I. COURT OF FIRST INSTANCE

A. T.K. BULKHANDLING GMBH v. MERIDIAN SUCCESS INTERNATIONAL LTD. [1998] HKCFI 801; HCMP4765/1998 (30 NOVEMBER 1998)

HCMP004765/1998

1998, No. MP 4765

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

IN THE MATTER OF the Arbitration Ordinance (Cap. 341

and

IN THE MATTER OF an arbitration

BETWEEN

T.K. BULKHANDLING GMBH (formerly OPT SHIPPING GMBH) — Plaintiff

AND

MERIDIAN SUCCESS INTERNATIONAL LIMITED — Defendant

Coram: The Hon Mr Justice Findlay, in Chambers

Date of hearing: 25 November 1998

Date of handing down of judgment: 30 November 1998

JUDGMENT

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1. I have before me a summons issued by the "defendant" on 22 October 1998 under Order 23 for an order that the "plaintiff" provide security for the "defendant's" costs on the ground that the "plaintiff" is resident outside the jurisdiction. I place the descriptions of the parties in parenthesis because, although this is the description in the title of the case, the "plaintiff" is more correctly the "creditor" and the "defendant" more correctly the "debtor"; the titles used in the applicable Order 73. This, in my view, is not just a matter of nomenclature, but a recognition by Order 73 that the person against whom an award has been made is in a position similar to that of a judgment debtor, and not to a party to an action.

2. On 15 September 1998, the creditor applied to me for an order that it be at liberty to enforce an arbitration award made in London. This was an award falling within the New York Convention. This application was made under section 2GG of the Arbitration Ordinance (Cap. 341) and Order 73.

3. Section 42 of Chapter 341 says that a Convention award is enforceable either by action or in the same manner as a domestic award. The creditor here chose to seek to enforce the award, not by action, but under section 2GG and Order 73.

4. Under Order 73, rule 10, the process by which a person seeks leave to enforce an arbitral award is by "application", although the court hearing the application may direct that an originating summons be issued. Order 73 and the Arbitration Ordinance (Cap.341) provide the same procedure for enforcing both domestic arbitral awards and foreign arbitral awards enforceable under the New York Convention. Order 73 provides its own code for enforcing awards under section 2GG, and includes, in rule 10A, a special provision for ordering security by a debtor seeking to set aside an order.

5. In accordance with the usual practice, the creditor's application for leave to enforce the award was made by ex parte application on affidavit to me in chambers, on the papers, without any appearance, without any originating process, the application being contained in the affidavit in support. On 16 September 1998, I granted the application. As is usual, my order informed the debtor that he could apply to set aside the order, and said that the order would not be enforced until the expiry of 14 days.

6. On 26 September 1998, the debtor issued a summons by which it sought an order setting aside my order of 16 September 1998.

7. On 22 October 1998, the debtor issued a summons seeking security. This is the summons now before me. The summons prays for an order to "give security for the defendant's costs in this action". The italics are mine. There is, of course, no action here, and nothing in the nature of an action.

8. Order 23 provides for the ordering of security for costs "on the application of a defendant to an action or other proceeding". Sub-rule (3) makes it clear that "defendant" refers to a party who is in the position of a defendant. It is also clear that the Order does not cover proceedings that are interlocutory in nature because these are not in the nature of an action.

9. Order 5 provides that civil proceedings are begun by writ, originating summons, originating motion or petition. The ex parte application on affidavit before me does not fall under any of these classes.

10. I am satisfied that that Order 23 does not apply to the enforcement procedures provided for in Order 73. These procedures are not in the nature of an action, and the debtor is not a defendant. If it were envisaged that a debtor involved in the Order 73 procedure should be permitted to apply for security for costs, that would have been provided for in Order 73, as that Order has provided for security to be provided by the debtor. And I do not believe that this result is accidental. Where an award is made under a domestic arbitration agreement, there is, by definition, no foreign party. The New York Convention provides, in Article III, that "There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.". If it were so that a creditor seeking to enforce a Convention award might have to provide security for the debtor's costs, this would be a more onerous condition than that facing a creditor seeking to enforce a domestic award, who would have no such liability. In my judgment, the rules have been drafted to avoid that consequence.

11. Even if I am wrong in this conclusion, and it is possible to make such an order as sought by a debtor facing enforcement of a Convention award, I believe that this power should be exercised only in the most unusual circumstances. Miss Cheng, with her usual frankness, said that she was conscious that her application might appear unusual given "the spirit and intent of the New York Convention", and she suggested that I should devise some special safeguards for this type of case; perhaps imposing some "high standard" on the debtor. Well, frankly, I cannot think of the kind of case where it would be appropriate, given the factors I have mentioned, to order a creditor to provide security, so I am unable to suggest such safeguards or high standard. All I am able to say is that I am satisfied that this case is not at all extreme or unusual, and not the sort of case in which, if the jurisdiction existed, it would be appropriate to order security.

12. In the result, the debtor's application is dismissed. There seems no obvious reason why the costs should not follow the event. I make an order nisi that the debtor pay the creditor's costs of this application.

JK FINDLAY

Judge of the High Court
Court of First Instance

Representation:

Mr Russell Coleman, instructed by Messrs Sinclair Roche & Temperley, for the plaintiff.

Miss Teresa Cheng, instructed by Messrs Crump & Co, for the defendant

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