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To: Transport Industry Operators

Mareva injunction

The Hong Kong High Court issued a Judgment on 29/4/2013 relating to a discovery order ancillary to and in support of a Mareva injunction. [HCA 2124/2011]

On 26/2/2010, BHP Billiton commenced an action in England against Transfield Shipping which was a Panama company, for breach of a Freight Forward Swap Agreement ("the Swap Agreement"). The Swap Agreement was contained in or evidenced by a written confirmation dated 14/2/2008 ("the Confirmation"). The Confirmation provided that legal proceedings may be validly served on Transfield Shipping at an address at Harbour Road, Wanchai, Hong Kong ("the Harbour Road Address"). The Confirmation also provided a HSBC's bank account held in the name of Transfield ER Maritime ("the Account") as Transfield Shipping's account for the purpose of the transaction under the Swap Agreement. In the English proceedings, the court granted leave to BHP Billiton to serve the proceedings out of jurisdiction at Transfield Shipping's registered address in Panama and the Harbour Road Address. The Harbour Road Address was later found to be occupied by Transfield Resources, which was another company associated with Transfield Shipping. Transfield Shipping did not respond to the English proceedings. On 15/7/2010, default judgment in the sum of US\$2,194,964.41 was entered against Transfield Shipping in the English court ("the UK Judgment"). BHP Billiton proceeded to effect service of the UK Judgment on Transfield Shipping. It was then discovered that the Harbour Road Address was empty. According to the record of the Companies Registry in Hong Kong, the registered office of Transfield Recourses was changed to another address at Lockhart Road, Wanchai, Hong Kong ("the Lockhart Road Address"). With the leave of the English court, the UK Judgment was served on Transfield Shipping at the Lockhart Road Address.

In the end of 2010, BHP Billiton discovered that Transfield Shipping was involved in another legal proceedings with a company called RTI in the English court. The legal proceedings were subsequently settled, and RTI paid a sum of US\$14,000,000 to Transfield Shipping by means of a telegraphic transfer to the Account on about 16/5/2011. Such information was obtained as a result of BHP Billiton obtaining a disclosure order in the English proceedings against RTI's solicitors. The disclosure order required RTI's solicitors to provide information in relation to any sums which were due and owing to Transfield Shipping from RTI pursuant to the settlement agreement made between them, whether such monies had been paid and if so when, how much, into what account, etc.

The payment of such sum of money prompted BHP Billiton to apply for a *Mareva* injunction against Transfield Shipping. On 2/6/2011, a worldwide *Mareva* injunction was obtained by BHP Billiton against Transfield Shipping in the English court up to the value of US\$2,650,000 ("the UK Injunction"). Undertakings Nos 6 and 7 of the UK Injunction order read as follows:

"The Claimant will not without the permission of the Court use any information obtained as a result of this order for the purposes of any civil or criminal proceedings, either in England and Wales or in any jurisdiction, other than this claim."

"The Claimant will not without the permission of the Court seek to enforce this order in any country outside England and Wales or seek an order of a similar nature including orders conferring a charge or other security against the Defendant or the Defendant's assets."

BHP Billiton also made various attempts to serve the UK Injunction order on Transfield Shipping but without any success. In December 2011, it was discovered that Transfield Resources had changed its registered address to another address at Lockhart Road.

On 15/12/2011, BHP Billiton obtained a *Mareva* injunction in Hong Kong ("the HK Injunction") before Carlson DHCJ in aid of the English proceedings up to the value of US\$2,650,000. By the order of Yam J on 28/12/2011, the HK Injunction was ordered to be continued until further order of the court. Both the UK injunction order and the HK Injunction order directed that Transfield Shipping must not withdraw money from the Account.

Transfield Shipping had at no stage taken part in any aspect of the English or the Hong Kong Proceedings.

Obviously, BHP Billiton wanted to find out what happened to Transfield Shipping's money paid into the Account on 16/5/2011. BHP Billiton took out a summons on 15/2/2012 pursuant to s 21 of the Evidence Ordinance, Cap 8 ("the Discovery Summons") requesting HSBC to disclose, *inter alia*, the bank statements of the Account and the flow of funds in the Account in the period from 16/5/2011 to 15/12/2011 ("the Relevant Period"). HSBC, by its letter dated 16/2/2012, indicated that it did not contest BHP Billiton's Discovery Summons. Transfield ER Maritime opposed the Discovery Summons and applied for leave to intervene. On 18/9/2012, Master de Souza granted leave to Transfield ER Maritime to be joined for the purpose of the Discovery Summons. The learned Master also allowed BHP Billiton's application and made the discovery order against HSBC ("the Discovery Order").

Shortly before the hearing on 14/9/2012, Transfield ER Maritime's solicitors wrote to BHP Billiton's solicitors enquiring whether BHP Billiton had complied with Undertaking Nos 6 and 7 before lodging the application for the HK Injunction. By the letter dated 17/9/2012, BHP Billiton's solicitors replied that Transfield ER Maritime did not have the requisite *locus* to seek confirmation in relation to the said queries. Upon realising its failure to comply with Undertaking No 7, BHP Billiton made an application for retrospective leave to commence the Hong Kong proceedings in the English court on 8/10/2012. It was BHP Billiton's case that there was an inadvertent breach of Undertaking No 7 and such breach was not noticed until it was brought to BHP Billiton's attention by the letter of Transfield ER Maritime's solicitors dated 14/9/2012. On 11/11/2012, Smith J made an order in the English proceedings granting permission to BHP Billiton to have issued the Hong Kong proceedings and to continue such proceedings for the enforcement of the UK Judgment and the UK Injunction. According to the transcript of the proceedings before Smith J, it seemed that the learned judge accepted that there was no breach of Undertaking No 6. Again, Transfield Shipping did not appear in the hearing.

On 26/2/2013, BHP Billiton obtained default judgment against Transfield Shipping in the Hong Kong proceedings herein in the sum of US\$2,194,964.41 with interest thereon ("the HK Judgment").

Transfield ER Maritime appealed against the Discovery Order. Transfield ER Maritime opposed the Discovery Order on the following grounds:

- (i) BHP Billiton's claim was not a proprietary claim, and so there was no justification for the court to make the Discovery Order which had the effect to "trace" into the Account;
- (ii) the scope of the disclosure sought was wider than the terms of the HK Injunction order;
- (iii) BHP Billiton had failed to establish that the Account belonged to Transfield Shipping, whether in form or in substance;
- (iv) HSBC should not be ordered to disclose the information by reason of confidentiality and privacy; and
- (v) by not informing Carlson DHCJ, Yam J and Master de Souza of the fact the HK Injunction was obtained without the leave of the English court, BHP Billiton was in contempt of court and had failed in its duty to make full and frank disclosure.

The Judge saw no merit in these arguments.

It is well established that one purpose for which information relating to a party's assets may be needed is to aid a *Mareva* injunction, in the sense of assisting the working of the injunction and making the

injunction effective. In *A v C* [1981] QB 956, Goff J said, at 960C, that “the court should, where necessary, exercise its powers to order discovery or interrogatories in order to ensure that the *Mareva* jurisdiction is properly exercised and thereby to secure the objective which is ... the prevention of abuse.” In *A v C*, Goff J distinguished the scope of the disclosure order which the court will be prepared to make in cases where: (i) the plaintiff has a proprietary claim and is seeking to trace property belonging to him; and (ii) the plaintiff is the beneficiary of a *Mareva* injunction, whose purpose is the prevention of the abuse constituted by the defendant of disposing of his own assets in order to avoid the risk of having to satisfy any judgment which may be entered against him. In the former case of a proprietary claim, the court can make orders designed to ascertain the whereabouts of the defendant’s property (see 959D). In the latter case where the plaintiff has the benefit of a *Mareva* injunction, the court would not make use of a general power to enable the plaintiff to discover whether the defendant has assets in the jurisdiction, but disclosure orders may be made about particular assets of the defendant which the plaintiff has identified and, if the asset is a bank balance in respect of which the plaintiff is entitled to discovery, the court may exercise the power under s 7 of the Bankers Books Evidence Act 1879 which is equivalent to s 21 of our Evidence Ordinance.

BHP Billiton confirmed that its claim was not a proprietary claim and BHP Billiton was not seeking to trace its money into the Account. BHP Billiton was just saying that it was the beneficiary of a *Mareva* injunction and was seeking to prevent Transfield Shipping from disposing of its own assets in order to avoid the risk of having to satisfy an adverse judgment.

Transfield ER Maritime confirmed that there was no application to discharge the UK or the HK Injunction order. By the making of such injunction orders, the courts had *prima facie* accepted that the fund paid by RTI into the Account was Transfield Shipping’s asset, and so Transfield Shipping should be asked to give information about the whereabouts of such asset. If the fund transferred into the Account by RTI had been transferred out to other bank accounts of Transfield Shipping or Transfield Shipping’s associated companies, BHP Billiton should be entitled to take action to prevent the dissipation of such asset on the part of Transfield Shipping.

As Transfield Shipping had failed to appear in both the English and the Hong Kong proceedings, the only way to give effect to the disclosure obligation on the part of Transfield Shipping was to require HSBC to disclose information about the flow of funds in the Account after the making of the telegraphic transfer by RTI. To achieve the object of the *Mareva* injunction in trying to prevent Transfield Shipping from dissipating its assets, the Discovery Order was, therefore, a necessary measure.

Further, as BHP Billiton had since the hearing before the Master become a judgment creditor of Transfield Shipping in the Hong Kong proceedings, there was much stronger reason for the court to make the Discovery Order against HSBC at this stage.

The Judge agreed with BHP Billiton, that the following propositions could be derived from the judgment of Kerr LJ in *Babanaft International Co SA v Bassatne* [1990] 1 Ch 13 at 42G-43C and that of Colman J in *Gidrxslme Shipping Co Ltd v Tantomar-Transportes Maritimos Lda* [1995] 1 WLR 299 at 309F-312F (see also: *Chinachem Charitable Foundation v Chan Chun Cheun & Anr*, HCAP 8 of 2007 (decision on 27/2/2012) at §§37-39):

- (i) unlike the position before judgment, after judgment a plaintiff is able to attach assets of the defendant against whom he has obtained judgment;
- (ii) after judgment has been obtained, there is no objection in principle to the judgment debtor being required to give disclosure of his assets worldwide under examination of debtor, injunction or appointment of receiver proceedings;
- (iii) the object of ordering such disclosure is to render the judgment effective;
- (iv) in a post-judgment situation, the jurisdiction to make a disclosure order arises both as a power ancillary to and in support of a *Mareva* injunction and independently of the injunction as a power in support of the execution of the judgment; and
- (v) it is just and convenient for a judgment creditor to have all the information he needs to execute the judgment or award anywhere in the world.

Hence, BHP Billiton was entitled to the information under the Discovery Order both as a beneficiary of the *Mareva* injunction and as a judgement creditor to facilitate the execution of the Injunction orders and the judgments obtained in the English and the Hong Kong courts. Further, Transfield Shipping had all along ignored the English and the Hong Kong proceedings, and so the most practical if not the only way to find out information about Transfield Shipping's assets was through the Discovery Order.

Transfield ER Maritime submitted that the Account could not be subject to the Discovery Order because the Account was held in the name of Transfield ER Maritime and not Transfield Shipping.

The Judge disagreed. It had long been established by the English cases that such kind of discovery order may be made where the evidence shows that the defendant has been using for his own purpose a bank account which is in the name of a third party. In *South Staffordshire Tramways Company v Ebbsmith* [1895] 2 QB 669 at 675, Lord Esher MR said the following:

" if the Court were satisfied that in truth the account which purported to be that of a third person was the account of the party to the action against whom the order was applied for, or that, though not his account, it was one with which he was so much concerned that items in it would be evidence against him at the trial then they might order the inspection I think that the party asking for the inspection ought to be able to show the Court very strong grounds for suspicion, almost amounting to certainty, that there are items in the account which would be material evidence against the defendant upon the matters in issue."

Such test had been applied in the subsequent decisions of *Ironmonger & Co v Dyne* (1928) 44 TLR 579 and *D B Deniz Nakliyat Tas v Yugopetrol* [1992] 1 WLR 437. In *D B Deniz*, the English Court of Appeal said (at 443E) that such test was applicable to orders made both in pre-trial and post-judgment cases.

In the case in question, there was ample evidence to show, quite certainly, that the "items" in the Account were Transfield Shipping's assets and Transfield Shipping had been using the Account as its own account. Firstly, Transfield Shipping provided the Account as its operative account in the Swap Agreement. Secondly, the sum of US\$14,000,000 remitted by RTI into the Account belonged to Transfield Shipping. It was because of these reasons that the UK and HK Injunction orders had expressly identified the monies in the Account as one of the assets which Transfield Shipping was restrained from disposing of or dealing with. With the UK and the HK Injunction orders remained intact the effect of which was to freeze the Account, the court was perfectly justified to make the Discovery Order against the Account though, in form, it was held in the name of Transfield ER Maritime.

The Judge also did not accept that confidentiality and privacy were reasons to deny the making of the Discovery Order. As mentioned in *Commercial Injunctions by Gee*, 5 ed at §22.006 to 22.008, confidentiality may be overridden if the disclosure is needed to make the *Mareva* relief effective. Here, the English and Hong Kong courts saw it fit to impose a *Mareva* injunction over the Account of Transfield ER Maritime. By so doing, the courts accepted that Transfield Shipping had been using the Account for its own purpose and disclosure was therefore needed to make the *Mareva* relief effective. Further, Transfield Shipping had tried to adopt a "catch-me-if-you-can" tactic and ignored both the English and the Hong Kong proceedings. Without the Discovery Order, there was simply no way for BHP Billiton to locate the assets of Transfield Shipping. In such circumstances, confidentiality should give way to the doing of justice between the parties, and the making of the Discovery Order was necessary to give effect to the object of the *Mareva* injunction and to enable BHP Billiton to identify the assets of Transfield Shipping for the purpose of the execution of the UK and the HK Judgments.

Transfield ER Maritime complained that the information sought in the Discovery Order would prejudice its interests as both BHP Billiton and Transfield ER Maritime were in the shipping industry. However, the information sought should not reveal commercially sensitive materials such as the commercial terms relating to the business undertaken between the Transfield ER Group and its customers, and so the Judge could not see how the revelation of such information would prejudice its commercial interests. In any event, Transfield ER Maritime had allowed Transfield Shipping to use the Account as its operative account, and so the court should not allow Transfield Shipping to hide the whereabouts of its assets by using the bank account of another associated company in the same group. Furthermore, BHP Billiton would be subject to an implied undertaking that the information obtained would be used only for the

purposes of the action in question. In such circumstances, there was minimal risk for the misuse of the information obtained.

The Judge also did not accept that the scope of the Discovery Order was too wide. The disclosure sought related to the period between 16/5/2011 (the date of the transfer of the fund into the Account by RTI) and 15/12/2011 (the date when the HK Injunction order was made), which was a period of 7 months prior to the making of the HK Injunction order. As such injunction order was intended to restrain Transfield Shipping from disposing its assets in Hong Kong, the information requested would be necessary to know what had become of the identified asset, including any remission of the asset prior to the date of the HK Injunction order.

In addition to the bank statements, the Master had also ordered HSBC to disclose information on the following matters:

- (i) instructions received by it in relation to remittances to the Account and the identity of the remitters of the funds to the Account during the Relevant Period; and
- (ii) records showing the identities of those persons and/or entities authorised to operate the Account.

Taking into account that the jurisdiction of the court to order discovery arises both as a power ancillary to and in support of a *Mareva* injunction and as a power in support of the execution of the judgement, one cannot complain that the scope of the discovery is too wide. As the court could not expect any co-operation from Transfield Shipping in providing information about its assets, BHP Billiton, being a judgment creditor, should be entitled to such information with a view to identify the assets of Transfield Shipping and to ascertain whether the assets in the Account belong to Transfield Shipping or Transfield ER Maritime. The Discovery Order was therefore necessary to facilitate the execution of the UK and the HK Judgments.

Finally, the Judge did not agree with Transfield ER Maritime that the Discovery Order should be set aside because of the breach of the undertakings contained in the UK Injunction order. Firstly, such breach might be a ground for the discharge of the *ex parte* HK Injunction order. But since there was no such discharge application before the court, there was nothing to prevent the court from making the Discovery Order which was only ancillary to the *Mareva* injunction itself and as a measure to facilitate the execution of the HK Judgment. Secondly, although it was a serious matter that BHP Billiton had not obtained the leave of the English court before instituting the Hong Kong proceedings, the English court had granted retrospective leave to BHP Billiton to have instituted and to continue the Hong Kong proceedings. The absence of leave, at most, only afforded a ground to Transfield Shipping or Transfield ER Maritime to discharge the *ex parte Mareva* injunction, but in the Judge's judgment, the propriety of the *Mareva* injunction continued after the granting of the retrospective leave could not be challenged. Hence, there was no reason for the Judge to disturb the Discovery Order granted by the learned Master and the Judge dismissed Transfield ER Maritime's appeal accordingly. The stay of execution of the Discovery Order was also set aside.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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