce -

(a) the duly authenticated original award or a duly certified copy of it;

(b) the original arbitration agreement or a duly certified copy of it; and

(c) where the award or agreement is in a foreign language, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent."

Mr Chan submits that s.43(a) and (b) have not been complied with. It is correct to state that, on a strict application of s.43, the ex parte application was deficient. However, Mr Jeevan Hingorani, on the plaintiff's behalf, answers the complaint by making the following two points which this court upholds.

(a) In **Guangdong New Technology Import and Export Corp. Jiangmen Branch v. Chiu Shing** [1991] 2 HKC 460, Barnes J. said :

" Section 43(a) is enacted in the form adopted by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. About that wording, *Mustill and Boyd's The Law and Practice of Commercial Arbitration in England* (2nd Ed) p 425, has this to say :

'The references to documents being 'duly authenticated' or 'duly certified' are unfamiliar in an English context, but probably add nothing to the ordinary rules of evidence concerning proof of documents - the most convenient method of proof will generally be by exhibiting the document to an affidavit deposing to its authenticity, accuracy as a copy, or truth as a translation, as the case may be.'

During the course of the hearing, Mr Jat, for the plaintiff, produced what purported to be the original award and submitted that 'duly authenticated' is satisfied by producing the original to the court.

I do not think that s 43(a) requires the strict proof suggested by Mr Chung. There is, before me, *prima facie* proof that the document produced by Mr Jat is the duly authenticated original award. On that evidence, I find that s 43(a) has been complied with."

Relying on this passage, Mr Hingorani produced to the court in this *inter partes* hearing the original award. Its authenticity was not challenged. However, Mr Chan maintained the argument that because it was not produced at the *ex parte* stage, the application was fundamentally flawed and could not be cured by the production of the original at this stage. In my judgment, its production in this hearing in which the plaintiff is still seeking to enforce the award, albeit now opposed, is sufficient. The purpose of s.43 is for the court to be satisfied that it is dealing with a proper and genuine award. Provided that it is so satisfied before the final adjudication, then s.43 will have been complied with. The method of proof employed in this case is the same as that employed and approved of in the**Guangdong's** case above.

(b) Following similar principles, s.43(b) has also been complied with. The original arbitration agreement has not been produced, it is in Korea, however Mr Hingorani relies on the affidavit evidence. An affirmation filed by Mr Ng Wai Cheong on 28 January 2000 states as follows :

"The facts and matters deposed to herein are derived from documents supplied to my firm by the plaintiff and are true to the best of my knowledge, information and belief. ... A copy of the contract is now produced... ."

The contract contains the arbitration agreement relied on. The court therefore has a copy of the contract, the truth of which has been deposed to by the plaintiff's solicitor, an officer of the court. Out of an excess of caution, should this be regarded as insufficient, the plaintiff, through their counsel, has undertaken to provide formal certification, if considered necessary.

In my judgment, bearing in mind the comments in *Mustill and Boyd's* (above), the affirmation evidence together with the offer of an undertaking is sufficient for this court to be satisfied that s.43(b) has been complied with. The undertaking is not strictly necessary in the circumstances of this case where the defendant has never challenged the existence of the agreement, only its application, and where the argument that s.43 has not been complied with has only been raised for the first time in this inter partes hearing without notice to the plaintiff.

2. Inadmissible affidavit evidence?

Order 41 rule 5(1) states that an affidavit may only contain such facts as the deponent is able of his own knowledge to prove. Rule 5(2) provides that affidavits in interlocutory proceedings may contain statements of information or belief together with their sources.

Two issues arise. Firstly, are these interlocutory proceedings in the true sense and secondly, if not, is the plaintiff's 3rd affirmation inadmissible because it fails to comply with rule 5(1). Both questions are answered in the negative. These are not interlocutory proceedings in the conventional sense but, nonetheless, the plaintiff's 3rd affirmation is admissible. This point also has only been argued for the first time at this *inter partes* stage without notice.

By their nature, these proceedings, although interlocutory by name, fall outside those covered by rule 5(2). The test to be applied is that stated in **Gilbert v. Endean** (1878) 9 Ch D at page 269 :-

"For the purpose of this rule those applications only are considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in statu quo till the rights can be decided, or for the purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause of the purpose of enabling the court ultimately to decide upon the rights of the parties"

Complaint is made of the affirmation of Mr Teo Han, the plaintiff's manager in Korea, dated 23 March 2000. He is the authorized representative of the plaintiff

and deposed to the fact that he has direct knowledge of the matters contained in his affirmation. It is necessary at this stage to understand the core issue in the dispute between the parties. The plaintiff is suing on a sales and purchase contract which contains an arbitration agreement in Korea. The defendant says that agreement was a sham and the true contractual relations between the parties are determined by a pre-existing importation agreement with an arbitration clause in Hong Kong.

Returning to Mr Teo's affirmation, Mr Chan for the defendant specifically refers to one sentence which starts "Mr Oh told me that during the trip... ". This is clearly hearsay and could be edited or excised from the affidavit. However the offending hearsay in fact supports the Defence contention that a pre-existing importation agreement was, in fact, entered into. The paragraph may offend Order 41 rule 5(1) but as it in no way prejudices the Defence case, it is hard to understand on what basis the whole affirmation should be ruled inadmissible.

There are other passages which Mr Chan also complains about. For example sentences starting "At all material times it was understood that ... " or "It was envisaged that ... " or "Accordingly, I do not believe that ... ". These statements coming from the plaintiff's authorized representative and merely stating the company's position do not offend the rule.

3. Failure to make full and frank disclosure at the ex parte stage?

Mr Chan submits that the plaintiff's failure to disclose the importation agreement between the parties when applying ex parte for the Korean award to be enforced as a judgment in Hong Kong is fatal to their case. Mr Chan confirmed that his argument on full and frank disclosure related only to the importation agreement and no more.

I find there to be no merit in this submission. The importation agreement, the existence of which has never been in dispute, amounts to the defendant's defence. It was produced to the Arbitrators in Korea. The defendant chose not to attend the Korean arbitration. An award was duly made in the plaintiff's favour and the defendant now contends there is an obligation on the plaintiff to tell the ex parte judge in Hong Kong about the defendant's defence which was never advanced in Korea. There is no such obligation. If the award was known to the plaintiff to be unenforceable in Hong Kong, because for example it had been previously set aside in Korea or had been paid, the court would have to be informed. There is no requirement however to disclose what the plaintiff might have understood to have been the defence advanced had the defendant attended the arbitration. There can be no allegation of bad faith on the plaintiff's behalf as there was full disclosure of the relevant and material documents at the arbitration itself.

Furthermore, had the importation agreement been disclosed at the *ex parte* stage and the judge had decided not to grant the application*ex parte* because of it, he

would have been in error. In other words, had there been disclosure it would have made no difference, the alleged non disclosure is therefore, in any event, non material.

Generally it is not open to the enforcing court to revisit the issues at arbitration unless there are allegations of fraud. With the exception of fraud, which was not raised in Korea, the enforcing court will not give the defendant a chance to argue the merits of its case for a second time.

4. The award is contrary to public policy?

By s.44(3) of Cap.41, an award may not be enforced if it would be contrary to public policy to do so. The defendant's submission under this heading relies again on the contention that the true agreement between the parties was the importation agreement. If so, so the argument continues, the plaintiff has secured an award against the defendant in a foreign country based on an agreement which both parties realized was not intended to bind them in any way. Such an outcome would offend basic notions of morality and justice and would therefore be contrary to public policy.

This submission faces insurmountable difficulties. Firstly, the defendant does little more than merely assert its case. It chose not to advance its case in the arbitration proceedings in Korea. Secondly, an analysis of the available material tends to be against the assertion rather than for it. For example there is no documentation to suggest that the defendant was not the purchaser of the goods. The contract of sale and purchase between these parties appears on its face to be perfectly valid and reflects a normal commercial arrangement. It is one of many such contracts between the same parties. Thirdly, a brief investigation into the defendant's conduct points, again, towards their assertion being incorrect rather than correct. For example, on several occasions, the defendant requested the plaintiff to grant it an extension of time to pay. This is consistent with a party who acknowledges rather than denies the validity of the contract. The defendant also opened letters of credit and drew up D/A bills for payment by the ultimate customers in China. This indicates that the defendant was the seller of the goods to the Chinese buyer which it could not have been had it not purchased the goods from the plaintiff.

In short, it is unsustainable for the defendant to say, now, that the whole operation was a sham and contrary to public policy. The defendant's case falls well short of the high threshold it must meet, before a court will set aside a regular judgment.

The defendant's summons dated 25 February 2000 is accordingly dismissed with an order nisi that the costs be against the defendant, to be taxed if not agreed. In the circumstances, it is not necessary to make any order in respect of the plaintiff's summons for security for costs. It can be disposed of by agreement between the parties.

(M.P. Burrell)
Judge of the Court of First Instance,
High Court

Representation:

Mr Jeevan Hingorani, instructed by Messrs Ince & Co., for the Plaintiff

Mr Anthony K.K. Chan, instructed by Messrs Robertson, Double & Lee, for the Defendant

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