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21-6-12

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 FINANCIAL SERVICES DIVISION

3
4 CAUSE NO: FSD 40 OF 2012-PCJ

5
6 The Hon Sir Peter Cresswell
7 31st May 2012

8
9
10 IN THE MATTER OF THE FOREIGN ARBITRAL AWARDS ENFORCEMENT LAW
11 (1997 REVISION)

12
13 BETWEEN:

14 QINHE ENERGY HOLDINGS

Plaintiff

15 AND

16
17
18 (1) LINVEST ENERGY PARTNERS L.P.
19 (2) LINVEST ENERGY HOLDINGS LIMITED

Defendants

20
21
22
23 APPEARANCES: Mr. Shaun Tracey of Appleby for the Plaintiff
24 Mr. Nick Dunne of Walkers for the Defendants

25
26
27 RULING
28
29

30 I am asked to rule as to costs in the circumstances described below.

31
32 There are before the Court the Plaintiff's Summons dated 26 April and Notice of Motion dated
33 17 May 2012. These applications concern enforcement of a Hong Kong arbitration award which
34 required the Defendants to do certain acts (the release of share charges, indemnities and other
35 security) within a time specified, upon the receipt of certain shares that were to be transferred
36 from the Plaintiff to the Defendants. The Plaintiff transferred the relevant shares to the
37 Defendants on 1 February 2012, in compliance with the terms of the arbitration award, but there
38 has been inordinate and inexcusable delay to the extent identified below by the Defendants in
39 complying with their obligations to release the share charges, indemnities and other security.

40
41 It is common ground that the Plaintiff's costs up to and including 26 March 2012 should be taxed
42 if not agreed on the standard basis.

1
2 2. The Plaintiff seeks costs on an indemnity basis from 27 March 2012. The Defendants
3 have conducted the proceedings improperly and unreasonably by failing to comply with
4 the Award and Order in particular –

5
6 (a) The Defendants were obliged to provide the releases on or immediately after 1
7 February 2012. They failed to do so, despite correspondence from the
8 Plaintiff's Hong Kong attorneys pressing for compliance.

9
10 (b) The Plaintiff was forced to obtain recognition of the Award by the Order in
11 the Cayman Islands, and that order granted costs on the standard basis.

12
13 (c) The Defendants failed to comply with that Order, which was served upon
14 them on 27 March 2012, and again, with penal notices, on 14 May 2012.

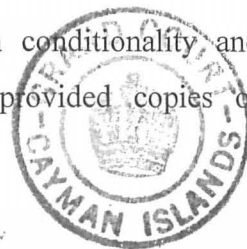
15
16 (d) Throughout this period, the Defendants made no challenge to the Award or to
17 the Order of this court.

18
19 (e) The Plaintiff, through its attorneys, gave repeated warnings that enforcement
20 proceedings would be brought, including stipulating a deadline of 18 May
21 2012, following which enforcement proceedings would be commenced.

22
23 (f) Notwithstanding this, the Defendants gave no releases by that deadline. On
24 22 May 2012, they gave what they claimed to be complaint releases but what
25 were in fact conditional releases, without prejudice to their right to challenge
26 the requirement for the releases. These releases were rejected by the Plaintiff,
27 whose attorneys provided the Defendants' attorneys with compliant releases.

28
29 (g) Appleby called Walkers on 29 May 2012 to see whether they were on the
30 record. Walkers said they were awaiting instructions.

31
32 (h) The Defendants have now tacitly accepted that such conditionality and
33 qualifications were unacceptable since, today, they provided copies of



1 unconditional executed releases and confirmed that they will be providing
2 original counterparts on 4 June 2012, without any covering letter containing
3 terms as to conditionality,
4

5 (i) The Defendants have therefore been in continuing breach of the Award and
6 the Order of this court and have acted in contempt of Court since 11 April
7 2012, and in any event entirely unreasonably. Their promised compliance
8 with the Award is solely as a result of the pressure of the enforcement
9 proceedings.
10

11 (j) The Plaintiff has been put to substantial and entirely unnecessary expense to
12 enforce its rights under the Award. The Defendants have been in breach of the
13 Award. The Plaintiff seeks an Order that the Defendants pay the Plaintiff's
14 costs on the indemnity basis from 27 March 2012.
15

16 (k) Such an indemnity costs order would reflect the unreasonableness of the
17 Defendants' conduct and also send a signal that the Cayman courts will not
18 tolerate the breach of arbitral awards and orders giving effect to such awards
19 in the Cayman Islands.
20

21 Mr. Nick Dunne ("Mr. Dunne") for the Defendants resists the Plaintiff's application for costs.
22 He submits that the applications by Summon dated 26 April and Notice of Motion dated 17 May
23 2012 were unnecessary.
24

25 I should record that despite the second paragraph of Skadden's letter of 22 March 2012 –
26

27 *"we are instructed that in the course of discussions this week between our respective*
28 *clients, your clients indicated that... 2 they were taking immediate steps to execute the*
29 *appropriate documentation for the release of the security and indemnities to comply with*
30 *their award obligation under paragraph 3 of Section IX of the Final Award"*.
31

32 Mr. Dunne was not able to point to any steps being taken to provide the necessary releases until
33 18 May 2012, a gap of almost two months.
34



1 The applications were served by Appleby on behalf of the Plaintiff on 23 May 2012. Mr. Dunne
2 referred to Latham & Watkins' letter of 22 May 2012 and submitted that it was unreasonable on
3 the part of the Plaintiff to serve the applications on 23 May having regard to the terms of Latham
4 & Watkins' letter of 22 May. It should however be noted that that letter contained at page 2 the
5 following reservation –

6
7 *“further the [three] [deeds] of release and the two release letters enclosed [are]...
8 without prejudice to Linvest contention that paragraph 3 of the operative order and part
9 9 of the Final Award dated 15 December 2012 consist of decisions of matters beyond the
10 scope of the submission to arbitration. We also make it crystal clear the Linvest does not
11 accept that its ability to seek to set aside the orders of the First Tribunal are in any way
12 hindered or limited by paragraph (f) of Section 12.2 of the NPA as contended by QYNAG
13 and all Linvest rights and remedies in this regard are fully reserved. The release letters
14 have specifically been executed and are provided to you on the basis outlined in this
15 letter.”*

16
17 Mr. Dunne referred to Skadden's reply on 23 May to which I refer for its full terms and effect. In
18 particular without limitation in paragraph 1 of that letter Skadden wrote –

19
20 *“your clients are not entitle to impose or subject their execution [of] delivery of the
21 releases to any of the conditions or qualifications in your 22 May letter including inter
22 alia that the draft release letters [shall] operate “only” to release or discharge a party
23 from a liability to indemnify Linvest in respect of another party's breach of the Amended
24 and Restated Shareholders' and Note Holder's Agreement SHA and the Note Purchase
25 Agreement NPA or that the Deeds of Release and Release Letters are provided without
26 prejudice to Linvest contention that Operative paragraph 3 of the Final Award consists
27 of matters beyond the scope of the submission to arbitration.... Your clients' obligation
28 to execute and deliver the releases is absolute and unconditional pursuant to Tribunal's
29 Order in paragraph 3 of Section 9 of the Final Award and the court Order.”*

30
31 Mr. Dunne referred to Appleby's letter of 24 May 2012 enclosing mark-ups showing Appleby's
32 amendments to the Deeds of Release which mark-ups contained an entire agreement clause –

33
34 *“the parties agreed that this deed constitutes the entire agreement between them with
35 regard to its subject matter and supersedes all previous drafts agreements, arrangements
36 and other understandings between them whether oral or written.”*

37
38 The intention as I understand it of the entire agreement clause was to make it plain that the Deeds
39 of Release were not subject to any qualification by way of side letter or otherwise. On 30 May
40 2012 by letter of that date Latham & Watkins on behalf of the Defendants accepted for the first
41 time the entire agreement clause.



1 Mr. Dunne's core submission is as follows –

2

3 He accepted that the foreign arbitration awards application was justified but he submitted that
4 there was no need for the additional remedies sought by the Summons and Notice of Motion
5 because by 22 May it was clear that Linvest were going to provide releases.

6

7 But he realistically and correctly accepted that the letter of 22 May 2012 contained qualifying
8 provisions which were "probably inappropriate".

9

10 If one stands back from this unhappy dispute the striking fact is that an international arbitration
11 award has not been complied with for a number of months.

12

13 I do not take into account the assertion (which as far as I can see is unsupported by any
14 evidence) that the Defendants did not pay the costs awarded until the service of the statutory
15 demand. I leave that matter on one side and make it absolutely clear that I do so.

16

17 I repeat that the order for costs up to and including 26 March 2012 is on the standard basis.
18 There might have been grounds for arguing that the costs up until 26 March 2012 should have
19 been on the indemnity basis, but Mr. Tracey does not make that submission. But following 27
20 March 2012 several weeks went by when (so far as I can tell from the papers) no action was
21 taken by the Defendants to comply with the relevant part of the Award. When eventually action
22 was taken on 22 May 2012 (by Latham & Watkins' letter of that date) the reservation quoted
23 above was insisted upon. The reservation was (in my opinion) shown to be unjustified by the
24 fact that as recently as 30 May 2012 the Defendants accepted the entire agreement clause.

25

26 In the circumstances set out above in my opinion the Defendants have acted improperly and
27 unreasonably from 27 March 2012. I make an order that the Defendants pay the Plaintiff's costs
28 from that date on the indemnity basis confined to the Plaintiff's Cayman legal counsel costs but
29 to include the costs of communicating with and taking instructions from Skadden. It is important
30 for the future that international arbitration awards should be timeously complied with. The
31 materials before the court in the present case show that weeks have gone by without appropriate
32 compliance, with the result that unnecessary expense has been incurred.

33

34 I order accordingly.

35

36 DATED this 21st day of June 2012

37

38

39


The Honourable Justice Crewe
Judge of the Grand Court

