

BRITISH VIRGIN ISLANDS

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(COMMERCIAL)**

Claim No. BVIHCV(COM) 37 OF 2010

BETWEEN

**(1) AL-RUSHAID PETROLEUM INVESTMENT COMPANY
(2) AL-RUSHAID PARKER DRILLING LIMITED
(Both companies incorporated under the laws of Saudi Arabia)
Claimants/Applicants**

And

**TSJ ENGINEERING CONSULTING COMPANY LIMITED
Defendant/Respondent**

Appearances:

Mr. Richard Evans and Ms. Tameka Davis of Conyers Dill & Pearman for the Claimants/Applicants

Mr. John Carrington of McTodman & Co for the Defendant/Respondent

Also present is Mr. Keith Edward Oliver, Senior Partner of Peters & Peters, London

2010: March 31
2010: April 14, 20

Discovery – Applicants seek *Norwich Pharmacal* relief – Respondent purportedly used as vehicle for receipt of secret commissions – information sought to trace assets –existing proceedings commenced in England against directors/shareholders of Respondent – Respondent incorporated in the BVI - Respondent not party to English proceedings- Whether conditions for grant of relief satisfied – Whether alternative means to obtain disclosure exists – Whether previous disclosure order made against registered agent of Respondent persuasive

JUDGMENT

Introduction

[1] **HARIPRASHAD-CHARLES J:** In their application filed on 24 March 2010, Al-Rushaid Petroleum Investment Company and Al-Rushaid Parker Drilling Company (“the Applicants”) seek an order for disclosure of all documents in the custody, possession or

control of TSJ Engineering (“the Respondent”) (including documents stored electronically) relating to any bank account, funds or source of funding held by it, whether in its own name or on its behalf and where so ever held.

Brief facts

- [2] The Applicants form part of one of the largest groups of suppliers of equipment and services to the onshore and offshore oil industry in Saudi Arabia (“the Group”).
- [3] The Respondent is a company registered in the British Virgin Islands (“BVI”). It was incorporated on 2 February 2006.
- [4] This application for disclosure has its genesis in a disclosure order made ex parte on 17 February 2010 in the Citco Proceedings¹ where the Court ordered that the registered agent of the Respondent, Citco BVI Limited (“Citco”), should provide disclosure of specified information including:
 - a. provide copies of all documents in its custody, possession and control (including documents stored electronically) relating to any bank account or other source of funding in the name of or relating to the Respondent; and
 - b. all information in its knowledge or records, about the ultimate beneficial ownership, members and directors past and present of the Respondent.
- [5] Citco complied with the terms of the Order. The disclosure revealed that (a) the beneficial owners, shareholders and directors of the Respondent were Mr. Shekhar Shetty, Mr. James Wight and Mr. Tom Caplis and (b) the sole bank account of the Respondent had been closed on 28 October 2009.

¹BVIHCV(Com) 2010/20 – Al-Rushaid Petroleum Investment Company and Al-Rushaid Parker Drilling Company v Citco BVI Limited.

- [6] The Applicants state that Mr. Shetty was a longstanding and very senior employee of the Group². His employment began in 1982 and by September 2009, he had risen to the position of director of both of the Applicants³. Mr. Caplis was employed as a vice president within the Group between 2000 and 2007⁴. Mr. Wight was also employed by the Group although his details are not that clear⁵.
- [7] It is the Applicants' case that the Respondent has been used as a vehicle for the receipt of secret commissions by these three individuals who owed fiduciary duties to them by reason of the positions which they held. They further allege that they are the victims of actionable wrongs (viz. diverting opportunities and profits) at the instigation of Mr. Shetty, Mr. Caplis and Mr. Wight.
- [8] The Applicants have brought claims in England for dishonest breach of fiduciary duties and in conspiracy against the beneficial owners. They allege that the information sought in the present application is made so as "*to enable the Applicants to trace the destination of the funds that (it is believed on cogent grounds) were routed via the Respondent*".
- [9] The Respondent trenchantly opposes the application and premises its objection on three broad grounds namely: (1) the Applicants have not disclosed any good arguable case entitling them to the disclosure of documents by the Respondent; (2) disclosure is available to the Applicants otherwise than in these proceedings and (3) there is no bar against the requested disclosure being sought in the English proceedings from the parties.

The English proceedings

- [10] The background to this Application is the claim in the English proceedings HC10C0074 between Al-Rushaid Parker Drilling Limited (the "English Claimant") v Shekhar Shetty, Tom Caplis and James Wight (the "English Defendants")⁶. The English Defendants are

² Paragraphs 20 to 23 of Dr. Ibler's affidavit in the Citco Proceedings.

³ Ibid, paragraphs 28, 30.

⁴ Ibid, paragraph 25.

⁵ Ibid, paragraph 26.

⁶ See Exhibit to Mishka Jacobs' affidavit in opposition to application for Norwich Pharmacal and Bankers Trust Orders.

directors/shareholders of the Respondent. The English Claimant claims equitable compensation and an account from the English Defendants.

[11] The material allegations in the Particulars of Claim in the English proceedings are well documented in the written submissions of learned Counsel for the Respondent, Mr. Carrington. For present purposes, I shall gratefully adopt them.

- The English Defendants owed fiduciary duties to the English Claimant, among other things, not to have any interest in any transaction made for the account of that Claimant; not to participate in any business competing with the Claimant or engage in any of the commercial activities carried on by the Claimant; not to receive any secret commission in respect of any transaction entered into by the Claimant; not to undertake any steps for the purpose or with the intention of securing such payments in future.
- The English Claimant found on Mr. Shetty's computer files an unsigned document dated 25 January 2006 headed "Consultancy Agreement" stated to be an agreement between the Respondent and a Chinese company called Shandong Kerui Petroleum Equipment Co. Limited ("Shandong Kerui").
- The Respondent's bank account at the Swiss bank of Pictet et Cie in Geneva, Switzerland was closed on 23 October 2009, five days after the solicitors for the English Claimant addressed a number of enquiries to Mr. Shetty's solicitors relating to the Respondent.
- The English Court is being asked to infer from these facts that the English Defendants procured the incorporation of the Respondent for purposes of procuring a and/or receiving secret commission in respect to the contract between the English Claimant and Shandong Kerui or alternatively, that the Respondent did enter an agreement with Shandong Kerui on the terms approximating those of the unsigned draft Consultancy Agreement.

- To date, the English Claimant has not seen any evidence of actual receipt by the Respondent of any secret commission in respect of the Shandong Kerui contract or otherwise in breach of the duties of the English Defendants.
- The English Claimant seeks an account from the English Defendants requiring full disclosure of their respective dealings with the Respondent and/or Shandong Kerui and/or full disclosure of any commissions received from Shandong Kerui and equitable compensation for the loss and damage incurred by its extensive and ongoing investigations in the alleged breaches of duty by the Defendants.

[12] The present application is made to enable the Applicants to trace the destination of funds that were routed through the Respondent. It cannot be disputed that the present application is in aid of the English proceedings. Notably, the Respondent is not a defendant to those proceedings.

Norwich Pharmacal Order

[13] The principles on which the Court will grant *Norwich Pharmacal* relief are conveniently set out in the treatise, **Gee on Commercial Injunctions**⁷. The power of the court to compel a third party to disclose information in its possession to enable a party to establish the identity of its wrongdoer and/or the wrongdoing has its genesis in the case of **Norwich Pharmacal Co. v Commissioners of Customs & Excise**.⁸ It was held that a person who was innocently mixed up in the wrongdoing of another, so that he was more than a “mere witness”, could be compelled to disclose the identity of the actual wrongdoer, in order that proceedings could be taken by the victim against the appropriate defendant. At page 175 of the judgment, Lord Reid stated:

“They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so

⁷ 5th edition, pages 688 to 693.

⁸ [1974] A.C. 133.

mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.”

[14] Thus, for example, information has been ordered to enable the person wronged to identify a mole within the organization,⁹ to trace assets which have been taken without the alleged fraudsters being alerted,¹⁰ to locate assets upon which a judgment could be enforced,¹¹ to enable third parties to be identified who had themselves done nothing wrong but who had received letters containing allegedly false statements,¹² and to obtain information which is central to a contemplated claim, and which will show whether the applicant does have a good cause of action against a named person.¹³

[15] The *Norwich Pharmacal* principle has been further extended to embrace cases where what is sought is not only restricted to the identity of a wrongdoer but can extend to “...full information required for this purpose, including information about what the wrongdoer has done with his assets.”¹⁴

[16] The key to the jurisdiction is that it enables the claimant to obtain legitimate redress for a wrong which otherwise would not be available to him. In **Mitsui & Co. Limited v Nexen Petroleum UK Limited**¹⁵, Lightman J. reviewed the authorities and re-stated at para. 19:

“In subsequent cases, the courts have extended the application of the basic principle. The jurisdiction is not confined to circumstances where there has been tortious wrongdoing and is now available where there has been contractual wrongdoing: *P v T Ltd* [1997] 4 All ER 200, [1997] 1 WLR 1309; *Carlton Film Distributors Ltd v VCI Plc* [2003] EWHC 616, [2003] FSR 876 (*Carlton Films*); and is not limited to cases where the identity of the wrongdoer is unknown. **Relief can be ordered where the identity of the claimant [sic, defendant] is known, but where the claimant requires a missing piece of the jigsaw:** see *AXA Equity & Law Life Assurance Society plc v National Westminster Bank plc* [1998] CLC 1177

⁹ *British Steel Corporation v Granada Television* [1981] A.C. 1096.

¹⁰ *Bankers Trust v Shapira* [1980] 1 W.L.R. 1274.

¹¹ *Mercantile Group (Europe) AG v Aiyela* [1994] Q.B. 366.

¹² *CHC Software Care Ltd v Hopkins & Wood* [1993] F.S.R. 241.

¹³ *Carlton Film Distributors Ltd v VCI Plc* [2003] F.S.R. 47.

¹⁴ *Mercantile Group AG v Aiyela* [supra].

¹⁵ [2005] 3 All ER 511, Ch. D, 517 f-h.

(*Axa Equity*); *Aoot Kalmneft v Denton Wilde Sapte (a firm)* [2002] 1 Lloyd's Rep. 417; see also *Carlton Films*. Further the third party from whom information is sought need not be an innocent third party: he may be a wrongdoer himself: see *CHC Software Care Ltd v Hopkins and Wood* [1993] FSR 241 and Hollander, *Documentary Evidence* (8th edn, 2003) p 78, footnote 1. [Emphasis added]

Norwich Pharmacal relief is a flexible remedy capable of adaptation to new circumstances. Lord Woolf CJ noted in *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29 at [57], [2002] 4 All ER 193 at [57], [2002] 1 WLR 2033:

'New situations are inevitably going to arise where it will be appropriate for the [*Norwich Pharmacal*] jurisdiction to be exercised where it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy.'

[17] Because the jurisdiction is available to ensure that there is justice to the wronged person/entity, it can, in appropriate circumstances, be extended to see that justice is done, it being an equitable remedy. But one thing is clear: the jurisdiction cannot be used as a fishing expedition to enable a claimant to decide whether or not to sue where the identity of the wrongdoer is known. If it is possible to plead a case without the information then the *Norwich Pharmacal* jurisdiction is not available: **Axa Equity and Law Life Assurance Society v National Westminster Bank**.¹⁶

[18] Essentially, three conditions ought to be satisfied for the court to exercise the power to order *Norwich Pharmacal* relief. These are:

- There must be an apparent wrong carried out, or arguably carried out, by an ultimate wrongdoer;
- There must be the need for an order to enable action to be brought against the ultimate wrongdoer; and

¹⁶ [1998] P.N.L.R. 433.

- The person against whom the order is sought must (a) be mixed up in so as to have facilitated the wrongdoing; and (2) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.

[19] Accordingly, I have to determine whether these three conditions are satisfied. Even if these conditions are satisfied the court has a residual discretion whether it is right that an order should be made in all the circumstances.

Have the Applicants set out a good and arguable case for a Disclosure Order?

[20] Mr. Carrington correctly submitted that the threshold test for the grant of a disclosure order is that the Applicant must disclose a good arguable case that a wrong has been committed: see **Bankers Trust Co. v Shapira** [supra]. Lord Denning M.R. at page 1282 had this to say:

“This new jurisdiction must, of course, be carefully exercised. It is a strong thing to order a bank to disclose the state of its customer’s account and the documents and correspondence relating to it. It should only be done when there is a good ground for thinking the money in the bank is the plaintiff’s money – as, for instance, when the customer has got the money by fraud – or other wrongdoing- and paid it into his account at the bank....”

[21] At page 1283, Waller LJ said *“Clearly, it is undesirable that an order such as this should be lightly made. But the answer...in my judgment, is that here there is very strong evidence indeed of fraud on the part of the other two defendants....”*

[22] The Respondent argues that the Applicants’ case does not disclose the required very strong evidence for the grant of such disclosure. The Respondent also argues that the First Applicant is not even a claimant in the English proceedings and as such, there is no basis for entitlement to disclosure by the First Applicant. It asserts that the English pleadings do not disclose any claim by the First Applicant against the English Defendants. According to Mr. Carrington, Dr. Ibler’s First Affidavit indicates that Mr. Shetty’s fiduciary duties were owed to the Second Applicant¹⁷. At paragraph 1 of the said affidavit, Dr. Ibler

¹⁷ Paragraph 43.

deposed to the fact that the First Applicant is a company incorporated in Saudi Arabia and the holding company of a family of companies comprising a number of joint venture entities and subsidiaries. It seems to me that this argument has no merit as the First Applicant is the holding company of the Second Applicant and as such, would be entitled to disclosure if it satisfies the three conditions required for such *Norwich Pharmacal* relief.

- [23] With respect to the Second Applicant, the Respondent raises an issue as to whether this is an existing entity. It says that until the Second Applicant satisfies the court of this burden, no relief should be made in its favour. Reference is made to Dr. Ibler's affidavit¹⁸ (wherein he compares Saudi Arabian law and English law with respect to directors' duties) and to the affidavit of Ms. Emma Jarvis. The Respondent contends that (1) the opinion of Saudi Arabian law appears to be vague. In other words, there is no firm statement of the duties owed by the English Defendants and neither statute nor precedent can be cited in support of the opinion and (2) it appears that the Second Applicant is a mixed liability company and Ms. Jarvis says that she is "*not advised that this makes any difference to the duties owed.*"
- [24] The Respondent submits that the evidence on the extent of the duties is not satisfactory and does not meet the threshold of a good arguable case. It says that in the absence of a definitive statement of such duties, there is no basis for the order for disclosure.
- [25] At paragraph 2 of Ms. Jarvis' affidavit, she deposes that she sought advice from a law firm based in the United Arab Emirates (practising in corporate law, commercial litigation and other related fields) as to the duties to which the director of a Saudi Arabian company is subject as a matter of Saudi Arabian Law. At paragraph 3, she identifies some of the duties owed by directors of a company including (a) not to obtain secret commissions pursuant to contracts entered into by the company; (b) not to have an interest, whether directly or indirectly, in any transactions or contracts made for the account of the company, except with the authorization from the general meeting; (c) to disclose to the board a personal interest in any transaction made for the account of the company; and (d) not, without the authorisation of the general meeting, to participate in any business competing with that of the company.

¹⁸ Paragraph 43

- [26] At paragraph 4, Ms. Jarvis states that the scope of the duties owed by a director under Saudi Arabian Law is analogous to the fiduciary duties owed by a director to the company as a matter of the common law in England and Wales. So, it seems to me that the Applicants have satisfied this burden and therefore, the Respondent's argument in this regard, lacks merit.
- [27] The Respondent asserts that the evidence with regard to the crux of the application for disclosure so as to enable tracing of the monies, which it is alleged, it received from the alleged breaches of fiduciary duties, is wanting. It alleges that (1) there is no evidence of any secret commission being received by the English Defendants or the Respondent with respect to the contract between the Second Applicant and Shandong Kerui; and (2) there is no allegation of any receipt by the Respondent of any other funds in breach of the English Defendants' duties. The Respondent argues that in the absence of cogent evidence on the issue of wrongful receipt of funds by the Respondent, no right to tracing arises and the mere incorporation of the Respondent by the alleged wrongdoers does not give rise to a right to trace the Respondent's assets.
- [28] Additionally, the Respondent alleges that Dr. Ibler's earlier witness statement¹⁹ and the Particulars of Claim²⁰ describe the Group of which the Second Applicant forms part as "*a leading provider of equipment and services to the onshore and offshore oil industry in Saudi Arabia.*" The draft agreement on which the Applicants rely refers to the provision of "*consultancy services aiming and putting KERUI in a position to develop a competitive and comprehensive offer on various projects in the Gulf States...: i.e. the provision of services to a Chinese company*". Mr. Carrington submits that there is no evidence that Kerui's business competes with that of the Second Applicant.
- [29] At best, says the Respondent, the Applicants' case is speculative and it does not disclose a good arguable case.

¹⁹ Paragraph 8

²⁰ Paragraph 1

The Citco Order

[30] In order to decide whether the Applicants have a good arguable case that a wrong has been committed, a convenient starting point is to look at the circumstances that led to the making of the Citco Order. The evidence in support of the Citco Order demonstrated a prima facie case that the Respondent has been used by Messrs. Shetty, Caplis and Wight as a conduit for the proceeds of a scheme of concerted wrongdoing against the Applicants. Specifically, the Applicants believed that the Respondent was incorporated for the purpose of allowing the alleged wrongdoers to receive secret (and unlawful) commissions. Strong circumstantial evidence led to this suspicion including:

- The nature of discoveries made from the forensic examination of the material deleted from the hard disk of Mr. Shetty's company computer which demonstrated a rancorous feeling on his part towards the Applicants and its founder, Shiekh Abdullah²¹.
- The discovery (also within the deleted material) of contractual documentation between the Second Applicant and a PRC entity called Shandong Kerui. This draft document (which the Applicants suspect was executed) purports to demonstrate contractual arrangements for the supply of four drilling rigs (at a cost of US\$4.2m. each). The Second Applicant authorised expenditure in respect of this supply agreement. At this time, both Messrs. Shetty and Caplis were directors, having been appointed at the very meeting which approved that expenditure.²²
- The discovery (again, from within the deleted material) of a draft consultancy agreement between the Respondent and Shandong Kerui purporting to provide an entitlement on the part of the Respondent to a commission payment of 5% of the price paid to Shandong Kerui pursuant to the purported supply agreement referred to above.

²¹ See paragraphs 36 to 41 of Dr. Ibler's First Affidavit.

²² See paragraph 45.3 of Dr. Ibler's First Affidavit.

- The fact that the name of the Respondent in part – TSJ – corresponds with the initials of each of the first names of the wrongdoer;²³
- The likelihood that TSJ was being used by the wrongdoers as a vehicle for the proceeds of the breach of fiduciary duties being committed against the Applicants.

[31] It is on the basis of this evidence that the Applicants persuaded Bannister J to issue a *Norwich Pharmacal* order against Citco. It seems to me that Bannister J found that the application before him presented sufficient evidence that the Applicants have suffered a wrong. Of course, the finding of Bannister J does not preclude this court from coming to a different finding if the facts and circumstances necessitate such.

[32] The First Affidavit of Dr. Ibler²⁴ asserts that Mr. Shetty was or was arguably involved in a breach of fiduciary duties owed to the Second Applicant which involved the taking (or purported taking) of secret commissions from Shandong Kerui in connection with the placing of an order by the Second Applicant for the construction and supply of four oil rigs and two gas rigs by Shandong Kerui to the Second Applicant. Mr. Shetty was a director of the Second Applicant at all material times and would, as a matter of BVI law, owe fiduciary duties to the Second Applicant. It appears that similar duties are owed according to English law and Saudi Arabian law.

[33] The evidence regarding the Shandong Kerui contract (of which the Applicants have experienced considerable difficulty in reconstructing what occurred because the principal players have all left the employment of the Al-Rushaid group and Mr. Shetty allegedly deleted documents from his work computer) are as follows:

- (i) In about December 2005 or January 2006, the Second Applicant entered into an agreement with Shandong Kerui whereby the Second Applicant agreed to initially purchase four oil rigs for US\$4,217,000 each.

²³ See paragraph 54 of Dr. Ibler's First Affidavit.

²⁴ See paragraphs 42 to 66 of the First Affidavit of Dr. Ibler.

- (ii) Mr. Shetty and Mr. Caplis were directors of the Second Applicant and Mr. Wight was also involved in the Second Applicant's business at the time the agreement was entered into between the Second Applicant and Shandong Kerui.
- (iii) In January 2006, whilst the Shandong Kerui agreement was in the process of being negotiated and finalised by the Second Applicant, Mr. Shetty instructed a Mr. Pierre-Alain Chambaz of Pictet et Cie to effect the incorporation of TSJ.
- (iv) TSJ was incorporated on 2 February 2006 with its directors being Mr. Shetty, Mr. Caplis and (it is to be inferred) Mr. Wight. The Applicants state that the court should infer that they were also its shareholders.²⁵
- (v) Prior to its incorporation, TSJ appears to have entered into a consultancy agreement with Shandong Kerui. The Applicants have been unable to trace a signed copy of this consultancy agreement but managed to recover an unsigned version which was deleted from Mr. Shetty's work computer. The consultancy agreement was dated 25 January 2006 but the meta-data retrieved from Mr. Shetty's computer demonstrates that it was last saved on 10 February 2006.
- (vi) The consultancy agreement provides, among other things that TSJ is "*appointed as a consultant*" for Shandong Kerui to provide "*consultancy services.*" Under the title "*COMPENSATION*" it further provides: "*For the services provided by TSJ, TSJ shall be compensated with a Success Fee equivalent to 5% of the value of the contract...*"
- (vii) The Applicants are in the dark whether or when the consultancy agreement was signed by TSJ and Shandong Kerui, and it is for this primary reason that they make the present application.

[34] In **Ashworth Security Hospital v MGN Ltd**²⁶, Lord Slynn of Hadley stated (at paragraph 30 of the Judgment):

²⁵ See the terms of the email from Mr. Chambaz dated 17 January 2006 at page 187 of "IB1" to Dr. Ibler's First Affidavit.

“...what is required is involvement or participation in the wrongdoing and that if there is the necessary involvement, it does not matter that the person from whom the discovery is sought was innocent and in ignorance of the wrongdoing by the person whose identity it is hoped to establish.”

[35] He continued at paragraph 35:

“Although this requirement of involvement or participation on the part of the party from whom discovery is sought is not a stringent requirement, it is still a significant requirement. It distinguishes that party from a mere onlooker or witness. The need for involvement, the reference to participation can be dispensed with because it adds nothing to the requirement of involvement, is a significant requirement because it ensures that a mere onlooker cannot be subjected to the requirement to give disclosure. Such requirement is an intrusion upon a third party to the wrongdoing and the need for involvement provides justification for the intrusion.”

[36] So, it is well-established that there must be involvement on the part of a respondent to justify the discovery sought. In **The President of the State of Equatorial Guinea v The Royal Bank of Scotland International & Ors**.²⁷, the Board was of the view that the bank was involved, albeit innocently as the interveners' accounts at the bank were likely to identify some of those involved and had done so.

[37] In the present application, the wrongdoers are known to the Applicants. They believe that the instigator of the wrongdoers is Mr. Shetty. His English solicitors have asserted in correspondence²⁸ that he [Mr. Shetty] does not recall being a director of the Respondent. The Applicants are concerned about his forthrightness. As a result of the Citco Order, the Applicants were able to establish the incontrovertible nexus between the wrongdoers and the vehicle used to facilitate the wrongdoing. On 23 October 2009, there was a meeting between Mr. Shetty's London lawyers, Speechly Bircham and the Applicants' English solicitors, Peters & Peters. Five days later, on 28 October 2009, the Respondent's sole account at Pictet et Cie was closed²⁹. The Applicants opined that two virtually important

²⁶ [2002] UKHL 29. Judgment delivered on 27 June 2002.

²⁷ [2006] UKPC 7.

²⁸ See Letter from Speechly Bircham dated 12 March 2010.

²⁹ See Letter from Citco dated 2 March 2010 at page 8 of Exhibit G 11. Tab. 6

questions arise from this: (1) what funds were formerly held in the Respondent's account at Pictet et Cie (or routed via it) and (2) where those funds have been transferred to.

[38] Given these circumstances, is it appropriate to make a disclosure order? Here, the case of **Bankers Trust v Shapira**³⁰ is helpful. The plaintiff bank alleged that two individuals, Shapira and Frei had defrauded it of \$1 million. The plaintiff bank further alleged that the money had been deposited in a bank in London and it named the bank as the third defendant in the action. Before Goff J the plaintiff bank sought and obtained a Mareva injunction to freeze the assets of Shapira and Frei. It then sought, before Mustill J, an immediate interlocutory order for disclosure of all correspondence, cheques, vouchers, transfer applications and other documents relating to any accounts in the names of Shapira and Frei. The judge refused the order, based on the importance of the confidential relationship between a bank and its customers.

[39] In effect, the plaintiff bank was seeking to extend the *Norwich Pharmacal* principle. Instead of seeking only the names of the potential wrongdoers, it was seeking evidence to use against the defendants whose identities they knew. What had begun as an order for the identity of the wrongdoers who had committed a tortious act was now being extended to the disclosure of extensive documentary evidence from an innocent third party. The plaintiff bank succeeded on appeal.

[40] The Court of Appeal which included Lord Denning M.R. said at page 1281 F-G:

“Having heard all that has been said, it seems to me that Mustill J. was too hesitant in this matter. In order to enable justice to be done – in order to enable these funds to be traced – it is a very important part of the court's armoury to be able to order discovery.”

[41] At page 1282, Lord Denning continued:

“This new jurisdiction must, of course, be carefully exercised....The plaintiff, who has been defrauded, has a right in equity to follow the money. He is entitled, in Lord Atkin's words, to lift the latch of the banker's door: see *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 K.B. 321, 355. The customer, who has prima

³⁰ [1980] W.L.R. 1274.

facie been guilty of fraud, cannot bolt the door against him. Owing to his fraud, he is disentitled from relying on the confidential relationship between him and the bank: see *Initial Services Ltd v Putterill* [1968] 1 Q.B. 396, 405. If the plaintiff's equity is to be of any avail, he must be given access to the bank's books and documents- for that is the only way of tracing the money or of knowing what has happened to it: see *Mediterranea Raffineria Siciliana Petroli S.p.a. v Mabanaf G.m.b.H.* (unreported). So the court, in order to give effect to equity, will be prepared in a proper case to make an order on the bank for their discovery. The plaintiff must of course give an undertaking in damages to the bank and must pay all and any expenses to which the bank is put in making the discovery: and the documents once seen, must be used solely for the purpose of following and tracing the money: and not for any other purpose. With these safeguards, I think the new jurisdiction –already exercised in the three unreported cases –should be affirmed by this court.”

- [42] Based on the evidence and the law as outlined above, I am of the considered opinion that it is just and convenient and in the interests of justice and/or it is necessary in the interests of justice to grant the *Norwich Pharmacal* relief. In order to enable justice to be done – in order to enable these funds to be traced –it is a very important part of the court's armoury to be able to order discovery so that the Applicants are able to trace the onward destination and recipients of the funds. This is not a fishing expedition.

Is this a proper case to make a Disclosure Order?

- [43] Having found that it is necessary to grant the relief, I still have to consider whether there are any other straightforward or available means of finding out the information that the Applicants seek.
- [44] In **The President of the State of Equatorial Guinea**, Lord Bingham of Cornhill and Lord Hoffmann who delivered the judgment stated at paragraph 16:

“*Norwich Pharmacal* relief exists to assist those who have been wronged but do not know by whom. If they have straightforward and available means of finding out, it will not be reasonable to achieve that end by overriding a duty of confidentiality such as that owed by banker to customer. If, on the other hand, they have no straightforward or available, or any, means of finding out, *Norwich Pharmacal* relief is in principle available if the other conditions of obtaining relief are met. Whether it is said that it must be just and convenient in the interests of justice to grant relief, or that relief should only be granted if it is necessary in the interests of justice to grant it, makes little or no difference of substance.”

- [45] Gordon JA in **Morgan and Morgan Trust Corporation Limited and Fiona Trust & Holding Corporation et al**,³¹ quoted with approval the passage cited above. He then proclaimed that the jurisdiction (*Norwich Pharmacal*) is a special one to be used only where no other procedure will achieve the ends of justice.
- [46] Learned Counsel for the Respondent submits that the Second Applicant has a straightforward and easily available means of seeking the disclosure sought against the Respondent. He says that Mr. Shetty is a director of the Respondent. The other directors of the Respondent are also named as Defendants in the English proceedings although one challenges jurisdiction and the other is yet to be served. According to Learned Counsel, a company may only act through its directors and any order made by this court for disclosure is, in actual fact, an order against Mr. Shetty to provide the requisite disclosure.
- [47] The Respondent argues that the Applicants have already acknowledged that disclosure is available to them other than in these proceedings. The Respondent points to the series of correspondence between the parties³² and submits that they demonstrate that Peters & Peters considered that the required disclosure was available from Mr. Shetty who is subject to the jurisdiction of the English Court, or otherwise from the English Defendants and was available through the English Courts as if there was jurisdiction to make a consent order for disclosure, there must also be jurisdiction to make a compulsory order.
- [48] True, disclosure can be obtained otherwise than by invoking the power of this Court. The difficulty with this can be gleaned from the litany of correspondence between the parties. As is apparent from the correspondence³³, the Applicants sought Mr. Shetty's co-operation by inviting him to endorse the consent order³⁴. Unfortunately, that co-operation was not forthcoming. Mr. Shetty's solicitors, Speechly Bircham said "*We cannot sign the consent*

³¹ BVI Civil Appeal No. 3 of 2006. Judgment delivered on 25 September 2006.

³² Exhibit to Dr. Ibler's First Witness Statement, pp. 25 to 27 (letter dated 3 March 2010), pp. 33-35 (letter dated 9 March 2010), p. 38 (letter dated 15 March 2010), pp. 36-38 (letter dated 12 March 2010 and exhibit to Mr. Oliver's witness statement, p.5.

³³ See Letter from Peters & Peters dated 9 March 2010.

³⁴ The Consent Order states as follows: "The First Defendant [Mr. Shetty] shall by 4 p.m. on 19 March 2010 provide to the Claimant copies of all statements of bank accounts which are held, or have at any time since the date of its incorporation been held, in the name of TSJ Engineering Consulting Limited or for its benefit including but not limited to the account held at Pictet et Cie.

order in the form drafted by you since it makes Mr. Shetty a hostage to fortune if he cannot persuade TSJ's bankers to release the statements to him". This is incredible as Mr. Shetty is one of the directors of the Respondent. They continued by stating immediately thereafter "As we have advised, he [Mr. Shetty] did not believe he was a director of TSJ. However, he is going to attempt to do so since production will clearly impact on the application you intend to make in the QBD and it would be easier for the statements to come to ourselves in England than pursuant to ARPD's action in the British Virgin Islands." This was since 14 March 2010.

[49] The Respondent argues that Mr. Shetty's position is that he would not sign the consent order presented to him but he will co-operate and provide the bank statements. The Applicants replied on 13 March 2010. They inquired whether Mr. Shetty had made any attempts to obtain the statements from Pictet et Cie. They extended the deadline to do so to 4 p.m. on 19 March 2010 and indicated that if they did not receive the statements by that date, they will have no alternative but to issue an application for an order compelling Mr. Shetty to provide disclosure of the statements.

[50] Then, on 24 March 2010, the Applicants received another letter from Speechly Bircham. At paragraph 4, it reads:

"For the reasons indicated in our letter of 12 March we consider that your threatened application is premature. As indicated earlier, our client is not in *de facto* control of the TSJ bank account and, with respect, your application would be best made against all defendants once Caplis and Wight have at the very least instructed solicitors and preferably after the due date for disclosure in the ordinary course. There is no justification for making an advance disclosure application against the only defendant so far to acknowledge service where he is unable to obtain the statements and you have obviously accepted that it makes no sense for any emergency application to be made."

[51] So, whilst there is no bar against the requested disclosure being sought in the English proceedings from the parties, there is just no co-operation and that disclosure has not been forthcoming.

- [52] The jurisdiction of the English Court to order disclosure of this kind against the English Defendants is beyond dispute. However, there are some practical difficulties with seeking to obtain such disclosure in the English Court. Firstly, the Respondent is not a defendant in the English proceedings. In order to join the Respondent as an additional defendant in the English proceedings, the Applicants would need to obtain leave of the English Court to serve out of the jurisdiction. Then, the Applicants will make their application for disclosure in the English proceedings which no doubt, will be opposed. If successful, then the issue of enforceability arises as such order would not be readily enforceable in this Court. The Applicants would have to issue new proceedings in this jurisdiction, plead the fact of the English Order, plead issue estoppel and eventually proceed to summary judgment. Unquestionably, this would be a considerable protracted process. Meanwhile, a BVI company, which the Applicants have identified as being a conduit for these wrongful activities, will have many months to put its assets beyond the reach of the Applicants. As learned Counsel for the Applicants, Mr. Evans correctly postulates, such a process is destructive to comity between courts of friendly nations which speaks to judicial co-operation.
- [53] The Respondent contends that any potential delay incurred in joining the Respondent to the English proceedings should be given little weight in the light of the 5-month delay in seeking the disclosure and that it is not necessary in the interests of justice that this is a proper case for the Court to make available to the Applicants one of its extraordinary remedies.
- [54] Persuasive though the submissions of learned Counsel, Mr. Carrington are, I find that this is the only means now available to the Applicants to get the information they seek. As I see it, Mr. Shetty is not co-operative and to join the Respondent to the English proceedings, would be too problematical, long-winded and would lead to further delays. It cannot be overlooked that five days after a meeting between Mr. Shetty's lawyers and the Applicants' lawyers, the Respondent's only bank account was closed. It seems to me that there is a deliberate effort to put whatever assets beyond the reach of the Applicants.

[55] In **Bankers Trust v Shapira** [supra], Lord Denning said at page 1282:

“If the courts were to wait until these two men were served, goodness knows how many weeks might elapse. Meanwhile, if some of it has got into the hands of third persons, they may dispose of it elsewhere.”

[56] I share similar sentiments in this application. The Applicants have established a good and arguable case that a wrong has been committed against them. They have identified the wrongdoers as the controllers of the Respondent. It appears that the Respondent has facilitated the wrongdoing. The question is: why would it close its sole bank account five days after a meeting with the Applicants’ lawyers? As I see it, the Applicants are entitled to the *Norwich Pharmacal* relief which they seek in order to trace the onward destination and recipients of the funds.

[57] It is imperative that proper disclosure be given as soon as possible if the Applicants are to stand a chance of recovery in respect of the wrongdoings. Any further delays will frustrate recovery of funds from which any judgment in favour of the Applicants could be satisfied and the Applicants may consequently suffer irreparable prejudice.

Special Provisions of Order

[58] **Gee on Commercial Injunctions**³⁵ states the learning in relation to disclosure orders of this nature. It states as follows:

“The jurisdiction is directed to uncovering the location of assets so that they can be preserved, and any application for an order pursuant to this jurisdiction should be honed so as to pursue this purpose. An order should not be made unless there is a real prospect that as a result assets can be located and preserved....

The order should not be too general or wide. It should, so far as possible, be specific, and directed to uncovering the particular assets which are to be traced: **Arab Monetary Fund v Hashim (No. 5)**.³⁶

[59] The primary allegation advanced by the Applicants is that the Respondent may have received secret commissions from Shandong Kerui for its contract with the Second

³⁵ 5th ed. Para. 22-055

³⁶ [1992] 2 All E.R. 911 at 919.

Applicant. No evidence is led to suggest any receipt of secret commission or other traceable property otherwise.

[60] In the circumstances, the order will be limited to what is necessary to trace the funds representing those secret commissions. The Respondent correctly asserts that the order should be limited only to information and/or documents relating to the funds arising from the receipt of any commissions on the Shandong/Kerui/Al-Rushaid Parker Drilling Agreement.

[61] Likewise, the information is only to be used for the purposes for which it was obtained and not for any other purpose without leave of the court. In any event, this is an implied undertaking. This undertaking sometimes gives rise to further ancillary applications seeking permission to deploy information in proceedings other than the one originally contemplated. Again, usually such orders are sought to be made without notice to the discovery defendant and when made are invariably limited to deployment of the information only in civil proceedings whether here or abroad.

Conclusion

[62] For all of these reasons, while expressing my indebtedness to both Mr. Evans and Mr. Carrington for their admirable submissions, I would grant the order which the Applicants seek but limited to what is necessary for them to trace the alleged secret commissions passed through the Respondent on the Shandong Kerui/Al Rushaid Parker Drilling Agreement only.

Order

[63] The Order of this Court will read as follows:

IT IS HEREBY ORDERED THAT:

1. Time for service of this Notice of Application be abridged.

2. The Respondent must by 4:30 p.m. on 21 April 2010 provide copies to the Applicants' legal practitioners of all documents in its custody, possession or control (including documents stored electronically) relating to any payment received by it from Shandong Kerui Petroleum Equipment Co. Ltd (Shandong Kerui) only, whether in its own name or on its behalf and where so ever held.

RESTRICTION ON USE OF MATERIAL DISCLOSED PURSUANT TO THIS ORDER

3. The Applicants shall be restrained from using any documents or information disclosed to it pursuant to the terms of this Order other than for the purpose of: (i) tracing or otherwise recovering such sums or property belonging to the Applicants; or (ii) instituting such proceedings or pleading such facts as the documents or information reveal may be available to the Applicants, unless the Court otherwise orders.

COSTS

4. The Respondent shall pay the Applicants' costs of the application, such costs to be summarily assessed at a hearing at 2:00 p.m. on 21 April 2010, unless agreed.
5. The Applicants shall pay the Respondent's reasonable costs of compliance with this Order.

SCHEDULE A

UNDERTAKINGS GIVEN TO THE COURT BY THE APPLICANT

1. The Applicant will pay the reasonable costs of anyone other than the Respondent which have been incurred as a result of this Order, including the reasonable costs of finding out whether that person holds any of the Applicant's assets and, if the court later finds that this Order has caused such person loss, and decides that

such a person should be compensated for that loss, the Applicant will comply with any other Order the Court may make.

2. If this Order ceases to have effect, the Applicant will immediately take all reasonable steps to inform in writing anyone to whom he has given notice of this Order, or who he has reasonable grounds for supposing may act upon this Order, that it has ceased to have effect.

Indra Hariprashad-Charles

High Court Judge