cacv 373/2008 &
CACV 43/2009

in the high court of the

hong kong special administrative region

court of appeal

civil appeal no. 373 of 2008 & No. 43 of 2009

(on appeal from HCMP NO. 928 of 2008)

BETWEEN

FG HEMISPHERE ASSOCIATES LLC Plaintiff (Appellant)
And
DEMOCRATIC REPUBLIC OF THE CONGO 1st Defendant (Respondent)
CHINA RAILWAY GROUP (HONG KONG) LIMITED 2nd Defendant
CHINA RAILWAY RESOURCES DEVELOPMENT LIMITED 3rd Defendant
CHINA RAILWAY SINO-CONGO MINING LIMITED 4th Defendant
CHINA RAILWAY GROUP LIMITED 5th Defendant
And
SECRETARY FOR JUSTICE Intervener

Before: Hon Stock VP, Yeung JA and Yuen JA in Court

Dates of Hearing: 21 April 2010

Date of Handing Down Judgment: 5 May 2010

J U D G M E N T

Hon Stock VP:

1. By a judgment handed down by this Court on 10 February 2010, the plaintiff's appeal was allowed by a majority. Each defendant now seeks leave to appeal to the Court of Final Appeal pursuant to the provisions of s. 22 (1) (a) and (b) of the Court of Final Appeal Ordinance Cap. 484; the Secretary for Justice seeks leave pursuant to the provisions of s. 22(1)(b); and the plaintiff seeks leave to cross-appeal under s. 22(1)(b).

2. Section 22(1) (a) confers a right of appeal "from any final judgment of the Court of Appeal in any civil cause or matter, where the matter in dispute on the appeal amounts to or is of the value of $1 million or more, or where the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of $1,000,000 or more."

3. It is common ground that the matter in dispute between the plaintiff and defendant, that is to say enforcement of the arbitral awards, involves a claim or question to or respecting property amounting to the value of more than $1 million. As regards the application of the subsection (1)(a), the only issue canvassed before us is whether the proposed appeal is from a final judgment.

4. Mr Barlow SC for the DRC points out that the decision of this Court was directed at the declaration made by Reyes J that the courts of Hong Kong had no jurisdiction over the DRC in respect of the subject matter of the claim or the relief or remedy sought by the plaintiff. The declaration of Reyes J, set aside by this Court but intended for restoration by the proposed appeal to the Court of Final Appeal, was one which declared the rights of the parties. Such an order is in its nature a final order: International General Electric Company of New York Ltd and another v Commissioners of Customs and Excise [1962] 1 Ch 784.

5. Mr Barlow further relied upon the decision of the Court of Appeal in WFM Motors Pty Limited v Malcolm Maydwell Civil Appeal No. 148 of 1995, 29 February 1996, unreported. That was a case in which the Court of Appeal had restored the registration in Hong Kong of a judgment obtained by the plaintiff against the defendant in Australia. Ching JA, as he then was, said:

"3. Having regard to the decision of this Court in First Pacific Bank, Ltd., v. Robert H.P. Fung (1990) 1 HKLR 527 the test for finality in Hong Kong is that which has been described as the application test, that is to say whether the controversy in issue between the parties would be finally resolved whichever way the decision should go. In the present case the controversy and the only controversy was whether or not the Plaintiffs should be entitled to register their Australian judgment in Hong Kong. Judgment had gone against the Defendant in Australia and he had exhausted his appeals there. His opposition to the registration here could not be based upon any allegation that the Australian courts had been mistaken or that he was in fact not liable to the Plaintiff. The Court does not sit on appeal from the Australian courts. His opposition was

based mainly on the allegation that the judgment had been obtained by fraud. We held that that had not been shown and that no sufficient ground was shown to order that any issue should be tried. In our view the judgment was final. Whichever way the decision had gone no further proceedings could have taken place on the question of registrability."

6. Mr Coleman SC for the plaintiff says that the present case is readily distinguishable from WFM Motors in that the sole issue with which the Court was concerned in that case was whether the foreign judgment could be registered in Hong Kong: whichever way that decision went, no further dispute in the proceedings was contemplated. That is to be distinguished from the present case, he argues, in that the Court is not merely concerned with whether there is jurisdiction to grant leave to enforce the awards but whether the interlocutory injunctions should be continued and whether and to what extent the assets in question are amenable to execution. He says that the situation is analogous to an application to strike out a pleading which, he argues, is undoubtedly interlocutory in nature.

7. Applying the test posed by the First Pacific Bank decision – that a matter is to be regarded as interlocutory unless it would have the effect, whatever the result of the application finally disposing of the controversy between the parties – the present 'matter' might be said to be interlocutory because the entire controversy between the parties (namely, the enforcement of the awards and whether the assets in question are amenable to execution) may or may not finally be disposed of by determination of the jurisdiction issue. It is only finally disposed of in the event of a declaration that the DRC enjoys absolute immunity.

8. However, First Pacific did not engage the unusual category of application which fell for determination by Reyes J and by this Court, and I do not think that the words used ("finally disposing of the controversy between the parties") could have been intended to deny appellate resolution of a claim to immunity from suit until after resolution at first instance of the substantive merits of the action.

9. The purpose of subsection (1)(a) is undoubtedly to preclude spasmodic, multiple and disruptive appeals from decisions which are only steps towards the ultimate determination of the parties' substantive rights in the action. But a claim to immunity from suit is fundamentally different in character from any step connected with the merits of an action. A determination that the State has immunity from suit finally deprives the private party of its substantive right to have the merits of its claim determined: see, albeit in a different context, Montreal Tramways Co v Creely et al [1949] SCR 197 at p. 199. Conversely, a requirement that all appeals from dismissal of a State's claim to sovereign immunity should await determination of the remaining substantive issues between the parties would give rise to the risk of undermining the policy which underpins recognition of sovereign immunity, when properly invoked. That policy has been expressed as one designed "to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties": In re Ayers, 123 US 443 at p. 505[1]. "The entitlement is an immunity from suit rather than a mere defence to liability; and [that immunity] is effectively lost if a case is erroneously permitted to be at trial": Mitchell v Forsyth 472 US 511 at p. 526. For these reasons, it seems to me that to treat the judgment of this Court on the issue of the DRC's immunity from suit as a final judgement would not flout the intent of s. 22 (1)(a).

10. I would, therefore, hold that the judgment of this Court of 10 February 2010 is a final judgement within the meaning of s. 22(1)(a) of the Court of Final Appeal Ordinance and that the appeal indirectly involves a claim or question to or respecting property amounting to or of the value of more than $1 million; and that the defendants enjoyed an appeal as of right to the Court of Final Appeal.

11. If I am wrong as to the appropriate application of s. 22(1)(a) to this case, I would in any event grant leave under s. 22(1)(b), for it seems self-evident that there are questions involved in the appeal which by reason of their great general or public importance ought to be submitted to the Court of Final Appeal for decision.

12. We have been presented with a plethora of suggested questions, many, not surprisingly, overlapping in their purport. Some of the proposed questions are put forward on an incorrect premise: for example, the suggestion on behalf of the DRC that this Court held that before 1 July 2007, the common law required the courts of Hong Kong to speak with one voice with the Executive 'on matters of foreign affairs' but that that requirement did not survive the change in the exercise of sovereignty. That is fundamentally to misread the reasoning of the majority. At least one of the proposed questions conflates the question of proposed importance with the argument that might be deployed an answer to it: I have here in mind question 3 proposed by the Secretary for Justice. One of the questions proposed by the DRC, namely, its third question which relates to champerty and maintenance, was not a question involved in the appeal. There is a question proposed by the plaintiff in respect of costs by which the plaintiff suggests that the Secretary for Justice ought to have been required to pay: in my judgment, the issue raised is too fact-specific to warrant leave under the second limb of s. 22 (1). Other questions are unnecessary because they are merely questions that would have to be canvassed en route, as it were, to determination of an ultimate question.

13. It seems to me that it would be more constructive to limit the number of questions and to prune their content so that what is left are the central issues of great general or public importance that are involved in the appeal. I would grant leave under s. 22(1) (b) in respect of the following questions:

(1) Are the courts of Hong Kong precluded by reason of the Basic Law from determining whether a foreign State is entitled to immunity from suit and execution?

(2) After the resumption of the exercise of sovereignty by the People's Republic of China on 1 July 1997, does the law of Hong Kong incorporate the restrictive doctrine of State immunity?

(3) If the law of Hong Kong incorporates the restrictive doctrine of State immunity, what is the scope of the commercial exception to which that doctrine gives effect?

(4) When a State voluntarily submits to arbitration pursuant to the Rules of Arbitration of the International Chamber of Commerce in force on 1 January 1988, does it thereby waive such state immunity as it otherwise enjoys from proceedings for the recognition and execution of the resulting award?

14. I would otherwise refuse leave in respect of the questions posed by the parties.

15. Accordingly, I would:

(1) grant leave as of right under s. 22(1)(a) to each of the defendants on condition that each shall within one month from the date hereof enter into a security to the satisfaction of the Court in the sum of $400,000, for the due prosecution of the appeal and the payment of all such costs as may become payable to the plaintiff in the event of the appeal being dismissed for non-prosecution, or of the Court of Final Appeal ordering that defendant to pay the plaintiff's costs of the appeal;

(2) grant leave under s. 22(1)(b) for determination of the questions specified in paragraph 13 above; and

(3) make a costs order nisi that the costs of these applications for leave be costs in the cause of the appeal in the Court of Final Appeal.

Hon Yeung JA:

16. I agree.

Hon Yuen JA:

17. I also agree.

Hon Stock VP:

18. There will accordingly be orders in the terms specified in paragraph 15 above.

(Frank Stock)
Vice-President

(Wally Yeung)
Justice of Appeal

(Maria Yuen)
Justice of Appeal

Mr Russell Coleman, SC & Ms Zabrina Lau, instructed by Sidley Austin for the Appellant/Plaintiff

Mr Barrie Barlow, SC, instructed by Messrs Fried, Frank, Harris, Shriver & Jacobson for the 1st Respondent/1st Defendant

Mr Gerard McCoy, SC & Mr Richard Zimmern, instructed by DLA Piper Hong Kong for the 2nd to 5th Respondents/2nd to 5th Defendants

Ms Teresa Cheng, SC & Mr Adrian Lai, instructed by Department of Justice for Secretary for Justice (Intervener)/6th Respondent

[1] This in the context of the Eleventh Amendment to the Constitution of the United States of America: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."