

Privy Council Appeal No. 41 of 1984

Tai Hing Cotton Mill Limited

Appellant

v.

Liu Chong Hing Bank Limited and Others

Respondents

FROM

THE COURT OF APPEAL OF HONG KONG

NOTICE OF MOTION

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 5TH FEBRUARY 1986

Present at the Hearing:

LORD BRIDGE OF HARWICH

LORD ROSKILL

LORD GRIFFITHS

[Delivered by Lord Roskill]

On 3rd July 1985 this Board in an opinion delivered by Lord Scarman humbly advised Her Majesty that an appeal by Tai Hing Cotton Mill Limited ("the company") against a decision of the Court of Appeal of Hong Kong in favour of certain banks ("the banks") should be allowed. By an Order in Council dated 31st July 1985 Her Majesty was graciously pleased to accept that humble advice and the appeal was accordingly allowed. Their Lordships had directed that in this event the banks should pay to the company "its costs of this appeal incurred in the said Court of Appeal" and also a specific sum "for its costs thereof incurred in England including the costs of three Counsel".

Rule 75 of the Judicial Committee (General Appellate Jurisdiction) Rules which are to be found in Schedule II to the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982, S.I. 1982 No. 1676 provides that "All bills of costs under the orders of the Judicial Committee shall be taxed by the Registrar ...". Rule 76 of those rules provides

that "The taxation of costs in England shall be limited to costs incurred in England". Rule 79(1) provides that "Any party aggrieved by a taxation may appeal to the Judicial Committee". Rule 80 provides that "The amount allowed on the taxation shall, subject to any appeal to the Judicial Committee, be inserted in Her Majesty's Order in Council determining the appeal ...". The specific sum mentioned in the Order in Council resulted from the taxation of the company's costs by the Registrar. In the event of the banks' present appeal succeeding that specific sum will require correction.

The question raised by the banks' appeal from the Registrar is how certain fees of Mr. Robert Tang of the Hong Kong Bar should have been dealt with by the Registrar in his taxation of the company's costs. Mr. Tang appeared for the company in both courts below and was instructed to appear on the company's behalf before the Board together with Sir Patrick Neill Q.C. and Mr. Nicholas Bratza.

The company lodged two bills of costs. The first was in respect of work carried out in England. The second was in respect of work carried out in Hong Kong. In a letter dated 23rd May 1985 from the Acting Registrar of the Supreme Court of Hong Kong to the company's solicitors in Hong Kong, doubts were expressed whether "I have authority to tax your clients' bill of costs for work done in respect of your appeal to the Privy Council". The company's solicitors were understandably anxious lest costs which, it would seem, that the company were in common justice entitled to receive should prove irrecoverable because neither the Registrar nor the Supreme Court in Hong Kong had jurisdiction to tax. It was to avoid being impaled on the horns of such a dilemma that these two bills were lodged with the Registrar, the second being described as supplementary.

Their Lordships had the advantage of an agreed note of the proceedings before the Registrar. It is clear that both sides were anxious to avoid two taxations, one in England and one in Hong Kong. It was suggested that where work was necessarily carried out by solicitors overseas in connection with the appeal, the resulting costs should be deemed to have been incurred in England and thus be amenable to taxation by the Registrar. It is clear that the Registrar was sympathetic to both parties and was anxious to assist them as far as possible. But he was of the view that a combination of rule 76, to which their Lordships have already referred, and also a note in Butterworths on Taxation of Costs page T2 precluded his acceptance of the submissions. He therefore refused to tax parts 2 and 3 of the supplementary bill but "he nevertheless made full provision in the

main bill for the fees of the appellant's third counsel, Mr. Robert Tang, in connection with the appeal in England and no further costs for Mr. Tang should be included in any bill submitted for taxation in Hong Kong".

The Registrar achieved his intended result by allowing Mr. Tang a fee for £3,000 for attendance with Sir Patrick Neill Q.C and Mr. Bratza at consultations held in February 1984 at none of which Mr. Tang had in fact been present and for which he himself had made no charge and a further fee of £5,000 for settling the case which Mr. Tang had not in fact done and for which once again he had made no charge. Their Lordships have seen copies of Mr. Tang's various fee notes and it is clear that he rightly made no charges for services which he had not in fact rendered.

While their Lordships sympathise with the Registrar's view that the company whose appeal to the Board had succeeded should not be deprived on some technical ground of the benefit of the order for three counsel, their Lordships cannot agree that the Registrar was justified in achieving his objective in this way. Still less, with great respect, was he justified in seeking to interfere with the jurisdiction of the Supreme Court in Hong Kong in relation to the taxation to take place there, by in effect barring the proper officer of that court from including any fees of Mr. Tang in any such taxation.

The Registrar's attention does not appear to have been drawn to the Hong Kong (Appeal to Privy Council) Order in Council 1909 (S.R. & O. Rev. XI; 1909) and in particular to rule 25 of the rules thereby promulgated. Though that Order in Council has since been amended on a number of occasions - see paragraph 1 of the Hong Kong (Appeal to Privy Council) (Amendment) Order 1980, S.I. 1980 No. 1078, it was confirmed to their Lordships that none of those amendments affected rule 25 of the 1909 Order in Council. That rule provides "Where the Judicial Committee directs a party to bear the costs of an Appeal incurred in Hong Kong, such costs shall be taxed by the proper officer of the Court in accordance with the Rules for the time being regulating taxation in the Court". The definition of "Appeal" in rule 1 of that Order in Council makes it plain that the appeal referred to in rule 25 is the Appeal to Her Majesty in Council.

It seems therefore clear to their Lordships that taking rule 76 of the Judicial Committee (General Appellate Jurisdiction) Rules and rule 25 of the 1909 Order in Council together, the intention is that the Registrar's jurisdiction is "limited" to the taxation of "costs incurred in England" whereas the proper

officer of the Supreme Court in Hong Kong has jurisdiction to tax the costs of an appeal to Her Majesty in Council which are "incurred in Hong Kong". The two jurisdictions are complementary but it would seem that they are also mutually exclusive. No doubt there may occasionally be room for debate whether a particular item of costs has been incurred in England or in Hong Kong. But as regards the disputed items concerning Mr. Tang's fees, there can be no doubt since those two disputed fees were never incurred at all, let alone incurred in England. Mr. Tang's brief fee and refreshers for his attendance before the Board have been duly allowed at the same respective rates as those allowed by the Registrar to Mr. Bratza and no question arises on them. Whether any other of Mr. Tang's fees not incurred in England but incurred in Hong Kong are recoverable on taxation in Hong Kong is not a matter with which their Lordships are concerned.

Their Lordships have already referred to the note in Butterworth on costs. This note in its turn appears to be based entirely on a learned work, "Costs in Privy Council Appeals", by Mr. W. Reeve Wallace, published in 1911. It seems that Mr. Wallace was then the Chief Clerk in the Judicial Department of the Privy Council Office.

Their Lordships are bound to say with respect that they have found the note in paragraph 5 on page 3 of Mr. Wallace's work, and reproduced verbatim in Butterworths, confusing at least in its application to appeals from Hong Kong where in their Lordships' view the matter is clearly regulated by the provisions of the two sets of Rules already referred to. To say this is not however to cast doubt upon the practice which their Lordships have been told has prevailed for many years of treating counsel's fees incurred in settling the cases of the parties as costs incurred in England.

In the result the banks' appeal must succeed and the two items inserted by the Registrar in the bill of costs in respect of Mr. Tang's fees must be deleted. It follows that the specific sum mentioned in the Order in Council will require adjustment accordingly. The Registrar's further order that "no further costs for Mr. Tang should be included in any bill submitted for taxation in Hong Kong" must clearly be set aside. To avoid any further dispute their Lordships think it right to add to the previous direction regarding costs incurred in England a further direction to the effect that there also be paid by the respondents (i.e. the banks), to the appellants (i.e. the company), its costs of this appeal incurred in Hong Kong, such costs to be taxed pursuant to rule 25 of the 1909 Order in Council.

The company also cross-appealed against the refusal of the Registrar to allow Mr. Tang's travelling expenses and hotel bills on taxation. In disallowing those items, the Registrar was following the practice of his predecessors for many years. After listening to argument from counsel, their Lordships see no reason for disturbing this long-standing practice. No doubt today communications are very different from what they were when the practice first evolved and when note 1 on page 13 of Mr. Wallace's book was written. But in their Lordships' view the underlying principle remains the same. If a party to an appeal to the Board wishes to be represented by the same counsel by whom he was represented in the court below he is fully entitled to that representation. But, in their Lordships' view, if his cause subsequently succeeds, he is not for that reason entitled to impose upon his unsuccessful opponent a greater liability for costs than would have arisen had he been represented by counsel of comparable standing and ability practising in this country. To hold otherwise would be to encourage extravagance in litigation and endless arguments as to the standard of travel and accommodation to which particular counsel from particular overseas countries was entitled. Such matters must be the subject of arrangement between counsel and his client. They are not matters with which in their Lordships' view the Registrar can properly be asked to deal on taxation. The cross-appeal is therefore dismissed. Since the company has failed both on the appeal and on the cross-appeal their Lordships are of the opinion that the appeal should be allowed and the cross-appeal dismissed both with costs.

