# FEDERAL COURT OF AUSTRALIA

## Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd [2020] FCA 1033

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| File number: | NSD 94 of 2020 |
| Judge: | **JAGOT J** |
| Date of judgment: | 16 July 2020 |
| Catchwords: | **PRACTICE AND PROCEDURE** – application by the applicant that the respondent provide security for the applicant's costs – whether the position of the respondent is purely defensive – where there is no cross-claim nor any order sought by the respondent against the applicant – application dismissed |
| Legislation: | *Corporations Act 2001* (Cth) s 1335<br>*Federal Court of Australia Act 1976* (Cth) ss 23, 56, 56(1)<br>*International Arbitration Act 1974* (Cth) ss 8, 8(1), 8(3), 8(5), 8(7) |
| Cases cited: | *Classic Ceramic Importers Pty Ltd v Ceramica Antiga SA* (1994) 13 ACSR 263<br>*IMC Aviation Solutions Proprietary Limited v Altain Khuder LLC* [2011] VSCA 246; 38 VR 303<br>*Interwest Ltd v Tricontinental Corporation Ltd (1991) 9 ACLC 1218*<br>*Jackson v Sterling Industries Ltd* [1987] 162 CLR 612<br>*Nine Films and& Television Proprietary Limited v Ninox Television Ltd* [2005] FCA 735; (2005) 146 FCR 144<br>*Toolgen Incorporated v Fisher* [2019] FCA 2158<br>*Visco v Minter* [1969] 2 All ER 714 |
| Date of hearing: | 16 July 2020 |
| Registry: | New South Wales |
| Division: | General Division |
| National Practice Area: | Commercial and Corporations |
| Sub-area: | International Commercial Arbitration |
| Category: | Catchwords |

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| Number of paragraphs: | 20 |
| Counsel for the Applicant: | T Castle |
| Solicitor for the Applicant: | Cowell Clarke |
| Solicitor for the Respondent: | Max Bonnell of Henry William Lawyers |

# ORDERS

**NSD 94 of 2020**

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| **BETWEEN:** | **ENERGY CITY QATAR HOLDING COMPANY (REGISTERED IN THE CR UNDER NO. 34913)**<br>Applicant |
| **AND:** | **HUB STREET EQUIPMENT PTY LTD (ABN 52 109 882 617)**<br>Respondent |

**JUDGE:** **JAGOT J**

**DATE OF ORDER:** **16 JULY 2020**

**THE COURT ORDERS THAT:**

1. The interlocutory application filed on 16 June 2020 seeking security for costs be dismissed.
2. The applicant pay the respondent's costs of the interlocutory application filed 16 June 2020 as agreed or taxed.
3. The notice to produce served on 12 June 2020 be set aside.
4. The applicant be granted leave to serve a revised notice to produce on the respondent by 4pm on 17 July 2020 reflecting the directions made by Justice Jagot on 16 July 2020.
5. The revised notice to produce be returnable on 23 July 2020 at 10.15am.
6. Costs of and in connection to the interlocutory application dated 23 June 2020 be costs in the cause.

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

## REASONS FOR JUDGMENT

**JAGOT J:**

1 These reasons for judgment concern an application by the applicant that the respondent provide security for the applicant's costs of and incidental to the determination of the respondent's case under ss 8(5) and 8(7) of the *International Arbitration Act 1974* (Cth) (the **International Arbitration Act**), pursuant to s 23 and/or s 56 of the *Federal Court of Australia Act 1976* (Cth) (the **Federal Court Act**).

2 The primary issue in dispute between the parties is whether it may be said that the respondent, in defending the proceedings, is, in substance, an applicant within the meaning of s 56 of the Federal Court Act. The applicant also contends that even if the respondent is not, in substance, an applicant within the meaning of s 56, the Court has jurisdiction under s 23 to make an order for security for costs against the respondent. The applicant submitted that the question of the respondent's position was to be determined by reference to three considerations:

(1) the Court must look to the substance, not the form, of the proceeding;

(2) the Court must look to:

  (a) the nature of the proceedings;

  (b) the issues that arise and the party who raises the issue; and

  (c) the onus of proof; and

(3) that an overlap of issues is not a barrier to ordering security for costs.

3 As to s 23 of the Federal Court Act, the respondent noted that there was no authority to support the applicant's proposition that this was an independent source of power to make an order for security for costs. The respondent also said that the applicant's position was contrary to the effect of the decision in *Jackson v Sterling Industries Ltd* [1987] 162 CLR 612 (***Jackson v Sterling Industries***), in particular, at 625 where it was observed that the purpose was not to create security for the plaintiff or to require a defendant to provide security as a condition of being allowed to defend the action against the defendant. The applicant pointed out that *Jackson v Sterling Industries* was a decision concerning security for judgment, not an application for security for costs, and was inapplicable.

4 In my view, while I would not say that s 23 does not provide an independent source of power to make an order separate from the preconditions in s 56 of the Federal Court Act, I would say that any exercise of power in reliance on s 23 should conform to the same principles by which decisions have been made under s 56. That is, as a matter of principle, the issue should be decided by reference to the question whether or not, in substance, the respondent is an applicant in the proceeding. If a party in the position of the respondent is not, in substance, an applicant in the proceeding, then it seems to me that it would be inappropriate as a matter of principle to order security for costs the effect of which would be to deprive a respondent of the opportunity to defend proceedings which have not been commenced by the respondent and to which the respondent is brought solely by reason of the application made by the applicant.

5 The parties' submissions involved different approaches to s 8 of the International Arbitration Act. The relevant provisions are ss 8(1) - 8(7) as follows:

> (1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the award.
>
> (2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court.
>
> (3) Subject to this Part, a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of that court.
>
> (3A) The court may only refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7).
>
> (5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:
>
> (a) a party to the arbitration agreement in pursuance of which the award was made was, under the law applicable to him or her, under some incapacity at the time when the agreement was made; or
>
> (b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made; or
>
> (c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case in the arbitration proceedings; or
>
> (d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration; or

(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(f) the award has not yet become binding on the parties to the award or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

(6) Where an award to which paragraph (5)(d) applies contains decisions on matters submitted to arbitration and those decisions can be separated from decisions on matters not so submitted, that part of the award which contains decisions on matters so submitted may be enforced.

(7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:

(a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or

(b) to enforce the award would be contrary to public policy.

…

6 The applicant emphasised s 8(3), which provides that subject to this Part, a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of that court. The applicant also emphasised the words in s 8(5) that, in any proceeding in which the enforcement of a foreign award by virtue of this Part is sought, the court may, and then in words of emphasis by the applicant, **at the request of the party against whom it is invoked**, refuse to enforce the award.

7 The applicant submitted that, in substance, the respondent was requesting the Court to refuse to enforce the award on grounds separate from those which would enable the applicant to enforce the award. As such, the applicant said that the nature of the proceedings was such that it should be concluded that the respondent is, in substance, an applicant by operation of s 8(5) of the International Arbitration Act. That is, the nature of the proceedings favoured a finding of the respondent being, in substance, an applicant.

8 This, the applicant said, could also be tested by reference to the issues that arise for determination. The issues that arise are solely because of the position of the respondent under ss 8(5) and 8(7) of the International Arbitration Act and would not otherwise arise but for the respondent's positive assertion of those issues. In addition, the respondent bears the onus of proving to the satisfaction of the Court the matters which it asserts under ss 8(5) and 8(7) of the International Arbitration Act.

9 I am unable to accept the applicant's submissions that in the circumstances of this case the respondent is, in substance, an applicant. As the respondent submitted, the relevant principles are apparent from a number of cases. The relevant test is whether the respondent's position is defensive in nature or not. It has been said that proceedings may be characterised as defensive in nature when they are either directly resisting proceedings already brought or seeking to halt self-help procedures: *Interwest Ltd v Tricontinental Corporation Ltd* (1991) 9 ACLC 1218 at [627]. Further, in *Classic Ceramic Importers Pty Ltd v Ceramica Antiga SA* (1994) 13 ACSR 263, Young J adopted a test which was stated in *Visco v Minter* [1969] 2 All ER 714 in the following terms:

> The principle seems to be that where a defendant counter-attacks on the same front on which he is being attacked by the plaintiff, it will be regarded as a defensive manoeuvre. But if he open a counter-attack on a different front, even to relieve pressure on the front attacked by the plaintiff, he is in danger of an order for security for costs depending upon the court's assessment of the position in each case.

10 In *Toolgen Incorporated v Fisher* [2019] FCA 2158 at [23] (***Toolgen***), Nicholas J observed that:

> The fact that the onus of proof lies on the respondents cannot be determinative of the question whether they are in substance the applicant in the appeal proceeding. So if a party sued for breach of contract pleads that the conduct is unenforceable for illegality, it would not follow that it was in substance the plaintiff merely because it bore the onus on the only matter in issue.

11 In *Nine Films and Television Pty Ltd v Ninox Television Ltd* [2005] FCA 735; (2005) 146 FCR 144 (***Nine Films and Television***) Lindgren J observed at [72] that while the language may differ as between cases and judges statements can be found that:

> …security will be ordered where the respondent's cross-claim raises a distinct claim or seeks relief other than dismissal of the head claim and, on the other hand, that security will not be ordered where the cross-claim is actually only defensive.

12 Also in *Nine Films and Television* at [56], Lindgren J suggested that absent a cross-claim a respondent would not be an applicant for the purposes of s 56(1) of the Federal Court Act or a plaintiff for the purposes of s 1335 of the *Corporations Act 2001* (Cth) (the **Corporations Act**).

13 As a result, the respondent submitted that the two cases in the Federal Court on which the applicant relied were both cases involving a cross-claim and there was no authority to support the applicant's proposition that, absent a cross-claim, an order for security could be made.

14 As I have said, in my approach to the power afforded by s 23 of the Federal Court Act, as a matter of principle, I consider that the issue remains whether the position of the respondent is, in truth, purely defensive or not. I accept the submissions for the respondent that the structure of s 8 of the International Arbitration Act does not support a conclusion that the respondent's defence to the proceeding is other than purely defensive. Section 8(3) operates "subject to this Part". Sections 8(5) and 8(7) are both provisions of the relevant Part of the International Arbitration Act. While it may be accepted that s 8(5) contains the words "at the request of the party against whom it is invoked", the power which the Court is exercising under both s 8(5) and s 8(7) is a power to refuse to enforce the award.

15 As the respondent put it, in the present case there is no cross-claim, nor is there any order sought by the respondent against the applicant. There is no counter-attack on a different front. There is merely a party, the respondent, who is directly resisting the proceeding which has been brought against the respondent by invoking provisions of the International Arbitration Act which provide the Court with a discretion to refuse to endorse the award.

16 I agree with the respondent that the observations in *IMC Aviation Solutions Proprietary Limited v Altain Khuder LLC* [2011] VSCA 246; 38 VR 303 are immaterial to resolution of the present case because, as disclosed at [132] of that decision, under the rules of the Supreme Court of Victoria there is a distinct two-stage process for enforcement of an award. First, an ex parte application is made by a party seeking to enforce an award. Second, if necessary, there is an inter partes hearing where the court decides whether or not it should exercise the discretion to refuse to endorse the award. These distinct stages are carried out pursuant to the rules of the Supreme Court of Victoria. There are no equivalent procedures in the Federal Court of Australia.

17 It is also important, as the respondent has submitted, that there is no authority to which the applicant could point which has required a respondent to provide security in the absence of a cross-claim. In *Nine Films and Television* at [56], Lindgren J doubted the capacity to make an order for security for costs under ss 56 of the Federal Court Act and 1335 of the Corporations Act in the absence of a cross-claim. The present case is an example, in my view, of a purely defensive position of the respondent consistent with the observations in *Nine Films and Television* at [77] and in contrast to the special position relating to threats of patent infringement identified in *Toolgen* at [29] to [33].

18 As a result, I am persuaded by the respondent's position that its case, in resisting the enforcement of the award, is a purely defensive position which, as a matter of principle, should not result in the making of an order for security for costs against it.

19 In these circumstances, it is not necessary to deal with the other bases upon which the respondent has alleged that there should be no order for security for costs. To the extent that it is relevant, I would accept that the respondent has a bona fide case by which it seeks to resist the enforcement of the award. I would not accept that there has been any relevant delay by the applicant in bringing the application in circumstances where the application was foreshadowed on 24 February 2020. I also would not accept that the order would be oppressive in circumstances where there is no evidence that the persons who stand behind the respondent are unable to provide the security which is sought. That is, I do not accept that the necessary consequence of an order for security would be to stultify the proceeding.

20 That having been said, however, I remain of the view that, as a matter of principle, no order for security for costs should be made against a respondent to a proceeding who is doing nothing more than defending the proceeding and, in my view, in substance, this is what the respondent is doing in the present case.

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

Associate:

Dated: 20 July2020