CACV 136/2011

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 136 OF 2011

(ON APPEAL FROM HCCT NO. 15 OF 2010)

IN THE MATTER of an Arbitration Award dated 24 August 2009 in case No. 14291/EBS/VRO made by the International Court of Arbitration, International Chamber Of Commerce

and

IN THE MATTER of section 34C(4) of the Arbitration Ordinance (Cap 341) and Article 34 of The UNCITRAL Model Law on International Commercial Arbitration

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BETWEEN

PACIFIC CHINA HOLDINGS LTD (In Liquidation) Plaintiff

and

GRAND PACIFIC HOLDINGS LTD Defendant

Before: Hon Tang VP, Kwan JA and Fok JA in Court

Date of Decision on Costs: 23 July 2012

DECISION ON COSTS

Hon Tang VP:

1. On 9 May 2012, we allowed the Defendant's appeal against the judgment of Saunders J setting aside the award for violation of Article 34(2)(a)(ii) and (iv). We also made a cost order nisi in favour of the Defendant in respect of the costs before this Court and in the Court of First Instance.

2. The Defendant applies to us for such costs to be taxed on an indemnity basis as well as for a certificate for two counsel.

2 counsel

3. This does not appear to be opposed by the Plaintiff, PCH. In any event, this is clearly a suitable case for two counsel, both here and below. And I would certify accordingly.

Indemnity costs

4. In *Gao Haiyan & Anor v Keeneye Holdings Ltd & Anor* (No 2) [2012] 1 HKC 491, this Court (differently constituted) said at page 494:

> "11. In my view, such provisions also support the view that under CJR, the court may be more ready to consider it appropriate to award indemnity costs.
>
> 12. Experienced judges in charge of the Construction and Arbitration List have adopted the approach that, in proceedings arising out of or in connection with arbitral proceedings, in the absence of special circumstances, the court will normally consider it appropriate to order costs on an indemnity basis.
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> 13. For the reasons given by Reyes J, I believe that is a salutary practice.
>
> 14. I do not believe there are special circumstances which should persuade me that indemnity costs are inappropriate. The fact that the Respondents' case is not unarguable is not a special

> circumstance. Had it been clearly hopeless, that would have been an additional reason for ordering indemnity costs."

5. That decision is binding on us and not distinguishable. Therefore, I would order costs to be taxed on an indemnity basis.

6. PCH has drawn our attention to a decision of the Supreme Court of Victoria, Court of Appeal, *IMC Aviation Solutions Pty Limited v Altain Khuder LLC*, 2011 VSCA 248, where the question of indemnity costs orders in similar proceedings was in issue.

7. There, the judge of the Trial Division had ordered IMCS to pay Altain's costs on an indemnity basis. The Victorian Court of Appeal noted at paragraph 328 that the judge had done so after referring to the decision of Reyes J in *A v R* [2009] 3 HKLRD 389 and subsequent decisions including the decisions of Saunders J, and because:

> "328. ... that it appeared 'to be the settled principle in Hong Kong that the Court of First Instance will generally award indemnity costs against an unsuccessful party in an application to challenge or resist enforcement of an arbitral award.' The judge then noted that Altain submitted that the Hong Kong approach should be applied because (a) IMCS had unsuccessfully sought to set aside the enforcement orders, and (b) the *Civil Procedure Act 2010* (*Vic*) strengthened the analogy with the Hong Kong approach. What was analogous was the overarching purpose in section 7 of the *Civil Procedure Act* 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute' and the overarching obligation of a party directed to achieving that purpose."

8. The Victorian Court of Appeal took a different view. Warren CJ in giving the judgment of the court said:

> "335. With great respect to his Honour, we can find nothing in the Act or in the nature of the proceedings that are available under the Act which of itself warrants costs being awarded against an unsuccessful award debtor on a basis different from that on which they would be awarded against unsuccessful parties to other civil proceedings. Accordingly, his Honour acted on a wrong principle

> in embracing the approach that has been adopted by the Hong Kong Court of First Instance. We note also that the *Civil Procedure Act 2010* was not in force when his Honour heard this proceeding. Even if it were in force, it would not have warranted the order he made.
>
> 336. In proceedings under the Act, as in other civil proceedings, costs will ordinarily be awarded against the unsuccessful party on a party and party basis unless the successful party can establish special circumstances. The principles for determining the existence of special circumstances are well established. Special circumstances, if they exist, are found in the facts of the case at hand, and the exercise of the judicial discretion is not otherwise conditioned on whether those facts are comprehended by a category of case or cases in which a special order has been made. The fact that an award debtor fails to establish a ground for resisting enforcement of a foreign arbitral award cannot, of itself, constitute special circumstances. Nor can a finding that the award debtor's case was 'unmeritorious' if all that is meant by that expression is that the award debtor failed to persuade the Court to accept his or her evidence and submissions."

9. *Altain Khuder* predated *Gao Haiyan (No 2)* but it was not drawn to that court's attention.

10. As I have said we are bound by our previous decision, but since I now have the benefit of the Victorian decision, I would go on to consider, whether, if I were free to do so, I would decide this application differently.

11. After careful consideration and with respectful recognition of the powerful reasons which supported the Victorian Court of Appeal decision, I remain of the view that this Court should nevertheless give effect to and recognise the practice of specialist judges in charge of the Construction and Arbitration List and order indemnity costs.

12. In *Gao Haiyan (No 2)*, I mentioned it might be paradoxical if a party who had succeeded but failed to better a sanctioned offer or payment may be ordered to pay indemnity costs, but if he had completely failed, and

the successful party had made no sanctioned offer or sanctioned payment because the latter was rightly confident of success, the successful party could not be awarded indemnity costs unless there were special circumstances.

13. I believe the implication of Order 22 rule 23 deserves careful consideration. It is perhaps best explored on a case by case basis at first instance and in this court until a synthesized theme can be discerned.

14. For the present purpose I note that under Order 62 rule 5(1), the court in exercising its discretion as to costs, shall, to such extent as may be appropriate in the circumstances, take into account:

> "(aa) the underlying objectives set out in Order 1A, rule 1;"

which includes

> "(d) to ensure fairness between the parties;".

15. Given that the parties had agreed to arbitration, I believe it is fair that if a party was unsuccessful in setting aside or resisting enforcement of the arbitral award, in the absence of special circumstances, he should pay costs on an indemnity basis. Reyes J said in *A v R*, and I respectfully agree:

> "67. Parties should comply with arbitration awards. A person who obtains an award in his favour pursuant to an arbitration agreement should be entitled to expect that the Court will enforce the award as a matter of course.
>
> 68. Applications by a party to appeal against or set aside an award or for an Order refusing enforcement should be exceptional events. Where a party unsuccessfully makes such application, he should in principle expect to have to pay costs on a higher basis. This is because a party seeking to enforce an award should not have had to contend with such type of challenge.
>
> 69. Further, given the recent introduction of Civil Justice Reform (CJR), the Court ought not normally to be troubled by such type of application. A party unmeritoriously seeking to challenge an award would not be complying with its obligation to the Court under Order 1A Rule 3 to further the underlying

> objectives of CJR, in particular the duty to assist the Court in the just, cost-effective and efficient resolution of a dispute.
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> 70. If the losing party is only made to pay costs on a conventional party-and-party basis, the winning party would in effect be subsidising the losing party's abortive attempt to frustrate enforcement of a valid award. The winning party would only be able to recover about two-thirds of its costs of the challenge and would be out of pocket as to one-third. This is despite the winning party already having successfully gone through an arbitration and obtained an award in its favour. The losing party, in contrast, would not be bearing the full consequences of its abortive application."

16. Nor do I believe that this practice is wrong in principle. It might be regarded as wrong in principle, if notwithstanding Civil Justice Reform and its implications, indemnity costs could only be awarded when special circumstances are established. However, I believe indemnity costs may be awarded under Order 62 rule (5)(1) in an unsuccessful application to set aside an arbitral award or to resist enforcement to "ensure fairness between the parties". Unless such practice is wrong in principle, we cannot interfere.

17. Nor can I agree that such practice amounts to an abrogation of discretion. The practice has left room for special circumstances; what are special circumstances in this context have to be worked out in due course. However, I cannot accept that the fact that the challenge was reasonably arguable is a special circumstance. That would neutralize the practice.

18. It was submitted on behalf of PCH that Reyes J had in mind unmeritorious challenges which are not reasonably arguable and abusive. That is what Reyes J said in *A v R*:

> "71. Such a state of affairs would only encourage the bringing of unmeritorious challenges to an award. It would turn what should be an exceptional and high-risk strategy into something which was potentially 'worth a go'. That cannot be conducive to CJR and its underlying objectives.

> 72. Accordingly, in the absence of special circumstances, when an award is unsuccessfully challenged, the Court will henceforth normally consider awarding costs against a losing party on an indemnity basis. The respondent will here pay the applicant's costs on an indemnity basis."

19. When these words are read in context (see para 15 above), it is clear Reyes J did not have in mind as suitable for indemnity costs only those cases where the challenges were not reasonably arguable, or abusive.

20. It is also submitted that the fact that this application had succeeded before Saunders J, and other courts have held that PCH's case was not unarguable, is a special circumstance.

21. It is correct that Saunders J had decided in favour of PCH. But parties opt for arbitration because they would not accept the uncertainty of litigation, so the fact that an appeal was necessary to put matters right does not detract from the reason for ordering indemnity costs in the first place.

22. It is also true that other courts have decided that PCH's complaints were arguable. We were not asked to decide whether PCH's complaints were arguable, we had to decide whether the complaints had been made out. In any event, this is just another way of saying that if a complaint is reasonably arguable, indemnity costs should not be awarded. For reasons already stated, I am unable to agree.

Hon Kwan JA:

23. I agree with the decision of the Vice President.

Hon Fok JA:

24. I also agree.

(Robert Tang)	(Susan Kwan)	(Joseph Fok)
Vice-President	Justice of Appeal	Justice of Appeal

Ms Teresa Cheng, SC & Mr Adrian Lai instructed by Herbert Smith for the Defendant

Mr Charles Manzoni, SC instructed by Sidley Austin for the Plaintiff