

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CIVIL APPEAL NO. 15 OF 2015

(Grand Court Cause No. FSD 25 of 2015 (AJJ))

IN THE MATTER OF MNC MEDIA LIMITED

AND IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

BETWEEN: MNC MEDIA INVESTMENT LIMITED

Plaintiff/Appellant

AND: ANG CHOON BENG@ANG SIONG KIAT

Defendant/Respondent

Before **THE HON JOHN MARTIN, Q.C., Justice of Appeal**
THE HON SIR RICHARD FIELD, Justice of Appeal
THE RT HON SIR ALAN MOSES, Justice of Appeal

In the presence of Mr David Lewis QC and Mr Brett Basdeo of Walkers for the Appellants and Mr Paul Smith and Mr Ben Hobden of Conyers Dill & Pearman for the Respondent.

Hearing: 13 November 2015

Ruling: 13 November 2015

Revised from transcript and approved

Released 18 January 2016

THE HONOURABLE SIR RICHARD FIELD, JA

1. This is an appeal from the decision of Justice Andrew Jones whereby he dismissed the application by Originating Summons of the appellant MNC for: (A) declarations that (i) a statutory demand for the sum of S\$1,162,209.81 is invalid; and (ii) there is a genuine

and substantial dispute concerning the said debt; and (B) a consequential order setting aside the statutory demand.

2. In setting out the necessary factual background, I rely substantially on Justice Jones' narration of the relevant facts. MNC is a holding company incorporated in the Cayman Islands which owns an electronic media products business carried on through a number of variable interest entities in the Peoples' Republic of China and various subsidiaries in Indonesia, Singapore, Malaysia and Hong Kong.
3. By a Put and Call Option Agreement made on 17 March 2010 between the Respondent (Mr. Ang) of the one part and Linktone International Limited, MNC (which was then called Linktone Ltd) and PT Media Nusantara Citra TBK (collectively "the Linktone Parties") of the other part, Mr. Ang agreed to grant an option to purchase the initial Put Option Shares and Further Put Option Shares ("the Shares") and the Linktone parties granted Mr. Ang an option to require them to purchase the Shares. The Shares were defined as shares in Innoform Media Pte Limited which is a 75% indirect subsidiary of MNC. They represent the 25% not already owned by MNC. The third Linktone party, PT Media Nusantara Citra TBK, is a related party. The agreement contained a mechanism for the completion of the Put Options for the Shares in these terms:

A. Ang shall deliver such Linktone Party as the Linktone Parties shall notify Ang in writing prior to completion ("the relevant Linktone Party") duly executed transfers of the initial Put Option Shares or Further Put Option Shares, as the case may be, in favour of the relevant Linktone Party accompanied by the Share Certificates in respect of the initial Put Option Shares or Further Put Option Shares as the case may be.

B. The relevant Linktone Party shall, and the other Linktone parties shall procure that such relevant Linktone Party deliver to Ang a cashier's order or banker's draft drawn on a bank licensed in Singapore or such other mode of payment agreed by the parties, for the Initial Put Option consideration or Further Put Option consideration as the case may be.

4. The Put and Call Option contained an arbitration clause under which any dispute arising in connection with the agreement was to be referred to arbitration in Singapore in accordance with the Arbitration Rules of SIAC. The governing law of the agreement was Singapore Law.
5. Mr. Ang commenced an arbitration against the Linktone Parties in the Singapore International Arbitration Centre in which he claimed that they were in breach of their obligations under the Put and Call Option Agreement. On 5 March 2014, the Tribunal issued a partial award in Mr. Ang's favour and directed that Mr. Ang (as seller) and the Linktone parties (as buyer) complete the sale and purchase of the Shares ("the Partial Award"). The Partial Award did not deal with interest and costs, but the Tribunal gave Mr. Ang liberty to make applications, in respect thereof, which he did.
6. The Linktone Parties failed to complete the sale and purchase of the Shares in accordance with the Partial Award, with the result that Mr. Ang made an application to

the arbitral tribunal for consequential orders relating to the procedure for completion, including the timing and place of completion, and delivery to him of a cashier's order for both the purchase price and the sums due for interest and costs. Mr. Ang's application was successful in every respect.

7. It is necessary to set out the concluding paragraph of the Final Award issued on 26 September 2014.

"158. For reasons set out above, after taking account of the parties' respective submissions, I make and publish this Final Award as follows:

- (1) the Respondents shall pay to the Claimant the sum of S\$367,124.98 as simple interest calculated at the rate of 5.33% per annum, on the amounts of S\$2,067,000.00 and S\$1,430,000.00 accrued from the dates of 18 October 2011 and 19 October 2012 respectively, to the date of the Partial Award, 5 March 2014;
- (2) the fees, and expenses and disbursements of the Tribunal and the administrative fees and expenses fixed by the Registrar in the amount of S\$171,256.70 shall be borne by the Respondents, with the remaining amount of S\$23,049.19 to be borne by the Claimant;
- (3) the Respondents shall reimburse the Claimant the amount of S\$795,104.83 being the Claimant's legal fees and other costs incurred in connection with the arbitration, with the remaining amount to be borne by the Claimant;
- (4) any enforcement of the amounts referred to in paragraph (2) above shall take into account any amounts the Claimant has paid from its Advance on Costs deposited with the SIAC;
- (5) the Respondents shall bear the whole of their legal fees and costs incurred in connection with the arbitration; and
- (6) the Claimant and Respondents shall comply with the following in connection with completion of the Initial Put Option Shares and the Further Put Option Shares:
 - (a) within five days from the date that the Arbitral Tribunal issues its decision herein, the Respondents are to:
 - (i) notify the Claimant, in writing, of the Relevant Linktone Party (as specified in Clause 3.1 of the P&C Agreement), in whose favour, the Claimant is to execute the transfers of the Initial Put Option Shares or Further Put Option Shares (as the case may be);

- (ii) notify the Claimant of the Relevant Linktone Party, to whom the Claimant is to deliver the duly executed transfers of the Initial Put Option Shares (as the case may be);
- (b) upon receiving notification from the Respondents of the Relevant Linktone Party, the Claimant will prepare and execute the transfers of the Initial Put Option Shares or the Further Put Option Shares (as the case may be) in favour of the Relevant Linktone Party;
- (c) subject to paragraphs (a) and (b) above, completion of the sale and purchase of the Initial Put Option Shares (“Completion”) is to take place within 14 days from the date that the Arbitral Tribunal issues its decision herein, at the office of the Claimant’s counsel, i.e. SGX Centre 2, #17-01, 4 Shenton Way, Singapore 068807, at a time to be specified by the Claimant’s counsel;
- (d) at Completion, the Relevant Linktone Party shall, and the other Linktone Parties shall procure that such Relevant Linktone Party deliver to Ang (the Claimant) a cashier’s order for the following sums:
 - i. the Initial Put Option Consideration;
 - ii. the Further Put Option Consideration;
 - iii. all interest awarded by the Arbitral Tribunal in its decision herein;
 - iv. all costs awarded by the Arbitral Tribunal in its decision herein; and
- (e) subject to paragraph (d), upon receiving the cashier’s order for the sums mentioned in paragraph (d), the Claimant shall deliver duly executed transfers of the Initial Put Option Shares or Further Put Option Shares (as the case may be) in favour of the Relevant Linktone Party accompanied by the share certificates in respect of the Initial Put Option Shares or Further Put Option Shares (as the case may be); and
- (f) upon completion, the Claimant shall deliver to the Relevant Linktone Party, a letter of resignation duly signed by the Ang Nominee Director.”

8. The Completion Orders were made on 26 September 2014 because the Linktone Parties were in breach of the Partial Award by failing to complete the sale and purchase of the Shares. They are still in breach. The court understands that MNC nominated PT Media Nusantara Citra TBK on 2 January 2015, well outside the stipulated period in subparagraph (6) and that subsequently that nominee has also been nominated by Linktone International Limited. Accordingly, both nominations occurred well outside the 14-day period prescribed in the Final Award and no cashier's order has ever been procured or tendered.
9. By an ex parte Originating Summons issued on 18 November 2014, Mr. Ang sought an order pursuant to section 5 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) to enforce the Final Award in this jurisdiction against MNC and Justice Jones made an order for enforcement on 4 December 2014 which was served on MNC. MNC had 14 days in which to make an application to set aside the ex parte order, failing which it was to be enforceable. On 17 December 2014, MNC's attorneys wrote to Mr. Ang's attorneys asking for an extension of time until 5 January 2015 in which to make an application to set it aside. This was agreed but MNC never made any such application, with the result that by the time the Originating Summons came before Justice Jones it was too late for such an application to be made. On 6 January 2015, the Final Award became unchallengeably enforceable within the Cayman Islands jurisdiction.
10. On 28 January 2015, Mr. Ang served his statutory demand requiring payment of S\$1,162,209.81, that being the total amount payable by MNC in respect of interest and costs under paragraphs (1) and (3) of the Final Award.
11. Justice Jones said that it was necessary to read together the Final Award with the Partial Award, the latter of which directs the parties to complete the sale and purchase of shares. He concluded that, read in this manner, paragraph 158 (6) of the Final Award did not create substantive rights and obligations but merely sets out a procedural mechanism for performing obligations created by the Partial Award and subparagraphs (1) and (3) of the Final Award. In the Judge's view, the meaning and effect of the Final Award was plain and obvious. Having regard to the unqualified language of subparagraph (1) and (3), and the context in which those orders were made, it was clear that they created unconditional obligations on the part of the Linktone Parties to pay S\$367,123.98 by way of interest and S\$795,104.83 in respect of legal fees and costs. The Tribunal must have intended payment obligations to arise immediately as at the date of the Final Award. It was inherently improbable that the Tribunal would make orders for interests and costs in favour of Mr. Ang which were intended to be conditional upon the Linktone Parties complying with the Partial Award. This was especially so bearing in mind that the completion orders were made because of the Linktone Parties' non-compliance with the Partial Award. It would make no commercial sense to defer the obligation to pay interest and costs for as long as the Linktone Parties could continue to avoid compliance with the completion mechanism.
12. Mr. Lewis QC submitted on this appeal that the enforcing court should abide by the principle of minimum curial intervention. This meant that the court should adopt a mechanistic approach and give the Final Award its plain and obvious meaning, thereby giving it an autonomous interpretation without recourse to national law. It was not for

the court to improve the award or to strive to construe it having regard to commercial considerations.

13. None of these submissions of Mr Lewis is controversial. He went on to argue that the plain and natural meaning of subparagraph (6) was that the interest and costs awarded by the tribunal should be paid when and in the manner provided for in subparagraph (6) and the judge had been wrong to construe the Final Award as he did. Subparagraphs (1) and (3) did not have immediate and binding effect as found by the judge. The judge had impermissibly substituted himself for the arbitration tribunal and reached an interpretation which he thought the tribunal had intended the Final Award to bear. The judge had also erred in taking into account commercial considerations and had wrongly and irrelevantly held against MNC the fact that it had not challenged the enforcement order made by the Cayman court.
14. What Mr. Lewis' submission came to is this: notwithstanding that under the Final Award the sums awarded for costs and interest are to be paid within 14 days, nothing is due for costs and interest under the Final Award until the steps to be taken under subparagraph (6) leading to the delivery of a cashier's order have been completed, notwithstanding that the 14-day period has long expired.
15. In my opinion, Mr. Lewis' interpretation of the Final Award ignores and fails to give due effect to subparagraphs (1) and (3). It is worth remembering that under subparagraph (1) mandatory language ("shall pay") is used, and in subparagraph (3) the language is "shall reimburse". In my judgment, the effect of those subparagraphs (1) and (3) is that if the sums for interests and costs are not paid in accordance with the mechanism in subparagraph (6) within 14 days, the sums are thereafter immediately payable under the Award. This construction gives proper effect to the wording of the Final Award as a whole. Mr. Lewis' construction, on the other hand, fails to give proper effect to subparagraphs (1) and (3) and fails to take on board the 14-day limit provided for in subparagraph (6).
16. The construction I propose does no more than give effect to what I regard to be the plain and obvious meaning of the Final Award looked at as a whole. It is an autonomous interpretation that does not involve recourse to those rules of construction of contracts in the Cayman Islands under which the court can adopt a commercial purposive approach. The judge's reasoning was different from the reasoning I think applicable to the Final Award, but he was right, in my judgment, to conclude that the meaning and effect of the Final Award was that MNC were under an obligation as of the day of the enforcement order made by the Grand Court to pay the costs and interest awarded by subparagraphs (1) and (3). For these reasons, I would uphold the judge's dismissal of MNC's Originating Summons and dismiss this appeal.

FIELD, JA

MOSES JA: I agree.

MARTIN JA: I also agree.