Credit Agricole Indosuez and Others v Rekasaran BI Limited and Another [2001] SGHC 81

Case Number : OS 1428/2000

Decision Date : 26 April 2001

Tribunal/Court : High Court

Coram : Tay Yong Kwang JC

Counsel Name(s) : Alvin Tan with Annie Wong (Wong Thomas & Leong) for the applicant (PT Bhakti Investama Tbk); Ho Chien Mien with Andrew Chan (Allen & Gledhill) for the plaintiffs

Parties : Credit Agricole Indosuez; State Bank of India; Baden-Wuttembergishe Bank AG — Rekasaran BI Limited; PT Asuransi Jasa Indonesia (Persero)

JUDGMENT:

Grounds of Decision

1 The First Plaintiff is a company incorporated in France and acting through its Hong Kong office. The Second Plaintiff is a company incorporated in India and acting through its New York branch. The Third Plaintiff is a company incorporated in Germany and acting through its Stuttgart branch office. The First Defendant was a company incorporated in the Cayman Islands (but since struck off the Register) while the Second Defendant is a company incorporated in Indonesia. The parties are now engaged in arbitration proceedings commenced by notice of arbitration dated 31 August 2000.

THE ORIGINATING SUMMONS

2 By this Originating Summons issued on 15 September 2000, the Plaintiffs sought the following relief:

> "1. An injunction to restrain the Defendants whether by themselves or by their agents or servants or howsoever otherwise from exchanging, cancelling, rescinding or otherwise howsoever rendering void or ineffective the First Defendants Notes (or interests in relation thereto) issued to or held by the Plaintiffs, under or in connection with (a) a Programme Agreement dated 11 July 1997 entered into between the Defendants and the First Plaintiff ("Programme Agreement"), (b) an Agency Agreement dated 11 July 1997 entered into between the Defendants and the First Plaintiff ("Agency Agreement"), (c) a Deed of Covenant dated 11 July 1997 between the First Plaintiff, Cedel Bank, socit anonyme and Morgan Guaranty Trust Company of New York ("Deed of Covenant") issued in favour of Noteholders and Relevant Account Holders (as defined in the Deed of Covenant) pursuant to the Programme Agreement and the Agency Agreement, and (d) a Deed of Guarantee executed by the Second Defendant in favour of *inter alia* Noteholders and Relevant Account Holders (as defined in the Deed of Covenant) ("Deed of Guarantee"), whether by the exchange of such Notes for Mega Caspian Petroleum (BVI) Ltds Notes or otherwise howsoever, until 7 days after the issuance of the final award in Singapore International Arbitration Centre Arbitration No. 47 of 2000 or until further order.
>
> 2. An injunction to restrain the Defendants whether by themselves or by their agents or servants or howsoever otherwise from cancelling, rescinding or otherwise howsoever rendering void or ineffective the Deed of Guarantee, until 7

days after the issuance of the final award in Singapore International Arbitration Centre Arbitration No. 47 of 2000 or until further order.

Disposal of Assets

3. (1) The Defendants and each of them whether by themselves or by their servants or agents or howsoever shall not until 7 days after the issuance of the final award in Singapore International Arbitration Centre Arbitration No. 47 of 2000 or until further order:

> (a) remove or cause or permit to be removed or take any steps to remove from Singapore any of their assets which are in Singapore whether in their own name or not and whether solely or jointly owned up to the value of US$42,000,000;
>
> (b) in any way dispose of, mortgage, assign, or transfer, pledge or charge or diminish or in any way howsoever deal with any of their assets or money wheresoever the same may be situated in Singapore or elsewhere whether in their own name or not and whether solely or jointly owned up to the above value.

The above prohibitions include, but are not limited, to the following assets.

> (i) such sums as may or may hereafter be held to the credit of the Defendants (whether or not held in the names of the Defendants or each or any of them and whether solely or jointly owned and whether held by some other person or nominee or otherwise howsoever held on the Defendants behalf, whether separately held or otherwise) at any bank, regardless of the purpose of such accounts;
>
> (ii) any shareholding of the Defendants (whether or not held in the names of the Defendants or each or any of them and whether solely or jointly owned and whether held by some other person or nominee or otherwise howsoever held on the Defendants behalf, whether separately otherwise) in any company;
>
> (iii) any notes so held by the Defendants (whether or not held in the names of the Defendants or each of them and whether solely or jointly owned and whether held by some other person or nominee or otherwise howsoever held on the Defendants behalf, whether separately or otherwise, including, but not limited to, the Mega Caspian Petroleum (BVI) Ltds Notes.

(2) If the total unencumbered value of each of the Defendants assets in Singapore exceed US$42,000,000.00, the Defendants may remove any of those assets from Singapore or may dispose of or deal with them so long as the total

unencumbered value of each of the Defendants assets still in Singapore remains above US$42,000,000.00. If the total unencumbered value of each of the Defendants assets in Singapore does not exceed US$42,000,000.00, the Defendants must not remove any of those assets from Singapore and must not dispose of or deal with any of them, but if the each of the Defendants have assets outside Singapore, the Defendants may dispose of or deal with those assets so long as the total unencumbered value of all their assets, whether in or outside Singapore, remains above US$42,000,000.00.

4. Such further or other relief that the Honourable Court deems fit.

5. Liberty to apply.

6. Costs of this application be taxed and paid by the Defendants to the Plaintiffs."

THE INJUNCTION

3 On 15 September 2000, the same day that the Originating Summons was commenced, the Plaintiffs applied for and obtained *ex parte* an injunction in support of the arbitration proceedings in practically the same terms as prayers 1, 2 and 3 of the Originating Summons with the variations listed below. The words "until (after) the disposal of this Originating Summons or until further order" in the injunction were substituted for the words "until 7 days after the issuance of the final award in Singapore International Arbitration Centre Arbitration No. 47 of 2000 or until further order" appearing in the prayers in the Originating Summons. The words "including, but not limited to, the Mega Caspian Petroleum (BVI) Ltds Notes" at the end of prayer 3 (1)(iii) in the Originating Summons did not appear in the injunction. The injunction contained the usual ancillary clauses such as those on disclosure of information on assets and the exceptions to the order. The Court also ordered that costs of the application for the injunction be costs in the cause. Solicitors acting for the Defendants in the arbitration proceedings were invited to attend the *ex parte* hearing and one Mr John Yap Chee Seng of J Koh & Co did attend.

4 On 22 September 2000, the Plaintiffs applied *ex parte* for the Originating Summons, the injunction and the application and the affidavit in relation thereto to be served on both Defendants outside the jurisdiction as J Koh & Co had no instructions to accept service of process. That was granted by an Assistant Registrar.

THE INTERVENERS APPLICATION

5 On 17 November 2000, solicitors for PT Bhakti Investama Tbk of Jakarta, Indonesia applied by SIC 604442 of 2000 pursuant to Order 15 Rule 6 of the Rules of Court and the inherent powers of the Court for the following orders:

"1. that PT Bhakti Investama Tbk be given leave to intervene in this action and be added as a party (intervener) to this action;

2. that the Order of Court made herein on 15 September 2000 be varied as follows:-

(i) to the effect that the exchange of, or any act done by any party to facilitate the exchange of any notes issued by the 1st Defendant and guaranteed by the 2nd Defendant referred to in paragraph 1 of the said Order issued to or held by

any noteholder other than the Plaintiffs, shall not be a breach of the said Order;

(ii) to the effect that the shares of Central Asia Petroleum Ltd held by Mega Caspian Petroleum Ltd and referred to in the Trust Deed dated 8 August 2000 between Mega Caspian Petroleum Ltd and Bermuda Trust (Singapore) Ltd and the schedules thereto be excluded from the operation of the said Order and no dealing in the said shares shall be a breach of the said Order, alternatively that paragraph 3 of the said Order be set aside.

3. that the costs of and incidental to this application be provided for

4. that there be liberty to apply."

6 By consent, the above applicant was granted leave to intervene in this Originating Summons for the purposes of the abovesaid application.

THE PLAINTIFFS CASE

7 The Plaintiffs have served the injunction on the First Defendant. They have also notified the Second Defendant about the injunction. The Registry of the Supreme Court has forwarded the Court documents through the Ministry of Foreign Affairs to the Indonesian authorities for service to be effected on the Second Defendant. Todate, both the Defendants have taken no steps to set aside the injunction. The intervener should therefore be permitted to set aside or vary the injunction only to the extent necessary to protect its own interest.

8 In this case, the First Defendant had issued Notes which were guaranteed by the Second Defendant. The issue of the Notes and the guarantee were effected pursuant to:

(1) a Programme Agreement entered into between the Defendants and the First Plaintiff dated 11 July 1997;

(2) an Agency Agreement entered into between the Defendants and the First Plaintiff dated 11 July 1997;

(3) a Deed of Covenant also dated 11 July 1997 entered into between the First Plaintiff, Cedel Bank, Socit Anonyme and Morgan Guaranty Trust Company of New York issued in favour of Noteholders and Relevant Account Holders pursuant to the Programme and the Agency Agreements; and

(4) a Deed of Guarantee executed by the Second Defendant in favour of, among others, Noteholders and Relevant Account Holders.

The Plaintiffs here were Noteholders or Relevant Account Holders entitled to payment under or in connection with the Notes issuance programme.

9 It was not disputed that monies had become due under the Notes and the Defendants had not paid up. The Defendants alleged that there was a restructuring arrangement which purportedly bound the Plaintiffs. The alleged restructuring arrangement involved an exchange of the First Defendants Notes for those issued by Mega Caspian Petroleum (BVI) Ltd ("MCP"), with the result that the liability of the Second Defendant as guarantors would be cancelled. The Second Defendant also claimed protection under sovereign immunity. These defences were the subject matter of the arbitration.

10 In the middle of 1998, the First Plaintiff made demands for payment from the Defendants under the Notes. Such demands were not complied with and following concerns about the Defendants financial health, an Informal Creditors Committee ("ICC)" was formed. The ICC comprised various banks and financial institutions representing the interest of Noteholders of the Notes issued by the First Defendant and other entities, all of which were guaranteed by the Second Defendant. It was to be the channel of communication between the Second Defendant and the Noteholders.

11 The negotiations between the Second Defendant and the ICC became protracted as the Second Defendant was not forthcoming in disclosing its assets. The assets disclosed were Dragon Oil shares, PT Medco Energi shares, alleged Kazakhstan oil assets and alleged receivables due from other Indonesian corporations.

12 Sometime in 1999, the Intervener, who was not an original Noteholder, began to purchase Notes issued by the First Defendant and others from the original Noteholders. The Intervener was provided more information by the Second Defendant about its assets, at least where the Kazakhstan oil fields were concerned, than the ICC. In separate discussions with the Defendants, which presumably took place sometime after June 1999 as that was when the Second Defendant purportedly informed the Intervener of its intention to restructure the debts, the Intervener was said to have been informed that the security contemplated was in the form of shares of Central Asia Petroleum Ltd ("CAP") shares, a BVI company that owned oil fields in Kazakhstan. The Interveners considered CAPs profile and the proposal and decided to support the restructuring plan.

13 On 11 February 2000, the Interveners called for a meeting of Noteholders to be held on 29 February 2000. A letter dated 16 February 2000 was sent from the Second Defendant to the Noteholders as follows:

> "To : Deutsche Bank AG
> Credit Agricole Indosuez
> National Westminster Bank
> Tokai Asia
> United Bank of Switzerland
>
> ("collectively called the Fiscal Agents" with the exception of Tokai Asia")
>
> **Sub : Rekasaran Noteholders Meeting on 29th February 2000**
>
> 1. This refers to the abovementioned event.
>
> 2. Please take note of the following:
>
> A. The Proposal put up by PT BHAKTI INVESTAMA shall be finalised and there shall not be a vote on it (it is not for discussions but the mechanics to implement it will be discussed),
>
> B. Voting might take place on minor issues that might crop up during the event (therefore the representative of the Noteholder must have a proxy letter in hand and if voting does take place, then the majority shall decide),
>
> C. Whoever is present will form the Quorum,
>
> D. For the Noteholders who do not attend the event, we will not entertain any request to meet or discuss the subject after the 29th of February 2000.

E. We consider the chapter as closed and will only entertain if the Noteholders wants to exchange their existing notes with the new REKASARAN CB Notes to be issued (with the Kazakhstan asset as well as the dividend flow from the asset, as the collateral).

F. We can accept a list or statement from Euroclear/Cedel confirming the names of the Noteholders as evidence of ownership.

1. Thanks and best regards.

For and on behalf of

PT ASURANSI JASA INDONESIA (PERSERO)

PS : Please see invitation letter from PT BHAKTI INVESTAMA as well as the attachment."

14 On 24 February 2000, the Intervener purportedly wrote to the Second Defendant requesting that a vote be taken, without informing the other Noteholders. The Second Defendant sent a second letter dated 24 February 2000 to the Noteholders in the following terms:

"**Ref : REKASARAN GROUP Noteholders Meeting on the 29th Feb 2000**

1. This message is in addition to the earlier one that was sent via e-mail through the abovementioned Fiscal Agents.

2. Please take note that each Noteholder is only to be represented by one person and no more.

3. If the Noteholder does not confirm attendance by the 25th Feb 2000 deadline, along with proof of ownership of the Note/s concerned, then the said Noteholder will not be allowed to attend the meeting.

4. Besides the Proposal by Bhakti, no other matter will be discussed.

5. Please send this message to the other Noteholders through Euroclear / Cedel.

6. Thanks and best regards."

No mention was made of any change in the position regarding voting.

15 The meeting on 29 February 2000 was attended by 50.58% of the Noteholders by value. A vote was taken despite the clear statement to the contrary in the Second Defendants letter of 16 February 2000 and the protest by the other Noteholders present. Out of the 50.58% present, only 69.2% voted in favour of the proposal. The Second Defendants notes of the meeting therefore showed that only some 35% of all the Noteholders by value agreed with the proposal.

16 Further, the said meeting and the voting procedure were not in accordance with the contractual provisions. Each individual debt issuance programme and the provisions by which it was governed must be considered individually and independently. Nevertheless, the Second Defendant and the Intervener considered in aggregate the total value of all the Notes issued by the Rekasaran Group of companies when determining the quorum and taking the vote. The nature of the business to be transacted at the meeting was also not properly notified to the Noteholders. In addition, there was not the requisite quorum of not less than two thirds in nominal amount of the Notes for the time being outstanding. There was also note the requisite majority of 75% of the persons at the meeting voting. To date, there was no evidence of any other party besides the Intervener who was interested in proceeding with the restructuring scheme.

17 The restructuring scheme essentially required the Noteholders to give up their rights of immediate payment by the Second Defendant in exchange for MCPs periodic repayments over a 10-year period. A summary of the scheme is found in the second affidavit of the Plaintiffs where the deponent, the First Vice-President of the First Plaintiff, stated:

> "13. Further, from a commercial view point, the Plaintiffs have difficulties with the scheme. Broadly, as I understand it, the proposal scheme is for new notes to be issued by MCP in exchange for notes issued by the Rekasaran Group, including that issued by the 1st Defendant. As I understand, the mechanics of the payment under the MCP notes are as follows:
>
> > (i) Central Asia Petroleum ("CAP") purportedly has (a) a 60% shareholding in Mangaistaumunaigaz ("MMG"), a Kazakhstan company which purportedly has a license to explore and operate oil and gas fields, and/or (b) a license agreement with MMG to explore 60% of MMGs oil and gas fields (hereinafter "the 1st Stage"). Whether CAP is, if at all, at present a shareholder or licensee of MMG or both is unclear.
> >
> > (ii) CAP has committed to spend a minimum of USD 4.1 billion over the term of the 1st Stage (see page 14 of the Profile which can be found at page 22 of Agustinus Affidavit). CAP has also agreed to pay USD 100 million of MMGs debt. CAP expects to receive dividends from its 60% stake in MMG and/or presumably to receive profits under its license agreement with MMG (hereinafter "the 2nd Stage").
> >
> > (iii) It appears it is intended that part of the dividends and/or profits paid to or generated by CAP will be paid to MCP. MCP would in turn presumably use the funds received for the payment of the proposed new notes issued by MCP (hereinafter "the 3rd Stage"). It is unclear however what the exact mechanics of such payment to MCP is."

18 The Plaintiffs could not accept the scheme for various reasons apart from the procedural irregularities mentioned earlier. The Second Defendants letter of 16 February 2000 had indicated that the exchange would be in respect of new Notes to be issued by Rekasaran CB whereas MCP was introduced as the vehicle for issuance at the meeting itself. There was also a dearth of information for the Noteholders to properly assess the scheme. The viability of the scheme was not supported by any independent financial assessments or audits and the only information provided came from the Second Defendant and the Intervener, both of whom were interested parties. CAPs profile was only distributed to the Noteholders during the meeting. The principal features of the arrangement also raised many doubts and questions which had not been answered. It appeared from the documents furnished that 37% of the shareholding in CAP was held by MCP beneficially for the Second Defendant. Why

should MCP want to be involved in the scheme and undertake the obligations under the notes to be issued? When all these were considered together with the surreptitious manner in which the scheme was devised and then sought to be foisted on the Noteholders in the highly irregular way at the meeting, it was patently clear that there were serious doubts regarding the *bona fides* of the restructuring scheme and the honesty of the Second Defendant and the Interveners.

THE INTERVENERS CASE

19 A. W. Handoyono, a Director of the Interveners, stated the following in his first affidavit supporting the Interveners present application:

> "4. The Applicant, PT. Bhakti Investama Tbk, is a public-listed company incorporated in the Republic of Indonesia. It is in the business of investment banking.
>
> 5. As far as the Applicant is aware, the 2nd Defendants have guaranteed various notes issued by PT Tripatrial Citra Sarana, PT Rekasaran Utama, Rekasaran BI Ltd and Rekasaran CB Ltd (the "Notes") bearing the total amount of USD216,500,000 and JPY6.842,000,000 (the "Rekasaran Notes Issuance"). The Applicant is the holder of the notes as indicated at page 7 of Exhibit AWH-1.
>
> 6. Thus, the Applicant holds notes in the aggregate sum of USD 116,500,000 and JPY 2,654,303,124. This is approximately 40% of the Rekasaran Notes Issuance. I believe this makes the Applicant the single largest beneficial owner of the Notes issued under the Rekasaran Notes Issuance. Needless to say, the Applicant is an interested party in any proceedings which involve the Rekasaran Notes Issuance, and which, may prejudice its rights thereto.
>
> 7. Sometime in June of 1999, Mr Khan of the 2nd Defendants informed me of the 2nd Defendants intention to restructure the Rekasaran Notes Issuance. The 2nd Defendants indicated that they wanted to arrange for fresh security for the Notes provided that they would remove themselves as guarantors to the Notes. I was very concerned because of the Applicants sizable interest in the Notes. I was informed that the security contemplated was in the form of shares of Central Asia Petroleum ("CAP"), which owned oil fields in Kazakhstan. I received a copy of CAPs profile, a copy of which is indicated at pages 8 to 24 of Exhibit AWH-1.
>
> 8. The Applicants management discussed the matter to determine whether it would be able to accept the 2nd Defendants restructuring plan. By then we were aware that China Trust Commercial Bank, also a holder of Notes under the Rekasaran Notes Issuance, had commenced an action against Jasindo in Indonesia in or about August 1999, but failed to make Jasindo liable on its guarantee. They were unable to recover any monies owing under their Notes.
>
> 9. The Applicants management made the decision to support Jasindos offer to procure new notes secured by CAP shares in return for the selling of the Notes to the 2nd Defendants. In fact, the Applicant arranged for a meeting to be held on 29 February 2000, for other holders of the Notes (the "Noteholders") to

discuss the restructuring plan. The Applicant circulated an invitation to Noteholders to attend the meeting and placed a notice in the International Herald Tribune to bring the meeting to the attention of any other Noteholders.

10. At the meeting, the Applicant, through its representative Mr. Aswin Dewanto Hadi Soemarto made it clear that the restructuring plan should be put to a vote. This was done and the outcome was as follows: 69.2% of the outstanding Notes represented at the meeting voted in favor of restructuring plan, whilst 50.58% of the outstanding Notes attended the meeting ("the Quorum").

The Exchange Offer

11. On 14 August 2000, the 2nd Defendant placed a notice in the Asian Wall Street Journal and the International Herald Tribune regarding its offer to purchase the Notes and in consideration of the same, it would procure Mega Caspian Petroleum Ltd to issue new notes (the "Exchange Offer"). A copy of this notice is indicated at page 25 of Exhibit AWH-1. The same notice has been placed earlier on 10 August 2000 in "Bisnis Indonesia". Noteholders who were interested in participating in the Exchange Offer had to contact the trustee of the Exchange Offer, Bermuda Trust (Singapore) Ltd ("Bermuda Trust"), for copies of the Trust Deed and Sale & Purchase Agreement.

12. The Applicant, of course, indicated its intention to participate in the Exchange Offer. On 2 October 2000, the Applicant wrote to Bermuda Trust to confirm the Applicants intention to execute the Sale and Purchase Agreement. In Bermuda Trusts reply, they stated that they have been served with a copy of the interim Injunction Order dated 15 September 2000 and were unable to proceed with the Exchange Order. A copy of the Applicants letter dated 2 October 2000 and the reply of Bermuda Trust are at pages 26 to 28 of Exhibit AWH-1. I contacted Mr Khan about the Injunction Order. He gave me a copy of the Injunction Order together with a letter from the Plaintiffs solicitors, Tan Kok Quan Partnership stating that under the Injunction Order, Bermuda Trust was prohibited from proceeding with the Exchange Order. A copy of the Injunction Order and the letter from Tan Kok Quan Partnership dated 18 September 2000 and the Injunction Order are at pages 29 to 45 Exhibit AWH-1.

13. The Applicant instructed solicitors in Singapore to seek clarification on the scope of the Injunction Order from the Plaintiffs and to liaise with the Plaintiffs to facilitate the Exchange of the Applicants notes. Copies of the correspondence between the Applicants solicitors Messrs Wong Thomas & Leong and the Plaintiffs solicitors are at pages 46 to 52 of Exhibit AWH-1.

14. The Plaintiffs position emerging from the letters from their solicitors letters appears to be that the Exchange of the Applicants notes could amount to a contravention of the Injunction Order. The Applicants solicitors therefore requested that the Plaintiffs vary the Injunction Order to enable the Applicant to proceed with the exchange of its notes. The Plaintiffs have not acceded to their request hence the Applicants have had to make the present application.

15. The Applicant being the beneficial owner of more than 50% of the Rekasaran Notes Issuance should be entitled to proceed with the Exchange Offer if it

decides that it is in its best interest to do so. The scope of the Plaintiffs Injunction Order should be confined strictly to its own notes and no aspect of it should prevent any other noteholders proceeding with the Exchange Offer."

20 In his second affidavit, the same Director of the Interveners said:

"2. I make this affidavit in response to the 2nd affidavit of Xavier Arnail.

3. My responses to paragraph 3 to 6 of the said affidavit are as follows:-

i) The applicant had decided to play an active role and take the initiative in moving the exchange scheme suggested by the 2nd Defendants as there were protracted negotiations between the 2nd Defendants and its Informal Creditors Committee without any results. I believe that the 1st Plaintiff at least is a member of this Committee.

ii) The Applicant was told by 2nd Defendant in late 1999 that negotiations had been going on for 18 months with no progress as the Committee was only interested in conducting a special investigative audit on 2nd Defendant.

iii) I believe that the Committee would have received information on the oil fields in Kazakhstan during these negotiations but did not communicate any information to the Applicant.

iv) I do not understand the Plaintiffs complaints of the Applicants request for a vote to be taken at the meeting on 29 February 2000 as the Applicants advertisement of 11 February 2000 states that the person shall attend the meeting above, must be given a proxy to vote . The Applicants letter to the 1st Plaintiffs dated 11 February 2000 has an attachment which again states the person attending the noteholders meeting above must be given a proxy to vote ". Please refer to pages 157 to 265 of the 1st affidavit of Xavier Arnail. As such, it is totally unwarranted for the Plaintiffs to state that there was not the remotest hint or indication whatsoever that the Applicant would require a vote at the said meeting. Please refer to page 7 lines 13 to 15 of the 2nd affidavit of Xavier Arnail.

4. In response to paragraph 7 of the said affidavit, the Applicant had instructed its solicitors to write to the 2nd Defendants solicitors to confirm that they would still be willing to succeed. Annexed hereto and marked AWH-2 is the exchange between the Applicants solicitors and the 2nd Defendants solicitors confirming the 2nd Defendants would still be willing to proceed with the notes exchange with the applicants.

5. On paragraph 11 of the said affidavit which refers to paragraph 15 of my 1st affidavit, I would clarify that my reference to the figure of 40% in paragraph 6 of my 1st affidavit is the correct figure.

6. As regards paragraph 12 of the affidavit under reply, I confirm that the report had been prepared by the Applicant for distribution to the noteholder on 29 February 2000 based on information received by the Applicant from Woods Mackenzie, a well known oil and gas consultancy firm.

7. As regards paragraph 14 of the said affidavit, I would make the following observations:-

> i) the late introduction of MCP is not significant in the scheme of things as the Plaintiffs would have known of the asset proposed as collateral for the new notes for a length of time before the meeting on 29 February 2000.
>
> ii) the Plaintiffs have not made any request for information or queries to the Applicant that they now list at paragraph 14 of the said affidavit. The Applicant does not know whether they made any queries of the Defendants. As I asserted earlier, the Applicants belief is that the 1st Plaintiffs at least received information on the scheme and the oil fields in Kazakhstan much earlier than the Applicant as it was a member of the 2nd Defendants Informal Creditors Committee so it would have had every opportunity to ask whatever questions it chose to, to satisfy itself on the viability of the scheme.

8. Lastly I exhibit marked AWH-3 correspondence exchange between the Applicants solicitors and Bermuda Trust (Singapore) Limited which contains a signed copy of the Mortgage of Shares made between the 2nd Defendants and Bermuda Trust (Singapore) Limited."

THE DECISION OF THE COURT

Who may apply for discharge or variation of injunction

21 An injunction may affect persons beyond the defendant in an action. Hence, it is not merely the defendant who can apply to discharge or vary an injunction. As Buckley LJ said in *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* [1978] 1 WLR 966 at 978:

> "Where an injunction has been granted in an action which affects someone who is not a party to the action, he can apply in the action for the discharge of that injunction without himself being made a party to the action."

It is also possible for the non-party to be made a party to the proceedings where necessary.

What may be the subject matters of variation

22 Variation may be sought by an intervener to enable a defendant to pay back money, which the intervener has advanced to the defendant, in good faith in the ordinary course of business ("*The Angel Bell*" [1980] 1 LLR 632). As Robert Goff J said in that case (at 636 column 1):

> " the point of the Mareva jurisdiction is to proceed by stealth, to pre-empt any action by the defendant to remove his assets from the jurisdiction. To achieve that result the injunction must be in a wide form because, for example, a transfer by the defendant to a collaborator in the jurisdiction could lead to the transfer of the assets abroad by that collaborator. But it does not follow that, having established the injunction, the Court should not thereafter permit a qualification of it to allow a transfer of assets by the defendant if the defendant satisfies the Court that he requires the money for a purpose which does not conflict with the policy underlying the Mareva jurisdiction."

Obviously, an intervener would also be able to come to Court to set aside an injunction obtained through the collusion of the plaintiff and the defendant if his interest has been affected.

23 Similarly, a variation could be sought by a defendant in order to permit him to pay trade creditors in the ordinary course of business even though that would result in the plaintiff having nothing left to levy execution on. Mareva injunctions were not meant to improve the position of the plaintiff in the event of insolvency (*Admiral Shipping v Portlink Ferries Ltd* [1984] 2 LLR 106).

24 Variations may therefore be made to injunctions to permit *bona fide* transactions to be carried out. As Kerr LJ said in *Galaxia Maritime v Mineral import export* [1982] 1 WLR 539, "in this connection, it is crucial to bear in mind not only the balance of convenience and justice as between plaintiffs and defendants, but above all also as between plaintiffs and third parties."

25 In the present case, the Interveners were not one of the original Noteholders. It would be a fair presumption to say that they purchased their Notes from the secondary market around 1999 at a substantial discount. They also appeared to be the principal party eager to see the fruition of the restructuring scheme and to have far greater access to the Second Defendants financial information than the other Noteholders. The restructuring scheme was also apparently put together by the Interveners and the Second Defendant without consulting the ICC.

26 The restructuring scheme would result in the Second Defendant being released from its liabilities as guarantor and the Noteholders being given uncertain prospects of repayment over ten years. The other Noteholders were certainly not convinced that the scheme was viable in the first place. The roles of CAP and MCP raised many unanswered questions. The Second Defendant appeared to be giving up rights in one of its assets, CAP, in return for absolving itself from all liability. It must be remembered that the Plaintiffs had taken up the Notes issued by the First Defendant because they would be guaranteed by the Second Defendant, a state-owned insurer.

27 In addition to the above substantive matters, there was the further issue of the procedural impropriety in purportedly pushing the scheme through at the meeting of 29 February 2000. Looking at the totality of the evidence adduced, one was left with serious doubts about the *bona fides* of the Second Defendant and the Interveners as well as the scheme. One also could not help but wonder what the real role of the Interveners was in this scheme particularly since the Second Defendant was aware of the injunction but has chosen not to do anything about it. It must be noted that the Interveners, "with the consent and agreement of" the Second Defendant called for the meeting of 29 February 2000 and appeared authorised to require other Noteholders to furnish information regarding their respective holdings. The Interveners seemed too eager, by their application to vary the injunction, to set in motion the dubious restructuring scheme and, by such subterfuge, affect the question of liability

of the Second Defendant in the arbitration proceedings as all the Notes appeared to be considered by the Second Defendant globally and the purported resolution of 29 February 2000 was said to be binding on all the Noteholders.

28 The Interveners solicitors also submitted that paragraph 3 of the injunction should be set aside because the Plaintiffs had not shown that the Defendants had assets within the jurisdiction or that there was a risk of the assets being removed. They also alleged that the Plaintiffs had failed to make full and frank disclosure. Since the Interveners were coming into the picture on the ground that they had been "inconvenienced as their freedom of action has been affected", I did not think it proper that they should attempt to step into the shoes of the Defendants in this way. Such objections should rightly be taken by the Defendants and not the Interveners and, as mentioned before, the Defendants did not seem to want to do anything about the injunction.

29 For the above reasons, I was not satisfied that this was an application taken out in good faith and therefore dismissed the Interveners application. I also ordered the Interveners to pay $8,000 costs to the Plaintiffs.

Tay Yong Kwang

Judicial Commissioner