CHINA XINXING CORP v MID-POINT DEVELOPMENT LTD - [1993] 1 HKC 629

HIGH COURT
KAPLAN J

MISCELLANEOUS PROCEEDINGS NO 110 OF 1993

4 August 1993

Arbitration -- Enforcement of award -- Application to set aside -- No evidence filed by applicant -- Abuse of process -- Indemnity costs

On 7 September 1992, a CIETAC arbitration panel rendered an award in favour of the plaintiffs against the defendant in the sum of US$655,800. On 23 April 1993, Kaplan J granted ex parte leave to enforce the award as a judgment of the court. On 11 May 1993, the defendant issued a summons seeking an order to set aside the order of Kaplan J. The summons did not state grounds. The summons was set down for a half-day hearing on 26 July 1993. On 22 July 1993, the defendant's solicitor obtained leave to cease to act for the defendant. On 26 July, the defendant did not appear. No affidavit evidence in support of the defendant's summons had been filed at any time.

Held, dismissing the summons: It was an abuse of the process of the court to take out an application to set aside a judgment of the court enforcing an arbitration award, reserve a half-day of court time, and not file any evidence in support of the application. It was highly desirable that applications should in all cases be supported by affidavit evidence. The defendant would be required to pay the plaintiffs' costs on an indemnity basis.

Legislation referred to

(HK) Arbitration Ordinance (Cap 341) s 44

(HK) Rules of the Supreme Court O 73

Application

This was an application by summons to the High Court to set aside an ex parte order by Kaplan J dated 23 April 1993 allowing the plaintiffs to enforce a CIETAC arbitration award against the defendant. The facts appear sufficiently in the following judgment.

Ben Beaumont (HH Lau & Co) for the plaintiffs.

Defendant absent.

KAPLAN J

On 7 September 1992, a CIETAC arbitration panel rendered an award in favour of the plaintiffs against the defendant in the sum of US$655,800.

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

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

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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.

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

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

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

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

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 21/2 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.

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).

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

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frequently an application to adjourn with resultant waste of court time and an escalation of the costs. This is wholly undesirable.

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.