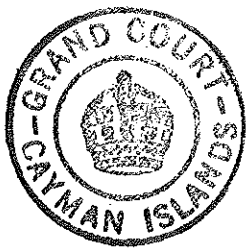

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 40 OF 2012-PCJ

The Hon Sir Peter Cresswell
31st May 2012

IN THE MATTER OF THE FOREIGN ARBITRAL AWARDS ENFORCEMENT LAW (1997 REVISION)

BETWEEN:

QINHE ENERGY HOLDINGS

Plaintiff

AND

(1) LINVEST ENERGY PARTNERS L.P.
(2) LINVEST ENERGY HOLDINGS LIMITED

Defendants

APPEARANCES: Mr. Shaun Tracey of Appleby for the Plaintiff

Mr. Nick Dunne of Walkers for the Defendants

RULING

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

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

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

By Order made on 26 March 2012 (pursuant to Section 5 of the Foreign Arbitral Awards Enforcement Law (1997 Revision)) the Plaintiff was granted leave to enforce, in the same manner as a judgment or order, the awards made in the arbitration in Hong Kong between the Plaintiff and the Defendants being –

(a) A Hong Kong arbitration award dated 15 December 2011;

(b) A Corrective Award to the Hong Kong arbitration award dated 6 February 2012; and

(c) An additional Award to the Hong Kong arbitration award dated 10 February 2012. (collectively "the Award").

The Plaintiff seeks indemnity costs limited to the costs of its Cayman legal counsel, but to include the costs of communicating with and taking instructions from Skadden, Arps, Slate Meagher & Flom ("Skadden") in Hong Kong, from 27 March 2012 because (it is said by Mr. Shaun Tracey ("Mr. Tracey") for the Plaintiff) the Defendants have behaved improperly and unreasonably.

On 22 May 2012, over three and a half months after the releases were required to be given the Defendants proffered to the Plaintiff for the first time releases that did not fall within the requirements of the Award.

On 23 May 2012, the Plaintiff's attorneys wrote to the Defendants' attorneys to inform them that the proffered releases were unacceptable for a number of reasons, including *inter alia* the fact that they were seeking to deliver the releases subject to qualifications and conditions.

On 24 May 2012, the Plaintiff provided the Defendants with a mark-up of the version of the releases that had been proffered on 22 May 2012. However the Defendants until today failed to execute releases substantially in the form provided by the Plaintiff on 24 May 2012. Until today the Defendants have not confirmed to the Plaintiff that the releases, provided for the first time today, are unconditional and unqualified as required under the terms of the Award and Order.

Mr. Tracey submits as follows –

1. Today Hong Kong time the Defendants provided photocopies of executed releases which appear to comply with operative paragraph 3 of the Award. They promised to exchange original counterparts on 4 June 2012. On the assumption this formality will be met, the Plaintiff requests that its Summons and Motion for Enforcement be adjourned with liberty to apply (and I so order). Once the counterparts have been duly exchanged, the Plaintiff will withdraw its applications.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Dunne's core submission is as follows –

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

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

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

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

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

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

I order accordingly.

DATED this 21st day of June 2012

Cresswell J

The Honourable Justice Cresswell
Judge of the Grand Court

GRAND COURT - CAYMAN ISLANDS