IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT AUCKLAND, NEW ZEALAND **CA 10/02**

IN THE MATTER OF	**The International Companies Act 1981-1982**
AND IN THE MATTER OF	**CHINA AERONAUTICAL TECHNOLOGY FUND LIMITED (IN LIQUIDATION)**
BETWEEN	**TL MANAGEMENT LIMITED**
	Appellant
A N D:	**JOHN JAMES TOOHEY and ANTHONY MITCHELL**
	Respondent

Hearing:	**22 September 2003**
Coram:	**Casey JA (Presiding)** **Smellie JA** **Williams JA**
Appearances:	**J Turner and L O'Gorman for Appellant** **N S Gedye for Respondent**
Judgment:	**25 September 2003**

JUDGMENT OF THE COURT

Solicitors
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Introduction

[1] This is an appeal from the High Court on the review of the Respondent Liquidators' adjudication in respect of the winding up of China Aeronautical Technology Fund Limited [China Aero] regarding management fees alleged to have been earned by the Appellant but disallowed in whole or in part by the Respondents. The liquidation was conducted pursuant to the Cook Islands International Companies Act 1981-1982 and Rule 87 of the (Winding Up) Rules 1956. It was on the 17 April 2001 that the company was put into liquidation by order of the High Court and the liquidators duly appointed. The judgment under appeal was delivered on the 27/11/02.

Factual Background

[2] China Aero was incorporated in 1993 and invested in several subsidiaries registered in the British Virgin Islands. Those subsidiaries then invested in joint ventures, as junior partners, with state owned enterprises within the People's Republic of China. China Aero retained the Appellant to look after its interests. The responsibilities assumed by the Appellant were extensive and included representation on the joint ventures boards of management, maintenance of records and co-operation with China Aero and its auditors to comply inter alia with China Aero's listing on the Irish Stock Exchange.

[3] The remuneration of the Appellant for their services was an annual fee of 2% of the Net Average Value (NAV) of China Aero which included any distributions of capital and dividends made during the year in question. There were other ancillary lesser payments but we need not be concerned with them. Monetary amounts referred to in this judgment are in the currency of the United States of America.

The fee for the year 1999

[4] The annual fees according to the contract between the Appellant and China Aero were to be fixed on the value of the fund at 31 December in any one year, the composite figure being fixed by the Board of Directors and audited as soon as practicable thereafter.

[5] There was much debate as to the basis upon which China Aero having made advance payments of $1,430,954 in respect of the 1998 fee, the figure was then reduced in or about June of 2000 by $75,253. This reduction was upheld in the High Court. Perhaps on a different basis we are satisfied that conclusion was correct. What the evidence shows is that the 1998 audit established a NAV as at 31/12/98 of $67,785,030 2% of which is $1,355,701. Those figures, however, were established after the advance payment had been made. They were shown in annual accounts as subject to adjustment. All that happened was that in the overall accounting conducted by the Liquidators the overrun of $75,253 was deducted from the Appellant's entitlement.

The fee for the year 2000

[6] Again, in accordance with the agreement between the parties this fee was to be calculated on the NAV as at 31/12/1999.

[7] Just as the 1998 figure was not established until mid 2000, the 1999 figure was also delayed until that time and even then was not audited. Thus on the express terms of the agreement no fee was payable. That, however, would be absurd result as submitted by counsel for the Appellant. The circumstances are tailor-made for the implication of a term to the effect that even if an audited NAV was never established the liquidators when dealing with the Appellant's proof of debt were entitled to make a reasonable assessment on the information available. The result would be the same either on The Moorcock (1889) 14 PD 64 approach or on the more sophisticated BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 16 ALR 363 decision of the Privy Council.

[8] Relying upon the information available the Liquidataors arrived at a NAV of $39,643,307, 2% of which is $792,000. China Aero had, in fact, already made an advance of $500,000, so the balance of $292,866 was allowed. On the evidence these figures were accepted in the High Court and we see no reason to disagree.

The fee for 2001

[9] During July 2000 the Respondent sold its entire investment for $15,888,912 and shortly thereafter (on 10/8/00) China Aero gave the Appellant one years notice of termination pursuant to a specific term recorded in the agreement.

[10] The consequence of the sale was that as at 31/12/2000 there was no NAV but there had been a distribution of capital equal to the sale price.

[11] The fee, therefore, fell to be calculated at 2% of $15,888,912 from 1/1/01-10/8/01 being the date upon which the 12 months notice expired.

[12] 2% of $15,888,912 equals $317,778 for 365 days.

[13] 2% of $15,888,912 equals $870.624/day

[14] 2% of $15,888,912 for 222 days to 10/8/00 equals $193,279. That is the figure the Appellant was entitled to provided the agreement was not terminated for breach as contended by China Aero and accepted by the Liquidators on 18 January 2001.

The breach issue

[15] The evidence shows that from April 2000 through to December 2000 there were several demands made of the Appellant to produce documents it was obliged to hold for China Aero. The Appellant contends it complied with those requests although denying it was obliged to do so. Ultimately a final demand was made giving 31 days to comply. When full compliance was not forthcoming China Aero purported to terminate on 18/1/01.

[16] The Liquidators adopted China Aero's stance and disallowed the Appellant's claim which was unrealistically based upon the 1998 NAV. Eighteen days only was allowed resulting in the sum of $15,671 being fixed for the part year in respect of the 2001 fee.

[17] In the High Court the Judge conducted a careful survey of the Appellant's responsibilities as manager of the fund and drew the inference from all the evidence that the Appellant must have had many more documents than it in fact divulged. The termination for breach was therefore upheld.

Was the breach material?

[18] We agree there were breaches. But whether the termination be regarded as being effected pursuant to the terms of the agreement which required a "material breach" or at common law where the breach would have to be substantial – we do not accept they justified termination in the circumstances of this case.

[19] In the judgment under appeal neither materiality nor substantiality are mentioned. When, however, the evidence is examined, despite counsel for the liquidators' careful argument to the contrary, the only tenable conclusion is that the breaches were not material and did not prejudice China Aero in any substantial way.

[20] It is clear that in March 2000, China Aero had decided to sell and by July 2000 it had done so and therefore ceased to trade. The breaches of failure to provide documents and co-operate all occurred after March 2000 and the final demand was not made until December 2000.

[21] Since by December the only figure upon which the fee could be calculated was the sale price which had been extant since July, it is inescapable that although the documents should have been produced, compliance would not have affected the fee. Indeed, Mr Toohey, one of the joint liquidators acknowledged as much in his affidavit. It follows that the Appellant was entitled to the fee of $193,279 referred to in paragraph [14] above. From that sum must be deducted the $15,671 already allowed as referred to earlier – the net figure therefore is $177,608.

Result

[22] The Liquidators originally allowed $313,357 of the Appellant's total claim of $647,828. We have determined that in addition to what was originally allowed the Appellant is entitled to a further $177,608. Total recovery therefore is $489,965.

[23] The Appellant is to receive that sum in total plus interest at the top rate allowed by the Judicature Act from the date of the judgment in the High Court. Credit, however, is to be given in respect of any amount already paid prior to or subsequent to that date.

Costs

[24] We understand costs have not been fixed in the High Court. We are of the view that both in the High Court and in this Court there should be no orders as to cost. In the High Court the Respondent was upheld on the reduction of $75,000 odd and the breaches of contract. The Appellant, however, has succeeded in this Court on the termination point. This is an appropriate ~~case~~ for the costs to lie where they fall and we so order.

Casey JA Smellie JA Williams JA