HONG KONG / JUDGMENT

RE NEW MAY LANDSCAPE LTD

COURT
Court of First Instance

DECIDED
19 July 2007

CASE / FILE NUMBER
HCCT30/2007

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bjbj HCCT 22/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE CONSTRUCTION AND ARBITRATION LIST ACTION NO. 22 OF 2007

IN THE MATTER of Arbitration Ordinance (Cap. 341), section 23(3)(b) and IN THE MATTER of the Rules of the High Court, order 73, rule 3(2)(a) and IN THE MATTER of a domestic arbitration between NEW MAY LANDSCAPE LIMITED (Claimant) and GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION acting through the LEISURE AND CULTURAL SERVICES DEPARTMENT (Respondent) and IN THE MATTER of an appeal against an arbitral award made by Arbitrator CHARLES MANZONI dated 23 January 2007 in respect of Tender Ref. LCQ 4017/2001 CWW Claim HCCT 23/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE CONSTRUCTION AND ARBITRATION LIST ACTION NO. 23 OF 2007

IN THE MATTER of Arbitration Ordinance (Cap. 341), section 23(3)(b) and IN THE MATTER of the Rules of the High Court, order 73, rule 3(2)(a) and IN THE MATTER of a domestic arbitration between NEW MAY LANDSCAPE LIMITED (Claimant) and GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION acting through the LEISURE AND CULTURAL SERVICES DEPARTMENT (Respondent) and IN THE MATTER of an appeal against an arbitral award made by Arbitrator CHARLES MANZONI dated 23 January 2007 in respect of Tender Ref. LCQ 4044/2001 YTM Claim HCCT 29/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE CONSTRUCTION AND ARBITRATION LIST ACTION NO. 29 OF 2007

IN THE MATTER of Arbitration Ordinance (Cap. 341), section 25(2) and IN THE MATTER of the Rules of the High Court, order 73, rule 2(1)(c) and IN THE MATTER of a domestic arbitration between NEW MAY LANDSCAPE LIMITED (Claimant) and GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION acting through the LEISURE AND CULTURAL SERVICES DEPARTMENT (Respondent) and IN THE MATTER of an application for setting aside of an arbitral award made by Arbitrator CHARLES MANZONI dated 23 January 2007 in respect of Tender Ref. LCQ 4017/2001 CWW Claim HCCT 30/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE CONSTRUCTION AND ARBITRATION LIST ACTION NO. 30 OF 2007

IN THE MATTER of Arbitration Ordinance (Cap. 341), section 25(2) and IN THE MATTER of the Rules of the High Court, order 73, rule 2(1)(c) and IN THE MATTER of a domestic arbitration between NEW MAY LANDSCAPE LIMITED (Claimant) and GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION acting through the LEISURE AND CULTURAL SERVICES DEPARTMENT (Respondent) and IN THE MATTER of an application for setting aside of an arbitral award made by Arbitrator CHARLES MANZONI dated 23 January 2007 in respect of Tender Ref. LCQ 4044/2001 YTM Claim Before: Hon Reyes J in Chambers Date of Hearing: 19 July 2007 Date of Judgment: 19 July 2007

J U D G M E N T

INTRODUCTION

New May contracted to provide horticultural and other services to the Government. New May seeks leave to appeal against 2 awards by Mr. Charles Manzoni (the Arbitrator). The awards respectively relate to what have become known as the CWW and YTM claims. Alternatively, New May applies to set aside the 2 awards on the ground of misconduct. In my view, for the reasons which I briefly set out below, none of the applications has merit. DISCUSSION A. Leave to appeal against the CWW award In respect of the CWW award, leave to appeal is sought on the basis that the Arbitrator wrongly construed certain special conditions of contract (SCCs). I shall assume that those conditions are standard terms in widespread use. Accordingly, I must be satisfied that the Arbitrator went seriously (as opposed to obviously) wrong in their construction. First, New May says that the Arbitrator wrongly construed SCC 10. The Arbitrator held that, having reduced the number of areas for which services had to be provided, there was no obligation on the Government to instruct New May in writing to supply fewer staff. The Arbitrator thought that, once service sites had been deleted, the number of staff provided by New May should have been adjusted in accordance with the formula set out in SCC 10.4. In support of its case on error, New May points to SCC 5.2 (New May to ensure that the number of employees specified in Contract

Schedule 4 are to be provided) and SCC 22.2 (no variation without an order in writing). In fact, the Arbitrator rejected New May's argument based on SCC 5.2. He pointed out that, construing the contract as a whole, SCC 5.2 was subject to SCC 10.4 and must refer to staff numbers stipulated in Schedule 4 as adjusted, if at all, by the operation of SCC 10.4. As for SCC 22.2, I do not see how that shows the Arbitrator erred. The adjustment of staff numbers is simply a consequence of SCC 10.4 which automatically comes into operation as a result of a variation (duly communicated to New May) in the number of sites. Second, New May suggests that the Arbitrator wrongly held that it was not entitled to a quantum meruit. Despite a reduction in sites, New May continued to supply the same number of staff. It appears that the Government used such staff supplied by New May. The Arbitrator stated:- "22. I note that at paragraphs 15 and 16 of the Claimant's opening in this arbitration, it seems to put forward a quantum meruit basis for this claim, premised on a notion of unjust enrichment. As pointed out by the Government, such a claim is not pleaded and therefore falls to be dismissed for this reason alone. However, even if it were pleaded it seems to me it would fail. There is no evidence that the Government requested the 'additional staff'. The Claimant simply provided them in the erroneous belief that it was obliged to do so. Such a factual situation does not give rise to a claim for unjust enrichment or quantum meruit. Further, from a contractual perspective, clause 3(c) of the General Conditions of Contract [contractor's acknowledgement of non-entitlement to additional payment] would exclude such a claim." I do not think that the Arbitrator's reasoning can be faulted. It seems to me that he probably came to the right conclusion on this head. If X, under a unilateral mistake as to his contractual obligation, gratuitously supplies more staff to Y than X has to provide, I doubt that Y (without more) comes under an obligation to pay X a greater amount that what the contract actually stipulates. Third, New May complains that the Arbitrator ruled that the obligation to clean only arises when Schedule 2 of the contract identifies the frequency of cleaning. New May says that this conclusion is contrary to Schedule 3, cl.19. The Arbitrator dealt with the matter thus:- "37. Clause 19 of Schedule 3 obliges the Contractor to pick up refuse. That is a far wider obligation [than] simply cleaning, as can be seen from the definition of refuse in clause 19.1. Thus, the collection of refuse does not indicate that the areas must include non-planting areas. The Contractor is also required to do cleaning, but that obligation is limited by the words of clause 19.2. The cleaning obligation extends to cleaning:- 37.1 Toilets etc which enclose the area; and 37.2 Pavements, paths etc, within the Scheduled Sites in accordance with the frequency as indicated in the Contract Schedule.

38. On my reading of that clause, having agreed to the other elements of the Contract which I have referred to in paragraph 34 above, the obligation to clean only arises when Schedule 2 identifies the frequency of the cleaning necessary. Thus, if no frequency is identified, the Claimant cannot clean 'in accordance with the frequency as indicated in the Contract Schedule'. To put it another way, if there is no frequency identified, then the 'frequency indicated' is zero, and so no cleaning obligation arises." Again, I think that the Arbitrator was probably right. He does not seem to me to be seriously wrong in his conclusion. Fourth, New May contends that the Government issued default notices outside of the time stipulated by General Condition of Contract 26. The default notices were in respect of the non-payment

by New May of a minimum wage to its workers, contrary to New May's contractual undertaking to Government. On this the Arbitrator held:- "82. I do not think that Clause 26 of the General Conditions is relevant to this issue. Clause 26 relates to the adequacy of the Services provided by the Claimant under the terms of the Contract, and does not relate to all breaches of the Contract. I do not construe it as deeming an acceptance that the wages paid to the labour force of the Claimant are at least the minimum wage. Thus, clause 26 does not assist the Claimant, and the point summarised in paragraph 78.2 above is rejected." Here I agree with the Arbitrator. I do not think that there has been error on his part, whether serious or otherwise. Finally, New May complains that the Arbitrator allowed Government to deduct liquidated damages in connection with its default notices. Such damages (New May argues) were a penalty and not a genuine pre-estimate of damages. The Arbitrator found that the liquidated damages were a reasonable estimate of Government's likely administrative expenses in addressing New May's breaches. I do not think that he went seriously wrong in that assessment. Indeed, it seems to me that such conclusion was a finding of fact which is not open to appeal in court proceedings. B. Leave to appeal against the YTM award In respect of the YTM award, leave to appeal is also sought on the basis that the Arbitrator wrongly construed certain SCCs. Again I shall assume that those SCCs are standard and in widespread use. First, New May makes the same complaint on the construction of SCC 10, especially SCC 10.4, advanced in connection with the CWW award. Therefore, for the reason previously given in that respect, I reject this ground for leave. Second, New May says that the Arbitrator wrongly construed its obligation to provide manpower on Sundays and public holidays. It is said that the Arbitrator misunderstood the meaning of a Table 1 (in Schedule 4) which Mr. Chow of New May completed by hand. The Arbitrator heard evidence from the parties (including Mr. Chow) on the meaning of the handwritten terms in Table 1. He did not accept Mr. Chow's evidence that the terms meant that New May would provide a total of 64 man-days annually to cover Sundays and public holidays. Instead, the Arbitrator preferred the evidence of Mr. Chau of Government to the effect that Mr. Chow had agreed to provide 64 man-days for each Sunday and public holiday in a given year. I am unable to fault the Arbitrator's conclusion. Indeed, I think his finding is a matter of fact as to what the parties objectively agreed at the time of contracting in relation to staffing on Sundays and public holidays. The requirement to provide 64 workers on each Sunday and public holiday of a year was not a variation, but what the parties initially agreed would be the scope of New May's obligation. Third, New May complains about the Arbitrator's treatment of Regional Park Site A. It suggests that he ought to have found that it was a site included in the contract from the beginning and that it was deleted as a site under SCC 10. Having heard live evidence (especially from Mr. Chau) and construed letters incorporated into the contract by reference, the Arbitrator held that Regional Park Site A only became part of the contract later (in February 2003) and was never deleted under SCC 10. What happened instead was that the work required at the site was varied from that which had been originally envisaged. This is not a matter solely of construing SCCs. This complaint seems to me to challenge findings of fact by the Arbitrator. That is not open to New May on an application for leave to appeal. I therefore reject this argument as a basis for the grant of

leave. Fourth, New May makes a similar complaint about cleaning and its frequency as has already been discussed in relation to the CWW claim. This ground is rejected for the reason stated in connection with the CWW award. Finally, New May complains about the Arbitrator's rejection of its unjust enrichment claim. For similar reason to that given in connection with the identical complaint about the CWW award, I do not think that this is a valid ground for leave to appeal. C. Applications to set aside for misconduct The same ground is raised on both awards. The ground is said to constitute misconduct. The Arbitrator is criticised for refusing discovery of the quantities of labour supplied by New May and used by the Government. Given the Arbitrator refused discovery, New May submits that he could not have rejected the claim for quantum meruit on the basis of a lack of evidence that the Government had requested additional staff. There is nothing in this ground. It can hardly constitute misconduct. The Arbitrator refused discovery on the number of workers supplied by New May. As the Arbitrator pointed out in his awards, simply because New May supplied labour, does not mean that Government requested the same. The records sought would not have helped the unjust enrichment or quantum meruit claim.

CONCLUSION

For the foregoing reasons, New May's several applications are dismissed. I shall hear the parties on costs. (A T Reyes) Judge of the Court of First Instance High Court Mr Vincent Chin and Mr Liu Chin Yu, instructed by Messrs Tso & Associates, for the Applicant in all actions Mr Ling Chun Wai, instructed by the Department of Justice, for the Respondent in all actions 1udk 1udk .vd= m@/ ;r,6 J<6B (_c8 }WDx .CxX: "w>`" nG1m qc@n wv^:K ?FPyf0H~ nG1m .CxX "w>` qc@n ? FPy ;r,6 (_c8 'k^0 'k^0 'k^0 6XuF) 4u<B dXHy hca.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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