NEW SOUTH WALES SUPREME COURT

CITATION:
Yang v S & L Consulting & Anor [2009] NSWSC 223

JURISDICTION:
Equity
Commercial List

FILE NUMBER(S):
50162/08

HEARING DATE(S):
20 March 2009

JUDGMENT DATE:
31 March 2009

PARTIES:
Xiaodong Yang
v
S & L Consulting Pty Ltd & Anor

JUDGMENT OF:
White J

LOWER COURT JURISDICTION:
Not Applicable

LOWER COURT FILE NUMBER(S):
Not Applicable

LOWER COURT JUDICIAL OFFICER:
Not Applicable

COUNSEL:
Plaintiff: J Hogan-Doran
Defendants: D Meltz

SOLICITORS:
Plaintiff: Gray & Perkins
Defendants: Marque Lawyers

CATCHWORDS:

ARBITRATION - plaintiff sought to enforce Chinese arbitral award against the defendants – defendants contended that to enforce award would be contrary to public policy – enforcement found to not be contrary to public policy

LEGISLATION CITED:
International Arbitration Act 1974 (Cth)
Commercial Arbitration Act 1984 (NSW)
Migration Act 1958 (Cth)

CASES CITED:
Nelson v Nelson [1995] HCA 25; (1995) 184 CLR 538
Fitzgerald v FJ Leonhardt Pty Ltd (1997) 189 CLR 215
Holman v Johnson (1775) 1 Cowp 341; 98 ER 1120
Thomas Brown & Sons Ltd v Fazal Deen (1962) 108 CLR 391

TEXTS CITED:

DECISION:
1. Judgment for the plaintiff for AUD$530,000 plus interest from 11 January 2008 to the date of judgment at 0.021 percent per day and judgment for RMB 323,932.60 Yuan plus interest from 11 January 2008 to the date of judgment at the same rate; 3. order that the defendants pay the plaintiff's costs; 4. exhibits may be returned after 28 days.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION
COMMERCIAL LIST

WHITE J

Tuesday, 31 March 2009

50162/08 Xiaodong Yang v S & L Consulting Pty Ltd & Anor

JUDGMENT

1 **HIS HONOUR**: This is an application to enforce an arbitral award made in China on 12 December 2007 as corrected on 21 December 2007. The principal issue is whether enforcement of the award would be contrary to public policy.

2 The plaintiff is a Chinese national. In April 2002 he applied for a subclass 127 (business owner) visa to allow himself and his family to reside permanently in Australia. He retained the services of the second

defendant, Mr Stephen Lee, a registered migration agent. On 27 May 2003 the plaintiff, Mr Yang, was advised by the Australian Consulate in Hong Kong that his application for a permanent entry visa to Australia for himself, his wife and his son had been approved.

3 On 12 January 2004 an agreement was entered into expressed to be between the plaintiff (described as the investor) and the first defendant, S & L Consulting Pty Ltd, (described as the "Consultancy Company"). The agreement was also signed by Mr Lee as guarantor and he assumed personal obligations under it. Clause 10 provided that any dispute arising out of, or relating to, the agreement should be submitted for arbitration to the China International Economic & Trade Arbitration Commission according to that Commission's arbitration rules. The clause provided that the arbitral award would be final and binding on both parties. It was pursuant to that submission to arbitration that the arbitral award which the plaintiff now seeks to enforce was made.

4 The agreement was in Mandarin. It included the following provisions as translated into English by a Ms Kardashinsky, an interpreter and translator accredited by the National Accreditation Authority for Translators and Interpreters. She provided the following translation:

> "*This agreement has been entered into as follows:*
>
> *1. Through the introduction of the Consultancy Company, the Investor decides to invest in a group company in Canberra. The group company owns a supermarket in McKellar area of Canberra and the total market value of its business, equipment and stock is over 700,000 Australian dollars. This group company will join forces with a Chinese agricultural and livestock group company to export Australian agricultural and livestock products to China. This export business program is a type of project supported by the Australian government. The Consultancy Company warrants that the above mentioned group company meets the requirement of Australian immigration law with regard to the types of enterprises investors can invest in. The Consultancy Company also warrants truth of the foregoing representations.*
>
> *2. The Investor agrees to put 500,000 Australian dollars into that group company and becomes a shareholder of that group company, the Consultancy Company will assist with the management, and starting from the date the total amount of investment contributed by the Investor is in place, for a period of 3 years.*
>
> *3. The Investor shall pay an investment amount of 20,000 Australian dollars at the time of the signing of the agreement. The remaining 480,000 Australian dollars shall be fully paid by 31 January 2004. In the even that the Investor failed to make the payment in time, the Consultancy Company has the right to cancel the agreement and forfeit the deposit.*
>
> *4. The Investor authorizes the Consultancy Company to assist with the management of its shareholding during the term of this agreement. The Consultancy Company will draw its managing fees from the dividend of such shares; however, the fees drawn shall not be more than the dividend from the Investor's shares. If the shareholding results in any loss under the management, the Consultancy Company shall be liable for compensating the amount of loss and guarantee to produce an investment tracking report promptly.*
>
> *5. The Consultancy Company undertakes to assist the Investor to handle all industrial, commercial and taxation matters relating to the investment during the term of the agreement. The relevant tax and fees resulting from the investment shall be borne by the group company receiving the investment.*
>
> *6. The Consultancy Company undertakes to produce a tracking report required of the Investor under the immigration regulations within 3 years without charging a separate fee.*

If the Investor's spouse Qing LI and eldest son Bochun YANG spend more than 2 years on a cumulative basis in Australia by 31 October 2005, the Consultancy Company shall guarantee to complete all the formalities for them to get their citizenship. If by that time Qing LI and Bochun YANG do not wish to apply for Australian citizenship, then the Consultancy Company does not have to complete such formalities for them.
Except for the reason that the Investor has not spent sufficient time in Australia in the 3 year period, the Consultancy Company shall guarantee that the Investor's permanent residency will not be revoked by the government.

7. *The Consultancy Company guarantees the purchase of the Investor's shares by a third party within 14 days after the expiry of the 3-year period, the shares shall be transferred for no less than 500,000 Australian dollars. In the event that the shares are transferred for a lower price, the Consultancy Company shall pay for the difference between the price and 500,000 Australian dollars. In the event no third party will purchase the shares, the Consultancy Company shall pay to the Investor 500,000 Australian dollars to compensate for the Investor's loss. The Consultancy Company shall be responsible for completing the formalities of transfer of the shares, any tax or fee arising therein shall be borne by the third party. When the Investor receives 500,000 Australian dollars, the Investor shall agree to the transfer of the shares.*

8. *Any party breaching the contract during the course of its performance shall pay a penalty of 30,000 Australian dollars for the breach and continue to perform its obligations under the agreement.*

9. *Mr. Stephen Ting Fong LEE as an individual guarantor is jointly liable for the performance of the agreement by the Consultancy Company. The scope of guarantee includes the transfer of the Investor's shares for 500,000 Australian dollars and the costs/expenses incurred by the Investor for recovering the debt. The time frame for such guarantee is one year after the expiry of the main agreement.*"

5 By 26 January 2007, S & L Consulting had not procured a third party to purchase Mr Yang's shares, nor paid him $500,000. Mr Yang commenced arbitration proceedings with the China International Economic & Trade Arbitration Commission. Notice of the proceedings was duly given to the defendants. They did not appear or make submissions to the Commission. After setting out the effect of clauses 1, 2, 3, 4, 7, 8 and 9, the nature of the plaintiff's claim, and some further background information in relation to the agreement, the Arbitration Tribunal found that the agreement was valid and effective, that the plaintiff had fully performed his obligation to pay $500,000 and that S & L Consulting and Mr Lee had failed to perform their obligations. The Arbitration Tribunal made an award in favour of the plaintiff against both defendants in the sum of $500,000 as compensation for loss as agreed in clause 7, plus $30,000 as the penalty for breaching the contract and RMB 323,932.60 yuan for costs and expenses incurred in recovering the debt. The plaintiff was also awarded RMB 123,345 for the arbitration fee paid by the plaintiff and the costs and expenses of the arbitrators. The award was made on 12 December 2007. Certain typographical errors were corrected on 21 December 2007. The award was made against both S & L Consulting and Mr Lee. They were required to pay the amounts of the award within 30 days. Interest accrued at the rate of 0.021 percent per day.

6 Section 8 of the *International Arbitration Act* 1974 (Cth) relevantly provides as follows:

"***8 Recognition of foreign awards***

(1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.

(2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award had been made in that State or Territory in accordance with the law of that State or Territory.

...

(5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:

(a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him or her, under some incapacity at the time when the agreement was made;

(b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;

(c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case in the arbitration proceedings;

(d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;

(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

...

(7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:

(a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or

(b) to enforce the award would be contrary to public policy."

7 The plaintiff seeks to enforce the award as a judgment of this court in the same way that an award under the *Commercial Arbitration Act* 1984 (NSW) may be enforced. No defence is advanced under any of the paragraphs in s 8(5). The principal submission for the defendants is that to enforce the award would be contrary to public policy, and on that ground, the Court should refuse to enforce the award (s 8(7)(b)).

8 Section 9 provides:

"***9 Evidence of awards and arbitration agreements***

(1) In any proceedings in which a person seeks the enforcement of a foreign award by virtue of this Part, he or she shall produce to the court:

(a) the duly authenticated original award or a duly certified copy; and

(b) the original arbitration agreement under which the award purports to have been made or a duly certified copy.

(2) For the purposes of subsection (1), an award shall be deemed to have been duly authenticated, and a copy of an award or agreement shall be deemed to have been duly certified, if:

> *(a)* *it purports to have been authenticated or certified, as the case may be, by the arbitrator or, where the arbitrator is a tribunal, by an officer of that tribunal, and it has not been shown to the court that it was not in fact so authenticated or certified; or*
>
> *(b)* *it has been otherwise authenticated or certified to the satisfaction of the court.*
>
> *(3)* *If a document or part of a document produced under subsection (1) is written in a language other than English, there shall be produced with the document a translation, in the English language, of the document or that part, as the case may be, certified to be a correct translation.*
>
> *(4)* *For the purposes of subsection (3), a translation shall be certified by a diplomatic or consular agent in Australia of the country in which the award was made or otherwise to the satisfaction of the court.*
>
> *(5)* *A document produced to a court in accordance with this section is, upon mere production, receivable by the court as prima facie evidence of the matters to which it relates.*"

9 The defendants also take the point that the only English translation of the award which has been certified by a diplomatic or consular agent of China is a certification by the First Secretary of the Consular Department of the Ministry of Foreign Affairs in China, not in Australia. It is convenient to deal with this last point immediately. The award and the arbitration agreement have also been translated by an accredited translator and interpreter in Australia. Whilst she identified some mistakes in the certified English translation, none was significant except a misstatement of the daily percentage rate of interest which, in the certified translation, was said to be 21/000 rather than 0.021 percent. The translation made by the Australian translator, Ms Kardashinsky, is not disputed. It is a translation "*to the satisfaction of the court*" within s 9(4). If, on the proper construction of s 9(4), the translation must be certified by either the requisite diplomatic or consular agent or otherwise to the satisfaction of the Court, Ms Kardashinsky's affidavits verifying her translation of the award and the arbitration agreement is a sufficient certification. As Mr Hogan-Doran for the plaintiff submitted, s 9(4) should be construed consistently with Articles 3 and 4 of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* which is Schedule 1 to the Act, to permit the use of a sworn translation given in accordance with the procedural rules of the forum for qualifying as an expert translator. It is immaterial that the certification of the translation by a diplomatic or consular agent is from such a person from outside Australia, because I am satisfied of the translation provided by Ms Kardashinsky.

10 The defendants' contention that the award should not be enforced for reasons of public policy was pleaded as follows:

> *"3.* *In answer to paragraph 4 and 5 the defendants admit that they have not complied with the award or at all but say that the award is neither binding nor enforceable on either of them and say further that:*
>
> *i.* *at all material times the first defendant was a consulting company, of which the second defendant owned half of the shares;*
>
> *ii.* *in or about April 2001 the plaintiff, then a Chinese national, engaged the services of the first defendant to assist him with his application for immigration to Australia;*
>
> *iii.* *in or about January 2004 the plaintiff engaged the first defendant to procure for him an investment opportunity in an Australian business in part for the purposes of satisfying the investment requirements of the Department of Immigration and Citizenship (or its predecessor in title) for permanent*

residency in Australia pursuant to a visa subclass 127 of the Migration Regulations 1958;

iv. the plaintiff caused his Chinese attorney to draft an agreement, and the parties signed such agreement on 12 January 2004, to reflect amongst other things that the investment by the plaintiff was, amongst other things, in return for a guarantee by the first defendant that the plaintiff's permanent residence right would not be cancelled by the government unless the plaintiff spent an insufficient amount of time in Australia.

4. By reason of the matters raised in paragraph 3 the award is contrary to public policy pursuant to section 8(7)(b) of the Act, and at law, because it purports to enforce an agreement, arrangement or understanding between the parties which is against public policy."

11 The primary criteria which an applicant for a subclass 127 visa was required to fulfil included the following:

"*127.216 The applicant genuinely has a realistic commitment, after entry to Australia as the holder of a subclass 127 visa:*

(a) to either:

(i) establish an eligible business in Australia; or

(ii) participate in an existing eligible business in Australia; and

(b) to maintain a substantial ownership interest in that business; and

(c) to maintain direct and continuous involvement in management of that business from day to day and in making decisions that affect the overall direction and performance of the business in a manner that benefits the Australian economy.

...

127.218 The applicant signs a declaration in a form approved by the Minister that the applicant acknowledges the Government's requirements in relation to entry to Australia as the holder of a subclass 127 visa." (Migration Regulations 1994 (Cth)).

12 These criteria also had to be satisfied at the time of the decision to grant the visa (Reg 127.221).

13 On 26 April 2002 the plaintiff signed a declaration that if granted a business skills visa, he would:

"*... make genuine efforts to actively participate, as an owner or a part-owner in the day-to-day management at a senior level of a new or existing business in Australia which will do one or more of the following:*

* *develop business links with international markets;*

* *create or maintain employment;*

* *export Australian goods or services;*

* *produce goods or services that would otherwise be imported;*

* *introduce new or improved technology;*

* *add to commercial activity and competitiveness within sectors of the Australian economy.*"

14 In advising the plaintiff that his application for a permanent entry visa for himself and his family was successful, the Australian Consulate General Hong Kong Migration Office advised him that by signing the Business Skills Declaration when he applied for a business skills visa, he had acknowledged a requirement of the Australian government that he would look to actively participate in business in a day-to-day management role after arriving in Australia.

15 Section 134 of the *Migration Act* 1958 (Cth) provides that subject to a presently irrelevant qualification:

"***134 Cancellation of business visas***

(1) ... the Minister may cancel a business visa (other than an established business in Australia visa, an investment linked visa or a family member's visa), by written notice given to its holder, if the Minister is satisfied that its holder:

(a) has not obtained a substantial ownership interest in an eligible business in Australia; or

(b) is not utilising his or her skills in actively participating at a senior level in the day to day management of that business; or

(c) does not intend to continue to:

(i) hold a substantial ownership interest in; and

(ii) utilise his or her skills in actively participating at a senior level in the day to day management of;

an eligible business in Australia.

(2) The Minister must not cancel a business visa under subsection (1) if the Minister is satisfied that its holder:

(a) has made a genuine effort to obtain a substantial ownership interest in an eligible business in Australia; and

(b) has made a genuine effort to utilise his or her skills in actively participating at a senior level in the day to day management of that business; and

(c) intends to continue to make such genuine efforts.

...

(9) The Minister must not cancel a business visa under subsection (1), (3A) or (4) unless a notice under section 135 was given to its holder within the period of 3 years commencing:

(a) if its holder was in Australia when he or she was first granted a business visa—on the day on which that first visa was granted; or

(b) if its holder was not in Australia when he or she was first granted a business visa—on the day on which its holder first entered Australia after that first visa was granted."

16 Mr Meltz for the defendants submitted that the agreement of 12 January 2004 should not be enforced for reasons of public policy and that the award which gave effect to that agreement should not be enforced for the same reasons of public policy. He submitted that the guarantee in clause 6 of the agreement whereby the Consultancy Company guaranteed that the plaintiff's permanent residency would not be revoked by the government unless the plaintiff had not spent sufficient time in Australia in the three-year period was contrary to public policy because it provided an incentive to the plaintiff not to comply with the undertakings he had made to the government on the basis of which the visa had been issued.

17 It was not submitted that any part of the agreement of 12 January 2004, including the guarantee in clause 6, was unlawful. That is to say, it was not submitted that any law forbad the parties making the agreement. Nor was it submitted that performance of the agreement would contravene any law. Rather, it was

submitted that the guarantee in clause 6 was contrary to the policy of the law found in the *Migration Act* and Regulations by providing an incentive to the plaintiff not to comply with undertakings he had given.

18 I do not accept that the guarantee in clause 6 provided any such incentive. Clearly the defendants could not promise that the Minister would not exercise his power to cancel a visa if the Minister was satisfied of any of the matters in s 134(1)(a)-(c). The Minister's exercise of that power is unaffected by the guarantee. If the Minister had cancelled the plaintiff's visa notwithstanding that the plaintiff had "*spent sufficient time in Australia in the 3-year period*", the plaintiff may have been able to recover damages to put himself, so far as money could do it, in the same position as he would have been in had the visa not been cancelled. There is nothing unlawful in such a promise.

19 Moreover, there is nothing in the *Migration Act* or the Regulations which required the plaintiff to seek to participate actively in a business in a day-to-day management role after arriving in Australia. Whilst the plaintiff would have committed an offence if he made a false declaration as to his intentions with the requisite knowledge (*Australian Criminal Code*, s 136.1), the only consequence of his not taking steps to participate actively as an owner or part-owner in the day-to-day management at a senior level of a new or existing business in Australia would be to enliven the power of the Minister to cancel the visa. In other words, even if clause 6 provided the incentive which the defendants assert, that would not promote any unlawful activity. In any event, even if the giving of the guarantee in clause 6 were associated with an unlawful purpose, the courts would not refuse to enforce the clause unless the conditions specified by McHugh J in *Nelson v Nelson* [1995] HCA 25; (1995) 184 CLR 538 at 613 were satisfied (*Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 229-230).

20 In *Nelson v Nelson*, McHugh J (at 604-605) identified four exceptions to the dictum of Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341 at 343; 98 ER 1120 at 1121 that a Court will not lend its aid to a man who founds his cause of action on an immoral or illegal act. Those exceptions are:

> "*First, the courts will not refuse relief where the claimant was ignorant or mistaken as to the factual circumstances which render an agreement or arrangement illegal. Secondly, the courts will not refuse relief where the statutory scheme rendering a contract or arrangement illegal was enacted for the benefit of a class of which the claimant is a member. Thirdly, the courts will not refuse relief where an illegal agreement was induced by the defendant's fraud, oppression or undue influence. Fourthly, the courts will not refuse relief where the illegal purpose has not been carried into effect.*" (Citation of authorities omitted.)

21 His Honour added (at 613):

> "*... in my opinion, even if a case does not come within one of the four exceptions to the Holman dictum to which I have referred, courts should not refuse to enforce legal or equitable rights simply because they arose out of or were associated with an unlawful purpose unless:*
>
> *(a) the statute discloses an intention that those rights should be unenforceable in all circumstances; or*
> *(b)(i) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct;*
> *(ii) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies; and*
> *(iii) the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of a breach of the statute or the frustration of its policies.*"
>
> In a footnote his Honour noted that elements (ii) and (iii) may often overlap.

22 Those conditions are not met. As Mr Hogan-Doran submitted, if the giving of the guarantee in clause 6 were contrary to public policy, the reason why that would be so is that migration agents ought not to hold out to their clients that they can control governmental decisions. The Code of Conduct regulating the conduct of registered migration agents (Sch 2 to the Migration Agents Regulation 1998) provides that:

> *"2.10 A registered migration agent must not engage in false or misleading advertising, including advertising in relation to:*
>
> *...*
>
> *(c) guaranteeing the success of an application.*"

23 The code does not prohibit the giving of such a guarantee as distinct from engaging in false or misleading advertising in relation to it. As Mr Hogan-Doran submitted, public policy would be promoted by permitting an unsuccessful visa applicant to sue on an agreement with his or her migration agent, whereby the agent gave such a guarantee.

24 Further, the award was not based on clause 6 of the agreement. If clause 6 were unlawful, it could be severed. The elimination of clause 6 would not change the nature of the remaining promises in the agreement (*Thomas Brown & Sons Ltd v Fazal Deen* (1962) 108 CLR 391 at 411). Indeed, if the guarantee in clause 6 were eliminated, it would not change the extent of the other promises. As Mr Hogan-Doran submitted, there is nothing in the agreement which makes the retention of the visa a condition of the plaintiff making his investment or of the consulting company and Mr Lee guaranteeing the purchase of the shares or repayment of the sum of $500,000.

25 There was no evidence as to whether the agreement of 12 January 2004 was disclosed to the Minister. If disclosed, it might have prompted the Minister to hold a concern as to whether the plaintiff intended to continue to hold a substantial ownership interest in an eligible business in Australia. It might have prompted concern as to whether the plaintiff ever genuinely intended to participate actively at a senior level in the day-to-day management of such a business. There is no evidence as to whether any inquiries were made by the government, or what was or was not disclosed if any inquiries were made. There is no basis to assume that if disclosure was required it was not made. In any event, the agreement would be enforceable, even if its terms were not disclosed to the government.

26 I therefore conclude that enforcement of the agreement is not contrary to public policy. It is unnecessary to consider whether, had I concluded that the agreement would not be enforceable as a matter of Australian law if it were sought to be enforced in this country on grounds of public policy, a narrower conception of public policy should be applied in construing s 8(2).

27 For these reasons the defendants' objection to the enforcement of the award fails. There will be judgment for the plaintiff for AUD$530,000 plus interest from 11 January 2008 to the date of judgment at 0.021 percent per day, and there will be judgment for RMB 323,932.60 yuan plus interest from 11 January 2008 to the date of judgment at the same rate.

28 I order that the defendants pay the plaintiff's costs. The exhibits may be returned after 28 days.

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LAST UPDATED:
31 March 2009