CITATION: Stans Energy Corp. v. Kyrgyz Republic et al, 2014 ONSC 6195
COURT FILE NO.: CV-14-10731-00CL
DATE: 20141024

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: STANS ENERGY CORP.

Applicant

AND:

KYRGYZ REPUBLIC, KYRGYZALTYN JSC AND CENTERRA GOLD INC.

Respondents

BEFORE: Newbould J.

COUNSEL: *Ranjan K. Agarwal*, for the applicant
Matthew Latella and Matt Saunders, for the respondent Kyrgyzaltyn JSC
Vanessa Voakes, for Centerra Gold Inc.

HEARD: October 20, 2014

[1] The applicant Stans Energy Corp. ("Stans") moves to extend a mareva injunction granted *ex parte* by Penny J. on October 10, 2014. Kyrgyzaltyn JSC ("Kyrgyzaltyn") opposes the motion, mainly on the grounds of alleged material non-disclosure by Stans, and moves for some relief from the terms of the injunction in the event that it is extended. Centerra Gold Inc. took no position on the motions.

[2] Stans is a Toronto-based publicly-traded company. It develops resource properties in the former Soviet Union. Its primary assets consist of exploration rights and property, being exploration and mining licenses in the Kyrgyz Republic (the "Republic"). Stans indirectly wholly owns Kutisay Mining LLC, a limited liability company registered under the laws of the Republic. Kutisay LLC has a mining licence for the "Kutessay II" REE open-pit mine ("Kutessay II") in the Republic. The licence was granted by the Republic's State Agency for Geology and Mineral Resources ("SAGMR").

[3] The Republic is a sovereign nation located in central Asia that declared its independence in 1991. It is a former republic of the Union of Soviet Socialist Republics.

[4] On June 26, 2012, the Committee for Development of Economic Industries of the Parliament of the Republic passed a resolution directing SAGMR to cancel the Kutessay II license. To date, SAGMR has not done so. However, Stans' mining rights have been frustrated by the Republic's refusal to allow work to go on at Kutessay II, to permit ecological examination, or to re-execute the underlying license agreement for Kutessay II.

[5] On April 15, 2013, the General Prosecutor's Office of the Republic obtained an injunction barring Kutisay LLC from taking any further steps to develop the mine. In the Spring of 2014, the trial court and appeal court in Bishkek (the capital of the Republic) upheld the Prosecutor's application.

[6] As a result of the Committee's and the Prosecutor's actions, Stans took the position that the Republic failed in its duty to uphold the Moscow Convention for the Protection of Investor's Rights, dated March 28, 1997, and the laws of the Republic that required the government not to unlawfully expropriate foreign investments. The Republic is a signatory to the Moscow Convention.

History of European proceedings

[7] On October 30, 2013, Stans and Kutisay LLC commenced arbitration proceedings against the Republic by filing a statement of claim with the Arbitration Court of the Moscow Chamber

of Commerce and Industry ("MCCI Arbitration Court") alleging the unlawful expropriation of its interests in Kutessay II.

[8] The MCCI Arbitration Court, in accordance with its rules, notified the Republic of the arbitration. The Republic participated in the arbitration by responding to the Tribunal's correspondence and filing motions for various interlocutory orders.

[9] Pursuant to the MCCI Arbitration Court rules, each party appoints an arbitrator, who then appoints a chairperson. Stans appointed its arbitrator. Despite successfully moving for an extension of time to appoint its arbitrator, the Republic never did so. According to its rules, an arbitrator was then chosen as the nominee for the Republic. The chairwoman of the MCCI Arbitration Court was then appointed as chair of the Ttribunal.

[10] In February 2014, the Republic challenged the Tribunal's jurisdiction. The Tribunal ultimately dismissed the jurisdictional challenge in March 2014. The Republic appealed this decision. The Court of Appeal remanded the case to the Moscow State Court pending a decision of the Economic Court of the Commonwealth of Independent States (the "CIS Economic Court").

[11] In February 2014, the Republic moved for a stay of proceedings pending an application it commenced in the CIS Economic Court seeking an interpretation of Chapter 11 of the Moscow Convention. The CIS Economic Court hears matter involving member states of the Commonwealth of Independent States, and Stans had no status to participate in that Court. The Tribunal dismissed the stay motion and ordered the Republic to deliver its statement of defence. The Republic never did.

[12] In March 2014, the Republic moved for adjournment on the grounds that it had insufficient time to choose a law firm even though news articles stated that an RFP for legal representation was completed and a successful law firm chosen in January 2014. The Tribunal dismissed the motion.

[13] On April 25, 2014, four days before the scheduled arbitration hearing on the merits, the Republic applied to the Moscow State Court for an order revoking the Tribunal's decision on jurisdiction. On the same day, the Republic moved before the Tribunal to postpone the arbitration on the basis of its application to the Moscow State Court. That motion was heard by the Tribunal at the hearing on the merits. The hearing of the Tribunal on the merits was held in Moscow on April 29-30, 2014. The Republic did not attend the hearing on the merits.

[14] The Tribunal dismissed the Republic's motion to postpone the arbitration hearing and ruled in favour of Stans. The Tribunal did not release its reasons for decision or the amount of the judgment at that time. The Tribunal issued its Award on June 30, 2014. The Award ordered the Republic to pay to Stans and Kutisay LLC the total sum of US$118,206,058.04, being US$117,738,940.30 in satisfaction of the principal claim, US$158,975.24 as reimbursement for the Stans' costs related to payment of the arbitration fee and US$308,142.50 as reimbursement of Stans' legal costs.

[15] On August 8, 2014, the Republic again applied to the Moscow State Court for an order setting aside the Award. The Republic also requested that the Moscow State Court make an order banning the recognition and enforcement of the Award. The Moscow State Court dismissed the applications on September 25, 2014. The Republic appealed that decision to the Federal Arbitration Court of the Moscow District.

[16] On September 23, 2014, the CIS Economic Court delivered a decision with respect to Article 11 of the Moscow Convention. The decision contained an opinion regarding Article 11 of the Moscow Convention and the types of institutions that may arbitrate investor-state disputes. The decision does not have the effect of setting aside or suspending the Award.

[17] On September 26, 2014, the Federal Arbitration Court of the Moscow District ordered the Moscow State Court to reconsider de novo its decision on jurisdiction. It did not set aside or suspend the Award.

Centerra Gold Inc. shares

[18] Centerra is a publicly-traded Canadian mining company that has extensive operations in Asia and, though subsidiaries, operates the Kumtor gold mine in the Republic, one of the largest gold mines in the world. Centerra's head office is in Toronto, it is a reporting issuer under the *Securities Act,* R.S.O. 1990, c. S.5 and its shares are traded over the Toronto Stock Exchange.

[19] Kyrgyzaltyn, a state-owned enterprise wholly-owned by the Republic, nominally holds 77,401,766 Centerra shares. In an earlier action in Ontario, Sistem Mühendislik Insaat Sanayi Ve Ticaret Anonim Sirketi ("Sistem"), a successful claimant in an ICSID arbitration against the Republic, brought proceedings in Ontario claiming that the shares of Centerra held by Kyrgyzaltyn were held for the Republic which had equitable or beneficial ownership of the shares. In a decision released April 14, 2014, Justice Thorburn held that the Republic held an equitable interest in the Centerra shares issued in the name of Kyrgyzaltyn and that the shares and dividends could be seized by the Sherriff pursuant to a writ of execution issued by Sistem.

[20] Kyrgyzaltyn has appealed the decision of Thorburn J. to the Court of Appeal. The appeal is scheduled to be heard on October 29, 2014.

[21] Stans seeks to do the same thing as Sistem in respect of 47 million shares of Centerra held in the name of Kyrgyzaltyn and dividends paid on those shares.

Analysis

[1] The tests for granting a Mareva injunction are well known and need not be repeated here. See *Chitel v. Rothbart* (1983), 39 O.R. S2d) 513. One requirement is that the moving party must establish a strong *prima facie* case.

[22] In the *United States of America v. Friedland*, , Sharpe J. (as he then was) dealt with the obligation to make full disclosure when *ex parte* relief is being sought. He stated:

> 26 It is a well established principle of our law that a party who seeks the extraordinary relief of an *ex parte* injunction must make full and frank

> disclosure of the case. The rationale for this rule is obvious. The Judge hearing an *ex parte* motion and the absent party are literally at the mercy of the party seeking injunctive relief. The ordinary checks and balances of the adversary system are not operative. The opposite party is deprived of the opportunity to challenge the factual and legal contentions advanced by the moving party in support of the injunction. The situation is rife with the danger that an injustice will be done to the absent party. As a British Columbia judge noted recently:
>
> > There is no situation more fraught with potential injustice and abuse of the Court's powers than an application for an *ex parte* injunction.
> >
> > (*Watson v. Slavik*, [1996] B.C.J. No. 1885, August 23rd, 1996, paragraph 10.)
>
> 27 For that reason, the law imposes an exceptional duty on the party who seeks *ex parte* relief. That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts and law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.

[23] The rule is not hard and fast. There must be some leeway depending on the circumstances. In *Friedland*, Sharpe J. went on to say:

> 31 The duty of full and frank disclosure is, however, not to be imposed in a formal or mechanical manner. *Ex parte* applications are almost by definition brought quickly and with little time for preparation of material. A plaintiff should not be deprived of a remedy because there are mere imperfections in the affidavit or because inconsequential facts have not been disclosed. There must be some latitude and the defects complained of must be relevant and material to the discretion to be exercised by the Court. (See *Mooney v. Orr*, (1994) 100 B.C.L.R. (2d) 335; *Rust Check v. Buchowski* (1994) 58 C.P.R. (3d) 324.

[24] Kyrgyzaltyn contends that Stans failed to make full disclosure in that a two page opinion of the CIS Economic Court was not translated from Russian to English when made an exhibit to

the supporting affidavit of Mr. Boris Aryev, the COO of Stans. In his affidavit, Mr. Stans swore in para. 70

> 70. I am advised by Mr. Zenkin [Stans' Russian lawyer] that the advisory opinion holds that Article 11 of the Moscow Convention establishes the types of institutions that may arbitrate investor-state disputes, subject to th existence of a separate arbitration agreement between the state and the investor. There is no such arbitration agreement between the Kyrgyz Republic and Stans. I am advised by Mr. Zenkin that this decision does not have the effect of setting aside or suspending the Award.

[25] Mr. Latella for Kyrgyzaltyn takes issue with the use of the word "advisory". He also says that the translation should have been before Penny J. The translation indicates that the CIS Economic Court at the request of the Republic gave an interpretation on the meaning of article 11 of the Moscow Convention. The decision said that it would be sent to the Republic for information and to the governments of the member states of the Commonwealth of Independent States, to supreme arbitration, commercial, economic and other courts which examine disputes in the economic sphere. The only party indicated in the decision that participated in the hearing was the Republic.

[26] Mr. Agarwal for Stans advised that the translation of the two page decision was not put in the material because of a mistake in his office. He said that his client had provided the translation to his firm but that in the rush of things he had not realized that they were in possession of the translation. I accept that explanation. I do not put any sinister motive on Stans, as Mr. Latella suggested I should.

[27] The importance of the decision of the CIS Economic Court according to Mr. Latella is that it is a first step in attacking the jurisdiction of the CIS Economic Court. He says that when the Republic applied to the Moscow State Court for an order setting aside the Award of the Tribunal, the decision of the CIS Economic Court was not yet available and that when the appeal from the Moscow State Court was heard by the Federal Arbitration Court of the Moscow District, the decision was available and led the appellate court to remand the matter back to the Moscow State Court for a new hearing de novo on the appeal of the Republic from the Award of the Tribunal.

[28] What Mr. Latella is essentially arguing is that had Penny J. had the two pages of the decision rather than the paragraph in Mr. Aryev's affidavit, it would have influenced him in his decision to grant the *ex parte* order. Mr. Latella referred in his argument to the decisions of the Moscow State Court and the Federal Arbitration Court of the Moscow District and contended that because of the decision of the CIS Economic Court, it is almost a certainty that eventually a binding ruling will be made that the MCCI Arbitration Court had no jurisdiction to deal with the dispute. He also contended that by referring to the decision as an advisory opinion rather than a decision, the importance of the CIS Economic Court decision was downplayed.

[29] Mr. Latella further contends that Stans failed to disclose in its material the significance of the decision of the Federal Arbitration Court of the Moscow District, the significance of the relevant articles of the Moscow Convention and the applicable laws of the Republic. This is really the same argument, that Penny J. was not told of the likelihood that the Republic will be successful in overturning the arbitration Award because of a lack of jurisdiction in the MCCI Arbitration Court.

[30] I do not accept this position of Kyrgyzaltyn. The material filed by Stans before Penny J. clearly disclosed the position of the Republic that there was no jurisdiction in the MCCI Arbitration Court to make any Award. The history of the proceedings and all of the jurisdictional challenges to the Award were set out in the affidavit material of Mr. Aryev filed on behalf of Stans, including English translations of the decisions of the Moscow State Court and the Federal Arbitration Court of the Moscow District. Mr. Aryev made clear in his affidavit that the Republic has challenged the jurisdiction of the Tribunal. The factum filed on behalf of Stans also referred to all of this.

[31] This was not lost on Penny J. who stated:

> There appears to have been full disclosure of the Republic's position. Among other things, it has been disclosed that the Republic disputes the Award/jurisdiction; that it has challenged the Award in various courts such that the Award might conceivably be set aside;

[32] What Mr. Latella is contending is that there should have been fuller explanation made on behalf of the Republic at the *ex parte* hearing as to the Russian or Kyrgyz law so that Penny J. could have better understood those laws and the strength of the Republic's case on lack of jurisdiction. However, I think this goes far too far. An Ontario court cannot get into Russian and Kyrgyz law and decide whether one side has the better case over another under those laws. Mr. Latella contends that the Republic has the better case. Mr. Agarwal says that there are many reasons why Sands may win out. It would not be possible for an Ontario court to say that by looking at the decision of the CIS Economic Court and the Moscow Courts decisions that the outcome in the Moscow courts can be safely presumed. On my reading of all of the decisions I cannot say that with any confidence at all. What is known is that the Award has not been set aside in spite of several attempts by the Republic to achieve that end.

[33] I agree with Penny J. that Stans has established a strong prima facie case that its Award should be recognized in Ontario and that the Republic has an equitable interest in the Centerra shares held in the name of Kyrgyzaltyn that can be seized in Ontario.

[34] There was no argument on behalf of Kyrgyzaltyn in its factum against the finding of Penny J. that there is a serious risk of dissipation or removal of assets from the jurisdiction. I agree with Penny J. essentially for the reasons given by him.

[35] A judgment creditor need not invariably provide direct evidence that there is a risk of removal or dissipation of assets. Rather, such a risk in an appropriate case can be inferred from the circumstances. See *Sibley & Associates LP v. Ross*, 2011 ONSC 2951 at para. 63.

[36] The Republic has publically announced its intention to move its share certificates in Centerra to the Republic, which would have the effect of making seizure of the Kyrgyzaltyn's shares in Centerra impossible. The interest of a judgment debtor in a certificated security may be seized only by actual seizure of the security certificate by a sheriff. This was a factor in ordering a mareva injunction in Sistem's case against Kyrgyzaltyn. See my reasons in *Sistem v. Kyrgyz Republic*, [2012] O.J. No. 4105.

[37] Recently Centerra has announced that it, the Republic and Kyrgyzaltyn have entered into an agreement under which Kyrgyzaltyn would exchange its shares in Centerra for a 50 per cent interest in a joint venture company that would own the Kumtor Project. On February 6, 2014, Centerra announced that the Republic's Parliament had adopted a resolution supporting the restructuring. The Republic has agreed to pay in excess of US$11 million in escrow to Sistem in exchange for a lifting of the injunction obtained by Sistem, which would be required in order for the restructuring to proceed.

[38] The Republic by its actions has made it clear that it has no intention of paying the Award. If the restructuring proposed by the Republic and Kyrgyzaltyn is completed before Stan's application to enforce the Award is finally determined, there will be no assets in the jurisdiction to satisfy the Award.

[39] In the circumstances the mareva injunction ordered by Penny J. should be extended until further order of this Court.

Cross-motion by Kyrgyzaltyn

[40] Penny J. held that Centerra must hold in trust to the credit of this application all amounts payable as dividends or distributions that may be declared. 47 million shares of Centerra are to be frozen. This number of shares is based on the low trading price for the Centerra shares in the past year of $2.82 per share and the amount of the Award in Canadian dollars of $133,052,738, resulting in 47,181,822.32 shares.

[41] Kyrgyzaltyn contends that as only 47 million shares held in the name of Kyrgyzaltyn are to be frozen, and the remaining 30,401,766 shares are not, the dividends or distributions to be declared from Centerra ordered to be held in trust by Centerra should not be all of the dividends or distributions but only those relating to the 47 million shares.

[42] The evidence is that Centerra has regularly authorized a quarterly dividend of 4¢ per common share. Stans anticipates that Centerra will announce another dividend payment in or

around November 2014 and the total dividend payable to Kyrgyzaltyn at that time will be $3.08 million.

[43] I would not change the order of Penny J. regarding dividends. There will be continuing interest on the Award and the dividends will likely do little more than cover that interest. I note that the order provides that to the extent that Centerra declares or pays a dividend or distribution and it is held in trust pursuant to the order, the respondents may apply to the court to vary the number of shares restrained by the order in an amount equivalent to the dividend or distribution.

Conclusion

[44] The order of Penny J. dated October 10, 2014 is continued until further order of this Court.

Newbould J.

Date: October 24, 2014