



Court of Appeal of Hong Kong

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CACV 31/2011

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO. 31 OF 2011
(ON APPEAL FROM HCCT NO. 45 OF 2009)

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BETWEEN

SHANDONG HONGRI ACRON
CHEMICAL JOINT STOCK COMPANY
LIMITED

Applicant/
Creditor

and

↕PETROCHINA**↕** INTERNATIONAL
(HONG KONG) CORPORATION
LIMITED

Respondent/
Debtor

—————
Before: Hon Kwan JA in Chambers

Dates of Written Submissions: 14, 21 and 28 July 2011

Date of Handing Down of Decision on costs: 11 August 2011

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DECISION ON COSTS
—————

1. On 13 June 2011, I handed down my decision dismissing the respondent's application for security for costs of the appeal. I made an order *nisi* that the respondent is to pay the applicant's costs in any event on a party and party basis, with a certificate for two counsel. The respondent applied by summons on 27 June 2011 to vary the order *nisi* that there should be no order as to costs of its failed application, alternatively the applicant be deprived of half of its costs and with no certificate for two counsel. I directed that this application be dealt with on the basis of written submissions without a hearing.

2. To seek a no costs order on an application which the respondent has lost is simply unrealistic. Nothing further need be said about this.

3. The respondent's position, as stated in its two submissions of ten pages, may be summarised as follows:

(1) it is not asking for an "issue based order" but a "proportionate costs order", namely, that the costs awarded to the applicant should be reduced by 50%;

(2) it is relying on principle (iii) in *In re Elgindata Ltd. (No. 2)* [1992] 1 WLR 1207, namely, that the court may deprive a successful party of part of his costs if that party raises issues or makes allegations on which he fails and such issues have caused a significant increase in the length or costs of the proceedings;

(3) the applicant has raised a number of grounds to oppose the application for security for costs (set out in paragraphs 1 and 17 of my earlier decision) and has failed on all of them except the issue that the court should not exercise its discretion to order security in the context of a foreign arbitration award against an award creditor ("the Discretion Issue");

(4) the issues on which the applicant failed constituted the bulk of the issues or arguments between the parties, a substantial proportion of the time and costs was spent on those issues and this has significantly increased the length and costs of the proceedings;

(5) the applicant had never made clear to the respondent or explained in detail its argument on the Discretion Issue until it served its skeleton on the respondent five days before the hearing; and

(6) a certificate for two counsel should not be granted as the application is a straightforward interlocutory application.

4. I reject the above contentions of the respondent. I see no sufficient basis for departing from the general rule that costs should follow the event. The issues on which the applicant failed were easily disposed of and would not have caused significant increase in the length or costs of the proceedings. Besides, it lies ill in the mouth of the respondent to

complain of lengthy affidavits and evidence filed by the parties dealing with the substantive merits of the case of each when it was the respondent who asserted that the appeal had no merits in the first letter of its solicitors seeking security for costs.

5. Quite clearly, it was the Discretion Issue that was the substantial issue in this application. It was not a point decided previously by the Court of Appeal and which I did not find easy to resolve. The applicant had given notice to the respondent that the Discretion Issue would be taken to oppose the application in the letter of its solicitors dated 24 March 2011 and its affidavit in opposition filed on 23 May 2011, although the detailed arguments were not developed. It was really up to the respondent's legal team to do their own research and form their own view on the Discretion Issue. They decided to proceed with the application and the Discretion Issue was resolved against them. This issue justified the engagement of leading counsel, who prepared the written submission.

6. I decline to vary the order *nisi* as sought by the respondent. I also decline to vary the order from paying costs in any event to costs forthwith, as sought by the applicant. I order the respondent to pay the applicant's costs of the application for security for costs and the application to vary the order *nisi* in any event. I grant a certificate for two counsel in the application for security for costs only.

(Susan Kwan)
Justice of Appeal

Ms Teresa Cheng, SC and Mr Adrian Lai, instructed by Messrs Hogan Lovells, for the Applicant

Messrs Mayer Brown JSM, for the Respondent