NEW SOUTH WALES SUPREME COURT

CITATION: LKT v Chun [2004] NSWSC 820

CURRENT JURISDICTION:

FILE NUMBER(S): 50174/03

HEARING DATE{S): 20 July and 19 August 2004

JUDGMENT DATE: 13/09/2004

PARTIES:
LKT Industrial Berhad (Malaysia) (Plaintiff)
Albert Chun (Defendant)

JUDGMENT OF: McDougall J

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:
N J Kidd (Plaintiff)
A B S Franklin SC/R Winfield (Defendant)

SOLICITORS:
Banki Haddock Fiora (Plaintiff)
William Chan & Co (Defendant)

CATCHWORDS:
INTERNATIONAL ARBITRATION - enforcement of international arbitral award - International Arbitration Act 1974 (Cth) - where defendant claims he was not bound by arbitration agreement - where agent signed agreement on behalf of defendant - whether defendant bound by agreement - credibility of defendant - whether Jones v Dunkel inference should be drawn from defendant's unexplained failure to call wife and son - where defendant claims he was not given proper notice of arbitration proceedings - whether defendant given notice of arbitration proceedings - where defendant claims that final award invalid as it purported to impose joint and several liability where initial award determined joint liability only - whether arbitrator in expressing the liability quantified by final award as joint and several acted consistently with basis of liability found in partial award

ACTS CITED:

International Arbitration Act 1974
Commercial Arbitration Act 1984 (NSW)

DECISION:
See paras [85] to [87] of judgment

JUDGMENT:

LKT INDUSTRIAL BERHAD (MALAYSIA) v ALBERT CHUN
50174/03

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

McDOUGALL J

13 September 2004

50174/03 LKT INDUSTRIAL BERHAD (MALAYSIA) v ALBERT CHUN

JUDGMENT

1 **HIS HONOUR**: The plaintiff ("LKT") says that it and, among others, the defendant ("Mr Chun") were parties to an "Equity Joint Venture Agreement" dated 1 August 1996 ("the agreement"). LKT says that it had claims against Mr Chun and other parties to the agreement; that those claims were validly referred to arbitration in Singapore pursuant to cl 29.2 of the agreement; and that the arbitrator, Mr Michael Hwang SC, made awards in its favour whereby Mr Chun is obliged to pay it substantial sums of money. LKT now seeks to enforce the awards pursuant to s 8(2) of the *International Arbitration Act* 1974 (Cth) ("the Act").

The issues

2 Mr Chun said that there are four reasons why the awards should not be enforced against him:

(1) He was not a party to, or was not bound by, the agreement, so that there was no submission to arbitration binding upon him.

(2) He was wrongly named in the awards.

(3) He was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings and was otherwise unable to present his case in the arbitration proceedings (s 8(5)(c) of the Act).

(4) The second, or final, award was invalid in so far as it purported to impose joint and several liability for the relevant amounts on him, because the nature of the liability had been settled by the first, or partial, award as joint liability only.

3 In the alternative, Mr Chun says that if the awards are found to be enforceable against him, he will apply to the International Court of Arbitration ("the ICA") to have them set aside as against him and that he will seek a stay of enforcement to allow him to make that application: relying on s 8(5)(f), (8) of the Act.

4 No point was taken as to proof of the agreement, the partial award or the final award. No point was taken that Singapore was not a "Convention country"; and in any event, the evidence showed that it was. The interim award and final award were, therefore, "foreign awards" for the purposes of the Act and, in principle, capable of being recognised and enforced pursuant to s 8 of the Act.

The agreement

5 The agreement is made between LKT and a number of parties referred to as "the AMCO Shareholders". They include a Mr Richard Fierkens of the Netherlands and "Albert Chum", whose address is given as Room 163, The Milson, 50 Alfred Street, Milson's Point, Sydney NSW 2061, Australia.

6 Mr Chun was a shareholder in Amco Holding B.V. when the agreement was made. His residential address in Australia, when the agreement was made and at all material times thereafter, was as stated in the agreement. It is clear that he was the person whose name was misspelt as "Albert Chum". His name is misspelled in some places (eg, recital B(c)) and correctly spelled in others (eg, cl 35.1(a), dealing with the way in which the agreement was executed, and at the place where provision was made for execution of the document by him).

7 On 29 July 1996, Mr Chun signed a document addressed to LKT. His signature was witnessed by his wife. By that document, Mr Chun confirmed that he had authorised Mr Fierkens to enter into the agreement and that he would be bound by its terms. Further, he appointed Mr Fierkens to exercise his voting rights as a shareholder in LKT and to perform his rights and obligations under the agreement. The document, omitting formal parts, reads as follows:

> "Re: Equity Joint Venture Agreement dated the 1st day of August 1996 between LKT Industiral [sic] Bhd and the AMCO Shareholders.
>
> I, Albert Chun (Passport No. K 3103127) of Unit 163, The Milson, 50 Alfred Street, Milson's Point, Sydney, NSW 2061, Australia do hereby confrim [sic] that I have duly authorized and empowered R Fierkens to enter into the above Agreement and confirm that I shall be bound by the terms and conditions therein the above Agreement stiputlated [sic].
>
> I also irrevocably and unconditionally appoint R Fierkens to exercise the voting rights in respect of my shares in the Company and to effectually do act, exercise and perform all my rights and obligations under the subject Agreement.
>
> Dated this 29th day of July 1996."

8 Mr Fierkens signed the agreement "as authorized agent for" Mr Chun. By cl 35.1 of the agreement, Mr Fierkens warranted that he had approval to sign on behalf of Mr Chun and other shareholders and to exercise their voting and other rights. That clause reads as follows:

> "**35 SPECIAL REPRESENTATIONS AND WARRANTIES AND UNDERTAKINGS BY R. FIERKENS**
>
> 35.1 R. Fierkens hereby represents and warrants to LKT that he has the prior approval and consent and the unlimited authority from:
>
> a) Albert Chun;
>
> b) Jaap van der Werff; and
>
> c) J. A. C. Houthoff
>
> to negotiate and enter into this Agreement and to exercise the voting rights thereunder for and on their behalf respectively And R. Fierkens also undertake [sic] to LKT that he shall immediately after the execution of this Agreement procure the written individual ratification of the aforenamed Amco Shareholders in the specimen form prescribed in the Second Schedule hereto expressly confirming and ratifying their

respective acceptance of their rights duties and obligation under this Agreement and the authority for R. Fierkens to act for and on their behalf."

9 Mr Chun did not after 1 August 1996 sign a document in the precise terms of the second schedule to the agreement. The second schedule, omitting formal parts, reads as follows:

> "RE: Equity Joint Venture Agreement dated the ……..day of 1996 between LKT Industrial Bhd and the AMCO Shareholders.
>
> ---
>
> I, **(name)** (Passport No:) of **(address)** do hereby confirm that I have duly authorised and empowered R. Fierkens to enter into the above Agreement for and on my behalf.
>
> I hereby ratify the Agreement and confirm that I shall be bound by the terms and conditions therein the above Agreement stipulated.
>
> I also irrevocably and unconditionally appoint R. Fierkens to exercise the voting rights in respect of my shares in the Company and to effectually do act, exercise and perform all my rights and obligations under the subject Agreement."

10 Clause 10.1.3(b) of the agreement imposed restrictions on the rights of the Amco shareholders to sell their shares in LKT, by giving rights of pre-emption firstly to the other Amco shareholders and thereafter to LKT. It reads as follows:

> "10.1.3 that notwithstanding any provisions of the articles of association of the Company and this Agreement:
>
> …
>
> (b) the AMCO Shareholders shall have the right of pre-emption to purchase shares that may be offerred [sic] for sale by any of the AMCO Shareholders and in the event that such shares which are offerred [sic] for sale are not purchased by the AMCO Shareholders the same shall thereafter be offerred [sic] for sale to LKT before the same are offerred [sic] to any other Person.
>
> …"

11 Clause 29.1 provided that Malaysian law was to be the governing law of the agreement. Clause 29.2 constituted a submission to arbitration. It reads as follows:

> "29.2 All disputes arising in connection with this agreement shall be finally settled by arbitration. The arbitration shall be held at Singapore and conducted in accordance with the Rules of the International Chamber of Commerce. Judgment upon the award rendered may be entered in any court having jurisdiction or application may be made to such a court for

judicial acceptance of the award and an order for enforcement (as the case may be)."

12 In 1997, Mr Chun sought the consent of LKT and the other shareholders in LKT to the transfer of his interest in the company to a company, A & A Semiconductor Asia Ltd ("A & A S") controlled by him and his wife. Between November 1997 and January 1998, Mr Chun wrote on a number of occasions to LKT seeking its consent. LKT was prepared to consent (ie, to waive its right of pre-emption) on certain terms. On 5 February 1998, Mr Chun wrote to the parent company of LKT:

> " … to confirm that I will be personally responsible for the performance and discharge of my obligations under the JVA (Joint Venture Agreement between LKT Industrial Berhad and Amco b.v.) up to the date of the transfer".

13 On the same date, he wrote on behalf of A & A S confirming that it "agrees to be bound by terms identical to the JVA (Joint Venture Agreement) between LKT Industrial Berhad and Amco b.v.), including the terms of the clause as regards any subsequent transfer of the Shares."

14 It appears that LKT was not satisfied with these undertakings. In exchanges of correspondence thereafter, Mr Chun pressed for its consent to the transfer.

First issue: is Mr Chun bound by the agreement?

15 Mr Franklin SC, who appeared with Ms Winfield of Counsel for Mr Chun, accepted that Mr Fierkens was authorised to sign the agreement on behalf of Mr Chun. However, he submitted, that of itself did not make the agreement binding on Mr Chun. Mr Franklin submitted that, on the proper construction of cl 35 of the agreement, two things were necessary for Mr Chun to be bound:

(1) Firstly, that Mr Fierkens should sign the agreement on behalf of Mr Chun; and

(2) Thereafter, that Mr Chun should ratify the agreement by signing and providing to LKT a document in the form of the second schedule.

16 I do not accept this submission. It is correct to say that cl 35.1 falls into two parts. The first part is Mr Fierkens' warranty of authority. The second part (commencing "And R. Fierkens undertake") is a promise by Mr Fierkens to procure the ratification of the individual shareholders in the form prescribed by the second schedule. If Mr Fierkens does not procure such a ratification then he is in breach of that obligation. It does not follow that the shareholders, having failed to ratify, are not bound by the agreement. The promise to procure ratification is for the protection of LKT, not those shareholders.

17 Whether those for whom Mr Fierkens signed are bound by the agreement is a question of construction of the authorities given by them to Mr Fierkens to sign on their behalf. In Mr Chun's case, that is the document that I have set out in para [7] above. That document in terms authorises and empowers Mr Fierkens to enter into the agreement on Mr Chun's behalf. It confirms that Mr Chun will be bound by the terms and conditions stipulated in that agreement. I think it clear, on the plain meaning of that document, that Mr Chun became bound when Mr Fierkens signed the agreement on his behalf and by virtue of that signature. It does not provide that Mr Chun will only become bound when he signs a document ratifying what Mr Fierkens has done.

18 The construction for which Mr Franklin contends requires the document to be read in such a way that the confirmation for which it provides and the appointment that it contains are suspended, pending something that is not even referred to in the document (namely, the signature by Mr Chun of a ratification in

the terms of the second schedule). That construction is inconsistent with the language of the document, which contemplates plainly that the agreement becomes binding on Mr Chun once Mr Fierkens signs it on his behalf.

19 Further, there is nothing in the language of cl 35.1 to suggest that the agreement does not become binding on those for whom Mr Fierkens signed until they sign a document in the form of the second schedule. Although Mr Franklin eschewed the language of condition precedent, it is difficult to understand how his construction could work unless (contrary to the plain language of cl 35.1) delivery of a signed document in the form of the second schedule were a condition precedent to liability. In this, the plain language of cl 35.1 (involving no conditional or suspensory wording) may be contrasted with that of cl 37, which is expressed to be, and which clearly is, a condition precedent to operation of the agreement.

20 I therefore conclude that the first issue should be resolved in favour of LKT. It is accordingly unnecessary for me to consider LKT's alternative submission that Mr Chun, by reason of the matters briefly described in paras [12] to [14] above, ratified the agreement.

21 It was not submitted that cl 29.2 was not an effective submission to arbitration if (contrary to Mr Chun's submission) the agreement was binding on him. Since I have found that the agreement was binding on him, it follows that he is bound by the submission to arbitration in cl 29.2.

Second issue: misnomer in the awards

22 Both the partial award and the final award referred to the respondent parties as including:

> "3. ALBERT CHUN YING LLO
> (Australia/Hong Kong)".

23 It is clear, both from the awards and from other material, that the arbitration relates to the agreement and that cl 29.2 of the agreement was regarded as constituting the submission to arbitration. It is clear that the arbitration was between LKT as claimant and the parties described as the AMCO Shareholders in the agreement as respondents.

24 In paragraph 13 of the partial award, the third respondent was described as "a natural person and a citizen of Australia". (Mr Chun was an Australian citizen.) It was noted that the agreement provided his address as "Room 163, The Milson, 50 Alfred Street, Milson's Point, Sydney NSW 2061, Australia": Mr Chun's residential address in Australia. It was noted further that there was an additional address 21A Sing Long Court, 13 Dragon Terrace Causeway, Hong Kong: Mr Chun's Hong Kong residential address.

25 There was no other AMCO Shareholder named in the agreement with a name remotely resembling "Albert Chun Ying Llo". The other AMCO Shareholders were a Dutch company, Mr Fierkens, and another Dutch gentleman, Mr Jaap van der Werff.

26 In my judgment, it is clear that the description of the third respondent to the arbitration as "Albert Chun Ying Llo" is a misnomer for Mr Chun, whose full name (rendered in English) has been variously stated as Albert Chun Ying Ho and Albert Ying Ho Chun.

27 Mr N J Kidd of Counsel, who appeared for LKT, submitted that the effect of s 8(2) of the Act (which provides, relevantly for present purposes, that a foreign award may be enforced in this State as if it had been made in this State in accordance with this State's laws) was that the *Commercial Arbitration Act* 1984 (NSW) applied to the partial award and the final award. Accordingly, Mr Kidd submitted, the misnomer could be corrected under s 30 of that Act: under paragraph (a) (clerical mistake) or paragraph (b) (accidental slip or omission) if it were not material or under paragraph (c) (relevantly, material mistake in

the description of a person) if it were. Mr Franklin accepted that if, contrary to his submission, Mr Chun was bound by the terms of the agreement and if, again contrary to his submission, Mr Chun had been given proper notice of the arbitration proceedings, then s 30 would apply. I think that this concession was properly made.

28 I therefore conclude that the misnomer of Mr Chun in the partial award and in the final award does not, of itself, prevent those awards from being enforced against him.

Third issue: notice

29 Before I return to the facts that are relevant to this issue, I need to deal with LKT's submissions as to Mr Chun's credibility and as to a *Jones v Dunkel* inference that, it was said, I should draw.

Mr Chun's credibility

30 Mr Chun gave evidence through an interpreter. It was apparent that he had a reasonable grasp of the English language. He sent and received correspondence in English. It appears that he may have understood some of the questions asked of him without the aid of the interpreter, although he said "The majority of it I need to guess" (T 33.15). Notwithstanding that, from time to time, Mr Chun clearly understood questions in English (because he answered them before the interpreter had translated them), I took the view that it was appropriate for his cross-examination to continue through the interpreter, for reasons that I gave at T 33.25.

31 I mention these matters not because, of themselves, they have any bearing whatsoever on Mr Chun's credit but because one of the attacks that was made on his credit related to his professed inability to understand the written authority that he had given to Mr Fierkens (see para [7] above). I formed the view that Mr Chun's understanding of written English was much better than he asserted in his evidence-in-chief, and that he was capable of understanding the written authority. The authority is no more complex in its language than other items of correspondence that Mr Chun received, and that clearly he understood (because he replied to them); it is no more complex than Mr Chun's own English correspondence; and there was no suggestion that Mr Chun was denied the opportunity to study the authority and contemplate its content.

32 Further, Mr Chun pretended to have no knowledge of the terms of the agreement. Nonetheless, as I have recounted, he engaged in correspondence with the other parties seeking their consent to the transfer of his interest to A & A S.

33 These matters seemed to me to reflect adversely on Mr Chun's credibility as a witness. I formed the impression that he was keen to understate his ability to comprehend documents written in English because he thought that it was in his interests in this litigation to do so. A review of the transcript in the light of counsel's submissions has not altered those impressions.

34 Further, there were a number of instances where Mr Chun's evidence in cross-examination was less than satisfactory. At T 30.5, he agreed that if the ICA's letter of 18 November 1998 addressed to "Albert Chun Ying Llo" (see paras [44] and following below) had been delivered to his Milson's Point address in late 1998, it would in all likelihood have come to his attention. However, he said, there was a possibility that he would not have opened the letter because of the misstatement of the name ("Llo" instead of "Ho"). That evidence is inherently implausible; and its implausibility is confirmed by his evidence later on the same page that if at that address he had seen such a letter he would have believed it was intended for him (T 30.35).

35 A little later in his cross-examination, Mr Chun sought to resile from what he had just said. At T 31.15 he said "There was a possibility that the letter would have been intended for me possible, possible" (T

31.15); contrast his unqualified acceptance of the same proposition at T 30.35. He then said that he would not have thought that the letter was intended for him (T 31.25): a further retreat from his earlier evidence.

36 It was my observation at the time that Mr Chun was well aware of the significance of the ICA's letter of 18 November 1998, and that it was important to his case that I should conclude that he had not received that letter. It was also my observation at the time that Mr Chun, realising this, sought to resile from his evidence that it is likely that the letter would have come to his attention had it been delivered to his address, and that he would have understood it to have been intended for him. Rereading the transcript with the benefit of counsel's submissions has done nothing to cause me to doubt those observations.

37 I am conscious that Mr Chun's evidence (both in chief and in cross-examination) was taken through an interpreter and that this may have contributed to some difficulty. Nonetheless, and making allowance for that, I do not find Mr Chun to be an impressive and credible witness. I think that his evidence needs to be treated with caution and, in particular, that his denials of receipt of documents (including, but not limited to, the ICA's letter of 18 November 1998) and his reasons given in support of those denials should not be accepted at face value. Thus, where a finding or an inference adverse to him is available on the other evidence in the case, I do not regard Mr Chun's unsupported testimony as sufficient to dissuade me from drawing that inference.

Jones v Dunkel

38 Mr Kidd submitted that I should draw a *Jones v Dunkel* inference from the unexplained failure to call Mr Chun's wife and son. Mr Franklin submitted that I should not, upon the basis that it had not been put to Mr Chun, or shown otherwise, that his wife and son were living in the building on the day in question.

39 As Campbell J pointed out in *Manly Council v Byrne & Anor* [2004] NSWCA 123 at [51], application of the principle in *Jones v Dunkel & Anor* (1959) 101 CLR 298, where it applies, may have two results. The first is that the tribunal of fact may infer that the evidence of the uncalled witness would not have assisted the party who should have, but did not, call that witness. The second is that the tribunal of fact may with greater confidence draw any inference unfavourable to that party if it appears that the evidence of that witness might have assisted the making of the decision, whether that inference should properly be drawn. It follows, as his Honour pointed out at [54], that before the second consequence can follow, there must be other evidence from which the inference against the party who failed, without explanation, to call the witness could be drawn. It follows further, as his Honour pointed out at [55], that where the evidence is sufficient to prove the case of the party who should have, but has not, called that witness, the tribunal of fact may regard the failure of that party to call the witness as something reducing the strength of that party's case.

40 I think that a *Jones v Dunkel* inference should be drawn. Mr Chun was asked whether, in late 1998, he and his wife were the only occupants of the Milson's Point premises. He said no – his son also resided at that address (T 30.15-.20). He was asked whether, if his wife had received the letter in question in late 1998, she would have brought it to his attention (T 31.35). He disagreed – a matter to which I will return – but did not suggest that his wife was not there in late 1998 to receive the letter. He said "so I would believe that she had not received such a letter and therefore she would not have such a letter to deliver to me" (T 31.55); and, again, that it was not possible that she had brought the letter to his attention (T 32.15). At no time, in dealing with these questions, did Mr Chun suggest that his wife had not been present to receive the letter.

41 It must have been clear from, at the latest, the time Mr Martin's affidavit sworn 9 July 2004 (see paras [47] and following below) was served that LKT was asserting that the ICA's letter of 18 November 1998 had been delivered to someone at Mr Chun's Milson's Point address and signed for by someone at that address. I say "at the latest" because it should have been clear a lot earlier. The ICA's records, including

DHL's record of delivery referred to in para [46] below, were proved by the affidavit of Ms Julie Robb, sworn 17 June 2001. That should have made it clear that LKT was asserting delivery of the ICA's letter in the manner just mentioned. If for whatever reason this was not clear when the hearing commenced on 15 July 2004, it must have been clear from the cross-examination of Mr Chun on that day to which I have referred. The hearing was adjourned, for presently irrelevant reasons, until 19 August 2004.

42 It was therefore apparent either before 15 July or, at the latest, after Mr Chun's cross-examination on that day, that LKT would be putting a case that the "signature" recorded by DHL's records was one given by Mr Chun's wife or, perhaps, by his son. Mr Chun did not suggest that they were not living at the Milson's Point address on the day in question, although in cross-examination he had several opportunities to do so. (In this context, it may be noted that, on other occasions, Mr Chun was not adverse to volunteering information that could not be regarded as entirely responsive to the question.) Clearly, their evidence (in particular, but by no means limited to, the evidence of his wife) would bear on the question of whether I should conclude, from the totality of the evidence, that the DHL delivery courier did make the delivery apparently attested by the record "Signature" to Mr Chun's Milson's Point address on 1 December 1998. As I say in para [56] below, there is evidence to support that conclusion. I think that it is appropriate, in considering whether or not so to conclude, to take into account, adversely to Mr Chun, his unexplained failure to call his wife or son. His failure to do so has two consequences. It gives me greater confidence in reaching that conclusion. And it reduces the strength of Mr Chun's case on this point.

Notice of the arbitration

43 LKT made a request for arbitration of the dispute to the secretariat of the ICA. The ICA referred the dispute to Mr Hwang.

44 On 18 November 1998, the ICA wrote, as it thought, to the respondents to the request for arbitration. The third respondent was named, and his address given as:

> "ALBERT CHUN YING LLO
> Room 163, The Milson
> 50 Alfred Street
> Milson's Point
> Sydney
> NSW 2061
> Australia".

45 The ICA's records show that the letter to "Albert Chun Ying Llo" was given to a courier organisation, DHL International ("DHL"), for delivery. DHL provided a record to the ICA that purported to show delivery of the letter to the addressee. It is apparent from DHL's record that the addressee, and his address, were specified exactly as they had been in the ICA's letter.

46 Relevantly, DHL's record showed that the document arrived at DHL's "facility" in Sydney on 22 November 1998. The next day, it was scheduled for delivery and given to a courier. On that day, and on 25 November 1998, it is noted as "Shipment on hold". Thereafter, on 30 November and 1 December 2000, the document was again with a courier for delivery. On 1 December 2000, at 8.52 am, DHL's record notes "Signature".

47 An employee of DHL, Mr J J S Martin, was called to explain its procedures and the significance of the notations to which I have referred. His evidence, which I accept, shows that at the relevant time deliveries by air courier (such as the one to Albert Chun Ying Llo) were sent under cover of an air waybill, which set out details of the sender, the recipient and the nature of the freight. Each air waybill has a unique barcode. The barcode is scanned at various times during the progress of the shipment through DHL's facilities. The results of those scans are downloaded to DHL's computer system and uploaded to its website so that customers can track the progress of a shipment without having to speak to an employee of DHL.

48 The references to "Shipment on hold" on 23 and 25 November indicate that the package had not been delivered at those dates. There might be a number of reasons, including that there was no one available to take receipt of the package.

49 Packages were organised by "runs", with each run being allocated to a delivery courier. The delivery courier was given a "run sheet" on which were recorded details of the packages to be delivered including (as I understand it) their barcode references.

50 When a DHL courier was able to effect delivery, the procedure was that the delivery courier, using a handheld scanner, would scan the barcode on the air waybill and would cause the scanner to recognise that this was for "Signature" (rather than some other step in the delivery process). This would happen if the proposed recipient was either the person named on the air waybill or someone else at the address for delivery who indicated that he or she would accept the delivery on behalf of that recipient. The parcel would be provided to that person in exchange for a signature acknowledging receipt.

51 After all this had happened, the delivery courier, at the end of the day, would download information from his or her scanner to DHL's computer system. When this happened, the computer system would record the detail "Signature". The details thus downloaded would be uploaded to and available for viewing on DHL's website.

52 The electronic records of all scans for a shipment received were kept for about three months and thereafter deleted. The hard copy records (including the air waybill, the run sheet and the receipt) were maintained. They are now imaged. In November and December 1998, the imaging process was in its infancy. Mr Martin's evidence was that it is likely that the original documents would have been boxed and archived.

53 Mr Martin has conducted a detailed search of DHL's computer records to find imaged copies of the relevant documents. That search was unsuccessful. He has also caused a search to be made of all DHL's archived material for the period from 1 December 1998 to 1 March 1999 (some 45 boxes). The original documents have not been located.

54 Mr Martin said, based on his knowledge of DHL's systems and procedures at the time, that the word "Signature" in relation to a package sent under cover of an air waybill indicates that either the addressee or someone at the delivery address who was prepared to accept delivery on behalf of the addressee received, and signed for, the package.

55 Mr Martin conceded that from time to time delivery couriers employed by DHL were unreliable. It could hardly be otherwise in an organisation that, worldwide, has some 150,000 employees. Mr Martin also acknowledged that it was possible that the procedures that he described in detail might not have been followed. Thus, it is possible that (for example) a delivery courier, for whatever reason, may have used his scanner to record a "Signature" for the relevant package without in fact handing it over to someone and obtaining a signature in response.

56 Nonetheless, I think that Mr Martin's evidence, coupled with the records to which I have referred, is capable of proving, on the balance of probabilities, that the package was delivered to someone at the address stated (which, I repeat, was Mr Chun's residential address in Australia) at 8.52 am on 1 December 1998, that person being someone who indicated that he or she was prepared to receive it and who signed for it. See *Connor v Blacktown District Hospital* [1971] 1 NSWLR 713, 721 (Asprey JA, with whom Mason JA agreed); *Olga Investments Pty Ltd v Citipower Ltd* [1998] 3 VR 485, 486-487 (Ormiston JA), 497 (Charles JA, with whom Callaway JA agreed).

57 If matters went no further, I would be satisfied that, subject to the question of misnomer, the ICA's letter giving notice of the request for arbitration was delivered to Mr Chun's address on 1 December 1998.

58 There is a latent difficulty in what I have just said. The ICA's letter stated that there was enclosed with it a copy of LKT's request for arbitration. That statement is prima facie evidence that such a document was enclosed. However, neither the copy of the ICA's letter that was proved, nor any other evidence before me, showed what were the terms of the request for arbitration. It may be – I do not know – that any reasonable person reading it would have perceived that it related to a dispute under the agreement, that the claimant was LKT, that the respondents were the AMCO shareholders, and that the name "Albert Chun Ying Llo" was a simple misnomer of Mr Chun. But, on the state of the evidence, I am unable so to conclude.

59 Mr Chun said that he was overseas from 30 November 1998 until 23 February 1999. He said that he did not receive the ICA's letter, either on 1 December 1998 or on any other day. His evidence on this point was not shaken in cross-examination.

60 In late 1998, Mr Chun (when he was not overseas), his wife and their 13 year old son lived at the Milson's Point address. That building was a security building. Any one wishing to go to a particular apartment within it would need to contact the occupants of the apartment by means of a buzzer and intercom to be admitted.

61 Mr Chun was asked in cross-examination whether he thought his wife (had she received the package) would have brought it to his attention. He said that she would not. I do not accept this evidence. Firstly, it is inconsistent with his earlier evidence that, if the letter had been delivered in late 1998, it would in all likelihood have come to his attention (T 30.5). Secondly, Mr Chun said that had he seen the letter, he would have believed it was intended for him (T 30.35). It is difficult to understand why his wife, or son, had either of them received the letter, would have had any different belief. Thirdly, in at least one of his answers, Mr Chun appeared to base his evidence of what his wife would have done (had she received the letter) on his belief that she had not received it, rather than on its merits (T 31.55). Fourthly, and simply, I regard as inherently implausible the proposition that, had Mrs Chun received the letter, she would not have brought it to Mr Chun's attention.

62 I have no doubt that, if the letter had been brought to Mr Chun's attention, he would have opened it. I have no doubt that, had he read it, he would have understood that it related to him, and more generally to the agreement, notwithstanding the misnomer. I repeat that, although Mr Chun gave evidence through an interpreter, it was clear that he was able to read, to a reasonable extent comprehend, and write English.

63 Mr Franklin submitted that it was implausible that Mr Chun would have received, read and understood the letter. This was so, Mr Franklin submitted, because if Mr Chun had received, read and understood the letter, he would have taken steps to defend himself. I do not think that this is necessarily so. It is clear that Mr Chun regarded his role in the joint venture as a passive one. It is clear that he thought that the joint venture was being managed for him and the other AMCO shareholders by Mr Fierkens. It is also clear that, by 1998, the joint venture had not been a success, and that, in commercial terms, Mr Chun regarded it as being at an end. Mr Chun had other business interests. He was pursuing them vigorously – spending considerable time in Hong Kong in the conduct of businesses effectively owned by him, his wife and other family members. In those circumstances, I do not regard Mr Chun's failure to take action in relation to the request for arbitration as something so startling that it should dissuade me from concluding that he did in fact receive the ICA's letter of 18 November 1998 with its enclosures. Again, I do not draw an inference of this kind in Mr Chun's favour having regard to his unexplained failure to call his wife and son.

Other evidence relevant to the third issue

64 LKT tendered a large number of documents sent (in the main) by facsimile transmission to Mr Chun at one of two fax numbers in Hong Kong. One of those fax numbers was for his business interests (conducted under the name Teltec). The other was at his Hong Kong residence. In each case, the transmitting facsimile machine (in the offices of LKT's solicitors, Shook Lin & Bok) showed that the transmission was "OK". All of those documents were addressed to "Mr Albert Chun Ying Llo".

65 There were forty such documents. Of those, seven were sent between 13 February 1999 and 13 September 1999 to the fax number at Mr Chun's Hong Kong residential address. The other thirty three were sent to the fax number at Mr Chun's Hong Kong business address (the offices of Teltec).

66 In each case, the facsimile transmission records of Shook Lin & Bok were proved. In each case, those records showed that a transmission of the relevant number of pages had taken place (by indicating "RESULT OK"). Mr Chun denied that he had received any of those documents.

67 As to those sent to the business fax number, Mr Chun said that he believed that staff employed there would not have brought the documents to him because they were addressed to "Albert Chun Ying Llo", not to "Albert Chun Ying Ho". He did not suggest that there was anyone named "Llo" who worked for or at Teltec, or that there was anyone other than him with a name that included "Albert Chun Ying".

68 Mr Chun's denial of receipt of any of those documents is implausible. I simply do not accept that none of those documents were referred to Mr Chun. He and his wife were in substance the owners of the business (and the only other proprietor was his sister). Particularly where the sister was not called to give evidence, and where her absence was not explained, I do not accept that Mr Chun was unaware of each and every one of those thirty three documents. I think the probabilities are that those documents were (or a majority of them was) brought to his attention. That does not mean that he had proper notice of the arbitration. But, coupled with my findings in respect of the ICA's letter, it means that Mr Chun, had he taken the trouble to read the documents, must have appreciated that LKT was proceeding with the arbitration of its dispute.

69 As to the documents sent to Mr Chun's Hong Kong residential fax number, his evidence was that the fax machine was not working "by the late 1990s". He said that paper was no longer loaded in it but that it was used as a telephone and sometimes to send facsimiles. It is to be noted, however, that when Mr Chun was corresponding with LKT in late 1997 and early 1998 (see paras [12] to [14] above), he gave the Hong Kong fax number as the means of communication with him. Presumably, the machine was able to receive transmissions at that time.

70 Mr Chun said that when the fax phone rang, and when "the fax signal sounded when the receiver was lifted up", he pressed the start button "simply to dispose of the fax caller". There was no evidence to show that this stratagem – if, indeed, it was adopted – would cause the transmitting facsimile machine to show that a successful transmission had been achieved. Mr Franklin submitted, in effect, that I should regard Mr Chun's evidence as showing that this would be so. However, in the absence of acceptable evidence that this would be the case, I do not think that I can do so – regardless of my views as to the credibility of Mr Chun's evidence.

71 Mr Chun said that, when he was at his Hong Kong residential address and when he wished to send a fax, he would hook up his laptop computer to the fax phone socket, enable the "WINFAX" application and proceed. It was clear that this would result in successful transmission (and, I infer, receipt) of a fax only when the laptop was connected to the fax phone socket and the WINFAX application was enabled. Mr Chun said that other people who lived in the apartment (including his sister) might have done the same. Unless they did so all the time – ie, unless there was always a laptop or other computer attached to the fax phone socket with WINFAX or some equivalent application enabled – this would not explain why a transmitting machine would record a successful transmission.

72 I do not accept Mr Chun's evidence that the fax machine in his Hong Kong residence was incapable of receiving facsimile transmissions "from the late 1990s". Unless that phrase is understood as excluding the last months of 1997 and the first month of 1998 (not its natural meaning), it is inconsistent with his use of his Hong Kong residential fax number as a point of contact in relation to his desire to transfer his interest in the joint venture from himself to A & A S.

73 I think it likely, on balance, that at least some of the faxes sent to Mr Chun's Hong Kong residential fax number were received there. I think it likely that at least some of those faxes came to his attention. Again, this does not mean that he had proper notice of the arbitration proceedings. It does however mean, as I have said in para [68] above, that he must have been aware that LKT was prosecuting those proceedings.

Conclusion on third issue

74 I find that Mr Chun was given notice of the arbitration proceedings against him. Although he was misnamed in the letter and notice (and other correspondence) that he received, I find that he would have understood the documents that he received as relating to him, and that they identified him as a party to the arbitration proceedings.

75 Mr Chun did not seek to make a case that, notwithstanding the notifications to which I have referred, he was unable to present a case in the arbitration proceedings. That is not a criticism: any such evidence would have been entirely inconsistent with his principal ground of defence. It means, however, that since I have found that the principal ground of defence fails, there is no reason for finding that he was unable to present a case in the arbitration proceedings.

76 I therefore conclude that enforcement of the award should not be refused on the ground set out in s 8(5)(c) of the Act.

Fourth issue: joint and several liability

77 In paragraph 83 of the partial award, the arbitrator set out the effect of cl 11.1 of the agreement. That was, relevantly, a joint and several warranty by the AMCO shareholders of certain cash flow and business projections. At paragraph 91, the arbitrator found that the AMCO shareholders had breached the relevant warranty. At paragraph 98, he said that "There will have to be a separate hearing to assess the quantum of damages payable" for that breach of warranty.

78 Pursuant to those findings, the partial award provided in paragraph (a) of the arbitrator's conclusions that the AMCO shareholders should pay LKT damages for breach of cl 11.1.3, such damages to be assessed. The assessment of those damages was (among other things) the subject of the final award.

79 In cl 1.1 of the final award, the arbitrator recited that his partial award contained his findings on liability. In cl 1.2, he noted that he had found the AMCO shareholders liable on LKT's claim under cl 11.1.3 of the agreement, and that they must pay damages to be assessed.

80 In cl 2.1, the arbitrator noted that the basis of assessment was pursuant to the joint and several warranty in cl 11.1.3. In cl 2.2, he noted that he had to determine "what the claimant has lost by acting on this warranty".

81 The arbitrator then considered the alternative bases of assessment that the parties had propounded. Nothing turns on the detail of this. He then concluded other matters (including interest and costs) and in cl 9.5 held that, relevantly, Mr Chun and certain other respondents "are jointly and severally liable to pay the Claimant damages for breach of Clause 11.1.3 of the Joint Venture Agreement in the sum of 4,117, 633

Euros." He then made certain further findings as to joint and several liability for interest, costs of the arbitration and legal costs.

82 Mr Franklin submitted that the finding of liability made in the partial award was one of joint liability only, so that what remained was only quantification of that joint liability. Accordingly, he submitted, it was not open to the arbitrator in the final award to determine a joint and several liability.

83 I do not accept this submission. It is clear, from the relevant paragraphs of the partial award, that the arbitrator was making a finding of liability in terms of cl 11.1 of the agreement. As the arbitrator noted, that clause provided for a joint and several warranty by the AMCO shareholders. The questions reserved by the arbitrator in the partial award included assessment of the damages for breach of that joint and several warranty.

84 The final award picked up the relevant findings. It is for that reason that the amount awarded by the arbitrator was awarded jointly and severally. In my judgment, when the arbitrator expressed the liability quantified by the final award as a joint and several liability, he was acting entirely consistently with the basis of liability that he had found in the partial award.

Conclusion and orders

85 Each of the reasons advanced by Mr Chun in support of the proposition that the awards should not be enforced against him fails. It follows that, in substance, LKT is entitled to the relief claimed by it in its summons.

86 As I have noted above, Mr Chun says that if these proceedings are determined against him, he will seek a stay of enforcement to enable him to apply to the ICA to have the awards set aside. No submissions have been put in support of that application. I express no opinion on it.

87 I direct the parties to bring in short minutes of order to give effect to these reasons. That is to be done within 14 days on a date to be arranged with my associate. I will then, if required, hear argument on costs and on any application by Mr Chun for a stay of enforcement.
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