HCCT 54/2018

[2019] HKCFI 1257

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO 54 OF 2018

IN THE MATTER of Order 73 rule 5 of the Rules of High Court (Cap 4A)

and

IN THE MATTER of Arbitration Award dated 25 May 2018 in Case No HKIAC/PA15047 made by the Hong Kong International Arbitration Centre

and

IN THE MATTER of section 81 of the Arbitration Ordinance (Cap 609) and Article 34 of The UNCITRAL Model Law on International Commercial Arbitration

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BETWEEN

WEILI SU	1st Plaintiff
FLASH BRIGHT POWER LIMITED	2nd Plaintiff (Respondents in

	the Arbitration)
and	
SHENGKANG FEI	1st Defendant
RICHARD YUQIANG LU	2nd Defendant
RANRAN XU	3rd Defendant (Claimants in the Arbitration)

Before: Hon Mimmie Chan J in Chambers

Date of Hearing: 3 May 2019

Date of Decision: 7 May 2019

Date of Reasons for Decision: 15 May 2019

REASONS FOR DECISION

Background

1. By an Originating Summons issued on 24 August 2018, the Plaintiffs in these proceedings applied to set aside an arbitral award dated 25 May 2018 ("**Award**") made in an arbitration by HKIAC in Hong Kong ("**Arbitration**"). The Arbitration concerns a dispute between the Defendants as Claimants, and the Plaintiffs as Respondents, arising under a Shareholders Agreement dated 22 January 2010 ("**Agreement**") made between the parties concerning their shareholding in Sky Solar Holdings Co Ltd ("**Company**"), a Cayman Islands company. The 1st and 2nd Plaintiffs (and Respondents in the Arbitration) were respectively the founder and controlling shareholder of the Company. The Defendants (and Claimants in the Arbitration) were the minority shareholders of the Company.

2. In the Arbitration, the Claimants complained that the Respondents had restructured the Company to exclude the Claimants from the benefit of an initial public offering ("**IPO**") of shares. As part of the restructuring, there was a share swap whereby shareholders in the Company were given the right to swap their shares in the Company for the shares in Sky Power Group Ltd ("**New Solar**"). A new company Sky Solar Holdings Limited ("**Listco**") was then formed as a subsidiary of New Solar, and Listco was then listed, instead of the Company. The Claimants complained that this was in breach of the covenants given by the Respondents in the Agreement. In particular, the Claimants alleged in the Arbitration that the Respondents had acted in breach of their obligations under the Agreement to use "commercially reasonable best efforts" to facilitate an IPO for the Company.

3. The tribunal in its Award found the Respondents to be in breach of the Agreement, and ordered the Respondents to pay to Mr Shengkang Fei (the 1st Claimant) the sum of US $7,552,500, to Mr Richard Yuqiang Liu (the 2nd Claimant) the sum of US $4,531,500, and to Madam Ranran Xu (the 3rd Claimant) the sum of US $377,625, together with interest and the costs and fees of the Arbitration, totaling US $13.7 million.

4. By these proceedings, the Plaintiffs (namely, the Respondents in the Arbitration) applied to set aside the Award, on the grounds that: (1) there was no valid arbitration agreement between the parties; (2) the composition of the tribunal was not in accordance with the agreement; (3) the Defendants (as Claimants in the Arbitration) had failed to plead and particularize their case, as a result of which the tribunal had acted in excess of jurisdiction, and/or contrary to public policy and/or the Plaintiffs were deprived of a fair opportunity to present their case; (4) the tribunal had made findings without evidential basis, in excess of jurisdiction and/or contrary to public policy and/or the Plaintiffs were deprived of a fair opportunity to present their case. A final catchall paragraph was included in the Originating Summons, to cover "any other grounds pursuant to section 81 of the Arbitration Ordinance or otherwise as the Court sees fit".

5. In opposition to the Plaintiffs' application to set aside, and by way of counterclaim, the Defendants seek leave to enforce the Award, and further seek security under section 86 (4) of the Arbitration Ordinance ("**Ordinance**") and O73 r 10A RHC as a condition for the further conduct of the setting aside application.

6. On 20 November 2018, the Defendants in this action applied for and obtained an *ex parte* injunction order ("**HK Injunction**") against the 1st Plaintiff ("**Su**") and a third party ("**Chen**"), whereby Su was restrained from removing or disposing of any of his assets in Hong Kong, and from using any legal or beneficial shareholder equity which forms part of his assets, or cause such equity to be used, so as to cause or procure Sky Solar (Hong Kong) International Co Ltd ("**SS HK**") and other named companies ("**Scheduled Companies**") to dispose of any of their assets, other than in the ordinary course of their business. Under the HK Injunction, Chen was also restrained from disposing of the shares in SS HK, and any assets within Hong Kong held by Chen for, on behalf of and/or on trust for Su, and from using any shareholder equity to cause or procure SS HK and the Scheduled Companies to dispose of any of their assets, other than in the ordinary course of their business.

7. The HK Injunction requires Su to inform the solicitors for the Defendants all of his assets of an individual value of HK $50,000 or more in Hong Kong, and all the assets held by each of the Scheduled Companies of an individual value of HK $50,000 or more in Hong Kong, as at the date of the HK Injunction, whether in Su's own name or not, and whether jointly or solely owned.

8. On 9 April 2019, Su applied to Set Aside the HK Injunction. Upon joint application made by the Plaintiffs and the Defendants, directions were made by the Court, by consent, on 12 April 2019, for the Defendants' application to continue the HK Injunction and Su's application to discharge the same to be heard together. These have been fixed for hearing on 4 June 2019.

9. On 30 October 2018, again on the parties' joint application, directions were made by the Court by consent, giving leave to the parties to file evidence in opposition and reply to the Defendants' application for security, for the application for security to be adjourned for argument, and at the same time, for evidence to be filed in relation to the Plaintiffs' application to set aside the Award, and the Defendants' application (by counterclaim) for leave to enforce the Award. The setting aside application and the counterclaim have been scheduled for hearing on 30 May 2019.

Application for security

10. The Defendants' application for security came up for hearing by this Court on 3 May 2019.

11. Dealing first with the Plaintiffs' objection on the basis that the Defendants' application for security has not been made by summons as required under O 73 rr 1 and 2, any irregularity arising therefrom does not nullify the proceedings. Having been given notice of the substance of the application, having consented to a full contested hearing of the application and to directions for the filing of evidence in connection with such application, and having filed evidence in opposition to the application for security, the Plaintiffs have clearly consented to the application being put before the Court for determination, and waived any irregularity. Further, I can see no prejudice whatsoever having been sustained by the Plaintiffs as a result of any such irregularity. They have considered the Defendants' evidence and arguments in support of the application for security, made their arguments to oppose the application, and have filed all the evidence they seek to adduce in opposition.

12. The legal principles applicable to determination of an application for security are not disputed between the parties. They are as set out in *Soleh Boneh International Ltd v Government of the Republic of Uganda* [1993] 2 Lloyd's Rep 208 at 212, applied in *Guo Shun Kai v Wing Shing Chemical Co Ltd* [2013] 3 HKLRD 484 and *Dana Shipping and Trading SA v Sino Channel Asia Ltd* [2017] 1 HKC 281. They will not be repeated here.

The strength of the argument that the Award is invalid

13. The strength of the argument that the Award is invalid, as perceived on a brief consideration by the court, is the first important factor to be considered on an application for security. As Staughton LJ explained in *Soleh Boneh*, if the award is manifestly invalid, there should be an adjournment and no order for security, and if it is manifestly valid, there should be either an order for immediate enforcement, or else an order for substantial security. In between where there are various degrees of plausibility in the argument for invalidity, the court must be guided by its preliminary conclusion on the point.

14. On my brief consideration of the grounds set out in the Originating Summons, I take the view that the Award is manifestly valid. The following are my preliminary but clear views.

Whether there was an arbitration agreement between the parties

15. The Plaintiffs do not dispute that the Defendants were parties to the Agreement (paragraph 20 of the 1st affidavit of Michael Kan, solicitor for the Plaintiffs, sworn on 24 August 2018 ("**Kan Affidavit**")). However, they allege that the Defendants are not parties to the arbitration agreement contained in clause 15 of the Agreement.

16. Clause 15.2 of the Agreement provides that "any dispute or claim arising out of or in connection with or relating to" the Agreement, "of the breach, termination or invalidity thereof (including the validity, scope and enforceability of this arbitration provision)" shall be finally resolved by arbitration. The same clause provides that "the Investors" (who were also parties to the Agreement) were to select one arbitrator, the Company and the 2nd Plaintiff (which was a party to the Agreement as the Controlling Shareholder) were to jointly select one arbitrator, and the Chairman of the Arbitration Center was to select the third arbitrator. The Investors were originally included as respondents in the Arbitration, but the claims against them were not pursued.

17. According to the Plaintiffs, the minority shareholders of the Company, including the Defendants, were never intended to have an arbitrable dispute under the Agreement as against the Plaintiffs or the Investors. Hence, they do not have the contractual right of appointment of arbitrator. The Agreement was to facilitate the investment made by the Investors in the Company, in preparation of the intended IPO of the Company. The Agreement was to define the rights and obligations between the Investors on the one hand, and the Company and Controlling Shareholder on the other.

18. Read as a whole, and having regard to the relevant context as well as the language of the Agreement as well as the arbitration clause, I cannot agree that objectively construed, clause 15 of the Agreement excludes the Defendants as parties.

19. A right to appoint an arbitrator and a right to arbitrate should be distinguished. A party to an arbitration agreement may not necessarily have the right to appoint an arbitrator. A party to an arbitration agreement may even agree to have an arbitrator appointed by a designated third party. In this case, the Agreement was made between the Investors, the Company, the Controlling Shareholder of the Company (the 2nd Plaintiff in this case), the founder of the Company (the 1st Plaintiff in this case), and a group of 22 named minority shareholders (which include the 1st and 2nd Defendant in this case), to govern the investment brought into the Company by the Investors, the continuation of the business of the Company, and the terms and conditions under which shares in the Company are to be held - not only by the controlling shareholder, but the minority shareholders as well. The minority shareholders assumed obligations such as restrictions on transfer of their shares.

20. Clause 15 is widely drafted, to include arbitration of "any dispute or claim", "arising out of or in connection with or relating to" the Agreement, which Agreement sets out rights and obligations of the minority shareholders as against the other parties. Clause 15 extends to disputes or claims relating to "the breach" of the Agreement, and expressly extends to any dispute or claim as to the "validity, scope and enforceability of" the arbitration provision contained in the Agreement.

21. Although the 22 named minority shareholders were not given the express right under clause 15.2 (a) to select an arbitrator, the third arbitrator to the dispute was to be selected by the Arbitration Center. All the parties to the Agreement agreed to this process, as arguably protecting the interests of those parties which did not have the right to select the arbitrator of their choice.

22. Clause 15.2 (d) states that "each Party" irrevocably consents to the service of process, notices or other paper in connection with or in any way arising from the arbitration or the enforcement of any arbitral award. This would include the service of any notice of the Arbitration.

23. Clause 15.2 (e) also provides that "the Parties" agree to facilitate the arbitration by cooperating in good faith to expedite the conduct of the arbitration, using their best benefits to observe the time periods established by the UNCITRAL Arbitration Rules or by the Arbitration Board for the submission of evidence, etc. By clause 15.2 (f), the costs and expenses of the arbitration, including the fees of the Arbitration Board, were to be "allotted between each Party" as the Arbitration Board deems equitable.

24. Finally, clause 15.2 (g) states that any award made "shall be final and binding on each of the Parties that were parties to the dispute".

25. "Parties" and "Party" are defined in the Agreement to mean "any signatory or the signatories to the Agreement" and any person who subsequently becomes a party to the Agreement as provided in the Agreement. The 3rd Defendant signed a Deed of Adherence to the Agreement.

26. The construction of an arbitration clause should start with the presumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they had entered to be decided by the same tribunal, unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction (*Fili Shipping Co Ltd and others v Premium Nafta Products Ltd and others* [2007] UKHL 40; *The Incorporated Owners of Hamden Court v Mega Miles Construction Co Ltd* HCCT 32/2014, 2 June 2015; *Giorgio Armani SPA v Elan Clothes Co Ltd* [2019] HKCFI 530). It would require plain provision before clause 15.2 can be construed to mean that despite its clear language, references to "Parties" and "Party" should exclude from its operation and effect the minority shareholders who signed and became parties to the Agreement, who clearly have rights and obligations under the terms of the Agreement, and when the dispute which arose between the Plaintiffs and the Defendants as minority shareholders clearly arose out of or in connection with or relating to the Agreement, and the breach thereof by the Plaintiffs.

27. The Company was not a party in the Arbitration. However, at all material times, the 2nd Plaintiff was the controlling shareholder of the Company, and Su was the Chairman of the board of directors of the Company. There is only the bare assertion made by the solicitor for the Plaintiffs, in the Kan Affidavit, that the Company was not involved in the selection of the arbitrator nominated by the Plaintiffs under the Agreement, such that it constitutes a departure from the express agreement between the parties. Su's 2nd affirmation signed and filed on 26 April 2019 simply stated that he would not repeat the Plaintiffs' responses to the factual allegations made in the affirmations of the Defendants' solicitor, where the same have been stated in the Kan Affidavit, stating only that the "content of which (had) been reviewed and approved by" him.

28. As the Defendants pointed out, they had no knowledge in the Arbitration as to whether the Company had jointly appointed the arbitrator selected by the Plaintiffs, but the Plaintiffs had never raised this in the Arbitration, when they challenged the jurisdiction of the tribunal. There is an extremely strong argument that the Plaintiffs had waived any objection on the basis that the Company (controlled by the Plaintiffs) had not made the joint nomination of the Plaintiffs' arbitrator.

29. In any event, I fail to see what prejudice the Plaintiffs had or could have sustained as a result of their own failure to seek the Company's participation in the joint appointment of their arbitrator. By clause 15.2 of the Agreement, the Plaintiffs had agreed to arbitration, and they had selected an arbitrator of their choice, who had proceeded to deal with the Arbitration. Even if a ground of serious irregularity could be made out, the Court has a residual discretion to enforce the Award, if no prejudice has been shown to have been suffered as a result of the irregularity complained of (*Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1)* [2012] 4 HKLRD 1 (CA)).

30. As for the claim that the 3rd Defendant was not a party to the arbitration agreement because the Deed of Ascension she signed to confirm her acceptance of the terms and obligations of the Agreement made no reference to and adoption of the arbitration agreement contained in Clause 15, again, this was not raised for argument before the tribunal in the jurisdiction challenge. The Statement of Objection to Jurisdiction served on behalf of the Plaintiffs in the Arbitration pointed out that the 3rd Defendant was not named or listed as a party to the Agreement, but the Plaintiffs accepted that the 3rd Defendant subsequently became a party by executing the Deed of Adherence (claiming only that the Defendants had not produced copies of the Deeds). By participating in the Arbitration without raising the objection as to the absence of adoption or incorporation of the arbitration clause in the Agreement, and depriving the Plaintiffs and the tribunal of the opportunity to deal with such challenge, the Plaintiffs must have waived any such irregularity.

Whether the Defendants failed to plead and particularize their case, depriving the Plaintiffs the opportunity to present their case

31. In gist, the Plaintiffs' complaint is that the tribunal had decided the dispute in the Arbitration by reference to unpleaded and unparticularised claims of the Defendants, such that the tribunal had acted in excess of jurisdiction, depriving the Plaintiffs of a fair opportunity to present their case.

32. The Defendants' pleaded claims of the Plaintiffs' breach are clear: that the Plaintiffs had arranged to have another related entity engage in the IPO, rather than make their best efforts to complete an IPO with respect to the Company, and this was in order to deny the Defendants the benefits of the IPO and to keep all of the value of the IPO for themselves.

33. The Plaintiffs allege that the Defendants had given no particulars as to ***why*** "best efforts" had not been made by the Plaintiffs as shareholders of the Company, only that another entity had been listed. They had therefore defended the claim on the basis of the transfer of assets to enable the IPO to be carried out by another entity under the restructuring, and on the basis that the restructuring was commercially reasonable from the perspective of the Plaintiffs as shareholders of the Company.

34. The Plaintiffs claim that in reaching the Award, the tribunal had allegedly deviated from the Defendants' arguments made in the course of the Arbitration, by holding that "evidence that the Plaintiffs could have achieved an IPO at a given point in time, but failed to do so, will be sufficient to establish breach of section 8.1 (d) of (the Agreement)". They also complain that the tribunal had placed emphasis on the fact that the Plaintiffs had failed to demonstrate that the restructuring was necessary to effect the IPO, when this was never pleaded as the reason for the breach of the "commercially reasonable efforts" provision of the Agreement.

35. In my view, the Plaintiffs are purely seeking to challenge the merits of the Award and the findings made by the tribunal. The Defendants are not required to argue their case on any pleadings, to show how or why the Plaintiffs were in breach of the relevant clauses of the Agreement, or how they had not made their best endeavors. They had already pleaded the necessary and essential facts relied upon: the failure to make their best endeavors to complete an IPO with respect to the Company. That was the case the Plaintiffs were given ample notice to meet in the Arbitration, with the reasonable opportunity to present their case. The Plaintiffs did present evidence to meet the Defendants' case of breach of the Agreement, and they made detailed submissions in the Arbitration.

36. Any claim that an award is outside the terms of the submission to arbitration is narrowly construed. It only includes those decisions which are "clearly unrelated to or not reasonably required for the determination of the issues that have been submitted to arbitration" (*Grant Thornton International Limited v JBPB & Co (A Partnership)* HCCT 13/2012, 5 April 2013). I fail to see how it can be said that the findings made by the tribunal on the allegedly unpleaded and unparticularised issues (even if such complaint can be made) are outside the submission to arbitration.

37. Errors of fact or law are not grounds to set aside an Award. Nor is a claim that a decision of the tribunal was made without evidential basis. This is trite. The arguments made by the Plaintiffs under the alleged grounds of absence of a pleaded case, the tribunal acting in excess of jurisdiction, and the Plaintiffs having been deprived of a fair opportunity to present their case, are all in truth attempts at challenging the correctness of the Award. Even on the brief consideration of the case at this stage, they can be seen as devoid of merit.

38. It is totally insufficient and improper for Counsel to suggest at this stage that the Plaintiffs should be given the opportunity to consider putting in further evidence to explain any point relating to their challenge of the Award. The grounds relied upon to set aside an arbitral award "must" be stated in the Originating Summons and, if the application is founded on evidence, a copy of every affidavit intended to be used "must" be served with the Originating Summons (O 73 r 5 (4) (a) and (b) (i)). If the grounds of the application and the evidence relied upon to support the application are not set out in the Originating Summons and the affidavits served with the Originating Summons, that application can be dismissed as abuse of process (*Po Fat Construction Co Ltd v Incorporated Owners of Kin Sang Estate* HCCT 15 & 23/2013). If the Plaintiffs have not put in any or any adequate evidence before the Court to establish any ground of objection, that is the end of the matter.

Whether the tribunal made findings without evidential basis and acted in excess of jurisdiction

39. The Plaintiffs' complaint is that the tribunal had made findings as to the Plaintiffs' breach of clause 3.8 of the Agreement (concerning the requirement to give notice after registering any transfer of shares), and had awarded damages, all without evidential basis. These only serve to attack the correctness and merits of the Award, and I repeat paragraphs 36 and 37 above.

Whether the Award should be set aside on the ground of public policy

40. The ground on public policy should be narrowly construed. The Plaintiffs in this case are only relying on the arguments of alleged absence of arbitration agreement, defect in the composition of the tribunal, and making findings without pleaded particulars and/or evidential basis to assert that the tribunal had acted in excess of its jurisdiction, and that accordingly, it would be contrary to public policy to enforce the Award. Having rejected the primary grounds, there is no basis to refuse enforcement on the ground of public policy. On the contrary, there are public policy interests in upholding parties' agreement to arbitrate their dispute, facilitating enforcement of arbitral awards, and observing obligations assumed under the New York Convention for enforcement of arbitral awards, and it would be against such public policy interests to permit the Plaintiffs to delay enforcement of the Award and to avoid the obligations thereunder in the absence of any substantial grounds.

The ease or difficulty of the enforcement of the Award

41. Much reliance was placed by Counsel for the Plaintiffs on the fact that the Plaintiffs have no assets, or no substantial assets, in Hong Kong, such that any delay in enforcement would not, in fact, make enforcement more difficult. This is based on the second point of importance highlighted by Staughton LJ in *Soleh Boneh International*:

> "The second point is that the court must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult, for example, by movement of assets or by improvident trading, if enforcement is delayed. If that is likely to occur, the case for security is stronger; if, on the other hand there are and always will be insufficient assets within the jurisdiction, the ease for security must necessarily be weakened." (Emphasis added)

42. Leading Counsel emphasized that in determining whether security should be ordered, the focus should be on whether difficulty of enforcement here is increased due to delay, as security is not to facilitate the enforcement process by requiring assets to be brought into a jurisdiction where there were none before. According to Counsel, if the Plaintiffs did not have assets in the jurisdiction in the first place, this is a factor against the grant of security. Whilst I agree this is one factor, it should not be treated as the one and only or determining factor.

43. It has also been pointed out that there is only a period of approximately 4 weeks between the hearing of the application for security and the substantive hearing for setting aside the Award. Security should not be ordered, in circumstances when the time gap is short and the debtor is able to pay the award on evidence of its worldwide assets (as in the case of *Karaha Boda LLC v Persusahaan Pertambangan Minydak Dan Gas Bumi Negara* (2003) 2 HKC 200).

44. The particular facts of *Karaha Boda* have to be borne in mind. The evidence there was that the debtor had assets in Hong Kong, shares in 3 private companies, which were already frozen by an injunction and garnishee and charging orders nisi. There was apparently evidence of the value of the shares, being in the region of US $40-65 million. Significantly, the Court was able to say that the debtor was "plainly able to pay the award", on evidence that the debtor had assets worldwide of over US $7 million, and profits of over US $350 million. There was no evidence of any dissipation of assets in Hong Kong. These are all the distinguishing features of *Karaha Boda*, totally different to the facts in the present case, to which I will turn.

45. On Su's own sworn evidence, I find it impossible to believe his assertion that he has no assets of worth in Hong Kong. The case presented by the Plaintiffs is paradoxical, full of contradictions, and incredulous.

46. First, in opposition to the application for security to be ordered against him, Su has repeatedly asserted in his affirmations that he has more than sufficient assets to satisfy the Award, and has no reason to dissipate his assets in order to defeat the Award. Examples can be found in paragraph 28 of his 2nd affirmation ("My assets outside jurisdiction are more than sufficient to satisfy the Final Award"), paragraph 29 of his 2nd affirmation ("My worldwide assets are significantly more than the amount awarded to the Defendants in the Final Award"), paragraph 36 of his 2nd affirmation ("I simply cannot understand why the Defendants would suggest that I had the intention to dissipate my assets solely to defeat an arbitral award of relatively small sum compared to my assets in Mainland China and also my shareholding in Sky Solar Holdings, Limited… In any case, …the Plaintiffs have significant assets in other jurisdictions, which is more than sufficient to satisfy the award debt under the Final Award"), paragraph 14 of his 3rd affirmation ("the Final Award is just a relatively small sum compared to my assets worldwide"), and paragraph 13 of his 2nd affirmation ("it is entirely open for the Defendants to seek recognition and enforcement of the Final Award in other jurisdictions").

47. To be fair, Su did state in his 2nd affirmation that the 2nd Plaintiff was the holder of 24.5% of the total share capital of Sky Solar Holdings Ltd which is listed on NASDAQ. He claims that the value of the 2nd Plaintiff's shares is over US $12.57 million. He also claims that he has shareholding in companies based on the Mainland.

48. However, in response to the HK Injunction and the order made therein, to inform the Defendants of all his assets of an individual value of HK $50,000 or more in Hong Kong, Su deposed in his 1st affirmation that he has no such assets in Hong Kong. It is on this basis that he has opposed any order requiring him to bring any assets into Hong Kong as security.

49. Whilst asserting that he has more than sufficient assets to satisfy the relatively small sum of the Award, Su nevertheless claimed that to order security against him would stifle his claim to set aside the Award. I fail to see the logic of this, to suggest that he would somehow not able to present his case to set aside the Award, if he should be required to make payment of substantial security from his significant assets. If he should ultimately succeed in setting aside the Award, any security paid would of course be returned to him. He should have no difficulty to provide security from his significant assets.

50. As for Su's assets on the Mainland, where he ordinarily resides, he has since June 2018 been declared and listed by the Supreme People's Court on the Mainland as a "Dishonest Person Subject to Enforcement in China" (失信被執行人) ("**Dishonest Person Listing**"), because of his failure to pay a judgment debt of RMB 100,984,385 and for violating his obligations to report to the Mainland court on his assets. The Mainland courts have not been able to locate any of Su's assets for enforcement of the debt of over RMB 100 million. As a result of this Dishonest Person Listing, there are restrictions on Su's ability to travel, make investments and do business on the Mainland.

51. Su claims in his 2nd affirmation served on 28 December 2018 that he was in the process of being removed from the Dishonest Person Listing, and that he would be removed "shortly", but according to the Defendants' latest search conducted on 24 April 2019, Su's Dishonest Person Listing remains unchanged.

52. The Plaintiffs argued that security should not be ordered by this Court, as the Defendants are sufficiently and adequately secured by virtue of the different injunctions and orders they have applied for, in different jurisdictions, by way of enforcement of the Award. It is not disputed that in March 2019, the Defendants obtained a temporary restraining order ("**US Restraining Order**") and an order of prejudgment attachment from the US District Court for the Southern District of New York ("**US Court**"). The US Restraining Order was to prohibit the 2nd Plaintiff from dealing with 13.38 million American Depositary Shares in Sky Solar Holdings, Limited. In their application to set aside the default judgment against the 2nd Plaintiff and the attachment order, the Plaintiffs disputed the New York Court's jurisdiction over the 2nd Plaintiff. As director of the 2nd Plaintiff, Su deposed to the fact that the 2nd Plaintiff did not own any property, did not have any bank account or trading account, and never had any offices in New York. Su also declared that the 2nd Plaintiff does not own any American Depositary Shares in Sky Solar Holdings, Limited, that it only holds an American Depositary Receipt, which is a certificate of American Depositary Shares of Sky Solar Holdings, Limited registered under the name of the 2nd Plaintiff. In particular, Su declared that until December 2018, the American Depositary Receipt which evidences 13.38 million American Depositary Shares of Sky Solar Holdings, Limited, registered in the name of the 2nd Plaintiff, was held in Zürich, but since December 2018, the said Receipt "has been held in another place outside the United States".

53. Whatever this somewhat convoluted statement may mean, Su has declared in the US proceedings that the relevant American Depositary Receipt was not in New York, and that the New York Court has no jurisdiction over the 2nd Plaintiff. He has declared that the Receipt is held outside the United States, in an undisclosed place.

54. Leading Counsel for the Plaintiffs confirmed at the hearing before this Court that the Plaintiffs do not dispute the Defendants' case, that Citibank controls the relevant American Depositary Shares certificates of the 2nd Plaintiff. However, according to the Defendants, Citibank has confirmed that it does not hold the relevant certificates in New York.

55. It is therefore totally unclear whether the US Restraining Order affords to the Defendants the security which the Plaintiffs maintain (to this Court) that the Defendants have. The premise of the 2nd Plaintiff's opposition to the US proceedings and US Restraining Order is that the 2nd Plaintiff has no assets in New York against which the Award can be enforced by the US Court.

56. Also in March 2019, the Defendants obtained a worldwide freezing order against the assets of the 2nd Plaintiff (a BVI company) ("**BVI Order**"). The application for enforcement of the Award in the BVI has been opposed by the 2nd Plaintiff and is stayed pending resolution of the setting aside application in Hong Kong.

57. In April 2019, the Defendants also obtained a domestic freezing order from the English court against the 2nd Plaintiff, directed at the American Depositary Receipt, on the basis that the Receipt was held in London. It is not known if this will be maintained.

58. On the evidence, therefore, the Plaintiffs have been far from candid, if not deliberately evasive, in disclosing the location and value of their assets, in Hong Kong or elsewhere, a far cry from the facts of *Karaha Boda.* This is notwithstanding the disclosure requirements contained in the BVI Order, whereby the Plaintiffs (with Su being ordered as the sole director of the 2nd Plaintiff) were compelled to disclose the 2nd Plaintiffs' assets worldwide.

59. On the issue of the assertions made in Su's affirmations filed in these proceedings, and his overall credibility, one point has to be made. In this case, apart from the 1st affirmation of Su's disclosure of assets made pursuant to the HK Injunction, which was in Chinese and signed by Su on 14 December 2018, with a notarial certificate issued on 14 December 2018 attesting to Su's attendance and signature on the same day, the other affirmations of Su which are relied upon by the Plaintiffs in these proceedings were all signed and filed after the event. On 28 December 2018, a solicitor of Dentons Hong Kong LLP made an affirmation on behalf of the Plaintiffs, exhibiting a copy of "the finalized draft 2nd affirmation" of Su, said to have been confirmed by the Plaintiffs to be accurate and correct. The solicitor stated that the Plaintiffs undertook to file the signed affirmation with the Court "as soon as practicable". On 9 April 2019, the solicitor made another affirmation on behalf of the Plaintiffs, exhibiting a copy of "the finalized draft 3rd affirmation" of Su, stating again that the Plaintiffs undertook to file the signed affirmation with the Court "as soon as practicable". The exhibited drafts of Su's 2nd and 3rd affirmations were not signed nor dated.

60. It was only on 26 April 2019, after protests from the Defendants' solicitors, that the Plaintiffs' solicitors filed with the Court signed versions of Su's 2nd and 3rd affirmations. According to the notarial certificates issued on 25 April 2019, these affirmations were only purported to have been signed by Su on 22 April 2019.

61. No explanation whatsoever has been offered by or on behalf of the Plaintiffs, as to why, despite their undertakings to the Court, the 2 affirmations of Su exhibited to affirmations filed on 28 December 2018 and 9 April 2019 were only signed on 22 April 2019 and filed on 26 April 2019. The Court can only infer that either Su had been reluctant to sign to affirm the contents of his affirmations, or he was totally indifferent to the affirmation. Little credibility can be attached to these contents.

62. It is also material to the Court's consideration and exercise of discretion that the Plaintiffs have taken steps, upon receiving notice of the Defendants' enforcement proceedings in Hong Kong and in New York, to dispose of their assets.

63. The Defendants highlight the fact that within days of being notified of the Defendants' intention to seek enforcement of the Award in Hong Kong, when the Defendants served their evidence on 24 October 2018 and made their counterclaim for enforcement, Su transferred the entire ownership of his shares in SS HK to Chen on 2 November 2018. In the 1st affirmation of Kang Jian (the Defendants' solicitor) sworn and filed on 24 October 2018 ("**Kang 1**"), the Defendants made reference to the availability of Su's assets in Hong Kong for enforcement of the Award, and to the shares in the two Hong Kong companies, SS HK and Sino Sea International Resource Development Group Limited, wholly and directly owned by Su.

64. Su maintains on the one hand that he has no substantial assets in Hong Kong, such that he should not be compelled to bring in assets by way of security. In this regard, he explained in his 2nd affirmation that SS HK had been "effectively dormant since 2008" and is "of little or no value", that SS HK ceased business since 2008, and no longer maintains any bank account in Hong Kong. According to Su, SS HK has subsidiaries, incorporated only recently, but the subsidiaries have no business operations or assets.

65. Despite the assertion that SS HK is an asset of no or little value, Su cannot dispute the transfer of his shares in SS HK to Chen (an employee of the 2nd Plaintiff) on 2 November 2018 ("**Transfer**"), shortly after learning that the Defendants seek to enforce the Award against his shares in SS HK. To explain this Transfer, Su claimed that it was necessary for "valid and legitimate business reasons". He also claimed that prior to the grant of the HK Injunction on 20 November 2018, he had been advised by his solicitors that there was no constraint on him to deal with the shares in SS HK in the ordinary course of business operations.

66. Su then sought support from the Dishonest Person Listing, which puts constraints on his ability to travel freely out of the Mainland, to make investments, and to carry on businesses in general. According to Su, the Transfer was to enable subsidiaries of SS HK to open bank accounts in Hong Kong and to begin operations in Hong Kong, to further the "joint ventures" he had set up with his other business partners for the "international expansion of the corresponding businesses operated by (Su)", and his business partners, on the Mainland. Su stated that Chen had been his business partner for some 5 years, and that the Transfer was made to Chen, as she has full understanding of the strategy and needs of the businesses. He claims that the subsidiaries of SS HK were not "***solely***" owned by him.

67. As the Defendants have noted, Su's own evidence shows that SS HK (wholly owned by him prior to the Transfer) has interests in business ventures which even now are being expanded. The shares in SS HK cannot be worth less than HK $50,000 as Su suggests in his 1st affirmation of disclosure of assets. The Defendants maintain that the Transfer to Chen for HK $10,000 was disproportionately below value, given SS HK's active and substantive business and assets. They refer to the 2017 Annual Report of Listco, which reflects outstanding loans of US $2,181,000 from SS HK, and outstanding loans of US $1,339,000 due to SS HK during the year of 2017. The Defendants claim that the Transfer was made by Su to Chen, in order to frustrate the enforcement of the Award.

68. The Defendants further highlight that Su has never stated that he has ***not*** retained a beneficial interest in SS HK and its subsidiaries, after the Transfer to Chen for the purposes of his business ventures with his partners. Despite the long explanation Su sought to make, he has not stated that after the Transfer, he would no longer have interests in or profit from the planned international business development and expansion. Su's own evidence refers to and acknowledges his interests in these joint ventures with his business partners for the expansion of the corresponding businesses operated by him, and his business partners, on the Mainland. The Transfer was made to Chen, referred to as Su's business partner, for the stated purpose that she may "facilitate" the opening of the corporate bank accounts, the setting up of the business platforms for the joint ventures, and in order for her to "undertake the contemplated matters". All these can be understood to mean that they were all made and done on Su's behalf.

69. Su's answer to the loans from SS HK, as recorded in the Annual Reports of Listco, is that they have been settled under a "settlement agreement" between Listco and Su in September 2017, so that no further debt is due.

70. As the Defendants have pointed out, Su has not chosen to exhibit any of the accounts and financial records of SS HK to support the assertion made in his 2nd affirmation, that the company had been dormant since 2008. The 2008 tax return he did produce stated that SS HK did *not* cease business during the period from 1 January to 31 December 2008. The Defendants have also produced evidence to show that SS HK did conduct business transactions, and entered into contracts with third parties to purchase components worth over EUR 9 million in August and September 2009, and RMB 27 million in 2012, and entered into other transactions for payment of substantial amounts of money in December 2009. It continued to conduct transactions with Sky Solar Holdings Ltd worth millions of dollars, until 2014.

71. These could not be disputed by Su, who only claimed in his 3rd affirmation that he had been misled by the accountant and company secretary of SS HK. He changed his evidence instead to say that no business activity of SS HK could be identified beyond 2014, and that he could not recall why SS HK had entered into the relevant transactions in 2009 to 2014. Despite being the sole shareholder and director of SS HK, Su's excuse was that it was only his "impression" that SS HK had been "effectively" dormant since around 2008, and that as the director of different companies in different places around the world, it was hard for him to keep track of the activities of each and every single company. This casts doubt on the veracity of his broad statements and claims concerning his assets in Hong Kong and the value of SS HK.

72. Further, after the Defendants commenced enforcement proceedings in New York on 29 January 2019, the 2nd Plaintiff (Su being its controlling shareholder and sole director) entered into a Stock Purchase Agreement, whereby the 2nd Plaintiff's 13.38 million American Depositary Shares (each representing 8 ordinary shares) and its 2.6 million ordinary shares in Sky Solar Holdings Limited were sold for approximately US $27 million. A deposit of US $1.9 million was already been paid to the 2nd Plaintiff.

73. The Plaintiffs emphasized that this sale was before the making of the US Restraining Order on 3 March 2019.

74. The Defendants' case is that the disposition was nevertheless part of the evidence of the Plaintiffs' movement of assets after having been given notice of the Defendants' enforcement proceedings in the different jurisdictions, highlighting the likelihood of enforcement being rendered more difficult by any further delay.

75. In all, I do not believe Su's self-serving assertion that he has no assets in Hong Kong. He has demonstrated little regard for orders made by the courts, and I believe that he will have no hesitation to dissipate and remove the Plaintiffs' assets in order to frustrate the effects of any order of any court, and to defeat the Defendants' actions to enforce the Award made against him and the 2nd Plaintiff. His Dishonest Person Listing is specimen example of his inclinations and propensity. From Su's own evidence, it would appear that he regards truth to be fluid and flexible, to be bended and stretched to fit such case as he sees necessary and convenient to present for his own immediate purpose. On his presentation, the facts are as readily changeable as the patterns of a kaleidoscope at the slightest movement. For this Court, he is a totally unreliable witness.

Conclusion

76. Having considered the lack of merits of the Plaintiffs' setting aside application, the absence of any frank disclosure of the Plaintiffs' assets, and the conduct of the Plaintiffs since enforcement proceedings have been commenced, I take the view that despite there being less than 4 weeks before the hearing of the setting aside application, enforcement of the Award will be rendered more difficult by further delay, and security must be ordered as a condition for the further conduct of the Plaintiffs' application for setting aside.

77. On that basis, on 7May 2019, in the absence of any acceptable undertaking provided by the Plaintiffs despite having been invited to do so, this Court ordered the Plaintiffs' provision of security within 7 days of 50% of the Award, by payment of US 6,850,000 into court or by provision of a guarantee issued by a bank in Hong Kong for the said sum. It was further ordered that unless such security be furnished by 4 pm on 14 May 2019, the Plaintiffs' application to set aside the Award be dismissed, with costs, on indemnity basis.

78. The costs order nisi for the security application is that the Plaintiffs are to bear the Defendant's costs, on indemnity basis.

Final Remarks

79. By way of final observation, it is astonishing how ready lawyers now are to swear affidavits and make affirmations as to factual matters on behalf of parties to contested litigation. *The Hong Kong Civil Procedure 2019* sets out reminders on good and bad practice so far as the swearing of affidavits is concerned. Paragraph 41/5/4 states:

> "An affidavit should where possible be sworn by the person with the most direct knowledge of the matters deposed to. This will usually be the party rather than his solicitor. Solicitors should only give evidence on behalf of their client in exceptional circumstances which should be justified. The court may require solicitors to explain why it is proper for them to make an affidavit on behalf of the client, and the costs of adducing such evidence may be disallowed in the absence of a satisfactory explanation. See *UES International (HK) Ltd v Maritima Maruba SA* (unrep, HCA 632/2011, [2013] HKEC 1831)."

80. In this modern age, the fact of a party not being in Hong Kong would very rarely be a satisfactory explanation for not having an affidavit being sworn and signed by the party outside Hong Kong, and being exhibited. Of course, the original, duly signed, sworn and attested copy of the party's affidavit or affirmation should in all cases be filed as soon as possible after having being produced as an exhibit.

81. In the present case, it is extremely regrettable that the best practice mentioned above has not been followed. To discourage such practice, the Court may in the future refuse to allow affidavits on facts which are made for a party by solicitors who do not have direct knowledge of the matters deposed to, in the absence of a satisfactory explanation. This is particularly so in cases where the facts are disputed and the decision of the Court turns on the very facts.

(Mimmie Chan)

Judge of the Court of First Instance

High Court

Mr Clifford Smith SC and Mr Kerby Lau, instructed by Dentons Hong Kong LLP, for the 1st & 2nd plaintiffs

Mr John Han (Solicitor Advocate), of Kobre & Kim, for the 1st to 3rd defendants