H & CS Holdings Pte Ltd v Glencore International AG

No. CR-2019-001425

High Court of Justice Business and Property Courts of England & Wales Insolvency and Companies List (ChD)

25 March 2019

[2019] EWHC 1459 (Ch)

2019 WL 02450499

Before: Insolvency and Companies Court Judge Jones

Monday, 25 March 2019

Representation

Miss J. Meech , Counsel (instructed by Locke Lord LLP) appeared on behalf of the Applicant.

Mr M. Ouwehand , Counsel (instructed by Clyde & Co LLP) appeared on behalf of Respondent.

Judgment

I.C.C. Judge Jones:

The Recognition Application

1 I have before me an application issued on 28 February 2009 for recognition of insolvency proceedings within the jurisdiction of the Republic of Singapore ("Singapore") under the Cross-Border Insolvency Regulations 2006 in respect of the Singaporean Company, H and CS Holdings PTE Ltd ("the Company").

2 The underlying purpose of this application for recognition is to achieve the benefit of the automatic stay that will be put in place when a recognition order is made under the Regulations. That purpose relates specifically in this case to arbitration proceedings between Glencore International AG (Glencore") and the Company.

3 That purpose is apparent from the affirmation of Mr Sun Willan(?) of 22 February 2019. He does not expressly appear to identify himself but he is a director of the Company. At paragraph 21 he says this:

> "As far as I am aware, the debtor [i.e. the company] has no creditors in Great Britain. However, the debtor is subject to an arbitration commenced by Glencore International AG on 26 January 2017 (ICC Arbitration No. 22571/TO), where the Tribunal has been convened in England, despite the debtor's legal representatives seeking a stay of the arbitration. Following the filing of the application, a substantive hearing of the arbitration took place on 11 February 2019 without the debtor being present. The Tribunal will make its final award after 4 March 2019 following receipt of the parties' closing submissions and the parties' respective bill of costs."

It is apparent from that paragraph that the existence of the arbitration is the only reason for seeking the relief of recognition in this country.

The Request to Modify the Automatic Stay and the Arbitrations

4 Recognition is not opposed by Glencore, who appear before me, but, as a creditor it seeks modification of the automatic stay to permit the arbitrations to continue. This is explained within

the witness statement of their solicitor, Mr Jackson of Clyde & Co LLP, who makes clear that the modification is sought in respect of two arbitrations: The primary arbitration referred to by Mr William and also another which is subject to the London Court of International Arbitration Rules 2014 (Arbitration Reference 173777). This relates to a dispute under a different contract and, therefore, the modification is sought in respect of both arbitrations. This arbitration was commenced by the Company but was effectively, withdrawn by its non-participation. However, it remains extant and relevant as to costs which the arbitrators have not yet determined.

5 The "primary arbitration" has been in play for some two years before January 2019 when relevant events occurred leading up to its final hearing. Those events involved the Company's application to the Singapore High Court for a six-month moratorium under Singapore Company Law. This was shortly before the final hearing in the arbitration. There was a request in those circumstances for Glencore to agree to a six-month stay of the arbitration it had commenced on 26 January 2017.

6 Under Singapore's legislation, an interim moratorium started automatically when the application was issued. It did not, however, have any effect or jurisdiction outside of Singapore and no application was made to give effect to it, directly or indirectly, until this application was issued on 28 February 2019.

7 The approach that Glencore adopts in the context of the automatic interim moratorium is that they took adequate responsive steps by offering that counsel for the Company would be permitted to appear at the final arbitration hearing by video link from Singapore in order to reduce the costs of the Company's participation. That is not a matter I consider to be directly relevant to me. What is relevant, however, is that, on 6 February, the Company applied to the arbitrators for a stay and that the stay was refused on 8 February 2019.

8 It is not for me to decide whether that decision is one which is capable of future challenge on the merits or in law. That is not a matter argued before me. I approach this application from the premise that the arbitrators were entitled under the terms of the arbitration to decide whether to grant a stay and to reach their decision.

9 The arbitration took place without further involvement of the Company and the hearing was concluded before these proceedings were issued. What remains is for the arbitrators to produce and issue their award. Once that occurs, Glencore will have a determination pursuant to the contractual terms upon which it relies. It will then, in principle, be able to seek enforcement of the award, although the request for modification by Glencore before me is made on terms of an undertaking not to do so for the period during which the Singapore insolvency process is in existence (subject to further order).

10 That is the background. I ought to deal next with the issue of recognition, because, although it has not been opposed by Glencore, plainly I need to be satisfied that the requirements of the Cross-Border Insolvency Regulations are met.

Should the Proceedings in Singapore be Recognised?

11 In this case, the foreign proceedings may be described, using the terminology as understood within this jurisdiction, as a "scheme of arrangement". It is a collective judicial or administrative proceeding in a foreign state, pursuant to a law relating to insolvency. The Singaporean Companies Act applies and the application for a moratorium was filed at the end of January 2009. It was confirmed at a hearing before Justice Vinodh Coomaraswamy on 20 February 2019. The purpose of the scheme is to achieve an arrangement whereby creditors will accept terms which will enable the Company to continue in business whilst paying, and after having paid, a lesser overall total sum to unsecured non-preferential creditors in accordance with the terms of the scheme. Overall, the scheme, and therefore the assets and affairs of the debtor Company, is subject to control or supervision by the Singapore courts for the purposes of this arrangement.

12 In those circumstances, in my judgment, this evidence establishes that the insolvency proceedings which remain extant in Singapore are foreign main proceedings, the applicant is a foreign representative who may apply for recognition and the requirements of paragraphs 2 and 3 of Article 15 of The Cross-Border Insolvency Regulations are met. As a result, this foreign main proceedings is recognised and the effects prescribed by Article 20 , which include the automatic

stay, do now come into effect.

Modification of a Stay – The Law

13 The next question, therefore, is whether, on the application of Glencore, or indeed, in principle, by the court of its own motion, the automatic stay should be modified to the extent that the arbitration proceedings will be able to continue.

14 Against that background, I need to identify the legal tests. Article 19 of the Cross-Border Insolvency Regulations 2006 deals with an urgent request by the foreign representative to protect the assets of the company. It includes the potential to ask, for example, for execution to be stayed. It is not directly relevant here because it does not arise in this case. The reason I refer to it, albeit as no more than a background feature, is that it makes clear an underlying purpose of this part of the Regulations, namely to protect the assets of the company or the interests of the creditors. Its wording provides a clear direction as to the manner in which the court is thinking when implementing the provisions of the Regulations.

15 More pertinent, however, is Article 20(1) , which imposes the automatic stay. Importantly, within sub-rule (2), it is explained that the stay shall be the same in scope and effect as if the debtor in the case of a company had been made the subject of a winding-up order under the Insolvency Act 1986 . Therefore, its application will be subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under the 1986 Act. The Article's provisions for the stay are to be interpreted accordingly.

16 In the case of a winding-up order there will be an automatic stay under s.130(2) of the Insolvency Act 1986 . The purpose is also to protect assets and the interests of creditors as a class. It aims to ensure realisations and distributions will be achieved in accordance with the statutory scheme. The proof of debt scheme within a winding up is directed at achieving a simpler and cheaper outcome to ensure more realisations are available to creditors. For example, by avoiding time and money being "lost" upon litigation.

17 Singapore's insolvency scheme for which recognition has been given is obviously different to a winding-up. However, it too involves proof of debts and the underlying concept of ensuring that as little money is spent on determining creditors' claims as is practicable. It aims to avoid the Company's assets being spent on litigation and instead provides for a process by way of proofs. I will bear that in mind in reaching my decision.

18 I will also note, but need not set out, sub-paragraphs (4) and (5) of Article 20 . Sub-paragraph (6) provides:

> "In addition to and without prejudice to any powers of the court under or by virtue of paragraph 2 of this article, the court may, on the application of the foreign representative or a person affected by the stay and suspension referred to in paragraph 1 of this article, or of its own motion, modify or terminate such stay and suspension or any part of it, either altogether or for a limited time, on such terms and conditions as the Court thinks fit."

It is to be noted how unfettered that power is, although, obviously, it is to be exercised judicially and to take into consideration the need to protect assets and the interests of creditors as a class.

19 Under Article 21(1)(a) , the Regulation provides that wider relief may be granted in appropriate cases to achieve those results and sub-paragraph (b) has the similar effect with regard to execution. Again, it is important to note the extent of the court's unfettered power and the feature that the court can even extend the effect of the stay if it is thought best for the insolvency process concerned.

20 In reaching my decision, I will also note Article 22 , which reads:

> "In granting or denying relief under article 19 or 21 , or in modifying or terminating relief under paragraph 3 of this article or paragraph 6 of article 20 [of particular relevance here], the court must be satisfied that the interests of the creditors (including any secured creditors or parties to hire purchase agreements) and other interested persons,

including if appropriate the debtor, are adequately protected."

Then at paragraph (2) of Article 22 ,

"The court may subject relief granted under article 19 or 21 to conditions it considers appropriate, including the provision by the foreign representative of security or caution for the proper performance of his functions."

That certainly does not arise here.

21 I will, therefore, approach this issue on the basis that the Cross-Border Insolvency Regulations provide for the stay, its potential extension or its modification to ensure that the aims of the foreign proceedings can be achieved efficiently and the debts and their payment be dealt with in a collective process. That includes the automatic stay avoiding money being haemorrhaged through legal proceedings. However, it is recognised that such an approach may be inappropriate and, therefore, the stay should be modified or lifted to allow matters to proceed including arbitrations to be determined.

Should this Stay be Modified? - Relevant factors

22 Continuation of the primary arbitration will mean the parties obtaining an award but no further steps being taken outside the Singapore insolvency proceeding because that is what Glencore has offered. That applies to both arbitrations, although, obviously, continuation of the arbitration started by the Company will lead only to the assessment of the costs.

23 It is to be noted that Glencore have paid the costs of the primary arbitration for which nothing else needs to be done by the participants. That includes advance costs paid to the ICC, totalling some US $250,000. There is also in place a bank guarantee in an equivalent sum representing the Company's unpaid share of the advance on costs. It has also paid all of the costs of the oral hearing on 11 February 2019, including transcription costs.

24 If the issuing of an award is stayed, it is to be anticipated that further costs will be incurred, both with regard to the cost of extending the bank guarantee, potentially until I believe after July, and also because the costs of the arbitration and the production of the award may well increase by reason of the effect of delay upon those having to produce the award.

25 In those circumstances, the longer the delay, the greater the increase in costs. It may be observed, however, that, although those costs are certainly not small, they do pale into insignificance when compared with the sum of money that is in issue in the primary arbitration. The claim of Glencore is for a sum in the region of $17 million, together with interest and possibly with costs, amounting to in the region of $22 million. The evidence before me is that there was a potential cross claim. I understand this to be the same or substantially the same claim as the Company sought within the second arbitration. That claim has not been put forward at this hearing in the circumstance of the company having decided not to pursue the second arbitration and to take no part in the primary arbitration following refusal of the stay by the arbitrators. However, it is Glencore's position that, in any event, a sum of some US $8 million would have been due as the minimum amount. They say - and I quote from the skeleton argument - that this ignores the Company's "frivolous defence". I will obviously not proceed on the basis that it is frivolous, but will recognise that there is a sum of some $8 million claimed due, in any event.

26 The position may be summarised, therefore, for the purpose of considering the stay, on the basis that it does not appear that any further significant costs will be incurred if the stay is lifted purely for the purpose of enabling the award in the primary arbitration to be issued. It is noted that it is not entirely clear that the stay would prevent that step being taken, but both sides have proceeded on that basis, whilst Glencore reserved their position in case this matter needs to go further. Nor should the issue of costs in the Company's abandoned arbitration be expensive.

27 Next it is necessary to consider what will occur presuming the insolvency scheme proceeds. I will assume it will and that the Singapore court will subsequently decide that a meeting of creditors should be called to consider the scheme.

28 There will be a system in place to decide the amount of each creditor's debt for voting. The

evidence refers to s.211(f) of the Companies Act 2006 of the Republic of Singapore. For the purposes of the meeting of creditors, the notice calling creditors will set out the manner in which a creditor is to file a proof of debt with the Company and the period within which the proof is to be filed. Only creditors who have filed the proof of debt, accordingly, will be entitled to vote at the meeting. Every proof of debt filed will be adjudicated by the person who is appointed by the Court to serve as the chairman of the meeting. All creditors are entitled to inspect the proofs of debt, subject to provisions with regard to secrecy, etcetera. The chairman must inform each creditor, who has filed a proof of debt, within such time and manner as may be prescribed by the court of the results of the adjudication of the proofs of debt filed.

29 Pausing there, this seems to me to indicate a straightforward system where, absent an award, Glencore would submit their claim, presenting their best case, as they have presented it before the arbitrators. In the event that the Company provides no assistance to the chairman with regard to that debt, it is reasonable to assume that the chairman will accept the debt. However, should the Company, as is not unreasonable to anticipate in the light of this hearing and the evidence that I have seen, wish to present a challenge to the debt based upon, for example, the cross claim raised in the arbitration, then, plainly, it must take time to do so and incur costs as a result. It is reasonable to anticipate those costs may be significant.

30 The chairman will then have to decide upon the proof of debt, taking into consideration Glencore's and the Company's information. The chairman may, in those circumstances, decide to simply take a "rough-and ready approach" to be cost effective or to incur costs to assist him in reaching a determination. Any further inquiries are likely to result in substantial costs on both sides.

31 In those circumstances, I conclude that the existence of a binding award will assist meeting the aim of the proof of debt procedure. It will make matters simpler and cheaper. Of course, the award will have been made without participation by the Company. It will have been made, for example, without the Company's cross-examination of Glencore's evidence. It will also be made without full consideration of the Company's case. Nevertheless, that situation has occurred as a result of the unchallenged, refusal of a stay by the arbitrators before this application for recognition was made. It is the "current state of play".

32 Therefore, as an award it will provide a decision based upon a properly conducted arbitration consequentially binding upon the parties. Alternatively if it right to anticipate a challenge to its binding nature for whatever reason, and I express no view upon that, at the very least it will provide an influential guide to the chairman of the Singapore insolvency of the merits of the case as presented by Glencore. That, it seems to me, will be of assistance and may, potentially, save time, effort and costs. However, it is right to state for the purpose of this decision that such anticipation is viewed purely hypothetically at this stage.

33 It is also to be noted in the context of time and expense that should the proof be rejected in whole or in part and Glencore wish to challenge that rejection, the Singapore Companies Act provides that there may be adjudication by an independent assessor appointed by agreement of all the parties to the dispute or, if there is no agreement, by the court on the application of any party to the dispute or the company. Therefore, there will then be a full adjudication by the independent assessor. Where there is disagreement by a creditor or the company, or, indeed, the chairman, with any decision of an independent assessor on adjudication, a notice of disagreement may be filed with the court. The court will then hear an application for the court's approval of the compromise or arrangements in question (i.e. the scheme itself).

34 Absent a binding award, that procedure may reasonably be anticipated. It is a procedure which would (in effect) repeat the procedures of the arbitration which have already taken place and reached the conclusion of final argument. The fact the Company failed to take part in the final, important part of that procedure is a matter of fact resulting from the refusal to grant a stay. That refusal has not been appealed and this application to lift the recognition stay should be viewed accordingly. In that circumstance it does not appear to provide any benefit to the creditors of the Company to repeat a process which is currently binding upon the Company.

35 However, and most importantly, as matters stand the award will be binding following a properly conducted arbitration and it would not be right for the recognition stay to require all those costs etcetera to be incurred as a result of the automatic stay preventing the award being issued at relatively little cost.

Case Law

36 In reaching that opinion and for the purpose of my decision I have taken consideration when exercising the unfettered discretionary power, the decision of Ronelp Marine Ltd. v. STX Offshore and Shipbuilding, Neutral Citation 2016 EWHC 2228 . This is a decision of Mr Justice Norris. I specifically refer to the passage quoted in the skeleton argument of Miss Meech is paras.29 to 31, which reads as follows:

> "29. … an affected creditor applying for permission to continue existing proceedings bears the burden of making out the case for that relief.
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> …
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> 31. Unsecured money claims are, of course, amongst the claims to be addressed in the rehabilitation plan and would inevitably be caught in any liquidation process in the event that the rehabilitation plan is rejected. As Patten J pointed out in AES Barry Ltd v TXU Europe Energy Trading [2004] EWHC 1757 at [24] it will only be in 'exceptional' cases that the court gives a creditor, whose claim is simply a monetary one, a right by the taking of proceedings to override and pre-empt the statutory machinery. The term 'exceptional' is protean: but in this context I think it means that the applicant creditor must demonstrate a circumstance or combination of circumstances of sufficient weight to overcome the strong imperative to have all the claims dealt with in the same way (and in the instant case by the insolvency court)."

37 I have borne that in mind and it would have been of particular significance had I been asked to lift the stay to enable the arbitration to take place. I give no indication of what the result might have been in that circumstances because it is of academic interest. Instead, I am concerned with a situation where, to all effects and circumstances, the arbitrations have concluded except for the issuing of the decision for the primary arbitration and the determination of costs in both.

38 I have also been referred to a number of other cases by both counsel. It seems to me, however, that, whilst, obviously, I bear them in mind, one can return to the decision of, as he then was, Briggs J in Costco Bulk Carrier Co. Ltd v. Armada Shipping SA and Another, Neutral Citation [2011] EWHC 216 . It has been reported elsewhere but I have not got the reference. He explained that one applies the same test and principles as the court would apply to a stay of a winding-up order under s.130(2) of the Insolvency Act 1986 to which I previously referred. As a result, he decided that the court has a "free hand to do what is right and fair according to the circumstances of each case" .

The Decision

39 Dealing with the primary arbitration, everything points to it being right and fair to modify the stay to enable the award to be issued. It seems to me that the line between the parties is really the Company's complaint that the arbitration should have been stayed whilst the Company was investigating or pursuing and obtaining the insolvency remedy upon which it now relies. The Company's primary position is that it was unfair and wrong to require it to be committed, in terms of finances and other resources, to pursuing the arbitration. Glencore, on the other hand, observes that all of that is, in effect, water under the bridge. The decision on the stay was a decision the arbitrators were entitled to reach. If it is going to be challenged in the future by way of appeal or other challenge, so be it, but that stage has not been reached and all that is being asked for is for the arbitrators to produce their award as a result of 11 February hearing.

40 It does seem to me that a distinction is to be drawn between the issue whether the stay should be modified and whether the making of an award in circumstances of non-attendance will affect the validity or binding nature of that award. I am only concerned with the former issue not the latter. It is not part of this decision to try to protect the Company from the outcome of the arbitrators' decision to refuse a stay or to effectively overturn that decision when all that is left is for them to produce the award.

41 I cannot approach this application on the basis that it was unfair that the Company was unable

to participate fully. It cannot be treated as unfair when it was a legitimate decision to reach within the contractual process. Of course, that is a decision which may potentially be subject to challenge and appeal in due course, but that is not a matter I am concerned with; not least because there can be no challenge or appeal until there is an award. Ironically, the obtaining of this award is the one legitimate method of trying to right what the company currently complains about.

42 It is apparent, from the terms of the arbitration and indeed the Arbitration Act, that a tribunal is entitled to proceed in the absence of a party or without their written evidence or submissions and make an award on the basis of the evidence before it. I do understand that a tribunal must give the party who did not participate an opportunity to do so. This is an obvious case where that was done. I emphasise that I make no observations upon the merits of any future challenge or appeal, if there will be one, but certainly, this is not a case where a wrong can be immediately or obviously identified and it can be said that the arbitration is plainly or ought to be treated as void, even if I had the jurisdiction to do so.

43 The arbitrators are now under a responsibility to consider the evidence and submissions and decide whether a claim has been established. They are not bound to accept the evidence and in principle, Glencore's claim could be rejected in whole or in part. I see nothing wrong in principle in an award being presented. Modification of the stay will give effect at nominal expense to the contractual process that was agreed. Indeed, it will reduce any potential increase in costs for the reasons that I have given. It will at the least have the benefit, as I have previously explained, that the chairman considering the vote will be able to look at how an independent party has viewed the case presented by Glencore. It will be for the chairman or any subsequent party so involved to decide its impact and relevance under the laws of Singapore including, if appropriate, taking into account, by way of discount or otherwise, any prospects of appeal or other challenge. I make no comment or observation upon that.

44 In reaching my decision I have taken into consideration, therefore, the fact that the award will be final and binding on both parties, unless otherwise agreed in writing. It will be conclusive as to the issues with which it deals. That is of benefit to the insolvency process, as I have explained. The decision will create new rights between the parties. Those rights, however, will not be immediately enforceable in this case because an undertaking will be given that no enforcement will take place while the insolvency process is extant.

45 That does mean, nevertheless, that the chairman will be addressing within a proof of debt procedure a binding award and, therefore, presumably only considering when deciding Glencore's voting rights whether there is a case that the award may be set aside (assuming that is then the Company's position). That raises the importance of this award and the question whether that consequence is in itself right and fair for the class of creditors in which Glencore falls to be bound by it in this process.

46 The consequence described is wider than way that it has been put on behalf of Glencore when dealing with the question of whether any prejudice will be served. Namely, that the award (if successful for Glencore) will cause no prejudice because it will not be enforced. However, this still returns to the same point. Namely, that this is the consequence of the contractual terms and the (on its face and at this stage) legitimate refusal by the arbitrators of the stay. It would not be right or fair to prevent that outcome within the Singapore process by refusing to modify the automatic stay in these recognition proceedings. The right and fair approach is to grant the modification.

47 In reaching that decision, I have taken into consideration the evidence in the second affirmation of Sun William concerning prejudice in the conduct of a defence and the need within the debt rehabilitation exercise for breathing space. I refer to paragraphs 5(a) and (b) and also at paragraph 6. However, as I have said, that prejudice is concerned with challenging Glencore's case as though the arbitration had not taken place. It really goes to grounds of challenge as and when an award is made in Glencore's favour. That is not the issue. The modification is sought to give effect to an arbitration which has concluded in circumstances where such a result will cause little adverse consequence to the Company in terms of cost etcetera now the final hearing of the issues has ended.

48 In reaching my decision, I make clear that the stay is modified only to the extent that it will permit, as far as required, the arbitrators to issue their award. The automatic stay is otherwise

unaffected subject to further order. That means that it cannot be enforced. It also means, as I understand it, that the time limits for any appeal or other challenge to the arbitration decision will be stayed. I say that, however, with caution and I make no legal decision to that effect. It has not been argued otherwise in front of me and I can see no reason, in the absence of any argument, why they would not be stayed but I say no more than that. Should that be a mistake - and I say this reluctantly, but plainly it is just to do so - and it is found that this modification of the stay will affect the requirements for or ability to appeal and some other form of order is required, the Company has permission to apply.

49 Moving to the other arbitration, the LCIA arbitration, the arbitration steps required to be carried out are for the Company to serve a response to the application within 14 days of the date of service of the respondent's costs schedule and submissions. The respondent, Glencore, can then serve a reply.

50 My reaction to this is that the amount involved is likely to be relatively small. I also anticipate that it will make little practical difference to the outcome with regard to Glencore's voting power. In those circumstances, I am reluctant to have the Company incur time and expense in putting in a response. It seems to me that the proof of debt process offers the most practical and cost-effective course in relation to this potential debt.

51 I recognise that this might lead, in practice, to that same response being served for the purposes of the proof of debt and then for the chairman having to decide the same dispute. That would be potentially unsatisfactory because the chairman would presumably need expert advice on English law. Should that occur, it would present new grounds potentially to justify modification and Glencore could return. However, I am leaving it on the basis that I urge both sides to take a sensible and practical approach, as would be required of them in these courts and I am sure is required in the Singapore courts. Namely, to reach an agreement over the costs and only to leave over limited issues. I see no reason why responsible firms of solicitors should not be able to do that.

52 I will end by mentioning that I have not taken into account an additional argument of Glencore, which can be found in its skeleton argument at paragraph 33, and I think onwards, to the effect, in summary, that there looks to be very little likelihood of the scheme of arrangement being approved by creditors taking into account the various percentages of particular creditors' debts. I recognise that in appropriate cases it can be very relevant to take such matters into account. Not in the sense of predicting the result, but in the sense of hearing from creditors as to what their views are upon such an application. However, no-one else has attended, there is no evidence from other creditors and it is right to proceed by recognising that the Singapore High Court has taken the view that these proceedings should proceed with the current moratorium in place.

53 I recognition subject to the modification permitting the award in the primary arbitration. Subject to that modification, the stay will be in line with para.43 of Schedule B to the Insolvency Act 1986 in the usual terms.