FEDERAL COURT OF AUSTRALIA

Sanum Investments Limited v ST Group Co., Ltd [2017] FCA 75

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| File number: |  |
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| Judge: | **FOSTER J** |
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| Date of judgment: | 8 February 2017 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – whether the applicant, an award creditor under a foreign arbitral award, should have leave to serve its Originating Application and affidavits in support upon the respondents who are resident in the Lao People’s Democratic Republic |
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| Legislation: | *International Arbitration Act 1974* (Cth), s 3 and s 8  *Federal Court Rules 2011*, r 10.42 and r 10.43 |
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| Date of hearing: | 8 February 2017 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 20 |
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| Solicitor for the Applicant: | Mr T Kwong of Hicksons |
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| Solicitor for the Respondents: | The Respondents did not appear |

ORDERS

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|  | | NSD 2201 of 2016 |
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| BETWEEN: | SANUM INVESTMENTS LIMITED  Applicant | |
| AND: | ST GROUP CO., LTD  First Respondent  SITHAT XAYSOULIVONG  Second Respondent  ST VEGAS CO., LTD (and another named in the Schedule)  Third Respondent | |

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| JUDGE: | FOSTER J |
| DATE OF ORDER: | 8 FEBRUARY 2017 |

**THE COURT:**

1. Pursuant to r 10.42 and r 10.43 of the *Federal Court Rules 2011,* GRANTS leave to the applicant to serve the Originating Application, the two affidavits sworn by Mr Jody Jordahl on 21 December 2016 and a copy of this Order upon each of the respondents in the Lao People’s Democratic Republic.
2. ORDERS that the costs of the Interlocutory Application filed by the applicant on 22 December 2016 be costs in the proceeding.
3. GRANTS liberty to all parties to apply on three (3) days’ notice or on such shorter notice as a Judge might allow.
4. DIRECTS that the applicant inform the Associate to Foster J when service has been effected upon the respondents so that the Court might arrange for an appropriate Case Management listing soon thereafter.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(REVISED FROM TRANSCRIPT)

**FOSTER J:**

1. The applicant is an award creditor under a final arbitral award dated 22 August 2016 made by an arbitral tribunal, the members of which were appointed by the Singapore International Arbitration Centre (**award**). The respondents are the award debtors under the award.
2. The applicant commenced the present proceeding on 22 December 2016. In its Originating Application it claims the following relief:

1. Pursuant to section 8(3) of the *International Arbitration Act* 1974, a declaration that the Applicant is entitled to enforce the award dated 22 August 2016 as if it were a judgment of the Court.

2. Judgment for the Applicant against the respondents in the amount of:

(a) USD 200,000,000.00 together with interest at the rate of 6.00% per annum compounded annually from 12 April 2012; and

(b) SGD 916,375.50 plus USD 1,235,403.70 together with interest at the rate of 6.00% per annum compounded annually from 22 August 2016.

3. In accordance with section 52 of the *Federal Court of Australia Act* 1976, the Respondents are to pay to the Applicant post-judgment interest on the amounts set out in paragraphs 2 above.

4. Costs.

5. Any further or such orders as the Court thinks fit.

1. The respondents are resident in the Lao People’s Democratic Republic.
2. By Interlocutory Application, also filed on 22 December 2016, the applicant seeks an order granting leave to it to serve the Originating Application and an affidavit sworn by Mr Jody Jordahl on 21 December 2016 on the respondents in the Lao People’s Democratic Republic.
3. That application for service outside this jurisdiction has been made pursuant to r 10.42 and r 10.43 of the *Federal Court Rules 2011* (**FCR**).
4. Rule 10.43 FCR requires that, before the Court ought authorise service out of this jurisdiction of an Originating Application, it should be satisfied of the following matters, namely that:
5. The Court has jurisdiction in the proceeding; and
6. The proceeding is of a kind mentioned in r 10.42; and
7. The party applying for leave to serve outside this jurisdiction has a *prima facie* case for all or any of the relief claimed in the proceeding.
8. The substantive relief claimed by the applicant in this proceeding is for enforcement of the award pursuant to s 8(3) of the *International Arbitration Act 1974* (Cth) (**the IAA**). By that section, this Court is given jurisdiction to enforce a foreign award as if the award were a judgment or order of this Court. For the purposes of s 8(3), a foreign award is an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the New York Convention applies, a copy of the English text of which is set out in Schedule 1 to the IAA.
9. At the hearing of the applicant’s application for leave to serve outside this jurisdiction, the applicant tendered a certified copy of the award (Exhibit A) and two agreements (Exhibit B).
10. I am satisfied from reading and considering the award itself that it is an arbitral award made in a country other than Australia (Singapore). I am also satisfied that Singapore is a Convention country.
11. In order to address the question of whether the award was made in pursuance of an arbitration agreement, the applicant tendered a Master Agreement dated 31 May 2007, the parties to which are the applicant, the first respondent, the second respondent, the third respondent and other related entities, and a second agreement entered into on 6 August 2007 and styled *“Participation Agreement”,* the parties to which are the applicant and the fourth respondent.
12. Clause 2(10) of the Master Agreement provides as follows:

If any dispute shall arise, the Parties agree to conduct an amicable negotiation. If such dispute cannot be settled by mediation, the Parties may submit such disputes to the Resolution of Economic Dispute Organization or Courts of the Lao PDR according to the provision and law of Lao PDR in accordance with this Agreement. All proceedings of the arbitration shall be conducted in Lao and English languages.

Before settlement by the arbitrator under the rules of the Resolution of Economic Dispute Organization, the Parties shall use all efforts to assist the dispute resolution in accordance with the laws of Lao PDR.

If one of the Parties is unsatisfied with the results of the above procedure, the Parties shall mediate and, if necessary, arbitrate such dispute using an internationally recognized mediation/arbitration company in Macau, SAR OPRC.

1. Clause 19 in the Participation Agreement is (*inter alia*) a dispute resolution clause. That clause is in the following terms:

**19. Applicable Law and Dispute Resolution**

(a) This Agreement is governed by the laws of Lao PDR.

(b) Any dispute, controversy or claim arising out of or relating to this Agreement, including any question regarding its existence, validity or termination, the parties agree to conduct an amicable negotiation. In the event such dispute cannot be settled by mediation, the unsettled dispute shall be referred to and resolved by, unless the parties otherwise agree, Resolution of Economic Dispute Organization or Courts of the Lao PDR according to the provision and law of Lao PDR.

(c) If one of the parties is unsatisfied with the results of the decision or judgment of the above procedure, the Parties shall mediate and, if necessary, arbitrate such dispute using an internationally recognized mediation/arbitration at the Singapore International Arbitration Centre (SIAC), Singapore and the rules of SIAC shall be applied.

(d) The tribunal shall consist of three arbitrators. Each of the parties to this Agreement (as a group) shall each be entitled to appoint one arbitrator and the third shall be nominated by the chairman of the arbitration in Singapore, but must be an arbitrator of a different nationality from that of the others. All proceeding of mediation or arbitration shall be conducted in English language.

(e) The parties shall continue to perform their respective obligations under this Agreement despite the occurrence of a dispute or arbitration to resolve that dispute.

1. Although there are some discrepancies between the requirements of the two clauses, for present purposes, I am satisfied that the award was made in pursuance of the provisions of the two clauses which I have extracted, read together. There is a sufficient basis in the reasoning of the tribunal to conclude that the arbitration which resulted in the award was conducted pursuant to the clauses to which I have referred.
2. Accordingly, I am satisfied that the Court has jurisdiction to hear and determine the claims for relief made by the applicant in this proceeding.
3. Item 10 in r 10.42 FCR is in the following terms:

Proceeding for an order under Division 28.5 in relation to an arbitration under the *International Arbitration Act 1974*.

1. The proceeding comfortably fits within that item.
2. As to the question of whether the applicant has made out a *prima facie* case for the relief which it claims, the applicant’s legal representative referred me to two affidavits sworn by the president of the applicant, Mr Jody Jordahl, on 21 December 2016. The evidence contained in those affidavits established the fact that the award had been made, that a copy of the award had been served upon the respondents at their business address in the Lao People’s Democratic Republic and that no payments in reduction of the award debts had been made by any of the respondents to the applicant.
3. In light of the matters referred to at [17] above, I am satisfied that the applicant has made out a *prima facie* case for all of the relief which it claims in this proceeding.
4. Accordingly, I am satisfied that the applicant is entitled to relief substantially in accordance with the relief which it seeks in its Interlocutory Application filed on 22 December 2016.
5. There will be orders accordingly.

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| I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Foster. |

Associate:

Dated: 10 February 2017

SCHEDULE OF PARTIES

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| Respondents |  |
| Fourth Respondent: | S.T. VEGAS ENTERPRISE LTD |