IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1999] SGCA 28

CA 268/1998

Between

Petromar Energy Resources Pte Ltd

… Plaintiff

And

Glencore International AG

… Defendant

GROUNDS OF DECISION

Civil Procedure; Civil Procedure — Mareva injunctions

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Petromar Energy Resources Pte Ltd v Glencore International AG

[1999] SGCA 28

CA 268/1998
Karthigesu JA; L P Thean JA
14 April 1999

Judgment:

LP THEAN JA

(delivering the grounds of judgment of the court): In this appeal, the appellants, Petromar Energy Resources Pte Ltd (`Petromar`), sought the discharge of two interlocutory orders, an Anton Piller order and a Mareva injunction, the latter prohibiting Petromar from disposing of their assets up to a value of US$21m. These orders were obtained ex parte by the respondents, Glencore International AG (`Glencore`), on 12 June 1998. Following the service of the orders, Petromar applied for the orders to be discharged. The application, however, was refused and they appealed against the refusal. We allowed the appeal and discharged the orders. We now give our reasons.

2. ***Background***

The figure at the centre of the dispute between Petromar and Glencore is a Liberian-registered company, Metro International Trading Inc (`Metro`) which,

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however, is not a party to the present proceedings. Metro is part of an international group of companies known as `the Kilakos group` which is owned and controlled by one Stamatis Kilakos and his son John Kilakos. Glencore are an international trading company based in Switzerland, dealing, among other things, in oil and oil products. At the material time they stored their oil with Metro at the latter`s storage facility at Fujairah in the Middle East. Glencore claimed that Metro by the use of false documents had diverted and disposed of a large quantity of oil belonging to them, and Metro and the Kilakos group could not account for approximately 1.4 million metric tonnes of oil valued at US$175m while the oil was stored at or on their way to be stored at Metro`s oil storage facility at Fujairah. The loss of the oil stocks was discovered by Glencore in February 1998. In consequence, proceedings were instituted in London against Metro by Glencore and other parties concerned. Glencore further alleged that Metro diverted part of the missing oil stocks to Singapore, where the oil was dealt with by Petromar. Petromar are a Singapore registered company set up in 1985 by one Michael Tziolas (`Tziolas`) and are brokers dealing in oil and oil products. At the material time, their largest customer was Metro.

3.On 12 June 1998, about four months after the loss of the oil stocks from the Fujairah facility was discovered, Glencore initiated proceedings against Petromar in Suit No 920 of 1998 claiming damages for conversion of six shipments of oil (`the oil cargoes`) with a value of US$25m which, it was alleged, arrived in Singapore on six vessels namely: the `Addax`, `Hyperion`, `Obo Victory`, `Shoko` `Devon` and `Vigour`, between December 1997 and February 1998. Glencore claimed that upon arrival in Singapore, the oil cargoes were dealt with by Petromar acting on behalf of Metro and parcels of the oil cargoes were sold to buyers in Singapore, including the Singapore Petroleum

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Company and Texaco, while the remainder was bought and retained by Petromar. Upon the commencement of the action, Glencore obtained ex parte two interim orders: (a) an Anton Piller order allowing their representatives to enter and search Petromar`s office in Robina House, [num ]17-06, Shenton Way and the residence of one Mr Steven Tan, Petromar`s trading manager at 20, Lorong K, [num]03-06, Telok Kurau, and (b) a Mareva injunction prohibiting Petromar from disposing of their assets in Singapore up to the value of US$21,202,253.12. Each of the orders was complemented with an ancillary order ordering Petromar to disclose various matters or documents (`the disclosure order`) to which we shall revert in greater detail shortly.

4.On 1 July 1998, Petromar applied for the discharge of the Mareva injunction and Anton Piller. By this time, the Anton Piller order had been partially executed and voluminous documents had been removed from Petromar`s office by Glencore`s representatives and copied. Glencore`s solicitors had also written to Petromar`s bankers, Credit Lyonnais, pursuant to the discovery order contained in the Mareva injunction asking for details of banking transactions effected by Petromar, including all cash, cheque, draft and telegraphic transfers transactions dating back to 1 January 1997. At the end of the hearing, the learned judge declined to discharge either order, and Petromar appealed.

5. ***The appeal***

Before us the question of whether Glencore had satisfied the condition of `a good arguable case` and `an extremely strong prima facie case` laid down for the grant of the Mareva injunction and Anton Piller order respectively was not seriously argued. In our opinion, they clearly had satisfied that condition. The `heart and core` of the appeal before us was whether: (a) in respect of the Mareva injunction, there was a real risk of Petromar dissipating or removing

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their assets from the jurisdiction and so stultifying any judgment that may be obtained against them, and (b) in respect of the Anton Piller order, there was a real risk of Petromar destroying or concealing evidence relevant to the trial of this action.

6. ***Real risk***

The law on this point is well settled. It is sufficient to quote what this court said in **Choy Chee Keen Collin v Public Utilities Board** [1997] 1 SLR 604 , 611-612 said at [para] 20-21:

> 20 In **The Niedersachsen; Ninemia Maritime Corp v Trave Schiffahrtsgesselschaft mbH & Co KG** [1984] 1 All ER 398, Mustill J, whose judgment at first instance was upheld on appeal, held that the plaintiff would have to adduce `solid evidence` to support his assertions of a real risk of dissipation. He said, at p 406:
>
> *`It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of different forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there.`*
>
> 21 At the minimum, a plaintiff in seeking a Mareva injunction must furnish `some grounds for believing that there is a risk` of the assets being dissipated (per Lai Kew Chai J in **Art Trend Ltd v Blue Dolphin (Pte) Ltd** [1983] 1 MLJ 25 , 29); [1982-1983] SLR 362, 367). A mere possibility or unsupported fear of dissipation is insufficient: **O`Regan & Ors v Iambic**

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> **Productions Ltd** [1989] 139 NLJ 1378, 1379 where Sir Peter Pain said:
>
> *`There are numerous paragraphs in the authorities relating to Mareva injunctions which make it plain that unsupported statements and expressions of fear carry very little, if any, weight. The court needs to act on objective facts from which the court can infer that the defendant is likely to move assets abroad or dissipate them within the jurisdiction. Here there is nothing of that nature in the documents at all ...`*
>
> *In* ***European Grain & Shipbuilding Ltd v Compania Naviera Euro-Asia SA & Ors*** *[1990] 2 MLJ 219 [1989] SLR 1001 Chan Sek Keong J (as he then was) discharged an ex parte Mareva injunction on the ground, inter alia, that there was no real evidence which suggested that the defendants would take steps to dissipate their assets.*

The above which was said with reference to an application for Mareva injunction applies equally to an application for an Anton Piller order, in other words, there must be `solid evidence` of a real risk that the defendant might destroy or conceal evidence relevant to the case.

7.In the present case, Glencore relied heavily on the close association between Petromar and Metro and suggested that Petromar had a role in the alleged fraud, in particular the unauthorised diversion of the oil cargoes from Fujairah and the issue of falsified documents to cover up the diversion. They alleged that Petromar was substantially, if not wholly, controlled by the Kilakos group and their associates, among whom was one Edwin Motte Griffin Jr (`Griffin`) who was the chief executive and president of Metro Trading (USA) Inc, an American affiliate of Metro. In David Toh`s affidavit filed in support of Glencore`s application, he produced the following evidence to support his claim that Petromar was substantially controlled by the Kilakos group: (i). a printout from the Registry of Companies and Businesses showing John Kilakos as a director and shareholder of Petromar and Edwin Motte Griffin Jr as a shareholder;

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(ii). the inclusion of Petromar, Metro Trading (USA) Inc, and another shareholder of Petromar, the Liberian-incorporated company Petromar Enterprises Inc, on the list of Metro`s `Worldwide Contacts` found on Metro`s website;

(iii). a clause in an agreement dated 7 February 1998 whereby the Kilakos group promised to promptly transfer `the net asset value of Petromar` to a Kilakos group company;

(iv). a chart of the Kilakos group of companies supplied by Metro and annexed to the agreement, which showed Petromar as being 65% owned by the Kilakos group;

(v). the `common market knowledge` that the names Petromar and Metro were used interchangeably in the oil industry, in particular in respect of futures contracts where Metro`s name would sometimes be substituted into the contract in place of Petromar`s name.

8.At the inter partes hearing, Glencore supplemented this evidence with further evidence of the close association between Petromar and the Kilakos group. This included, in so far as material, the following: (i). a Metro brochure listing Petromar, Petromar Enterprises Inc and Metro Trading (USA) as their `Affiliates`;

(ii). the affidavit of one Siobhan Quinn, the regional manager of Texaco, in which she stated that representatives from Petromar and Metro attended meetings as `one` and further that Tziolas was present at meetings between Texaco and Metro in which Petromar had no interest; and

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(iii). faxes found in the course of the execution of the Anton Piller order which were sent to Metro and marked `To the attention of Michael Tziolas` despite the fact that Petromar Enterprises Inc had a separate fax number and their own office in the same building in Greece as Metro.

9.In response, Petromar denied the allegations that they were part of the Kilakos group or was controlled by the Kilakoses and their associates. They pointed out that the Registry of Companies printout annexed to David Toh`s affidavit was outdated. While John Kilakos was a director of Petromar at one time, he had resigned from the position in March 1998 and his resignation was notified to the Registry of Companies and Businesses in April 1998. Griffin, who was also a director of Petromar at one time, had resigned from his directorship even earlier, in April 1997. Further, John Kilakos no longer held any interest in Petromar as his entire shareholding in the company, Anita Holdings Limited, had been sold and transferred to Tziolas`s wife and sister-in-law in January 1998. Anita Holdings Ltd had also ceased to be the majority shareholder in Petromar, after Tziolas and Petromar Enterprises Inc each injected $50,000 into the company at the end of February 1998. Instead, as at 12 June 1998, Anita Holdings Limited held only 45% of Petromar`s issued share capital. In any event, John Kilakos had never been actively involved in Petromar`s operations. His shareholding in Petromar came about at Tziolas`s request, when the latter sought his assistance in raising capital for the company at their inception in 1985. Similarly, Tziolas had asked John Kilakos to be a director of Petromar, because he hoped that the Kilakos name could help Petromar obtain cheaper financing in the form of open credit from Metro. The arrangement had always been that Tziolas would buy out John Kilakos`s shareholding at some future date.

10.In the present case, there was never any dispute by Petromar that they had a close commercial relationship with Metro. Petromar even publicly admitted in

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a press statement in March 1998 that they were severely affected financially by Metro`s troubles. The extent of Petromar`s dependence on Metro was evident from the drastic scaling down of their operations after Metro collapsed in February 1998. From a monthly average of 500,000 metric tons of oil products which they handled at the end of 1997, Petromar had all but ceased operations by the middle of 1998. It was also fairly obvious that the Petromar-Metro relationship was an informal one, with few of the normal distinctions which are drawn between two corporate entities. Nevertheless, we do not think that any sinister connotation should be attached such closeness of commercial relationship (see **SSAB Oxelosund AB v Xendral Trading Pte Ltd** [1992] 1 SLR 600 , 607). It was not unexpected for Petromar, a new entrant to the oil industry, to jump at the opportunity of associating themselves with a major and apparently reputable company, which Metro was at the time when Petromar commenced operations in Singapore in 1985. The important fact was that Petromar`s operations were at no time controlled by Metro or the Kilakos group. Tziolas had adduced evidence which showed prima facie that the company was set up and run by himself, together with John Benjamin and Steven Tan, and further that John Kilakos and Griffin were never actively involved in Petromar`s affairs even during their directorships.

11.The learned judge held as follows at [para] 8:

> *Whilst it may be that the link between Metro and the defendants was a purely commercial one and that, with respect to these shipments, the defendants were dealing with Metro on an arm`s length basis and in entire ignorance of any wrong-doing by Metro, it is not the court`s function, at this stage, to make a final determination of that issue: that is a matter for the court conducting the trial to determine. I was, however, satisfied, on the evidence before me, including the evidence adduced by the defendants, that there was a strong prima facie case that the relationship between the defendants and Metro went beyond a close commercial relationship and was so close that a strong prima facie case existed that the defendants were knowingly*

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> *involved in the alleged wrongful diversion by Metro to the defendants of the plaintiffs` oil intended to be stored at the Fujairah facility.*

With respect, we were unable to agree. Looking at the evidence as a whole we think that the most that could be safely said was that Petromar and Metro had a very close commercial relationship, but it did not follow that Petromar was knowingly involved in the alleged fraud. On the contrary, the evidence relied on by Glencore to support their allegations against Petromar did not really implicate Petromar.

12.With regard to the dissipation of assets, David Toh merely made bald assertions in his affidavit as to his belief that Petromar`s assets would be dissipated and that the evidence would be destroyed or concealed. He stated:

> 139 By reason of the matters aforesaid, I verily believe that any assets including monies presently standing to the credit of Petromar in the said bank accounts(s) and/or any of her bank account(s) in Singapore are likely to be dissipated and/or remitted by Petromar out of the jurisdiction to avoid satisfying any judgment Glencore may obtain herein. Furthermore, I also believe that unless Anton Piller relief is granted against Petromar in respect of the above list of documents, there is a substantial danger that when proceedings are brought against Petromar all evidence will be hidden and/or documents including computer records will be destroyed or otherwise made unavailable.

It is well settled that any applicant for a Mareva injunction and an Anton Piller order must adduce at least some evidence from which it can reasonably be inferred that there is a real risk that the assets would be dissipated and evidence destroyed. It necessarily follows that something substantially more than unsupported bare assertions is required before the court will exercise its jurisdiction to grant the orders. Merely this paragraph alone in an affidavit would not satisfy such requirement.

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13.In fact, contrary to the allegation of squirreling away the assets, the records from the Registry of Companies and Businesses showed that Petromar had received a capital injection of $100,000 at the end of February 1998 when Tziolas and his Liberian-registered company Petromar Enterprises Limited each took up an additional $50,000 of shares in the company. This was a few weeks after the Metro scandal had erupted. There was also evidence to support Tziolas`s claim that he was in fact planning to expand Petromar`s operations in the region when they were suddenly slapped with the Mareva injunction and the Anton Piller order. Tziolas produced drafts of formal documents prepared by Messrs Gillett Kian Fong, the company secretary, to increase Petromar`s authorised share capital from $1 million to an unspecified amount which drafts were received by Petromar on 11 June 1998, one day before the two orders were obtained. This evidence was inconsistent with the behaviour of a company alleged to be dissipating their assets in order to defeat or frustrate a potential judgment. Neither did Petromar`s bank statements show that any unusual withdrawals had been made from their three bank accounts in Singapore. While there were large fluctuations in the account balances from month to month, we found this to be not unusual in trading accounts. In any event, the large fluctuations in the account balances were present even prior to the events of February 1998.

14.Petromar had notice of Glencore`s claim to the oil cargoes, in particular the `Vigour` cargo, as early as February 1998. In fact, Glencore wrote to Petromar almost immediately after they discovered the loss of the oil stocks in early February to put Petromar on notice that Glencore were claiming title to the oil cargo on board the `Vigour`. From the ensuing exchange of correspondence between Petromar and Glencore, the tone of which bordered on accusatory, it would have been manifestly clear to Petromar at that stage that there was a good

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chance of Glencore commencing proceedings against them. As it turned out, Glencore did not take any legal action until June 1998, a delay of some four months. Petromar would have had ample time and opportunity to destroy or conceal evidence, and/or dissipate their assets, if they had any propensity of so doing. From the numerous documents which Glencore were able to find in the course of the execution of the Anton Piller order, it was clear that the evidence remained quite intact.

15.On the evidence, we were not satisfied that Glencore had made out a case for the Mareva injunction and the Anton Piller order. Glencore`s case rested wholly on the close relationship between Petromar and Metro, and not on any evidence of wrongdoing on Petromar`s part. For these reasons, the Mareva injunction and the Anton Piller order were not warranted and should have been discharged at the inter partes hearing.

16. ***Scope of the Anton Piller order***

There are two matters in respect of which we have some concern. The first relates to the scope of the Anton Piller order. The order was made in terms of Glencore`s application which sought an order in unjustifiably wide terms. The order obtained extended to both Petromar`s office in Robina House as well as the home of Steven Tan, Petromar`s trading manager. The action relates purely to a commercial dispute between Glencore and Petromar, and did not involve Steven Tan in his personal capacity. There was nothing in David Toh`s affidavit filed in support of Glencore`s application which showed the necessity for Steven Tan`s home to be searched. All that had been shown and relied on was a single sentence in his affidavit which set out only his belief that some of the documents covered by the order `might be in the possession of the trading manager, Steven Tan, and/or Michael Tziolas, the managing director, at both their residences`.

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This was a bare assertion completely unsupported by any evidence whatsoever, and clearly did not justify the extension of the Anton Piller order to include Steven Tan`s home. That the scope of the order was unwarranted was borne out by the results of the search at his home, which did not yield any important document relevant to Glencore`s claim against Petromar. We think that considerable humiliation and family distress would be caused when private homes are searched. It is helpful to remind ourselves of what Scott J said in **Columbia Picture Industries Inc & Ors v Robinson & Ors** [1987] Ch 38, 73:

> *... Anton Piller orders are often granted not simply in respect of business premises but in respect of the respondent`s home. He is required, on pain of committal, to open the doors of his house to the plaintiffs` representatives and to permit a search of the contents thereof. The plaintiffs and their representatives are at liberty to search and rummage through the personal belongings of any occupant of the house and to remove the material they consider to be covered by the terms of the order. The traumatic effect and the sense of outrage likely to be produced by an invasion of home territory in the execution of an Anton Piller order is obvious.*

17. ***Disclosure order***

The second matter on which we have serious concern was the very extensive orders for discovery which were tacked on to the Mareva injunction and the Anton Piller order respectively. Glencore sought very extensive discovery against Petromar and the orders were granted in terms of their application. The Mareva injunction contained an order directing Petromar to disclose `at once` all their assets in very broad terms. This was then followed by no less than eight specific items of assets for disclosure, namely:

> (a) the identity of all bank or other accounts whether in the defendants` own name or jointly held or held by nominees or otherwise howsoever on its behalf identifying the branch at which the account is held, the account number, the state of the

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> account and the existing balance in each such account; and the defendants shall give its consent in writing within four (4) days of the service of the order to be made hereon to all of its bankers providing to the plaintiffs or its solicitors any information relating to its bank account and/or copies of its bank statements;
>
> (b) the nature, value and location of the shareholdings of the defendants, if any, in any company;
>
> (c) any overdraft or loan facility with a bank or licensed deposit taker or any other person, partnership or body corporate whatsoever, identifying such person, partnership or body corporate, and stating the nature and terms of the facility, and the state and extent of indebtedness thereunder;
>
> (d) any debt owed to the defendants by any other person, partnership or body corporate whatsoever, identifying the amount of such debt, and stating how it arose and when the same is payable;
>
> (e) real property, identifying the same and stating in whose name the property is held, whether the property owned freehold or leasehold, the value of the property and whether it is mortgaged or charged and if so, to whom and for what amount;
>
> (f) any Oil Products, identifying the same and the location where such Oil Products have been stored, whether on land storage facilities and/or storage vessels or elsewhere;
>
> (g) any other property, identifying the nature, sums and stating its value, whether it is pledged or charged and if so, to whom and in what amount;
>
> (h) monies, balances, debts, property (real or person) held on behalf of or in trust for the defendants by any other person, partnership or body corporate, stating by whom or which the same is held and the appropriate particulars as are referred to in paras (a) to (g) above.

Following these, there was a direction that Petromar were required to confirm in an affidavit such disclosure within seven days of the service of the order.

18.Similarly, the Anton Piller order also contained an extensive order for discovery. The order required Petromar to inform Glencore`s solicitors of the following:

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> (a) where all the listed items are; and
>
> (b) so far as they are aware:
>
> (i) the name and address of everyone who has supplied them, or offered to supply them with the Oil Products referred to in the listed items;
>
> (ii) the name and address of everyone to whom they have supplied, or offered to supply, the Oil Products referred to in the listed items; and
>
> (iii) full details of the dates, specifications and quantities of every such supply and offer.

There were no less than seven listed items with reference to the cargoes delivered to Petromar and heading the list of these items was: (a). records of all fuel oil, crude oil, condensate and other oil products (hereinafter collectively referred to as `the Oil Products`) ostensibly or actually originating from the Middle East and delivered to Petromar since 1 January 1997 to the date of completion of execution of this order;

In addition, Petromar was required to make disclosure of another five listed items in respect of their role as broker. These five listed items included: (a). records of all the Oil Products (as defined above) imported from the Middle East in which Petromar acted as broker or agent, since 1 January 1997 to the date of completion of execution of this order;

19.We have two observations on these orders for discovery. First, in our opinion, these orders are far too wide and extensive to be made at such a early stage. Although we accept that, sometimes, an order for discovery may be necessary in aid of a Mareva injunction and/or an Anton Piller order, such wide and extensive orders for discovery at the commencement of the proceedings and the very short period allowed for such discovery are onerous and oppressive. Secondly, we do not see why an application for such orders could not and should

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not be dealt with at an inter partes hearing. We think that parties applying ex parte for a Mareva injunction or an Anton Piller order which contains an order for discovery should bring that order to the court`s attention so that court would direct its mind to it and consider whether it should: (a) allow the discovery as sought; (b) grant a limited discovery in aid of the Mareva or Anton Piller orders and give leave to the plaintiff to apply inter partes for a more extensive discovery; (c) adjourn the prayer for discovery for hearing inter partes and direct that the papers be served on the opposing side; or (d) refuse to make an order on that prayer ex parte and give liberty to the applicant to file an inter partes application for discovery.

20.Reverting to the instant case, acting under the terms of the disclosure order, Glencore obtained consents in writing from Petromar to write to the bankers of Petromar. Following that, Glencore wrote to Credit Lyonnais (Petromar`s bankers) on 26 June 1998 asking for details of all transactions in respect of Petromar`s accounts with them, whether by cash, cheque, draft, telegraphic transfer or otherwise, from ***1 January 1997*** to date, showing the date, amount, source, identity of the remitting party, destination and identity of the receiving party, as well as details of all letter of credit transactions from 1 June 1997 to date. In our opinion the information sought from the bankers was totally unwarranted.

21.It must be borne in mind that the disclosure order is merely an ancillary order made in aid of a Mareva injunction in order for the plaintiff to determine the location of the defendant`s assets and take appropriate steps to preserve them pending the trial. In this case, it seems to us that from Glencore`s letter to Credit Lyonnais that Glencore was not merely seeking to ascertain the balance in Petromar`s bank account, but were seeking to determine any movements of money to and from the bank account which might assist Glencore in their claims

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against Petromar and possibly, their claims against Metro. That, in our opinion, was an abuse of the ancillary order for disclosure.

22. ***Conclusion***

In the result, we allowed the appeal and discharged the two interlocutory orders against Petromar.

Karthigesu JA
L P Thean JA

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for the appellants
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