HCCT55/2001

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS
NO.55 OF 2001

IN THE MATTER OF an arbitration award of the International Court of Arbitration, Paris, France dated 28 June 2001

AND

IN THE MATTER OF Section 2GG of the Arbitration Ordinance, Cap.341

AND

IN THE MATTER OF Order 73 rule 10(1)(b) of Rules of High Court, Cap.4

BETWEEN

SOCIETE NATIONALE D'OPERATIONS PETROLIERES DE LA COTE D'IVOIRE – HOLDING (acting on behalf of Petroci Exploration Production S.A.) — Plaintiff

and

KEEN LLOYD RESOURCES LIMITED — Defendant

Before : Hon Burrell J in Chambers

Date of Hearing : 4 March 2002

Date of Decision : 11 March 2002

D E C I S I O N

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1. By an order dated 27 January 2002 (pursuant to a hearing on 18 December 2001) this court dismissed an application by the defendant to set aside a judgment entered on 2 August 2001 which allowed enforcement of an I.C.C. arbitration award obtained against the defendant by the plaintiff. On 31 January 2002 the defendant issued a notice of appeal against the refusal to set aside the judgment.

2. By this summons the defendant seeks a stay of the enforcement order pending the hearing of the appeal. The summons was first listed to be heard on 18 February 2002. On that day, however, the defendant requested an adjournment because its grounds for requesting a stay was that it was unable to pay the judgment debt as at 18 February and the evidence in support of the contention was not available. A two weeks adjournment was granted with costs. After some discussion the court indicated that at the adjourned hearing it would want to hear from the defendant about its willingness or ability to pay the judgment sum in full into court pending the appeal, should the court be considering granting a stay. The plaintiff had informed the court that had the defendant offered to do so, it would not have opposed the stay (whilst at the same time reserving its position that in law no stay should be granted).

3. At the adjourned hearing, the defendant had filed an affirmation setting out its financial position and had offered, as a condition of a stay being granted, to undertake not to dispose of any of its properties in Hong Kong pending the appeal. According to the affirmation the net asset value of its Hong Kong properties was $243 million as at June 2000 when they were valued. However, their net asset value was only about 20% of their gross value.

4. At the conclusion of the adjourned hearing I indicated to the defendant that my decision would be either to refuse the stay or to grant it on condition that the full sum be paid into court within 21 days. I gave that indication at the conclusion of the hearing because the 21-day period, if the conditional stay was to be granted, was to run from the date of the hearing, namely 4 March 2002.

5. Having now considered the submissions on both sides my decision is that the application for a stay be refused for the following reasons.

6. Firstly, the defendant has demonstrated an unwillingness to comply with what the court considered to be a reasonable condition, namely to pay the judgment sum into court. It says it has assets to the value of $243 million. The judgment is for approximate $48 million. Since the date of the hearing on 18 December 2001 and in spite of an indication from the plaintiff and the court on 18 February no steps have been taken to raise such a sum. What is more, the defendant's affirmation states that since June 2000 it has sold properties to the value of

$342 million but does not state where this capital now is or how it has been used.

7. Secondly, the normal rule is that there should be no stay. A stay should only be granted if there are exceptional circumstances. A stay can be granted if there are strong grounds of appeal or that an appeal might be rendered nugatory should a stay not be granted. In this case the specific ground advanced is that the defendant cannot pay the judgment. In fact the evidence that it cannot pay is far from satisfactory. Such a contention is a mere assertion in the defendant's affirmation. It has property of considerable value and it has recently sold property of an even greater value. Furthermore in recent correspondence and affirmations (December 2001 and January 2002), it has stated that it would pay and has denied being in a precarious financial situation.

8. Thirdly, the defendant submits that a factor to be taken into account when deciding if the court should exercise its discretion to order a stay is the fact that the defendant will be wound up if a stay is not granted and therefore will be unable to pursue its appeal. The answer to this is simply that the liquidators can carry on with any appeal or even commence one themselves if deemed prudent and in the company's interest.

9. Fourthly, there is an additional matter which weighs in the plaintiff's favour when considering the question of discretion. The plaintiff has ample funds to repay the defendant if and when required to do so.

10. For all these reasons, the application of a stay is refused with costs.

(M.P. Burrell)
Judge of the Court of First Instance,
High Court

Mr Temogen Hield of Messrs Coudert Brothers, for the Plaintiff

Mr Joseph Fan of Messrs Alvan Liu & Partners, for the Defendant