HCMP928/2008

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO. 928 OF 2008

BETWEEN

FG HEMISPHERE ASSOCIATES LLC	Plaintiff
and	
DEMOCRATIC REPUBLIC OF THE CONGO	1st Defendant
CHINA RAILWAY GROUP (HONG KONG) LIMITED	2nd Defendant
CHINA RAILWAY RESOURCES DEVELOPMENT LIMITED	3rd Defendant
CHINA RAILWAY SINO-CONGO MINING LIMITED	4th Defendant

Before : Deputy High Court Judge Mayo in Chambers

Date of Hearing : 14 October 2008

Date of Judgment : 22 October 2008

J U D G M E N T

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1. This is an application by the 1st defendant for security for costs pursuant to Order 23 rule 1 in relation to the proceedings taken by the plaintiff to enforce an arbitration award.

2. The 1st defendant is seeking to invoke sovereign immunity as the main ground upon which it claims that the court has no jurisdiction to enforce the said award.

3 Mr Barlow SC for the 1st defendant contends that it is plainly the plaintiff's case that the court would have jurisdiction pursuant to Order 23 rule 1 :

> "Security for costs of action, etc. (O.23, r.1)
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> 1.—(1) Where, on the application of a defendant to an action or other proceeding in the Court of First Instance, it appears to the Court—(25 of 1998 s.2)
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> (a) that the plaintiff is ordinarily resident out of the jurisdiction, or
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> (b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or
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> (c) subject to paragraph (2) that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or
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> (d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation, then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.
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> (2) The Court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.
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> (3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim. "

4. He argued that there could be no question that the present proceedings come within the ambit of the order.

5. The Rules of the High Court are delegated legislation and there is no remit for a judge to disregard the clear provisions contained in an order.

6. I do not think that it is quite as simple as that.

7. Mr Coleman SC for the plaintiff argued that the application which was being made to enforce the award was being made pursuant to the provisions contained in Order 73 of the Rules which deal specifically with arbitration.

8. Order 73 rule 10 provides for the method by which any award may be enforced.

9. Under Order 73 rule 10(1) the application is made initially *ex parte*. If the order is made it is served on the other side and they are given 14 days in which to apply to set it aside.

10. The award is a New York Convention award which is governed by section 2GG of the Arbitration Ordinance, Cap. 341.

11. The regime under the New York Treaty is extremely onerous and a heavy burden is placed upon any party seeking to set aside an award.

12. Considerable assistance can be derived from the English Court of Appeal case of *Gater Assets Ltd v. Nak Naftrogaz Ukrainiy* [2007] 2 Lloyd's Law Reports 588. By a majority, the court ordered that the order for security for costs made by the judge in the court below should be set aside.

13. On the question of jurisdiction Rix LJ had this to say at page 603 :

> "71. I acknowledge that the present day provisions of the CPR may be viewed as suggesting that an application to enforce an arbitration award is to be regarded as a 'claim' to which Naftogaz is defendant, because such an application is to be made in an 'arbitration claim form' (CRP 62.18) and the court's own order giving permission to enforce and entering judgment against Naftogaz refers to Gater as claimant in an arbitration claim and to Naftogaz as 'defendant'. Moreover, CPR 62.18(3) says that parties on whom the arbitration claim form is served 'must acknowledge service and the enforcement proceedings will continue as if they were an arbitration claim under section I of this Part'. Section I at CPR 62.1(3) says that Part 58 applies to arbitration claims; and CPR 58.3 applies the Rules in general to 'claims in the commercial list unless this Part or a practice direction provides otherwise'. I would regard that as a strong, even formidable, argument.

72. Nevertheless, these provisions are complex and not without their mystery for present purposes: and it remains the case that there is no express application of the security for costs regime to the statutory enforcement of an arbitration award. Moreover Dardana appears to be the sole authority for saying that such a regime applies, and even there the judge was unwilling to order security, in part because enforcement is in principle different from an ordinary claim. Above all, there is something counter-intuitive about an award debtor being able to obtain security for costs in order to challenge the formal or public policy validity of an award in what are clearly intended to be, in the absence of a challenge by the award debtor, highly summary and essentially quasi-administrative proceedings. If anything, that counter-intuition is increased by knowing that, in the case of a domestic award, any challenge has to be made timeously, by the challenger, and at risk of that challenger being himself, by express statutory provision outside the CPR regime, required to give security for costs of his challenge. Does it really make all that difference that the challenge comes by way of a defensive response to a move for enforcement, especially as in the meantime it has always remained the obligation of an award debtor to pay the award? It may be that all these matters go only to discretion, rather than to jurisdiction; but it will be recalled that one of the conditional gateways of the security for costs regime under CPR 25.13 itself is that an order is just in all the circumstances. "

and at page 604 :

"75. It is unsatisfactory that these matters should still be subject to any degree of controversy. One possibility, however, is that they have been deliberately left uncertain, because of the importance of the issue in the special context of international arbitration – or simply because, with the problematical exception of Dardana there never appears to have been any attempt to claim security for costs in enforcement proceedings. Even so, since these matters were not deeply canvassed before us, and because in any event in my judgment this appeal can ultimately be decided as a matter of principle under the rubric of discretion, I would be prepared to assume, but not decide, that there is technical jurisdiction to order security for costs against any award creditor who brings enforcement proceedings to statute. My present view, however, is that a distinction is to be made. Where, at the initial stage, the judge is not prepared to order summary enforcement but directs service of the claim form, the technical position is that the enforcement claim is assimilated to any claim and is brought within the ordinary CPR regime. Where, however, as here, there is summary, albeit provisional, enforcement, the enforcement proceedings remain outside the ordinary CPR regime. In any event, for the reasons given below, I consider that as a matter of principle, the courts should be reluctant, save in an exceptional case, to order security for costs against the award creditor, even if the power to do so is technically available. I proceed, however, contrary to my view on the basis that the regime is available here. "

14. Moses LJ agreed with the views expressed by Rix LJ and said at page 608 :

> "92. But in my judgment, Buxton LJ is incorrect in concluding that the court has jurisdiction in the circumstances of this case, that is where Colman J made a without notice order which did not require the arbitration form to be served on Naftogaz pursuant to 62.18(3). I conclude that the court did not have jurisdiction to make an order for security of costs. My reasons for that conclusion rest on the very grounds which found Rix LJ's refusal to endorse such an order as a matter of discretion. I should explain my reasoning.
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> 93. The crucial issue, as I see it, is whether, in relation to the enforcement of a domestic award, an award debtor could seek security for costs from the court. An award debtor, under a domestic award, who seeks to challenge an award timeously may be ordered to give security for costs (see section 70(6) of the 1966 Act, cited para 44). It is not possible to discern any coherence in a scheme which permits an award debtor, who fails to object, to be in a better position to obtain an order in his favour. In those circumstances, to require an award creditor, under a Convention award, to provide security is to impose more onerous conditions, contrary to article III of the convention. Burxton LJ's riposte, at para 115, does not seem to me fully to meet the point that such an order may be made against an award debtor in a domestic arbitration."

15. It will be observed from these extracts that the issues of jurisdiction and the relevant exercise of the discretion which is proposed in hearing applications of this nature are to an extent inter-related.

16. I have no doubt that the correct approach to an application for the enforcement of an arbitration award is the one referred to by Findlay J in *T.K. Bulkhandling GMBH v. Meridian Success International Ltd*, unreported, being HCMP4765/1998.

17. There are numerous examples of situations where different rules overlap each other and that what is required is a consideration of the context of the problem which arises. Here what is being considered is the enforcement of an arbitration award and clearly Order 73 must take precedence over Order 23.

18. For these reasons I am satisfied that the court does not have jurisdiction to make the order sought by the 1st defendant and the application is dismissed.

19. I make an order *nisi* that the plaintiff is to have its costs.

(Simon Mayo)

Deputy High Court Judge

Mr Russell Coleman, SC, instructed by Messrs Sidley Austin, for the Plaintiff

Mr Barrie Barlow, SC, instructed by Messrs Huen Wong & Co., for the 1st Defendant