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To: Transport Industry Operators

Worldwide Mareva injunction

The Hong Kong High Court issued a Decision on 15 March 2021 converting a domestic Mareva injunction into a worldwide Mareva injunction in a shipowner's freight and demurrage claim against a charterer. [HCMP 1190/2020] [2021 HKCFI 680]

Background
The shipowner and the charterer had a long-standing business relationship, with the charterer chartering the shipowner's vessels for shipment of bauxite cargoes from the Solomon Islands to the PRC. Between September 2018 and June 2020, the parties entered into 16 charterparties governed by English law. The shipowner's claim against the charterer was for outstanding fees for freight and demurrage.

Procedural history
On 10 August 2020, the High Court granted an *ex parte* domestic Mareva injunction in the sum of approximately US$5.6 million ("Mareva ceiling"). On 20 August 2020, the charterer disclosed that its assets within Hong Kong were approximately US$40,000 which, in the context of the Mareva ceiling, was a minimal amount.

On 1 September 2020, the shipowner applied to convert the domestic Mareva injunction into an interim worldwide Mareva injunction. At that hearing, the charterer disclosed that it had a wholly-owned subsidiary incorporated in the Solomon Islands, i.e. BMSI and that its shares in BMSI were valuable based on a November 2018 valuation of US$91 million made on a discounted cash-flow basis. Upon the charterer's undertaking not to dispose of or deal with its shareholding in BMSI, the charterer was ordered to provide a valuation of BMSI within 21 days on a net tangible asset basis and to confirm whether its shareholding was encumbered ("the 4 September order").

However, the valuation the charterer provided on 25 September 2020 was in breach of the 4 September order in 2 respects: (a) it was a valuation of the charterer and not of BMSI; and (b) it was done on a cash-flow basis and not on a net asset value basis.

On 14 October 2020, the charterer exhibited a certificate of gross tangible asset value of BMSI as of 9 October 2020 of approximately US$23 million ("BMSI gross value certificate") prepared by Ting & Co, BMSI's accountants, who opined that there was insignificant debt and all funding was by internal sources. However, as a full audit had not been conducted there was no statement of its exact liabilities.

The BMSI gross value certificate showed that the bulk of its value lay in fixed assets of some US$16.7 million, and the valuer opined that BMSI could operate as a going concern with insignificant external debt.

Applicable legal principles

The applicable legal principles are well established and are not controversial. The burden was on the shipowner to show (a) a good arguable case on the merits; (b) that there was a risk of dissipation; and (c) the balance of convenience was in favour of granting Mareva relief.

The charterer had assets in Hong Kong as well as outside the jurisdiction. The Hong Kong assets were insufficient to satisfy the shipowner's claim.

The application

The relief the shipowner sought from the High Court consisted of :

(i) an expansion of the domestic Mareva injunction to a worldwide Mareva injunction;
(ii) further ancillary disclosure orders should a worldwide Mareva injunction be granted; and
(iii) a variation of the Mareva ceiling to approximately US$8.1 million.

The shipowner's claim for unpaid freight and demurrage under the charterparties was supported by an opinion on English law. That the shipowner had shown a good arguable case on the merits was not seriously challenged: the fact that the charterer had not adduced evidence to counter that opinion spoke for itself.

It was the risk of dissipation that was highly controversial.

The charterer also raised material nondisclosure as a reason for the High Court to refuse to grant the injunctive relief sought.

RISK OF DISSIPATION

In its recent decision in *Convoy Collateral Limited v Cho Kwai Chee* [2020] HKCA 537, the Court of Appeal had occasion to examine the proper approach when assessing whether there is a risk of dissipation. It adopted the principles set out by Popplewell J in *Fundo Soberano de Angola v dos Santos* [2018] EWHC 2199 (Comm) at [86] which were held to be applicable in Hong Kong.

The ultimate question, whether a plaintiff succeeds in showing objectively there is a solid basis for concluding that there is a real risk of unjustified dissipation of assets, is to be answered by examining the evidence holistically, involving an evaluative and predictive judgment. Evidence of dishonest and fraudulent conduct or other serious wrongdoing which form the basis of the claims and which reflect adversely on the integrity of the defendant could point powerfully towards the inference of such a risk.

The shipowner relied on 4 factors that supported the inference of a risk of dissipation on the part of the charterer.

I. The charterer's fraudulent and dishonest conduct towards the shipowner

It was the shipowner's case that the charterer, for its own benefit, lied to the shipowner on 2 occasions to induce the shipowner to give up its security rights to the detriment of the shipowner's financial position.

The first attempt was made in the following circumstances:

(i) In view the fees then outstanding, in June/July 2020, the shipowner exercised its security rights and obtained security over 8 cargoes by withholding 3 cargoes and, upon obtaining an order from the Qingdao Maritime Court, arrested 5 cargoes.
(ii) After the shipowner's multiple requests for confirmation of the charterer's ownership of those cargoes, on 23 July 2020, the charterer did confirm the charterer's ownership.
(iii) In fact, 4 of the 8 cargoes had been sold to a third party who, on 27 July 2020, applied to the Qingdao Maritime Court for their release and it was only on that date that the charterer

disclosed their sale.

Prior to 27 July, the charterer had given inconsistent explanations. It was clear from contemporaneous documents that they were shown to be false.

The second attempt was successful. The shipowner was deceived into releasing certain cargo by the charterer's representation that once sold, proceeds of US$2 million would be used to pay the shipowner. On 5 June 2020, when the shipowner was about to issue a notice of lien over certain cargo, the charterer represented to the shipowner that it had been sold to Chalco Trading ("Chalco") and that the first instalment proceeds of about US$2 million would be applied to pay the shipowner on 12 June 2020. In reliance on that representation, the shipowner released the cargo on 10 June 2020. However, upon receipt of the proceeds, the charterer did not pay the shipowner but immediately applied the proceeds for other purposes, thus diminishing the amount of security available to the shipowner. The charterer relied on an extract from the transcript of the 24 June meeting to question the very existence of the Chalco representation. However, the extract set out in the charterer's submissions was not an accurate presentation of the evidence. The unwarranted interpolation into the shipowner's office transcript spoke to the charterer's total lack of integrity and willingness to deceive.

II. The charterer's breach of the Court's disclosure order

The charterer failed to comply with the 4 September order in 2 material respects.

The reasons for requiring an asset valuation of BMSI were to enable the High Court to obtain a clearer picture of BMSI's financial position and to evaluate its worth in terms of assets.

What the charterer provided (being a valuation of the charterer done on a cash flow basis as at June 2020) could not possibly have advanced the High Court's understanding of BMSI's financial position which was the whole point of the 4 September order. The underlying financial statements of the charterer or its subsidiary did not feature at all and remained unknown.

That the charterer breached the High Court's disclosure order was an undeniable fact.

III. The charterer's acts of dissipation

The local assets disclosed by the charterer included sums held in an USD account at Industrial and Commercial Bank of China (Asia) Ltd and one at Agricultural Bank of China. Funds of approximately US$11.8 million (including the Chalco proceeds of US$2.2 million) had been paid into those business bank accounts between March and June 2020. However, by 10 August 2020, such funds had dwindled to less than 1% of what had been paid in during the relevant period.

The charterer submitted that as its cash flow had been restricted because of the Covid pandemic delaying the discharge of cargoes and also from their being withheld/arrested, the monies were spent in the ordinary course of business. It was further submitted that there being no suggestion that money had been squirreled away, the decrease in funds in those accounts could not reasonably be construed as equivalent to active dissipation of assets and the charterer was not required to provide any explanation in the absence of any actual evidence of dissipation.

In the High Court's view, it was incumbent on the charterer to adduce evidence of its operating expenses for that period in support. It failed to do so and, in the circumstances, the inference of dissipation was warranted.

IV. The charterer's undertakings dishonestly given to the Court

On 15 October 2020, the charterer gave two undertakings to the High Court.

The undertakings given were:

(i) an undertaking not to dispose of the shares in BMSI ("the BMSI undertaking"); and
(ii) undertakings to pay receivables of approximately US $2 million from C & D Logistics (Tianjin) ("C & D") into the charterer's Hong Kong bank accounts and to update the shipowner monthly ("the C & D undertaking").

(A) The BMSI undertaking

This undertaking was premised on BMSI having financial value based on the BMSI gross value certificate.

On 17 November 2020, the charterer produced a certificate dated 12 November 2020 of the BMSI's net tangible asset value which adopted a valuation date of 15 October 2020 showing a value of approximately US$21 million (the "BMSI net value certificate"). The only difference with its gross value certificate was the item of liabilities of approximately US $2.1 million.

BMSI's mining operations were conducted on customary land (parcel number 298-005-1 known as "Western Rennell") pursuant to rights granted under Heads of Agreement dated 21 March 2014 entered into by Asia Pacific Investment Development with the charterer and BMSI, granting them the sole and exclusive right for 25 years to mine, market and sell the bauxite in return for a royalty fee.

The shipowner's case was that the BMSI undertaking was of no value because Solomon Islands Government had stripped BMSI of its mining rights and fixed assets and that the charterer must have been aware of this on 15 October 2020 when the undertaking was given. The shipowner had produced a Minute dated 19 October 2020 issued by the Registrar of Titles of the Registrar General's Office of the Solomon Islands rectifying the registration of Western Rennell through revocation of the registration ("the revocation letter"). The Registrar considered the registration unlawful since customary land can only be acquired under Part V by Solomon Islands Government and/or Provincial Governments by private treaty or compulsory acquisition for public purposes. Accordingly, the registration was revoked, returning Western Rennell to customary ownership as customary land pursuant to his powers.

The shipowner submitted (and the High Court accepted) that the land revocation adversely affected the value of the charterer's shares in BMSI:
(i) BMSI's ability to continue its mining operations as a going concern was a major component of its value. That was in doubt given the land registration revocation and potential cancellation of the mining lease.
(ii) Ownership of the building and infrastructure (which as fixtures would vest with ownership of land), the stockpile (the rights to which were dependent on the mining lease), and potentially parts of the machinery and equipment (which may have become fixtures upon installation) was in serious doubt.

(B) The C&D undertaking

Since the date of the undertaking, the shipowner had never been notified that the charterer had received any part of the C&D proceeds. It then transpired from the shipowner's own investigations that the underlying contracts proved to have no substance, not being true sales contracts but part of a much wider arrangement, and further, C&D denied any liability to pay such receivables.

The charterer made no submissions in response. In those circumstances, it was irrefutable that the charterer knew that the C&D undertaking was worthless when it was given.

Conclusion on risk of dissipation

Bearing in mind the applicable principles set out in *Convoy*, looking at the evidence holistically, the shipowner had demonstrated dishonest and fraudulent conduct on the charterer's part in relation to

matters that form the basis of the claims. The charterer's lack of integrity was amply borne out by the evidence.

The more egregious instances were the following:
(i) The Chalco representation.
(ii) The charterer's failure to apprise the Court of the revocation letter once it came to the charterer's notice.
(iii) On 17 November 2020, the charterer proferred the BMSI net value certificate to the Court when it must have known that the basis for that valuation was no longer valid.
(iv) The charterer gave the C & D undertaking when it must have known that the undertaking was worthless.

Those events could not be explained away as innocent errors or misjudgements. They were deliberate and dishonest acts undertaken to deceive and mislead.

Accordingly, the High Court had no hesitation in concluding that the risk of dissipation had been made out.

MATERIAL NONDISCLOSURE
The charterer's allegations were that at the *ex parte* stage, the shipowner did not disclose past dealings between the shipowner's associated companies with Indo Bauxite Mining Corporation ("IBMC").

The shipowner's associated companies were separate legal entities. The same applied to IBMC and the charterer. None of these companies was involved in the proceedings in question.

In the High Court's view, the charterer's submission that there was material nondisclosure at the ex parte stage had not been made out.

If the High Court was wrong, the principles set out by the Court of Appeal in *Excel Courage Holdings Limited v Wong Sin Lai* [2014] 3 HKLRD 642 pertaining to the discretion to re-grant injunctions became relevant.

Once the Court finds that there have been breaches of the duty of and fair disclosure on the ex parte application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial. This is sometimes referred to as the "golden rule". Nevertheless, the Court has jurisdiction to continue or re-grant the order to ensure that justice is done and not to allow the application of the golden rule to become the instrument of injustice in a particular case.

The Court would have regard to the principle of proportionality in the exercise of its penal jurisdiction to impose sanctions for non-disclosure. The overriding question for the Court is what is in the interests of justice in the particular circumstances of the case.

Applying those principles, if necessary, the High Court would re-grant the domestic Mareva injunction.

DISPOSITION
Having regard to the evidence, the High Court had no hesitation in converting the domestic Mareva injunction into a worldwide Mareva injunction.

In addition to the usual ancillary disclosure order, the shipowner sought disclosure of the details of any disposition or transfer of assets on or after 1 March 2020 up to the date of the order to be made. The evidence showed that of funds of approximately US$11.8 million paid into the charterer's Hong

Kong bank accounts between March and June 2020, by 10 August 2020, only US$40,000 remained.

Given the amount transferred out of the charterer's Hong Kong bank accounts within such a short time span, it was not unlikely that those funds had been transferred to other entities under circumstances that would fall within the Court's *Chabra* jurisdiction.

The High Court agreed that such an order would be appropriate in the circumstances of the case in question.

New Mareva ceiling

The outstanding fees due under the charterparties were US$15,062,391.14. The shipowner calculated the value of valid security it held at US$6,948,338.70. The new Mareva ceiling it sought was US$8,114,052.44.

The High Court agreed that there should be a new Mareva ceiling as sought.

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

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