H&C S Holdings Pte Ltd *v* Mount Eastern Holdings Resources Co., Limited [2015] SGHC 323

Case Number	: HC/Originating Summons No 1035 of 2015
Decision Date	: 21 December 2015
Tribunal/Court	: High Court
Coram	: Kan Ting Chiu SJ
Counsel Name(s)	: Mr Peter Gabriel, Mr Manoj Nandwani & Ms Christine Ong (Gabriel Law Corporation) for the Applicant; Mr Daniel Chia Hsiung Wen & Mr Ker Yanguang (Morgan Lewis Stamford LLC) for the Respondent.
Parties	: H&C S Holdings Pte Ltd — Mount Eastern Holdings Resources Co., Limited

Civil Procedure – Summons for Injunction

International Arbitration Act (Cap 143A)

21 December 2015

Kan Ting Chiu SJ:

Background

1 This is an unusual and unsatisfactory application. H & C S Holdings Pte Ltd ("H Holdings") applied by ex parte originating summons under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") for relief:

> 1. That the award in the arbitral proceedings in Arbitration No. 223 of 2013 is not rendered ineffectual by the dissipation of assets by the Respondent; and/or
>
> 2. That the amount in dispute in Arbitration No. 223 of 2013 is secured; and/or
>
> 3. As an interim measure, the monies paid by the Applicant into Court on 19 October 2015, pursuant to DRI 102 and 103 of 2015 as ordered by the Learned Assistant Registrar Ms Ho Yee Tien Delphine in the Order of Court ORC No. 6799 and 6800 of 2015 dated 16 October 2015, shall remain in this Court, pending the determination and issue of the final award in Arbitration No. 223 of 2013, and the Applicant to have the right of set-off if such award determined by the arbitral tribunal in Arbitration No. 223 of 2013 is given in its favour; and/or
>
> 4. For an interim injunction to be given, restraining the Respondent from obtaining any payment out of this Court from the monies paid by the Applicant into this Court on 19 October 2015, pursuant to DRI 102 and 103 of 2015 as ordered by the Learned Assistant Registrar Ms Ho Yee Tian Delphine in Order of Court ORC No. 6799 and 6800 of 2015 dated 16 October 2015,

collectively, "the Prayers".

2 H Holdings and the respondent in this application, Mount Eastern Holdings Resources Co., Limited ("Mount Eastern"), were the counter-parties in two arbitration proceedings, SIAC Arbitration No 200 of 2013 ("Arb 200") and SIAC Arbitration No 223 of 2013 ("Arb 223"), arising from two

contracts for the sale of iron ore. Mount Eastern was the claimant in Arb 200 and H Holdings was the claimant in Arb 223. Arb 200 was completed with Final Award 48 of 2015 ("the Final Award") issued in favour of Mount Eastern, while Arb 223 is still ongoing. After the Final Award, H Holdings applied to court in OS 870 of 2015 under s 24 of the IAA to aside the final award. Pending the hearing of that application, an Assistant Registrar made orders for the sums of US$1,527,660.00, US$188,417.40 and SGD$145,593.04 to be paid into court, and the payment was made on 19 October 2015 as stated in Prayer 3 of the application. When the application came before Quentin Loh J he dismissed it and ordered that the money paid into court be paid to Mount Eastern's solicitors. An application to Loh J for a stay of his order pending appeal was dismissed as well. H Holdings is dissatisfied with the outcome and has appealed against the orders in appeals CA 197/2015 and CA 198/2015 against Loh J's refusal to set aside the Final Award and the refusal to stay of enforcement pending appeal.

The present application

3 The title to the originating summons states *inter alia*:

> In the matter of An Arbitration under the Rules of the Singapore International Arbitration Centre (ARB No. 223/2013) Between H&C S Holdings Pte. Ltd as the Claimant therein, and Mount Eastern Holdings Resources Co., Limited as Respondent

The purpose of the application is disclosed in an affidavit deposed by Wang Kaiyang ("Wang"), a director of H Holdings, and filed on 4 November 2015 in support of the present application, where he stated:

> 11. … As the setting aside of the Final Award has not been disposed of yet … the payment sum should not be paid out to [Mount Eastern] yet. Notwithstanding, any final award in ARB 223 in [H Holdings'] favour will render any subsequent Judgment nugatory without any interim preservation of this asset.

The "Final Award", the "payment sum" and "this asset" all refer to the money paid into court on 19 October 2015 following the Final Award in Arb 200. Under "Urgency of the Application", Wang stated:

> 14. … the protection sought … is urgently required as there is an immediate risk of dissipation by [Mount Eastern]. This would greatly prejudice [H Holdings] because they would not be able to recover the said sum of money should the decision of the Arbitral Tribunal in ARB 223 be in [H Holdings'] favour, especially as demonstrated by the fraudulent conduct of [Mount Eastern] as shall be outlined hereafter and/or its employees and its likely insolvent state.

Additionally, under "High risk of dissipation", he elaborated that:

> … there exists an immediate risk that the Respondent will *dissipate the payment sum of the Final Award* in part and/or in its entirety once it is paid out to them for the purpose of *paying its own creditors*. This will greatly prejudice the Applicant because they would not be able to recover the said some of money should the decision of the Arbitral Tribunal in ARB No.223 of 2013 be in the Applicant's favour. [emphasis added]

That is the only form of dissipation referred to in the affidavit.

4 Wang referred to three matters which give rise to the risk of dissipation. First, he stated that Ma Xian Jun ("Ma"), whom he described as the "owner" of Mount Eastern, had been arrested for contractual fraud and was facing trial (without explaining the nature of the "ownership" and the

charge(s) against Ma). Second, Mount Eastern owed two creditors a total sum of US$2,900,093.09. Third, Mount Eastern Holdings (Hong Kong) Co Limited ("Mount Eastern HK") was wound up by a creditor on 15 April 2015. As regards this third matter, Wang added "…as I believe that they are for all intents and purposes the same company, I am certain that the insolvent state of Mount Eastern Holdings (Hong Kong) Co Limited is reflective of the Respondent's own insolvency." No connection was made of the investigations against Ma to Mount Eastern or the effect the investigations had on Mount Eastern, and no grounds were given for the belief that Mount Eastern HK was for all intents and purposes the same company as Mount Eastern, or for the assertion that the financial state of the former was reflective of the financial state of the latter.

5 There were no allegations of any wrongdoing with respect to the anticipated payments to creditors. Using the money to pay creditors is a decision which Mount Eastern was entitled to make, and there is nothing objectionable or illegitimate about it if it is done in good faith. Furthermore, there was no evidence that Mount Eastern was unable to pay its debts, and the references to Ma's arrest and the winding-up of Mount Eastern HK were of little relevance or assistance to the application.

The powers of the Court or Judge

6 The provisions of the IAA under which the application is made is set out in the title of the originating summons

> In the matter of Sections 12(1)(g), (h) and (i), 12A(2) and 12A (4) of the International Arbitration Act (Chapter 143A, 2007 Rev Ed.)

The powers of the Court or Judge in dealing with the application would be the powers conferred by those provisions.

7 Section 12 deals with the powers of the arbitral tribunal, and s 12(1)(*a*) to (*i*) sets out the orders and directions which the arbitral tribunal can make. The IAA also gives the High Court or a Judge of the High Court powers to make orders in connection with arbitration proceedings. Section 12A(2) provides that:

> Subject to subsections (3) to (6), for the purpose of and in relation to an arbitration referred to in subsection (1), the High Court or a Judge thereof shall have the same power of making an order in respect of any of the matters set out in section 12(1)(*c*) to (*i*) as it has for the purpose of and in relation to an action or a matter in the court.

The Court and the Judge have some, but not all, of the powers of the arbitral tribunal.

8 The powers conferred by s12(1)(*c*) to (*i*) are the powers to make orders or give directions to any party for:

> (*c*) giving of evidence by affidavit;
>
> (*d*) the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;
>
> (*e*) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;
>
> (*f*) the preservation and interim custody of any evidence for the purposes of the proceedings;

(*g*) securing the amount in dispute;

(*h*) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and

(*i*) an interim injunction or any other interim measure.

These powers will be referred to as power (*c*), (*d*) and (*e*) and so on, and the orders made pursuant to those powers as a (*c*) order, a (*d*) order, a (*e*) order and so on. The powers are discretionary powers, and a tribunal, Court or Judge would not make an order without being satisfied that that it should be made.

9 The powers of the High Court or a Judge thereof to make orders and give directions differ in urgent and non-urgent cases. Section 12A(4) provides that:

(4) If the case is one of urgency, the High Court or a Judge thereof may, on the application of a party or proposed party to the arbitral proceedings, make such orders under subsection (2) as the High Court or Judge thinks necessary for the purpose of preserving evidence or assets.

Additionally, s 12A(5) provides that:

(5) If the case is not one of urgency, the High Court or a Judge thereof shall make an order under subsection (2) only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the arbitral tribunal) made with the permission of the arbitral tribunal or the agreement in writing of the other parties.

The effect of s 12A(4) is that in an urgent case, a Court or Judge has the power can make (*c*) to (*i*) orders when the Court or Judge thinks *necessary for the purpose of preserving evidence or assets*.

10 When the Prayers were examined against the setting of the powers of a Court or Judge to grant relief under s 12A(4), the conclusions were as follows:

(a) No order could be made in respect of Prayer 1 as it did not state the measure(s) required to ensure that any arbitral award would not be rendered ineffectual.

(b) No order could be made in respect of Prayer 2 as it did not state the amount in dispute which was to be secured or the security to be provided. (In respect of Prayer 1 and Prayer 2, the affidavit filed in support of the application did not address the matters omitted in the prayers.)

(c) Prayer 3 came within powers (*h*) and (*i*).

(d) Prayer 4 was really not an application for an interim injunction. There was no threatened violation of rights, which is a prerequisite for the making of a restraining order, and the relief sought was not an interim injunction, but a permanent open-ended injunction. This prayer did not come within power (*i*).

11 Prayers 1 and 2 were deficient and defective, and Prayer 4 fell outside the powers of the Court or Judge. That left Prayer 3, which has been referred to in [3]–[5] above. As noted, H Holdings' case was simply that if the money in court is paid to out, Mount Eastern might use it to pay its creditors, and the money might not be recovered if the Final Award in Arb 200 is set aside. H Holdings' case would be stronger if there was some basis to believe that the anticipated payments were intended to

put the money out of its reach, but there was no assertion or indication of that. To the contrary, H Holdings acknowledged that there were judgment debts owing by Mount Eastern which needed to be paid.

Conclusion

12 On the completion of this examination of H Holdings' application, the conclusions were that Prayers 1, 2 and 4 were for relief that the High Court or a Judge could not grant. While Prayer 3 was for a (*h*) order or (*i*) order which a Court or Judge may make, it should not be made for the reasons stated in[4] and [5] above. Mount Eastern should not be denied the benefits of the Final Award on the ground H Holdings put up. The application was dismissed with costs.

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