IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 319

Originating Application No 554 of 2022

Between

Pengrui Leasing (Tianjin) Co Ltd

… *Claimant*

And

Milaha Explorer Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Injunctions — Application — Proprietary injunction]

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Introduction

1 The claimant, Pengrui Leasing (Tianjin) Co Ltd (the "claimant"), filed the present application without notice on 20 September 2022 for a proprietary injunction to restrain Milaha Explorer Pte Ltd (the "defendant") from removing or in any way disposing of or dealing with or diminishing the sum of US$5.2m in the defendant's account with The Hongkong and Shanghai Banking Corporation Ltd, bearing account number 260-103908-178 (the "HSBC account").

2 I first heard the application without notice on 27 September 2022. After directing that the defendant be given notice and hearing the matter *inter partes* on 30 September 2022, I dismissed the application with costs. As the claimant

has appealed against my decision, I furnish these grounds of decision incorporating the brief oral remarks which I previously delivered.

Facts

The parties

3 The claimant is a company incorporated in the People's Republic of China. It is engaged in the business of owning and leasing ships.[1]

4 The defendant is a company incorporated in Singapore. It is in the business of ship-chartering and oilfield service equipment rental services.[2] The defendant is a one-ship company owning an offshore jack-up rig known as the "Milaha Explorer" (the "Vessel").[3] The defendant's ultimate beneficial owner is Qatar Navigation QPSC ("Qatar Navigation"), a company listed on the Qatar Stock Exchange. Qatar Navigation has been publicly traded on the Qatar Stock Exchange since 1997 and had a net profit of more than US$16m as at 2020.[4]

Summary of background to the dispute

5 The claimant and defendant entered into a Memorandum of Agreement dated 31 May 2021 (the "MOA") for the sale and purchase of the Vessel at the agreed price of US$26m.[5] On 27 June 2021, the claimant, as the buyer, lodged

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1 Chia Hock Chye Michael's affidavit dated 19 September 2022 ("Michael Chia's affidavit") at para 7.

2 Michael Chia's affidavit at para 8; Respondent's Submissions ("RS") at para 10.

3 Michael Chia's affidavit at para 9; RS at para 11.

4 Michael Chia's affidavit at para 10; RS at para 10.

5 Michael Chia's affidavit at para 3.

a deposit of 20%, amounting to US$5.2m (the "Deposit") into the defendant's HSBC account as security for the correct fulfilment of the MOA.[6]

6 By Addendum No 1 dated 8 July 2021, the MOA was amended to change the protocol for delivery of the Vessel to the claimant.[7] A second addendum dated 30 July 2021 was allegedly entered into, but the claimant claimed that this was not agreed between the parties.[8]

7 Owing to a dispute as to the delivery protocol, the defendant failed to deliver the Vessel.[9] On 4 August 2021, the claimant exercised its right under cl 14 of the MOA to cancel the MOA upon the defendant's default in delivering the Vessel.[10] The parties were unable to agree that there was an agreement to vary the MOA.[11] On 12 August 2021, the defendant alleged that the claimant had breached the MOA and as such the Vessel could be sold to other buyers.[12] On 16 August 2021, the claimant denied these allegations and further demanded the return of the Deposit.[13]

Procedural history

8 The claimant commenced proceedings against the defendant on 20 August 2021. The claimant obtained an *ex parte* Mareva injunction in

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6 Michael Chia's affidavit at paras 4–5 and 18–19.

7 Applicant's Submissions ("AS") at para 10.

8 Michael Chia's affidavit at para 36; AS at para 11.

9 AS at paras 13–14.

10 Michael Chia's affidavit at para 37.

11 Michael Chia's affidavit at paras 38–40.

12 Michael Chia's affidavit at para 41; RS at para 27.

13 Michael Chia's affidavit at para 42.

HC/OS 849/2021 ("OS 849/2021") restraining the defendant from disposing of its assets up to a value of US$23,760,473, including the Vessel and the Deposit.[14] The defendant applied unsuccessfully to the High Court Judge in HC/SUM 4226/2021 ("SUM 4226/2021") to set aside the Mareva injunction.[15]

9 In the meantime, on 25 August 2021, the claimant commenced arbitration proceedings against the defendant in London in respect of the disputes over the MOA.[16] The arbitration proceedings were at the stage of discovery as of 29 September 2022 when the defendant filed its submissions in this application.[17]

10 The claimant filed an appeal in CA/CA 2/2022 ("CA 2/2022") to the Court of Appeal and succeeded in reversing the decision of the High Court in SUM 4226/2021. The Mareva injunction was consequently set aside. The Court of Appeal's written grounds of decision have yet to be released at the time of writing these grounds of decision. Nevertheless, it was noted in the Court of Appeal's minutes when allowing the appeal on 7 September 2022 that the claimant "did not furnish solid evidence of a risk of dissipation by the [defendant]".[18]

11 On 3 December 2021, in separate proceedings, OHT Osprey AS ("OHT Osprey") obtained an *ex parte* Mareva injunction in HC/OS 1229/2021 to restrain the claimant and defendant from diminishing the assets in the HSBC

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14 Michael Chia's affidavit at para 11 and p 107; RS at paras 28–29.

15 Michael Chia's affidavit at paras 12–13.

16 Michael Chia's affidavit at para 70.

17 RS at para 30.

18 CA 2/2022 minute sheet dated 7 September 2022.

account up to the value of US$3,883,266.54. On 20 September 2022, OHT Osprey's injunction against the defendant was discharged by the High Court in HC/SUM 3409/2022. By consent, the injunction against the claimant was maintained.[19]

12 The claimant subsequently filed the present application without notice for a proprietary injunction over the Deposit, pending the determination of the arbitration in London. Counsel for the claimant sought to justify the urgency of the application by pointing to the defendant being "virtually insolvent", and to its refusal to accede to the claimant's request to hold the Deposit in the HSBC account pending the final arbitration award and/or appeal therefrom. Counsel further maintained that there was urgency as the Deposit was made in cash and could be dissipated by the defendant at will.

13 The application was fixed before me for hearing on 27 September 2022. I declined to deal with the application on a without notice basis. I directed instead that the matter be adjourned to 30 September 2022, and that the claimant had to give notice to the defendant and serve the papers by 4.00pm on 27 September 2022 so that the defendant could have an opportunity to respond if necessary. The defendant filed its submissions in response on 29 September 2022, along with a notice of intention to refer to affidavits from Zhang Xiao Cong Watson, Rui Peng, Ngoo Sin Hung Justin and Shawn Lim Zi Xuan, and copies of the said affidavits.

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[19] RS at para 41.

The parties' cases

14 At the outset, I note that the claimant submitted that there was urgency in the application as it was for the purpose of interim preservation of assets, having regard to s 12A(4) of the International Arbitration Act 1994 (2020 Rev Ed) ("IAA"). As I determined at the initial hearing on 27 September 2022 that the application should not be heard without notice, I will not set out the parties' submissions on whether an urgent hearing without notice was necessary.

The claimant's case

15 The claimant submitted that although the arbitral tribunal had been constituted, this was not a bar to the application. It relied on advice from Mr Chirag Karia KC ("Chirag KC") to the effect that an application to the arbitral tribunal for equivalent relief would pose significant difficulties for three reasons. First, the arbitral tribunal would not act *ex parte* but only on an application made with notice to the defendant. However, as noted above, this point was moot since I had directed that notice should be given to the defendant. The second reason was that the arbitral tribunal would take "considerably longer than the Court to deal with such an application". The third reason was that the arbitral tribunal would be unable to act effectively as any injunctive relief granted would not be backed up by the threat of contempt sanctions, and its jurisdiction did not extend to third parties such as HSBC.[20]

16 The claimant's primary case was premised on the application being one for a proprietary injunction and not a Mareva injunction. The claimant cited *Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and another and another appeal* [2015] 5 SLR 558 ("*Bouvier*") at [144], where

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[20] AS at paras 29–33.

the Court of Appeal affirmed that the established principles set out in *American Cyanamid Co v Ethicon Ltd* [1975] 2 WLR 316 ("*American Cyanamid*") would apply, *viz*, that the claimant had to demonstrate a serious question to be tried, and the balance of convenience lay in favour of granting the injunction.[21]

17 The claimant submitted that there was no requirement to show a risk of dissipation. It had a seriously arguable case that it had a proprietary interest in the Deposit until it was proved that it had breached the MOA. Under the MOA, the Deposit was liable to being either (a) "released" to the claimant together with interest should the claimant cancel the MOA pursuant to cl 14 of the MOA; or alternatively (b) "forfeited" to the defendant together with interest should the defendant cancel the MOA pursuant to cl 13 of the MOA.[22]

18 As the question of whether the claimant or defendant was in breach of the MOA was pending arbitration in London, the claimant submitted that until such time as the arbitral tribunal determined that the claimant was in breach of the MOA as buyer of the Vessel, the claimant retained a proprietary interest in the Deposit. A term should therefore be implied into the MOA to prevent the defendant from dealing freely with the Deposit unless and until it had been determined by the arbitral tribunal that the Deposit had been validly forfeited in accordance with cl 13 of the MOA. The claimant further submitted that both the officious bystander and business efficacy tests for implied terms were satisfied.[23]

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21 AS at paras 37–38.

22 AS at paras 43–44.

23 AS at paras 45–48.

19 As a proprietary injunction seeks to preserve what may be the claimant's property, the claimant argued that once it showed a seriously arguable case for a proprietary remedy, the court should be more ready to grant a proprietary injunction.

20 In addition, the claimant contended that the Deposit was subject to a *Quistclose* trust (see *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] 1 AC 567) given that the purpose of the Deposit, as set out in the MOA, was to serve as security for the correct fulfilment of the agreement. The Deposit should therefore be held by the defendant on a resulting trust for the claimant until it is used for its designated purpose. In particular, cll 13 and 14 of the MOA demonstrated the parties' intent to restrict the disposal of the Deposit by the defendant except in accordance with the two clauses, such that the Deposit was clearly not intended to be at the free disposal of the defendant. As the matter is before the arbitral tribunal, the claimant submitted that there was at least a serious issue to be tried in relation to whether a *Quistclose* trust arose in relation to the Deposit.[24]

21 As for the balance of convenience, the claimant submitted that this lay in favour of granting the injunction. Should the arbitral award be in its favour, any such award would be ineffective should the defendant deal with the Deposit. In addition, the defendant was clearly insolvent and the only money it had available was the Deposit. The claimant would suffer irreparable damage if the injunction was not granted. Conversely, the defendant would not suffer prejudice since it had operated without access to the Deposit from 23 August

[24] AS at paras 53–55.

2021 to 6 September 2022 when the Mareva injunction was in place, and its operating expenses had been funded by Qatar Navigation.[25]

The defendant's case

22 As indicated at [14] above, it is unnecessary to set out the defendant's submissions concerning the improper filing of the application without notice.

23 In relation to the claimant's substantive application for a proprietary injunction, the defendant submitted that: (a) the court should not act in aid of the ongoing arbitration in London; and (b) the considerations in support of a proprietary injunction were not satisfied. I set out the defendant's position on each point in turn.

24 First, the defendant argued that the court should not grant an injunction in aid of a London-seated arbitration in circumstances where the arbitral tribunal had not only been constituted but the arbitral proceedings were already underway and at the stage of discovery. The claimant's position that it was seeking an injunction from the court rather than the arbitral tribunal because the tribunal "will not act *ex parte* and will instead only act upon an application made on notice to the [defendant]"[26] was not a reason for the court to act in aid of the claimant.[27] It was further submitted that the application was a non-starter because the claimant itself had relied on expert opinion from Chirag KC, who had accepted that the arbitral tribunal had the power to grant interim relief in

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25 AS at paras 56–60.

26 AS at para 31.

27 RS at para 47(b).

the form of the proprietary injunction sought. Thus, it could not be said that the tribunal was unable to act effectively.[28]

25 The defendant emphasised that the threshold requirement for an application under s 12A(4) of the IAA was *urgency*. Further, s 12A(6) makes it clear that where the claimant seeks the court's assistance in arbitration proceedings, the court can act "only if or to the extent that the arbitral tribunal … has no power or is unable for the time being to act effectively".[29] The claimant had not cleared the statutory hurdle in s 12A(6) merely by asserting that the tribunal may take 21 to 28 days to decide an application (even if true), especially since it had agreed to the relevant arbitral process.[30]

26 With reference to the claimant's Form 14 of Appendix B to the Supreme Court Practice Directions 2021 which was filed to support the need for an urgent application, the claimant's stated reason for urgency was that the defendant was virtually insolvent and, despite that, had refused to hold the Deposit in the HSBC account pending the determination of the arbitral tribunal. It also suggested that the Deposit which was in cash could be easily dissipated. The defendant pointed out, however, that the parties had already undergone the same exercise of examining the risk of dissipation of the Deposit before the Court of Appeal in CA 2/2022, and the claimant had been unsuccessful in its arguments.[31] Moreover, even if the defendant was insolvent, that was not a basis for the grant

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28 RS at para 67(e).

29 RS at para 63.

30 RS at paras 67(a) and 67(b).

31 RS at paras 53–56.

of an injunction since Qatar Navigation, as the defendant's parent company, had undertaken to meet the defendant's liabilities as and when they fell due.[32]

27 Moreover, the arbitral tribunal was able to effect enforcement of its order as the order could be enforced in the same manner as if it were a court order under s 12(6) of the IAA.[33] In this regard, s 12(6) of the IAA provides as follows:

> (6) All orders or directions made or given by an arbitral tribunal in the course of an arbitration are, by permission of the General Division of the High Court, enforceable in the same manner as if they were orders made by a court and, where permission is so given, judgment may be entered in terms of the order or direction.

28 In addition, the defendant relied on the extended doctrine of *res judicata* to submit that the claimant was precluded from raising the present arguments in support of the application for a proprietary injunction, as it could have, or ought to, with reasonable diligence, have advanced the same arguments previously when applying for the Mareva injunction before either the High Court or the Court of Appeal. The contentions being raised were all matters previously known to the claimant and the claimant was thus estopped from pursuing the present application on the same grounds.[34]

29 Second, the defendant contended that the claimant had failed to show a seriously arguable case that it had a proprietary interest over the Deposit. Clause 2 of the MOA specified that the Deposit was to be furnished as security for the correct fulfilment of the MOA, with cl 13 setting out the defendant's right to

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32 RS at paras 57(c) and 57(d).

33 RS at para 68(a).

34 RS at para 71.

forfeit the Deposit should the claimant fail to pay the purchase price for the Vessel. Thus, the Deposit was meant to be security for the defendant against potential breaches by the claimant, and the defendant was free to hold the Deposit in any bank account or mix it with other moneys. It was only after the Court of Appeal had discharged the Mareva injunction that the claimant asserted for the first time that it had a proprietary interest in the Deposit. The claimant had not objected even in November 2021 when the defendant disclosed in its compliance affidavit that US$13,264.65 out of the sums previously deposited in the HSBC account had been spent in the ordinary course of business.[35]

30 As for the claimant's submission that the Deposit was subject to a *Quistclose* trust, the defendant contended that there was no evidence of any restriction on the use of the money for any specified purpose. Rather, the purpose of the Deposit, in line with cl 2 of the MOA, was to serve as security for the defendant.[36]

31 Turning to the balance of convenience, the defendant submitted that the Court of Appeal had already rejected the claimant's argument premised on the defendant's insolvency, and the same conclusion ought to be reached in the present case. The defendant would be prejudiced if the proprietary injunction were to be granted, with the imposition of onerous disclosure and reporting obligations without any concomitant undertaking from the claimant as to damages when the claimant itself was insolvent. There would be no finality in litigation despite the Court of Appeal having already rejected the claimant's

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35 RS at paras 75(c) to 75(e).

36 RS at paras 75(i) to 75(j).

primary arguments on the risk of dissipation of assets in the face of the defendant's insolvency.[37]

32 Lastly, as the application had originally been filed without notice, the claimant was duty-bound to make full and frank disclosure of all material facts. The defendant submitted that the claimant had failed to draw the court's attention to the fact that its arguments on the risk of dissipation of assets justifying urgency and the defendant's insolvency had already been fully considered and rejected by the Court of Appeal.[38]

Issues to be determined

33 Based on the foregoing, the following issues arose for my determination:

(a) whether the court should act in aid of the arbitration before the arbitral tribunal pursuant to s 12A of the IAA; and

(b) whether the considerations in support of a proprietary injunction were satisfied.

34 I agreed with the defendant's submissions. I was not persuaded that the arbitral tribunal was unable for the time being to deal with the matter, and I was of the view that the considerations in support of the grant of a proprietary injunction had not been satisfied. I shall elaborate on the reasons for my decision below.

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37 RS at para 76.

38 RS at para 77.

Whether the court should act in aid of the arbitration before the arbitral tribunal

Whether the application was urgent and should have been heard without notice

35 Under s 12A(4) of the IAA, the General Division of the High Court is empowered to make such orders as it thinks necessary for the purpose of preserving assets in connection with arbitration proceedings where the case is one of *urgency*. The claimant submitted that there was such urgency in the application, on account of the defendant's refusal to accede to the claimant's request not to "deal with, dissipate or otherwise use" the Deposit pending a final arbitration award and/or final appeal therefrom. Further, this urgency also necessitated the bringing of this application without notice. I was of the view that the application was neither urgent within the meaning of s 12A(4) of the IAA, nor urgent such that it should be heard without notice.

36 The applicable law on when it would be appropriate to hear an application on an *ex parte* without notice basis is clearly set out by the Court of Appeal in *Bouvier* at [115]. The claimant must file an affidavit in support of the *ex parte* application giving reasons for the urgency of the application, or explain why giving notice would defeat the purpose of the application. Pursuant to s 12A(4) of the IAA, an claimant should similarly furnish sufficient reasons to demonstrate the urgency of the application.

37 The claimant sought to rely on *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088 ("*WSG Nimbus*") in support of the argument that the application was sufficiently urgent, because the defendant

had refused to confirm that they would not deal with the Deposit.[39] However, the relevant passage of Lee Seiu Kin JC's (as he then was) judgment in *WSG Nimbus* at [70] cited by the claimant appeared to contain Lee JC's observation arising from the facts, rather than an enunciation of a statement of broad legal principle. In the factual context of that case, the defendant had already taken positive steps in dealing with certain rights under the agreement and Lee JC therefore found that there was urgency in the application.

38 Related to the question of urgency, I also preliminarily considered the claimant's arguments seeking a proprietary injunction. It was apparent that irrespective of how the claimant framed the present application, the question whether there was a risk of dissipation remained at the core of its submissions. To be clear, the claimant had fairly stated in its written submissions for the without notice hearing that the defendant's appeal in CA 2/2022 was allowed and that the Court of Appeal had found insufficient evidence of risk of dissipation.[40] However, this did not alter the fact that the application appeared to be an attempt by the claimant to relitigate the same point, while relying on the risk of dissipation as a reason for the urgency of the application.

39 In view of the background to the proceedings, I saw no clear need for urgency and thus declined to deal with the application on a without notice basis. As such, I did not see the need to further address the defendant's submission that full and frank disclosure had not been made for the purpose of the without notice application.

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39 AS at para 28.

40 AS at para 22.

Whether the court's jurisdiction under s 12A of the IAA was properly invoked

40 Next, I turn to consider the issue of the court's jurisdiction under s 12A of the IAA. I agreed with the defendant's submission in this regard and accepted that the court should not grant the injunction in aid of the ongoing arbitration before the arbitral tribunal.

41 I begin by evaluating the claimant's position that it was seeking an injunction from the because the arbitral tribunal "will not act *ex parte* and will instead only act upon an application made on notice to the [defendant]".[41] This argument was neither here nor there and did not assist the claimant. In any case, this consideration was not material as I had found that a without notice hearing was inappropriate and had directed that notice be given to the defendant.

42 As for the argument that the arbitral tribunal would likely take a comparatively longer time to make a determination, this was again a neutral point that did not advance the claimant's case. It could not be a reason by itself for the court to exercise its powers under s 12A of the IAA. Moreover, the parties had agreed to refer the dispute to the arbitral tribunal. In the absence of special circumstances, there was no reason why the court's jurisdiction under s 12A of the IAA had to be invoked. As the Court of Appeal observed in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [61]:

> … the courts should generally decline to exercise their jurisdiction to grant interim injunctions pending arbitration where an arbitral tribunal has concurrent jurisdiction to make such orders *and* there are no special circumstances to justify the application being made to the court instead of to the tribunal.

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41 AS at para 31.

[emphasis in original]

43 In the present case, it was certainly not the case that interim relief, if warranted, could not be obtained from the arbitral tribunal. The defendant rightly highlighted the fact that the claimant's expert opinion, as proffered by Chirag KC, affirmed that the arbitral tribunal had the power to grant interim relief in the form of the proprietary injunction sought. It also could not be said that the arbitral tribunal was "unable for the time being to act effectively", as specified in s 12A(6) of the IAA. There were no special circumstances warranting the application being made to the court instead of to the tribunal. Accordingly, I agreed with the defendant that the claimant had not met the statutory requirement in s 12A(6) of the IAA, especially since it had agreed to the relevant arbitral process.

44 Finally, it was incorrect for the claimant to make the sweeping suggestion that any order made by the arbitral tribunal would be ineffective as it could not be enforced through contempt sanctions and had no effect on third parties. As the defendant correctly pointed out, s 12(6) of the IAA expressly provides for the enforceability of "[a]ll orders or directions" made by the arbitral tribunal in the course of an arbitration, subject to the permission of the General Division of the High Court. In *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 2 SLR 1279, the Court of Appeal further clarified (at [113(a)]) how such an order or direction made by an arbitral tribunal could be enforced, *viz*, either with leave of the court, in the same manner as orders of court; or by entering judgment in terms of the order or direction. As for the claimant's argument relating to the alleged inefficacy of the tribunal's order against third parties (such as HSBC), this was irrelevant in the present context since the order sought pertained only to the defendant and not HSBC. In any case, if the tribunal's order is registered in Singapore and

enforced as a court order, third parties who knowingly act in breach of the order would face similar sanctions.

45 For the above reasons, I was not persuaded that the court's jurisdiction under s 12A of the IAA was properly invoked. The application would have failed on this ground alone, but I also gave due consideration to the claimant's remaining arguments in support of the application and found them to be unmeritorious as well.

Whether the considerations in support of a proprietary injunction were satisfied

46 The claimant submitted that the present application was premised on interim preservation of its purported proprietary interest in the Deposit. In couching the submission in this form, the claimant took the view that it did not need to demonstrate risk of dissipation of assets to support its application for a proprietary injunction. With respect, I differed from this view. Perhaps inevitably, the claimant in fact centred its arguments on the risk of dissipation, given that the factual premises it relied on were closely and inextricably intertwined with the facts on which the previous application for a Mareva injunction were grounded.

47 It appeared to me that the question of risk of dissipation was very much a live issue in this application. It remained central to the claimant's various arguments. This was manifestly clear from its written submissions. At paras 46 to 55 of the said submissions, it was submitted that a term should be implied into the MOA precluding the defendant from dealing with the Deposit and further that a *Quistclose* trust was operative. At para 59, the claimant submitted that it may suffer "irreparable damage in that there will be nothing left of the Deposit to be repaid". All these arguments were indisputably aimed at showing

that the Deposit was at serious risk of being dealt with and dissipated, and that a proprietary injunction was thus necessary and justified. However, these would have been the same arguments it could (or would) have relied on in applying for a Mareva injunction at the outset.

48 The claimant also sought to demonstrate the urgency in the application by pointing to the defendant's virtual insolvency and its refusal to confirm that it would not deal with the Deposit in the HSBC account pending the determination of the arbitral tribunal. Once again, this argument revolved around the risk of dissipation, despite the claimant's efforts to suggest otherwise.

49 The defendant submitted that the extended doctrine of *res judicata* applied to preclude the claimant from raising the present arguments in support of the application for a proprietary injunction. I found this cogent and persuasive. It bears repeating that the claimant had already unsuccessfully canvassed the argument of risk of dissipation of the Deposit before the Court of Appeal.[42] To begin with, the defendant's alleged virtual insolvency was not a new development.[43] It could not form the basis for the grant of an injunction since Qatar Navigation had undertaken in its capacity as the defendant's parent company to meet the latter's liabilities as and when they fell due.[44]

50 Pertinently, the claimant also did not put forward any new evidence before me on the risk of dissipation, beyond indicating that the defendant had declined on 9 September 2022 to provide an undertaking not to deal with the

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42 RS at para 56.

43 RS at paras 57(a) and 57(b).

44 RS at para 57(d).

Deposit after the defendant's appeal in CA 2/2022 had been allowed. In my view, the defendant's position was perfectly legitimate and justified, given that the Court of Appeal had set aside the Mareva injunction on the basis that the claimant had failed to furnish solid evidence of any risk of dissipation. There was simply no reason why the defendant had to accede to the claimant's request for an undertaking not to deal with the Deposit, and the defendant's refusal to do so could not form a basis for the present application.

51 As noted by the Court of Appeal in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104, the extended doctrine of *res judicata* is termed as such because (at [102]):

> … it extends cause of action estoppel and issue estoppel beyond cases where the point sought to be argued in later proceedings had actually and already been decided by a court in earlier proceedings between the same parties … to cases where the point was not previously decided because it was not raised in the earlier proceedings even though it could and should have been raised in those proceedings. As mentioned earlier, this 'extended' doctrine has come also to be known by the name 'abuse of process' …

52 In *Goldbell Engineering Pte Ltd v Etiqa Insurance Pte Ltd (Range Construction Pte Ltd, third party) and another matter* [2022] SGHC 1, Ang Cheng Hock J helpfully summarised the relevant legal principles from existing case law (at [90]–[92]). I need not repeat them in full for present purposes, but I adopt Ang J's summary, in particular his observation at [91]:

> … in determining whether there is an abuse of process that attracts the extended doctrine of *res judicata*, the court looks at all the circumstances of the case and in particular, the following: (a) whether the later proceedings is in substance nothing more than a collateral attack on the previous decision; (b) whether there is fresh evidence that might warrant re-

> litigation; (c) whether there are *bona fide* reasons why an issue that ought to have been raised in the earlier action was not; and (d) whether there are some special circumstances that might justify allowing the case to proceed (*Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ('*Goh Nellie*') at [53]). In this process, the court is guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court and recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant (*Goh Nellie* at [53]).

53 The claimant appeared to maintain that even though the factual premises remained unchanged, the relief sought in the form of a proprietary injunction was different from the Mareva injunction sought in OS 849/2021 which was set aside by the Court of Appeal in CA 2/2022. However, this missed the point that the issue of risk of dissipation arising from the *same* factual premises had already been determined by the Court of Appeal. As I previously noted at the initial without notice hearing on 27 September 2022, it did not appear that there was any new evidence on this issue.

54 Having had the benefit of hearing full submissions from the parties, I concluded that the claimant plainly could have, or ought to have, with reasonable diligence, advanced the same arguments pertaining to its alleged proprietary interest previously when applying for the Mareva injunction before the High Court and/or the Court of Appeal. This was an abuse of process, being a thinly veiled collateral attack on the Court of Appeal's decision to allow the appeal in CA 2/2022. In my assessment, the claimant was estopped from pursuing the present application on essentially the same grounds.[45]

55 In any case, I was of the view that the claimant had raised the argument of having a proprietary interest in the Deposit as an afterthought. As

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[45] RS at para 71.

Lord Millett opined in the House of Lords decision of *Twinsectra Ltd v Yardley and others* [2002] 2 AC 164 at [73], "[a] *Quistclose* trust does not necessarily arise merely because money is paid for a particular purpose". The question in every case is whether the parties intended the money to be at the *free disposal* of the recipient (at [74]). Based on the terms of the MOA, I saw no basis for reading in an implied term to prohibit the defendant from dealing with the Deposit as part of its assets. The Deposit was furnished by the claimant to provide "security for the correct fulfilment of [the MOA]": cl 2 of the MOA. I accepted the defendant's submission that the MOA thus envisioned the Deposit as security for the defendant against potential breaches by the claimant.

56 Even if I had erred in this reasoning, and cll 13 and 14 of the MOA could instead be validly construed in the restrictive fashion suggested by the claimant as set out at [20] above, any force in this argument was blunted once it was appreciated that the claimant itself was equally subject to those clauses. If the claimant was correct that the Deposit was subject to a *Quistclose* trust which was supported by those clauses, then the defendant could, by the same token, be said to have an equivalent proprietary interest in the Deposit by virtue of cll 13 and 14. This was of course illogical and unlikely to have accorded with the parties' intent as set out in the terms of the MOA. I was not persuaded therefore that the claimant had shown a seriously arguable case of proprietary interest in the Deposit.

57 The claimant's arguments pertaining to whether there was a serious issue to be tried and the balance of convenience were similarly plainly grounded in substance on the claimant's fear or suspicion that the Deposit was at risk of being dissipated. I accepted the defendant's submission that there was no serious issue to be tried, particularly when the same arguments as those raised in CA 2/2022 were being repeated in substance in this application. The Court of

Appeal had already rejected the claimant's arguments as to risk of dissipation. Pending the release of full grounds for the Court of Appeal's decision, the matter could be wholly *res judicata* or would at least give rise to issue estoppel. I found that the balance of convenience did not lie in favour of the claimant as it had not shown that it would suffer irreparable or irremediable prejudice if the injunction was not granted.

Conclusion

58 For the reasons set out above, the application was dismissed. In summary, the claimant had not succeeded in showing why the court's jurisdiction under s 12A of the IAA ought to be invoked in aid of the ongoing arbitration proceedings in London.

59 The claimant was in effect seeking a second bite of the cherry to obtain a Mareva injunction under the guise of an application for a proprietary injunction. The application was misconceived and a clear abuse of process, thereby attracting the extended doctrine of *res judicata*. The defendant was compelled at short notice to defend an application which was little more than an attempt to go behind the Court of Appeal's decision in CA 2/2022 allowing the defendant's appeal and setting aside the Mareva injunction that had initially been ordered. Despite the Court of Appeal having categorically found that the claimant had not provided solid evidence of the risk of dissipation of the Deposit, essentially the same arguments as to risk of dissipation were raised again in this application, in a vexatious attempt to relitigate the issue where no relevant new evidence was placed before the court.

60 Having regard to the established *American Cyanamid* principles, the claimant did not have a seriously arguable case founded on a proprietary

interest, and the balance of convenience did not lie in favour of the grant of an injunction. I found that the claimant's various arguments were unmeritorious in all respects.

61 In the circumstances, after hearing the parties' submissions on costs, I was satisfied that it was appropriate to order the claimant to bear the defendant's costs on an indemnity basis. I ordered costs against the claimant fixed at $35,000 all-in.

See Kee Oon
Judge of the High Court

Goh Kok Leong, Daniel Tan An Ye and Nicholas Say Gui Xi (Ang & Partners) for the claimant;
Tan Zhengxian Jordan and Leong Hoi Seng Victor (Audent Chambers LLC) (instructed), Edgar Chin Ren Howe and Ch'ng Cheng Yi Samantha (Ascendant Legal LLC) for the defendant.