SUN MOBILITY
Insurance and Claims Services Limited

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Ref : Chans advice/180

To: Transport Industry Operators

LOI - specific performance

The Hong Kong High Court issued a Judgment on 24/11/2015 dealing with a mandatory injunction and specific performance in respect of a letter of indemnity in connection with a delivery of cargo without production of the original bills of lading. [HCCL 12/2015]

This was an application made by Loyal Base Development ("**LB**") to discharge an ex parte mandatory injunction order ("**Order**") made by Deputy High Court Judge Marlene Ng on 26/8/2015. Under the Order, LB was required to provide by 31/8/2015 ("**Deadline**") "such security and/or bail , and/or take all steps as are required to provide for the release from arrest" of MV KSL China ("**Vessel**"), "or to replace any security provided for the purpose of release of (the Vessel) from arrest". The Vessel had been arrested on 11/8/2015 by order of the Qingdao Maritime Court ("**Qingdao Court**") on the Mainland, in proceedings instituted by the Bank of China ("**Bank**") against the owners or charterers of the Vessel. On 28/8/2015, which was the return day of the application by Cargill International Trading ("**Cargill**") for continuation of the Order, the Deadline for LB to provide security was extended to 7/9/2015. On 2/9/2015, LB applied by summons to set aside the Order ("**Summons**"), on the ground of material non-disclosure. On 4/9/2015, at the hearing of the Summons, the application for discharge was adjourned, and the Deadline under the Order was further extended until 7 days after the determination of the Summons.

The Order was made on the basis of the claim made by Cargill for a final mandatory injunction and/or an order for specific performance under and in respect of a letter of indemnity issued by LB to Cargill on 11/9/2014 ("**LOI**").

Under a contract dated 2/9/2014 ("**Sale Contract**"), Cargill had agreed to sell and LB had agreed to purchase a cargo of iron ore products ("**Cargo**"), to be shipped from Australia to China. Cargill had purchased the Cargo from a company which was related to Fortescue Metals ("**FM**"). FM chartered the Vessel from the owners of the Vessel, for carriage of the Cargo to China. The Uploading Conditions of the Sale Contract provide as follows (under paragraph (t)):

> "In the event that original bills of lading are unavailable at the discharging port(s), the Seller shall endeavor to arrange the discharge of the cargo into the custody of the port or the carrier's/shipowner's agents against the issuance of a letter of indemnity by the Buyer in a format acceptable to the carrier/shipowner. Provided however that the cargo shall be released to the Buyer only against presentation of original bills of lading or a bank guarantee issued by the LC issuing bank in a format acceptable to the Seller and the carrier/shipowner."

The Cargo was loaded on board the Vessel, and 2 bills of lading dated 1/9/2014 were issued with respect to the carriage of the Cargo ("**Bills**"). Pursuant to the request made by LB to Cargill to provide for discharge of the Cargo and its delivery to MSN Shipping Agency ("**MSN**"), without production of the original Bills, LB issued the LOI on 11 September. Clause 3 of the LOI issued to Cargill provides as follows:

> "The above (Cargo) was shipped on the above ship by (FM) and consigned TO ORDER for delivery at the port of MAIN PORT(S), CHINA but the bills of lading have not arrived and we, (LB), hereby request you to deliver the (Cargo) to MSN or to such party as you believe to be or represent (MSN) or to be acting on behalf of (MSN) at RIZHAO PORT, CHINA without production of the original bills of lading.
> In consideration of your complying with our request, we hereby agree as follows:

1. To indemnify you, your servants, and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of delivering the cargo in accordance with our request.
2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with the delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.
3. If, in connection with the delivery of the cargo as requested, the ship, or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.
...
4. This indemnity shall be governed by and construed in accordance with English law and each and every person liable under this indemnity shall at your request submit to the jurisdiction of the High Court of Justice of England." (Emphasis supplied)

Having received the LOI from LB, Cargill also issued a letter of indemnity to FM ("**Cargill LOI**") and requested FM to agree to the delivery of the Cargo without production of the original Bills. The Cargill LOI was back to back in terms with LB's LOI. In turn, FM issued its own letter of indemnity to the owners of the Vessel. In the interim, LB opened a letter of credit in favor of Cargill for payment of the price for the Cargo under the Sale Contract. On 11/9/2014, Cargill submitted documents in accordance with the terms of the letter of credit, which documents included the original Bills. The Vessel arrived at the discharge port on 15/9/2014. Discharge was completed on 17/9/2014 and the Cargo was released to MSN. The Cargo was ultimately released from the port without production of the original Bills.

About a year later, on 11/8/2015, the Bank obtained an order from the Qingdao Maritime Court for the arrest of the Vessel. The Bank claimed that it was the lawful holder of the Bills, which was entitled to take delivery of the Cargo, but that the Cargo had been wrongly released without the original Bills in the Bank's possession. On 14/8/2015, FM notified Cargill of the arrest of the Vessel and demanded that Cargill should provide security of US $9.3 million in order to allow for the release of the Vessel. On the same day, Cargill demanded LB for its provision of bail or other security for the release of the Vessel. Not having received any response from LB, Cargill gave notice to LB on 24/8/2015 that unless security was provided by LB by 25/8/2015, Cargill would apply to the Court for a mandatory injunction. A Writ was issued on 25/8/2015. On 26/8/2015, Cargill purported to give notice to LB at 5:20pm that it was applying to the Court for ex parte relief. The Order was obtained on that day, in the absence of LB.

LB's application for discharge of the Order was on the grounds that:

(1) there was no urgency for the ex parte Order on 26/8/2015, Cargill having delayed its application for the Order, when the Vessel had been arrested on 11/8/2015;
(2) Cargill misled the Court that LB's obligation under the LOI was immediately engaged upon the arrest of the Vessel;
(3) Cargill had misled the Court that the Bank's arrest of the Vessel was solely based on the delivery of the Cargo without production of the original Bills, when there were issues as to whether the Bank was the lawful holder of the Bills, and as to the true nature of the Bank's claims;
(4) Cargill had failed to disclose to the Court that it had arranged for security to be provided for the release of the Vessel, which release took place on 31/8/2015.

Applicable legal principles

In the context of discharging an ex parte order on the ground of material non-disclosure, the relevant legal principles are not in dispute. Material facts are those which are material to the judge's determination of the ex parte application when it was made. Materiality is to be decided by the court, and not by the assessment of the applicant or his legal advisers. The applicant has the duty to make proper inquiries before making the application and the duty of disclosure applies not only to material facts as known to the applicant, but also to any additional facts which the applicant would have known if

he had made such proper inquiries. The extent of the necessary inquiries to be made depend on all the circumstances of the case, including the nature of the case which the applicant is making, the order for which application is made, the probable effect of the order on the defendant, and the degree of legitimate urgency and the time available for making inquiries. (*Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350, *Bank Mellat v Nikpour* [1985] FSR 87).

If material non-disclosure is established, the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure... is deprived of any advantage he may have derived by that breach of duty" (per Donaldson LJ in *Bank Mellat v Nikpour* [1985] FSR 87, at 91). Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

In the present case, Cargill sought a mandatory injunction for LB to comply with its obligations under the LOI. The parties did not dispute that Cargill had to establish a strong prima facie case, and that the Court had to be satisfied to "a high degree of assurance" that at trial, it would appear that the mandatory injunction was rightly granted (*TKI Limited v New Happy Limited* [1995] 1 HKC 551). As in any case for the grant of interim injunctions, the Court has to consider whether damages would be an adequate remedy and where the balance of convenience lies between the parties (*American Cyanamid Co Ltd v Ethicon Ltd* [1975] AC 396).

Cargill highlighted that where LB did not have an arguable defence, the question of balance of convenience did not arise (*Yeko Trading Ltd v Chow Sai Cheong Tony* [2000] 2 HKC 612). Cargill also emphasized that the LOI given by LB to Cargill, and by Cargill to FM up the chain to the owners, were in the standard form used in the shipping industry and were commonplace in international trade. It is common for ship owners to be asked to deliver the cargo to the ultimate consignee without production of the documents of title or the original bills of lading. Typically in such cases, the shipowner is offered, and accepts, an indemnity in respect of the consequences of compliance with such request. The practice is clearly set out in *The Jag Ravi* [2012] 2 All ER (Comm) 707 at 709-710.

There are clear authorities to the effect that specific performance is an appropriate remedy for letters of indemnity given in cases which provide for the consequences of cargo being discharged without production of the original bills, on the basis that damages would *not* be an adequate remedy for the indemnified, and that it would be inequitable not to give effect to the very purpose and object of the letter of indemnity and instead to leave the indemnified to a remedy in damages which the letter of indemnity specifically seeks to avoid. In *The Laemthong Glory (No 2)* [2005] 1 Lloyd's Rep 632, the Court rejected the argument that damages would be an adequate remedy for the owners of the vessel in the event of breach of a letter of indemnity to put up security, and Cooke J observed as follows (at p 638):

> "I consider that the owners are right here in saying that a failure to arrange the provision of security by either receivers or charterers in accordance with their letter of indemnity obligations so negates the object of the letters of indemnity that the Court ought to grant specific performance. The very purpose of the letter of indemnity was to avoid the detention which has actually occurred. This clause is of a different nature therefore from those which constitute the ordinary, primary obligations to be found in most contracts.
> ...
> Whereas damages may constitute an adequate remedy for failure to perform many primary obligations, the whole point of the letters of indemnity was to replace secondary liability under any suit for damages for detention by the primary performance of the obligation to ensure release of the vessel, so that such a suit was unnecessary. It would, in such circumstances, be inequitable not to grant specific performance to require fulfillment of that obligation and then to leave the owners to a remedy in damages for detention, or even damages for the loss of the ship, which was the very thing that the letters of indemnity were intended to avoid."

In Hong Kong, the Court likewise refused to discharge an ex parte mandatory injunction for the defendant to provide security pursuant to a letter of indemnity. In *Global Maritime Trust (S) Pte Ltd v Fortress Group Limited* HCCL 23/2014, 21/10/2014, Recorder A Ho SC stated:

> "In my view, this is one of those cases where the plaintiff has demonstrated a strong prima facie case on the merits (though my assessment of the merits is necessarily provisional at this stage). The defendant's obligation under the Letter of Indemnity to provide bail or other form of security is one that the Court will enforce by specific performance: see *The Laemthong Glory (No 2)* [2005] 1 Lloyd's Rep 632, Cooke J at paras 49 to 51. The essence of the injunction is precisely to require the defendant to perform that obligation to prevent the vessel's arrest."

Whether there was delay and material non-disclosure

The Vessel was arrested on 11/8/2015. Since 14/8/2015, Cargill had served various demands on LB in its attempts to seek LB's provision of security, in accordance with the LOI, to procure the release of the Vessel. There had been no response from LB, and Cargill was also threatened with legal proceedings by the owners of the Vessel and by FM under and in respect of the Cargill LOI. In all the circumstances, the Judge did not consider that there had been unexplained or undue delay in applying for the Order. Significantly, Cargill had informed the ex parte judge of the date and circumstances of the arrest.

The affirmation filed by Cargill in support of the ex parte application clearly explained the circumstances of the arrest in the proceedings instituted by the Bank in Qingdao. The Bank claimed that it had issued a letter of credit to one Rizhao Shijia International Trade ("**SIT**"), became the holder of original bills of lading, and was entitled to take delivery of cargo shipped on board the Vessel upon SIT's default in payment under the letter of credit. The Bank claimed that the cargo under the letter of credit was released by the carrier without presentation of the original bills of lading in the Bank's possession, and accordingly claimed that the owners or charterers of the Vessel are liable to compensate the Bank for its loss and damage. The Qingdao Maritime Court made the order for the arrest of the Vessel in respect of the Bank's claim on 11/8/2015.

The Judge did not consider that there was any non-disclosure of the nature or relevant facts of the Bank's claims.

Whether the operation of the indemnity was triggered

LB sought to argue that Cargill failed to demonstrate that there could be a high degree of assurance that at trial, the Court would find that the arrest of the Vessel fell within the scope of the LOI, to trigger LB's obligations and liabilities thereunder.

First, it was argued that emails exchanged on 11/9/2014 between Cargill and LB (or Rizhao Xinye Group Co Ltd ("**Xinye**"), not disputed to be associated to and representing LB) show that LB had asked for the "discharge" of the Cargo at the time when the LOI was sought, and finally issued. It was claimed that the parties had actually intended that the LOI was to cover "discharge" of the Cargo from the Vessel, and not "delivery" of the Cargo (after discharge) without the original Bills. LB also referred to Cargill's instructions to MSN, that the Cargo should be "discharged" against the LOI, but to be released against the original Bills. In these circumstances, it was argued that the LOI did not extend to any wrongful delivery of the Cargo to a party which cannot produce the original Bills. LB claimed that the LOI should be rectified on the ground of alleged common mistake.

On the question of construction of the LOI, the Judge agreed with the observations made by the Court in *The Jag Ravi* [2011] 2 Lloyd's Rep 309, when HH Judge Mackie QC remarked (at para 43 of his judgment):

> "... The goods have been delivered so owners are entitled to enforce the LOI. LOIs, particularly those in standard form, are important commercial instruments which need to be interpreted robustly and in a straightforward way. They are often used and relied upon by those for whom English is not their first language and whose opportunities for close textual analysis before committing to a wording are in the real world very limited."

The distinction between "discharge" and "delivery" on the basis of the emails is artificial. The LOI refers consistently to "delivery" throughout. It recites the request from LB to Cargill "to deliver" the Cargo to MSN without production of the original Bills. It refers to LB's agreement to indemnify Cargill in respect of any liability etc "by reason of delivering the Cargo" in accordance with its request.

There was no evidence of any mistake on the part of Cargill, to form the basis of any claim for rectification by reason of alleged common mistake. Even if there is any difference between the

"discharge" of the Cargo and its "delivery", the indisputable fact is that the Cargo was in fact released and "delivered" to MSN, despite and notwithstanding any instructions from Cargill that the Cargo should be "discharged" without the original Bills, but only to be "released" against the original Bills.

There was nothing material in the emails of 11/9/2014, of which LB complained, as having been withheld from the ex parte judge.

As for the capacity of MSN, Cargill had sufficiently established a strong prima facie case that MSN was acting as LB's agent in taking delivery of the Cargo:

(1) On 5/9/2014,Xinye on behalf of LB declared that the agency nominated at the discharge port of Rizhao was MSN. LB has emphasized that under the Sale Contract, its appointment of MSN as agent had to be approved by Cargill (which approval cannot be unreasonably withheld). The fact that Cargill had to approve LB's appointment of MSN cannot alter the fact that such appointment was made by LB, and that when the appointment was approved, MSN was appointed as LB's agent.
(2) On 15/9/2014, the Notice of Readiness for the Vessel at the discharge port was signed by MSN "as agent", "for and on behalf of the receiver of the Cargo", ie LB.
(3) Under the "Unloading Conditions" of the Sale Contract, a Statement of Facts ("**Statement**") regarding the discharge and completion of discharge is to be signed by the master of the Vessel, and by a person designated by LB. The Statement in question was signed by the master of the Vessel (on behalf of Cargill), and by MSN, which must have been signing as the person designated by LB.
(4) Under the terms of the Sale Contract, the discharge of the Cargo from the Vessel was the responsibility of LB. LB was to make all arrangements for the immediate discharge of the Cargo from the Vessel on her arrival at the discharge port, and to upload the Cargo at its risk and expense. When MSN was making arrangements for the uploading and discharge of the Cargo, it could only be acting for LB.

Even if it should transpire, at trial, that MSN had dual functions or capacities at different times, the Judge accepted on the evidence available at this stage that at the time of the discharge of the Cargo from the Vessel, MSN was taking delivery in the capacity of an agent of the consignee of the Cargo.

As Cargill rightly observed, if MSN was solely Cargill's agent, there is simply no sensible commercial reason why Cargill would request, and LB would provide, a letter of indemnity for Cargill's release of the Cargo to Cargill's own agent.

It is particularly pertinent, that in the affidavit filed on behalf of LB to support its application to discharge the Order, LB itself acknowledges and accepts that the fundamental requirement to trigger LB's obligations and liability under the LOI is the delivery of the Cargo ***to MSN***.

That can hardly be disputed in view of the express wording of the request contained in, and acknowledged by, the LOI.

The Judge was satisfied, on the authorities relied upon by Cargill (*Voyage Charters* para 10.2, citing *The Jaederen* [1892] P 351), that "delivery" took place, when the Cargo passed over the Vessel's rail into the hands of MSN and agents of the consignees.

On the evidence, after MSN received the Cargo into its possession following discharge from the Vessel, the Cargo was released from the discharge port. This is supported by the claim made by the Bank, and Cargill's evidence of its meeting with SIT (during which SIT's representative claimed that the Cargo was released on 15/9/2014 without production of the original Bills). MSN never denied that the Cargo had been taken away from the port of discharge, without production of the original Bills.

LB attempted to argue that the arrest of the Vessel as a result of the Bank's claims in the Qingdao Maritime Court did not arise by reason of the delivery of the Cargo without the Bills. It was claimed that the Bank's claim was for loans made and sums due by SIT under the letter of credit, and arguably not connected with the delivery of the Cargo.

LB also sought to argue that the Bank had no contractual right to possession of the Cargo, which right to possession had ceased on delivery of the Cargo, even to the wrong person, such that it could not have acquired any lawful rights under the Bills. Cargill stressed that the merits of the Bank's claims were

irrelevant, but further relied on *Standard Chartered Bank v Dorchester LNG (2) Ltd* [2015] 3 WLR 261, in which the English Court of Appeal stated that the rights under a contract of carriage to obtain goods from the carrier do not cease when the goods are delivered against a letter of indemnity, and that such rights remain in existence and are capable of forming the basis of a claim against the carrier for misdelivery.

In any event, the short answer to LB's arguments on the validity of the Bank's claims was that under the LOI, LB agreed to provide security if, in connection with the delivery of the Cargo, the Vessel is arrested or detained, "***whether or not such arrest or detention or threatened arrest or detention ... may be justified***." The Judge agreed that LB's liability under the LOI did not depend on the merits of the claim made by the Bank. To permit arguments being raised as to whether arrests, or threatened arrests, of the Vessel are based on valid claims asserted would, again, defeat the expressed purpose and the objective of the LOI. On the evidence, the Vessel was arrested, on the Bank's application, as a result of or "in connection with" (a very broad term used in the LOI) the delivery of the Cargo to MSN, without production of the Bills.

For all the above reasons, the Judge was satisfied, to a high degree of assurance, that LB's obligations and liabilities under the LOI are triggered, and further, that the ex parte judge had not been misled as to the basis of Cargill's claims under the LOI, and LB's liability thereunder.

Whether there was material non-disclosure as to jurisdiction

At the ex parte application, the affirmation in support referred to the jurisdiction clause in the LOI. This provides:

> "This indemnity shall be governed by and construed in accordance with English law and each and every person liable under this indemnity shall at your request submit to the jurisdiction of the High Court of England."

LB's complaint was that Cargill failed to disclose to the Court at the ex parte stage that Cargill had requested LB to submit to the jurisdiction of the High Court of England.

In *Wynn Resorts (Macau) SA v Mong Henry* HCA 192/2009, 29/9/2009, the Court emphasized that the existence of a non-exclusive jurisdiction clause, which provides that a party may litigate disputes against defendants in a foreign jurisdiction, does not prevent a plaintiff from suing a defendant outside the chosen foreign jurisdiction, and is not a factor which makes the foreign jurisdiction clearly or distinctly a more appropriate forum than Hong Kong.

Cargill's solicitors in Singapore had by a letter of 16/8/2015 invited LB to submit to the jurisdiction of the High Court of England, but the letter also specified that if LB did not provide security under the LOI, Cargill would "have no choice other than to enforce their rights under (the LOI) in Court proceedings in UK, Hong Kong and any other jurisdictions".

Since the clause in question was a non-exclusive jurisdiction clause, and Cargill had made it clear that it might commence proceedings in other jurisdictions, including Hong Kong, and since there was no evidence of LB having agreed to submit to the jurisdiction of the English Court, the Judge did not consider the relevant clause to be relevant. Nor did the Judge consider Cargill's failure to disclose the existence of the jurisdiction clause in question to be material non-disclosure, so as to warrant the discharge of the Order.

Cargill's provision of security and the release of the Vessel

The more pertinent issue related to the fact that, after the ex parte Injunction was made on 26/8/2015, the Vessel was released from its arrest on 31/8/2015, as a result of security having been procured by Cargill, and provided by Deutsche Bank. A Letter of Undertaking was issued by Deutsche Bank ("**Undertaking**") to the Qingdao Maritime Court on 28/8/2015, on the same day as the first hearing of the inter-partes Summons (when the matter was adjourned).

The release of the Vessel and the issue of the Undertaking was first disclosed by Cargill in the affirmation it filed on 29/9/2015, for the inter-partes hearing. LB claimed that Cargill failed in such affirmation to make disclosure of when it first had contact with the Deutsche Bank for the issuance of the Undertaking.

The duty to make full and frank disclosure in an application for ex parte relief continues while the proceedings remain on an ex parte basis (*Commercial Bank of the Near East plc v A, B, C and D* [1989] 2 Lloyd's Rep 319). An applicant has a duty to inform the Court as soon as he comes aware that the Court has been misinformed or given incomplete information at the time of the ex parte application. In *Commercial Bank of the Near East*, the plaintiffs commenced proceedings against the guarantors of a loan and obtained ex parte Mareva injunctions, without making disclosure of the fact that they had taken preliminary steps to obtain other security over the defendants' property in Greece. The Court highlighted the importance of a plaintiff's duty to make full disclosure of "everything of materiality", and stated at p 323 of the reported judgment:

> " … While the proceedings remain on an ex parte basis, in the absence of agreement by the party enjoined or unless the court otherwise directs, it is the duty of a party who obtains ex parte Mareva relief to bring to the attention of the court any subsequent material changes in the situation, ie any new or altered facts or matters which, had they existed at the time of the application, should have been disclosed to the Court. It must always be remembered that the granting of ex parte relief provides (albeit so that justice can be done) an exception to the most basic rule of natural justice - that both parties should be heard. Thus the need for full disclosure by the party seeking relief - and thus to my mind the need to continue to make full disclosure while the proceedings remain on an ex parte basis."

Whilst the Court in *Commercial Bank of the Near East* took the view that the plaintiffs should have disclosed "the preliminary steps taken by them to obtain security in Greece", it considered that no prejudice was caused to the 2nd defendant in this respect, since those applications were in their initial stages and the failure to disclose was not sufficiently grave to cause the Court to discharge the ex parte order.

On Cargill's evidence, it was on 28/8/2015 that it "procured Deutsche Bank to issue" the Undertaking which led to the release of the Vessel on 31/8/2015.

It was only on 12/11/2015 that Cargill sought leave to file its affirmation, to disclose that due to Cargill's concerns that LB would not provide security and that it was at risk of being in breach of its own contractual obligations under the Cargill LOI, Cargill "commenced its own investigations to provide security, by contacting Deutsche Bank on or about 19/8/2015". No further particulars have been given as to what those "contacts" with Deutsche Bank consisted of, and what the results of such contacts were. Even giving the benefit of the doubt to Cargill, that no clear indication had been given by the Deutsche Bank on or shortly after 19 August, and that it was only on 28/8/2015 that the Undertaking was issued, there must have been clearer indication made by Deutsche Bank close to, or even on the eve of, 28/8/2015 that the Undertaking was to be issued.

At the hearing of the inter-partes Summons on 28/8/2015, less than 2 clear days' notice of the hearing and of the evidence relied upon by Cargill had been given to LB, and there had been no reasonable chance for LB to put its evidence before the Court. The proceedings remained at an ex parte stage on 28/8/2015. The mandatory injunction was continued on that day, in the sense that LB was ordered to furnish security, only that the Deadline for it to do so was extended until 7/9/2015.

In the Judge's view, Cargill was under the duty to disclose to the Court on 28/8/2015 that the Undertaking had been issued, or was in the course of being issued that day, as a result of Cargill's approach to Deutsche Bank, and that there was a possibility that the Vessel would be released as a result. This information was relevant to the Court's consideration of whether it should continue, or extend, or amend the Order.

Whether the undisclosed fact was material to require discharge of the Order

The authorities to which Cargill referred showed that the obligation of LB to provide security under the LOI survived the provision of security by Cargill, or any other party. Cargill was entitled to specific performance of LB's obligation to provide security under the LOI according to its terms, even though Cargill had already provided security to the Bank, and the Vessel had been released.

In *The Bremen Max* [2009] 1 All ER (Comm) 423, a vessel was arrested, and the owner of the vessel arranged for security in the form of a corporate guarantee to secure the vessel's release. The claimant in the proceedings before the Court then provided security by way of cash to be held in escrow by solicitors, and called upon the defendant to provide substitute security under a letter of indemnity. The Court

granted interim mandatory relief requiring the defendant to provide the funds necessary to replace those deposited by the plaintiff, pending a trial of preliminary issues: as to whether the obligation to provide bail or other security under the letter of indemnity was no longer a current obligation, when the release of the vessel had already been secured. After the trial of preliminary issues, the court held that the obligation remained a current one, notwithstanding the release of the vessel, and that specific performance was an appropriate remedy for breach of that obligation. At p 429e-f of the reported judgment, Teare J stated:

> "The action of the owners in putting up security had the effect of ending the detention of the vessel and to that extent mitigated the loss caused by the charterers' breach. But the charterers remained in breach of their obligation. The action of the owners did not discharge the obligation of the charterers to put up bail or other security. That obligation had accrued. The action taken by the owners to mitigate the loss cannot discharge that obligation or provide the charterers with a defence to the charge that they remained in breach of the obligation to provide bail or other security. Were it to do so the commercial purpose and intention of the clause would be frustrated; for the owners would have to incur the cost of putting up the bail required to secure the release of the vessel. It is correct that the owners would have a remedy in damages for the cost of putting up bail but the commercial purpose and intention of cl 3 was that the owners should not have to incur the cost at all." (Emphasis added)

The release of the Vessel and the fact of Cargill putting up or procuring bail or security from Deutsche Bank, therefore, did not discharge LB from its liabilities under the LOI, nor did they prevent or deter the Court from granting specific performance of the LOI. In these circumstances, the Judge was of the view that the non-disclosure of Cargill's contacts with Deutsche Bank before the provision of the Undertaking on the day of the hearing on 28/8/2015 was not of sufficient materiality to justify the discharge of the Order.

On reviewing the matter inter partes, and bearing in mind the guidance set out in *Arena Corp Ltd v Schroeder* [2003] EWHC 1089 Ch (applied in *Excel Courage Holdings Ltd v Wong Sin Lai* [2014] 3 HKLRD 642), the Judge considered that the strong merits of Cargill's claims, the high degree of assurance that the Judge had that damages were not an adequate remedy and that specific performance would be ordered under the LOI at trial, the inequity of leaving Cargill to a claim of damages against the very objective of the LOI (*The Laemthong Glory (No 2)*; *The Bremen Max*), and the proportionality between any punishment for any non-disclosure and the offence, led to the conclusion that a mandatory injunction was appropriate, and that the Order should be continued in the interim of trial, with variations as provided below. To balance the justices of the case, the Judge already gave directions at the hearing on 17/11/2015 for a speedy trial, with a timetable for the immediate filing of pleadings, discovery and witness statements, and for dates to be fixed for the trial.

Orders made

The Judge dismissed the application to discharge the Order.

The Order would be revised, to order LB to provide security within 7 days by making payment into this Court of the sum of US$9.3 million. In the event that the parties could agree on an alternative form of security, they could apply by consent to further vary the Order, but otherwise the Order for payment into this Court would stand.

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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