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5 of 5 DOCUMENTS

[2010] HKCU 268

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Hong Kong Unreported Judgments

CHOK YICK INTERIOR DESIGN & ENGINEERING CO. LTD.

([#x4F5C][#x76CA][#x88DD][#x98FE][#x5DE5][#x7A0B][#x6709][#x9650][#x516C][#x53F8])

v FORTUNE WORLD ENTERPRISES LIMITED

([#x8C50][#x83EF][#x4F01][#x696D][#x6709][#x9650][#x516C][#x53F8])

COURT OF FIRST INSTANCE

HCA 2394/2008; HCA 280/2009

HEARING-DATE-1: 22 January 2010

DECIDED-DATE-1: 29 JANUARY 2010

Hon Saunders J in Chambers

CATCHWORDS:

Arbitration - Stay of proceedings - Action for payment of interim certificates in contracting - Exercise of discretion

JUDGMENTBY: Saunders J

The circumstances of the dispute:

1. Chok Yick is a building contractor. Fortune World is a construction company.
2. In December 2006, Chok Yick and Fortune World entered into an agreement for Chok Yick to carry out certain interior fitting works and related alterations and additions in respect of a construction project being undertaken by Fortune World in Mong Kok. The agreement is evidenced by two letters, signed by Chok Yick as the contractor, and certain architects on behalf of Fortune World.
3. It is common ground between the parties that the Standard Form of Building Contract Conditions n1 forms part of the contract. Consequently, the contract contains the usual submission to arbitration, see para 35 thereof.
4. In due course the architects issued interim certificates for payment. Chok Yick presented certificates Nos. 10 and 11 respectively certifying two sums of \$ 18,076.32 and \$ 504,899.55 together with invoices for payment by Fortune World. Fortune World failed to make payments of the invoices.

The issue of writs:

5. Notwithstanding the existence of the arbitration submission contained within the contract, Chok Yick issued a writ (HCA 2394/2008) on 21 February 2008. A statement of claim was filed on 14 April 2008, seeking the total sum of \$ 522,965.87. On 28 April 2008, Fortune World filed a defence, and counterclaimed for damages for delay totalling \$ 1,358,987.20. Further sums totalling \$ 1,400,000, also said to arise as a result of the delay were also sought. On 29 December 2008, Chok Yick filed a reply and defence to the counterclaim.

6. In separate proceedings (HCA 280/2009) by way of writ with a statement of claim attached, issued on 5 February 2009, Chok Yick sued Fortune World asserting that additional works to the value of \$ 2,735,140 had been carried out, and repeating the claim for the two outstanding invoices. In those proceedings the architects were named as second defendant, and a mandatory injunction was sought against the architects requiring them to issue certificates of payment, to certify for an extension of time, and to certify payment for additional expenses. Fortune World filed a defence and counterclaim on 25 March 2009. Chok Yick filed a reply and defence to the counterclaim on 8 July 2009.

7. On 7 September 2009 Fortune World took out a summons for directions in both actions including seeking an order to actions be consolidated.

8. Irrespective of the outcome of the argument I am about to consider in relation to the reference of the proceedings to arbitration, consolidation is sensible. There will accordingly be an order that the proceedings be consolidated, with costs on the consolidation summonses in the cause.

Chok Yick seeks to refer the proceedings to arbitration:

9. In HCA 280/2009, on 11 June 2009, Chok Yick, in accordance with the arbitration clause in the contract, served a notice of arbitration. In HCA 2394/2008, on 16 September 2009, Chok Yick also served a notice of arbitration. Fortune World rejected the notices of arbitration, contending that the proceedings had gone to litigation and resisted taking part in the proposed arbitration. An arbitrator has been appointed, on the unilateral application of Chok Yick, Fortune World refusing to take part in the process.

10. On 15 September 2009, in HCA 280/2009, and on 22 September 2009, in HCA 2394/2008, Chok Yick filed a summons seeking a stay of proceedings pending the final determination of the proposed arbitration. The summonses are endorsed as being in reliance on "s 6 of the Arbitration Ordinance, Cap 341, Rules of High Court O 1B; Inherent Jurisdiction".

11. I must now determine whether or not there should be a stay, and the matter go to arbitration.

12. The application for stay is unusual in that it is brought by a plaintiff who has already commenced his proceedings. Those are proceedings in which there has been a defence, a counterclaim, a reply and a defence to counterclaim, all filed. The usual circumstances in which a stay pending arbitration is sought is when a defendant is in receipt of a writ in relation to a contract containing an arbitration provision. Then, in reliance upon 6(2) Arbitration Ordinance Cap 341, (AO), or Article 8 of the UNCITRAL Model Law, and before taking any step or making any statement in the proceedings, the defendant will seek a stay. It is fair to say that such applications are invariably granted.

13. As Chok Yick commenced proceedings it is unable to rely upon s 6(2) AO, instead relying upon the inherent jurisdiction of the court. In the course of argument Mr Clough specifically disavowed any reliance upon s 6(2) AO or Article 8 of the UNCITRAL Model Law.

Inherent jurisdiction to stay:

14. That an inherent jurisdiction to stay exists is beyond argument. It is expressly recognised by s 16(3) High Court Ordinance Cap 4, (HCO), which provides:

"Nothing in this Ordinance shall affect the power of the Court of Appeal or the Court of First Instance to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person, whether or not a party to the proceedings."
"

15. Mr Koo argued that the jurisdiction to stay was entirely statutory, and contained in s 6(2) AO or Article 8 of the UNCITRAL Model Law. I reject that submission.

16. I accept Mr Clough's submission that neither of those provisions contain words which indicate that the legislature intended to take away the power to stay recognised by s 16(3) HCO. In that respect I agree entirely with Waung J in *Louis Dreyfus Trading Ltd v Bonarich International (Group) Ltd* [1997] 3 HKC 597, where it was held that even if there were not to be a mandatory stay under the UNCITRAL Model Law, there should be a discretionary stay granted under the Court's inherent jurisdiction.

17. The existence of the inherent jurisdiction was also recognised by the House of Lords in *Channel Tunnel Group Ltd & Anor v Balfour Beatty Construction Ltd* [1993] AC 334, and acknowledged in Russell on Arbitration, 22nd Edn, para 7-027.

18. Mr Koo relied upon the decision of the Burrell J in *Tapbo Civil Engineering Company Ltd v Rolling Development Ltd*, unreported, HCA 2468/99, 10 December 1999. It is clear however that that was a decision that turned entirely upon the provisions of s 6(2) and Article 8, and did not raise in any way any issue of the inherent jurisdiction.

19. For another example of a situation in which a party who has taken a step in proceedings, succeeded in having the proceedings go to arbitration, with the stay under the inherent jurisdiction, see *Marshall-Karson Construction and Engineers Ltd v Kowloon Canton Railway Corporation*, unreported, Con. List No. 38 of 1994, 9 June 1995, Leonard J.

20. In any event, if there was any doubt as to the existence of the power to stay, and I am satisfied there is not, such a power may now be found in the Court's general powers of case management contained in the Rules of the High Court, O 1B r 1(e) in which a specific power to stay the whole part of any proceedings is granted to the court.

Power to stay to allow proceedings to go to arbitration:

21. I am satisfied that the following provisions of the High Court Rules, in an appropriate case, entitle a judge to stay proceedings in order that they may go to arbitration. First I have regard to the underlying objectives contained in O 1A r 1. Next, I have regard to the Court's duty to manage cases as set out in O 1A r 4:

"(1) The Court shall further the underlying objectives of these rules by actively managing cases.

(2) Active case management includes -

(e) encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate, and facilitating the use of such a procedure;"

22. By O 1B r 1(1), the Court may take any other step or make any other order for the purpose of managing the case and furthering the underlying objectives set out in O 1A. That must include staying proceedings to enable them to go to arbitration in circumstances where the parties have previously agreed that arbitration would be the appropriate venue to resolve any dispute between.

The exercise of discretion:

23. I am accordingly satisfied that I have a discretion under the inherent jurisdiction to stay the proceedings and the power, to be exercised by way of judicial discretion, to make such order as is appropriate to manage the case. That power includes a power to stay a case so that it may go to alternative dispute resolution, including arbitration.

24. In exercising my discretion to refer the matter to arbitration I have regard to the following factors:

(a) the contract between the parties contained an arbitration clause, thereby indicating that both parties agreed that was the appropriate course to follow in the event of a dispute;

(b) notwithstanding the fact that Chok Yick had commenced proceedings it has not, by that step necessarily waived the arbitration agreement: see *Aggressive Construction Co Ltd v Data-Form Engineering Ltd*, unreported, HCA 2143/2008, 4 August 2009, Deputy High Court Judge To (as he then was);

(c) the cost involved in the pleadings that have been filed in the two actions are not wasted, as those pleadings have defined the issues that would have to be determined by an arbitrator;

(d) it is clear from the pleadings in HCA 280/2009, in which Chok Yick seeks payment for an additional work, and that "nuts and bolts" issues as to whether or not the numerous items for which the claim is made were justified will need to be determined. These are issues which are entirely appropriate for determination by an experienced building arbitrator; they are clearly not issues which are appropriate for litigation in the High Court;

(e) expense and delay will be saved by all issues between the parties being determined in one arbitration rather than through two sets of proceedings, albeit that those proceedings are consolidated;

(f) the reference of these disputes to arbitration will avoid any possible conflicts of inconsistent findings should there be any other disputes between the parties arising out of the contract which might subsequently be referred to arbitration.

25. The only argument that could be mounted by Mr Koo when pressed to say why the matter should not go to arbitration was that Chok Yick had already taken a step in the proceedings, and was thereby prevented under s 6(2) or Article 8 from seeking a stay and reference to arbitration. That Chok Yick has taken a step in proceedings is not in any way at all a bar to the exercise of the inherent jurisdiction to stay, or the case management power to allow the matter to go to arbitration. Mr Koo offered no sensible reason why arbitration was not the most suitable means of resolving the dispute, particularly a dispute of this nature.

26. I am accordingly satisfied that on a proper exercise of the discretion both sets of proceedings must be stayed, in order they may proceed to arbitration.

27. To date, Fortune World have declined to take part in the procedural steps leading to the appointment of the arbitrator. It will now be open to them either to accept the arbitrator appointed, or to require the appointment procedure to be undertaken again. Having regard to the circumstances of this particular case, I would have thought that it was entirely appropriate to accept the appointed arbitrator. In the event that Fortune World continues to refuse to take part in the arbitration it will be open to the arbitrator to proceed in their absence.

28. It will be for the arbitrator, whoever he is, to determine whether or not the pleadings filed in these two actions should stand as the pleadings in the arbitration. It would plainly be a sensible course to adopt.

Costs:

29. There will be an order nisi that the costs of the summonses to consolidate and stay the proceedings will be to Chok Yick. There will be an order nisi that the costs of the proceedings in all other respects the costs in the cause in the arbitration.

30. Leave is reserved to apply.

Mr Neal Clough and Mr Harry Liu, instructed by Messrs S Y Wong & Co, for the Plaintiff in HCA 2394/2008 & HCA 280/2009

Mr Ernest Koo, instructed by Messrs George Chan & Co, for the Defendant in HCA 2394/2008 & the 1st Defendant in HCA 280/2009

FOOTNOTES:

n1 Agreement in Schedule of Conditions of Building Contract (Standard Form of Building Contract) for use in Hong Kong, (Private Addition Without Quantities), Second Edition 1976 (April 1998 Revision)

LOAD-DATE: 02/04/2010

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HCA 2394/2008

IN THE HIGH COURT OF THE
 HONG KONG SPECIAL ADMINISTRATIVE REGION
 COURT OF FIRST INSTANCE
 ACTION NO. 2394 OF 2008

BETWEEN

CHOK YICK INTERIOR DESIGN &
 ENGINEERING CO. LTD.
 (作益裝飾工程有限公司)

Plaintiff

and

FORTUNE WORLD ENTERPRISES LIMITED
 (豐華企業有限公司)

Defendant

AND

HCA 280/2009

IN THE HIGH COURT OF THE
 HONG KONG SPECIAL ADMINISTRATIVE REGION
 COURT OF FIRST INSTANCE
 ACTION NO. 280 OF 2009

BETWEEN

CHOK YICK INTERIOR DESIGN &
 ENGINEERING CO. LTD.
 (作益裝飾工程有限公司)

Plaintiff

and

FORTUNE WORLD ENTERPRISES LIMITED
(豐華企業有限公司)

1st Defendant

EDDIE CHAN ARCHITECTS LTD.

2nd Defendant
(Discontinued)

(Heard together)

Before: Hon Saunders J in Chambers

Date of Hearing: 22 January 2010

Date of Decision: 29 January 2010

DECISION

The circumstances of the dispute:

1. Chok Yick is a building contractor. Fortune World is a construction company.

2. In December 2006, Chok Yick and Fortune World entered into an agreement for Chok Yick to carry out certain interior fitting works and related alterations and additions in respect of a construction project being undertaken by Fortune World in Mong Kok. The agreement is evidenced by two letters, signed by Chok Yick as the contractor, and certain architects on behalf of Fortune World.

3. It is common ground between the parties that the Standard Form of Building Contract Conditions¹ forms part of the contract. Consequently, the contract contains the usual submission to arbitration, see para 35 thereof.

4. In due course the architects issued interim certificates for payment. Chok Yick presented certificates Nos. 10 and 11 respectively certifying two sums of \$18,076.32 and \$504,899.55 together with invoices for payment by Fortune World. Fortune World failed to make payments of the invoices.

The issue of writs:

5. Notwithstanding the existence of the arbitration submission contained within the contract, Chok Yick issued a writ (HCA 2394/2008) on 21 February 2008. A statement of claim was filed on 14 April 2008, seeking the total sum of \$522,965.87. On 28 April 2008, Fortune World filed a defence, and counterclaimed for damages for delay totalling \$1,358,987.20. Further sums totalling \$1,400,000, also said to arise as a result of the delay were also sought. On 29 December 2008, Chok Yick filed a reply and defence to the counterclaim.

6. In separate proceedings (HCA 280/2009) by way of writ with a statement of claim attached, issued on 5 February 2009, Chok Yick sued Fortune World asserting that additional works to the value of \$2,735,140 had been carried out, and repeating the claim for the two outstanding invoices. In those proceedings the architects were named as second

¹ Agreement in Schedule of Conditions of Building Contract (Standard Form of Building Contract) for use in Hong Kong, (Private Addition Without Quantities), Second Edition 1976 (April 1998 Revision)

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7. On 7 September 2009 Fortune World took out a summons for directions in both actions including seeking an order to actions be consolidated.

8. Irrespective of the outcome of the argument I am about to consider in relation to the reference of the proceedings to arbitration, consolidation is sensible. There will accordingly be an order that the proceedings be consolidated, with costs on the consolidation summonses in the cause.

Chok Yick seeks to refer the proceedings to arbitration:

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10. On 15 September 2009, in HCA 280/2009, and on 22 September 2009, in HCA 2394/2008, Chok Yick filed a summons seeking

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E Jurisdiction”.

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M a defence to counterclaim, all filed. The usual circumstances in which a
N stay pending arbitration is sought is when a defendant is in receipt of a writ
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“Nothing in this Ordinance shall affect the power of the Court of Appeal or the Court of First Instance to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person, whether or not a party to the proceedings.”

15. Mr Koo argued that the jurisdiction to stay was entirely statutory, and contained in s 6(2) AO or Article 8 of the UNCITRAL Model Law. I reject that submission.

16. I accept Mr Clough’s submission that neither of those provisions contain words which indicate that the legislature intended to take away the power to stay recognised by s 16(3) HCO. In that respect I agree entirely with Waung J in *Louis Dreyfus Trading Ltd v Bonarich International (Group) Ltd* [1997] 3 HKC 597, where it was held that even if there were not to be a mandatory stay under the UNCITRAL Model Law, there should be a discretionary stay granted under the Court’s inherent jurisdiction.

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20. In any event, if there was any doubt as to the existence of the power to stay, and I am satisfied there is not, such a power may now be found in the Court's general powers of case management contained in the Rules of the High Court, O 1B r 1(e) in which a specific power to stay the whole part of any proceedings is granted to the court.

Power to stay to allow proceedings to go to arbitration:

21. I am satisfied that the following provisions of the High Court Rules, in an appropriate case, entitle a judge to stay proceedings in order that they may go to arbitration. First I have regard to the underlying objectives contained in O 1A r 1. Next, I have regard to the Court's duty to manage cases as set out in O 1A r 4:

(1) The Court shall further the underlying objectives of these rules by actively managing cases.

(2) Active case management includes –

(e) encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate, and facilitating the use of such a procedure;

22. By O 1B r 1(1), the Court may take any other step or make any other order for the purpose of managing the case and furthering the underlying objectives set out in O 1A. That must include staying

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proceedings to enable them to go to arbitration in circumstances where the parties have previously agreed that arbitration would be the appropriate venue to resolve any dispute between.

The exercise of discretion:

23. I am accordingly satisfied that I have a discretion under the inherent jurisdiction to stay the proceedings and the power, to be exercised by way of judicial discretion, to make such order as is appropriate to manage the case. That power includes a power to stay a case so that it may go to alternative dispute resolution, including arbitration.

24. In exercising my discretion to refer the matter to arbitration I have regard to the following factors:

- (a) the contract between the parties contained an arbitration clause, thereby indicating that both parties agreed that was the appropriate course to follow in the event of a dispute;
- (b) notwithstanding the fact that Chok Yick had commenced proceedings it has not, by that step necessarily waived the arbitration agreement: see *Aggressive Construction Co Ltd v Data-Form Engineering Ltd*, unreported, HCA 2143/2008, 4 August 2009, Deputy High Court Judge To (as he then was);
- (c) the cost involved in the pleadings that have been filed in the two actions are not wasted, as those pleadings have defined the issues that would have to be determined by an arbitrator;
- (d) it is clear from the pleadings in HCA 280/2009, in which Chok Yick seeks payment for an additional work, and that “nuts and bolts” issues as to whether or not the numerous

items for which the claim is made were justified will need to be determined. These are issues which are entirely appropriate for determination by an experienced building arbitrator; they are clearly not issues which are appropriate for litigation in the High Court;

(e) expense and delay will be saved by all issues between the parties being determined in one arbitration rather than through two sets of proceedings, albeit that those proceedings are consolidated;

(f) the reference of these disputes to arbitration will avoid any possible conflicts of inconsistent findings should there be any other disputes between the parties arising out of the contract which might subsequently be referred to arbitration.

25. The only argument that could be mounted by Mr Koo when pressed to say why the matter should not go to arbitration was that Chok Yick had already taken a step in the proceedings, and was thereby prevented under s 6(2) or Article 8 from seeking a stay and reference to arbitration. That Chok Yick has taken a step in proceedings is not in any way at all a bar to the exercise of the inherent jurisdiction to stay, or the case management power to allow the matter to go to arbitration. Mr Koo offered no sensible reason why arbitration was not the most suitable means of resolving the dispute, particularly a dispute of this nature.

26. I am accordingly satisfied that on a proper exercise of the discretion both sets of proceedings must be stayed, in order they may proceed to arbitration.

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27. To date, Fortune World have declined to take part in the procedural steps leading to the appointment of the arbitrator. It will now be open to them either to accept the arbitrator appointed, or to require the appointment procedure to be undertaken again. Having regard to the circumstances of this particular case, I would have thought that it was entirely appropriate to accept the appointed arbitrator. In the event that Fortune World continues to refuse to take part in the arbitration it will be open to the arbitrator to proceed in their absence.

28. It will be for the arbitrator, whoever he is, to determine whether or not the pleadings filed in these two actions should stand as the pleadings in the arbitration. It would plainly be a sensible course to adopt.

Costs:

29. There will be an order nisi that the costs of the summonses to consolidate and stay the proceedings will be to Chok Yick. There will be an order nisi that the costs of the proceedings in all other respects the costs in the cause in the arbitration.

30. Leave is reserved to apply.

(John Saunders)
Judge of the Court of First Instance
High Court

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Arbitration
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HCCT 49/2010

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTRUCTION AND ARBITRATION PROCEEDINGS**

NO. 49 OF 2010

BETWEEN

YAU LEE CONSTRUCTION COMPANY
LIMITED

Plaintiff

and

CHINA STEEL ENGINEERING CO.,
LIMITED

1st Defendant

SIU SHU TONG

2nd Defendant

Before: Hon Reyes J in Chambers
Date of Hearing: 21 December 2010
Date of Judgment: 21 December 2010

JUDGMENT

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Mr Neal Clough and Mr Harry Liu, instructed by Messrs S Y Wong & Co,
for the Plaintiff in HCA 2394/2008 & HCA 280/2009

Mr Ernest Koo, instructed by Messrs George Chan & Co, for the
Defendant in HCA 2394/2008 & the 1st Defendant in HCA 280/2009

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1. Yau Lee was the Head Contractor and China Steel the Sub-Contractor on a project. The Sub-Contract in cl. 16c contained the following provision (in agreed translation):-

“If the Sub-Contractor does not receive within a reasonable period (approximately 45 days) the interim payment formally certified by the Main Contractor, the Sub-Contractor is entitled to interest at bank’s Prime Rate and the Sub-Contractor has a right to request both parties to jointly appoint a neutral arbitrator to arbitrate in relation to the unpaid income payment and quality of works, progress and etc. Once an award is made, both parties promise to be jointly bound by the decision of the arbitrator.”



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2. Yau Lee commenced this action against China Steel. By the action, Yau Lee claims about \$10 million. That amount comprises a claim of nearly \$5 million for material wastage, \$1.15 million for extra administrative costs incurred in relation to the payment of wages to China Steel’s workers, and some \$3 million in restitution. Yau Lee further sues Mr Siu as Guarantor of China Steel’s performance.

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3. Relying on cl. 16c, China Steel has applied to stay Yau Lee’s action against it to arbitration. China Steel itself claims that it has not been paid \$10 million by Yau Lee upon the completion of the project.

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4. I do not think that cl. 16c is applicable on its plain terms.

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5. That clause comes into play when an interim payment certified by Yau Lee has remained unpaid for 45 days. China Steel’s right to request arbitration only crystallises on the happening of that event. China Steels’ right to arbitration arises in that single limited situation.

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6. Here all interim certificates issued by Yau Lee have been duly paid. There is no suggestion that the interim certificates have been paid out of time. So the requisite crystallising event has not occurred.

7. It is true that China Steel contends that monies remain due and owing from Yau Lee on the taking of a final account. But, even if that is correct, cl. 16c does not deal with a claim for monies due to China Steel after the taking of a final account, including after the assessment of any alleged set-off or cross-claim by Yau Lee.

8. Therefore, I refuse a stay and dismiss China Steel's application.

9. I note that Mr Siu is not party to an arbitration agreement with Yau Lee. In that circumstance, the claim against Mr Siu would have to proceed in any event before this Court. Insofar as I have any residual discretion whether or not to stay Yau Lee's claim to arbitration, the fact that the action would still have to proceed in Court against Mr Siu militates against the exercise of my discretion.

10. I shall now hear the parties on consequential matters.

(A. T. Reyes)
Judge of the Court of First Instance
High Court

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Mr Victor Dawes, instructed by Messrs Stephenson Harwood, for the Plaintiff

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Mr Ivan Cheung, instructed by Messrs Tam, Pun & Yipp, for the 1st Defendant

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