Judgment 13/2007 **Garnet Investments Limited (Plaintiffs) and BNP PARIBAS (Suisse) S. A. (Defendant) and The Government of the Republic of Indonesia (Third Party) – Royal Court (Civil Action File 1028) – 23rd May 2007**

Third Party's application to continue a freezing injunction - Norwich Pharmacal application – issue of risk of dissipation of assets – Third Party's application for disclosure – proper approach to disclosure applications – freezing injunction varied – provision for limited disclosure – freezing injunction to be reviewed on 7th December 2007

IN THE ROYAL COURT IN THE ISLAND OF GUERNSEY

Civil 1028

The 23rd day of May, 2007 before Sir de Vic Carey, Lieutenant Bailiff; sitting alone

In the matter of:-

GARNET INVESTMENTS LIMITED

Plaintiffs

And

BNP PARIBAS (Suisse) S A

Defendant

And

THE GOVERNMENT OF THE REPUBLIC OF INDONESIA

Third Party

WHEREAS on the 14th, 15th, 16th and 17th day of May, 2007 the Lieutenant Bailiff considered an application by the Third Party to continue a freezing order and for further relief and heard thereon Advocates R G Shepherd and C H Edwards, Counsel for the Plaintiff and Advocates K Le Cras

and S H Davies, Counsel for the Defendant and Third Party respectively, the Lieutenant Bailiff, this day, gave Judgment in the terms attached hereto and ORDERED as follows:-

1. Save as expressly provided below, the Order of the Royal Court dated 22 January 2007 shall continue to be in full force and effect;

2. The said Order dated 22 January 2007 be varied as follows:

   a. Order 3 is replaced and substituted with the following:

      "3.1 Upon the Third Party giving the undertakings set out in the attached schedule and until further order of the Court the Plaintiff must not remove from the Bailiwick of Guernsey or in any way dispose of, deal with or diminish the value of any of its assets which are in the Bailiwick of Guernsey (and no formal service of this Order by the Third Party on the Defendant shall be required);

      3.2 Order 3.1 applies to all of the Plaintiff's assets whether they are in its own name and whether or not they are solely or jointly owned. For the purposes of this order the Plaintiff's assets shall include any asset which it has the power, directly or indirectly, to dispose of or deal with as if it were its own. The Plaintiff is to be regarded as having such power if a third party holds or controls the asset in accordance with its direct or indirect instructions;

      3.3 This prohibition includes in particular any money or other assets in accounts GF 820726 J001, GF 820726 J002, and GF 820726 J003 at the Defendant bank."

b. The following shall be added to the Order of 22 January 2007 as Order 4A:

"4A.1 subject to Order 4A.2 below, the Plaintiff shall by a deponent who can speak from his/her own knowledge as to the affairs of the Plaintiff and by no later than 4.30 pm on 2 July 2007 and to the best of its ability and having made all reasonable inquiries provide an affidavit to the Third Party's advocates:

(i) setting out all of the worldwide assets which the Plaintiff owns or has owned exceeding £10,000 in value whether such assets are or were in its own name or not and whether solely or jointly owned, giving the date of acquisition, value, location, date of disposal (if applicable) and details of all such assets;

(ii) confirming, if it be the case, that the evidence given by Abdurrahman Abdul Kadir in his affidavit sworn 14 May 2007 and Robert George Shepherd in his affidavit and exhibit RGS1 sworn 14 May 2007 is true complete and accurate and if not, providing details of how the information and documentation deposed to by Mr Kadir and Advocate Shepherd is not true complete and accurate;

(iii) setting out details of all and any payments into or payments out of any account of the Plaintiff at any bank or similar institution, such details to include the amounts and currency of such transfers, and the dates on which such transfers took place;

(iv) save that the information and documentation disclosed pursuant to this Order shall not

(save as has already been disclosed) without further order state the name of any individual (except for Mr Hutomo Mandala Putra also known as Tommy Soeharto) with whom Garnet has had dealings and that where a document exhibited to the affidavit has been redacted to comply with this Order each individual shall be given a unique identifying number.

4A.2 If the provision of the information required at order 4A.1 above is likely to incriminate the Plaintiff, it may be entitled to refuse to provide it, but the Plaintiff is recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of Court and may render the officers of the Plaintiff to be imprisoned, fined or have the assets of the Plaintiff seized."

c. That the following be substituted for Order 8 of the Order of 22 January 2007:

"8. The injunction be reviewed by the Court on 11 December 2007"

d. That the following be substituted for the Schedule to the Order of 22 January 2007:

"**SCHEDULE**

Undertakings given to the Court by the Third Party:

(a) to maintain its election de domicile at Ogier House, St Julian's Avenue, Saint Peter Port;

(b) to pay the reasonable costs and expenses on the full indemnity basis of anyone other than the Plaintiff which have been incurred as a result of this order including the costs of finding out whether that person holds any of the Plaintiff's assets and if the court later finds that this order has caused such person loss, and decides that such person should be compensated for such loss, the Applicant will comply with any order the court may make;

(c) if the court later finds that this order has caused loss to the Plaintiff or to the Defendant and decides that the Plaintiff or the Defendant should be compensated for that loss, the Third Party will comply with any order that the court may make;

(d) within 28 days of this order becoming effective, to deposit with the Greffe the sum of £25,000 to be held as security to meet any award of compensation or costs contemplated by undertakings (b) and/or (c) above;

(e) anyone notified of this order will be given a copy of it by the Third Party's advocates;

(f) if this order ceases to have effect the Third Party will immediately take all reasonable steps to inform in writing anyone to whom it has given notice of this order, or who it has reasonable grounds for supposing may act upon this order, that it has ceased to have effect;

(g) the Third Party will not without the permission of the court (for the avoidance of doubt, such permission may be sought on an ex parte basis) use any information obtained as a result of this Order for any proceedings;

(h) to commence a civil claim against Mr Hutomo Mandala Putra in the Republic of Indonesia, such claim to include one or more of the substantive causes of action set out in the third affidavit of Yoseph Sabda sworn 26 April 2007 by no later than three months from the date on which this order becomes effective;

(i) to file an affidavit with the Royal Court of Guernsey reporting on the status of the proceedings referred to in undertaking (h) above within 5 months of the date on which this order becomes effective."

e. The Plaintiff and the Third Party are hereby granted leave to appeal generally such leave to effect from the date on which the judgment in this matter is perfected by the Court;

f. In the event that an appeal is commenced, the disclosure order 4A is stayed pending the outcome of such appeal.

S M D ROSS
Her Majesty's Deputy Greffier

FINAL VERSION APPROVED BY LIEUTENANT BAILIFF CAREY on 12th JUNE 2007

IN THE ROYAL COURT OF GUERNSEY

Rôle De Causes En Preuve

Between	**GARNET INVESTMENTS LIMITED**	**Plaintiffs**
	And	
	BNP PARIBAS (Suisse) S A	**Defendant**
	And	
	THE GOVERNMENT OF THE REPUBLIC OF INDONESIA	**Third Party**

Judgment of Lieutenant Bailiff Carey on Third Party's Application to continue a Freezing Order and for further relief as specified in its application to the Court dated 5 March 2007.

Dates of hearing: 14th, 15th, 16th, 17th May 2007

Date Judgment delivered: 23rd May 2007

Advocates for Plaintiff: R G Shepherd and C H Edwards
Advocate for Defendant: K Le Cras
Advocate for the Third Party: S H Davies

History Of The Matter Up To The Issue Of Proceedings In This Court

1. The Plaintiff is a Company incorporated in the British Virgin Islands. The Defendant was at the material time conducting banking business through its branch in Guernsey. I am told that the Defendant no longer operates here. The Plaintiff first started to do business with the Defendant around 1998 when it placed substantial funds with the Defendant for investment. The present value of such funds are in the region of €36,000,000.

2. In 2002, the Plaintiff asked the Defendant to pay away substantial sums from these accounts and so directed it. In the period since the account was

opened by the Defendant, the Defendant had learnt more about the beneficial owner of the Plaintiff a Mr Hutomo Mandala Putra and that Mr Putra and his family members may have been involved in corrupt or criminal conduct whilst his father a Mr Soeharto had been President of Indonesia. The Defendant considered its duties under the provisions of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law 1999 and disclosed its position to the Financial Intelligence Service ("FIS") of the States of Guernsey. On receipt of the payment requests, the Defendant sought consent from the FIS. This body was unwilling to give such consent. In the light of continued refusal of the Defendant to honour requests for the withdrawal of funds by the Plaintiff, the Plaintiff commenced an action against the Defendant in this Court on 3 March 2006. The cause recited the facts that I have outlined in the previous paragraph. The Plaintiff's advocate pleaded the fact that Mr Putra was the beneficial owner of the Plaintiff Company. Defences were filed on the 31 March; again the facts relating to the Defendant's dealings with the FIS were pleaded. The funds were effectively frozen because of the refusal of the Defendant to comply with instructions to pay them away without the approval of the FIS.

3. On 21 July, Advocate Le Cras for the Defendant, sought a stay of the proceedings and directions concerning the possible involvement of the Indonesian Government and in particular raised the possibility that that Government might wish to lay claim to the funds of the Plaintiff company. The way that I decided that the matter should proceed at an adjourned hearing on the 13 September was that Miss Le Cras should write to the Embassy of the Republic of Indonesia in London in the form annexed to the Act of Court, notifying the Government of these proceedings and enquiring of it whether it wished to assert any claim to the funds held by the Defendant.

4. At this stage, Her Majesty's Comptroller, who had been interested in the matter on behalf of the FIS appeared, although he was not in any way instructed by the Government of Indonesia. There were delays but

eventually progress was possible on 15 December last. By that stage Mr Strappini had been instructed on behalf of the Government and a discussion took place before the Court as to how the matter would proceed. Mr Strappini made no secret of the difficulties that the Government was in at getting its case together. In the circumstances I agreed to adjourn the matter until 22 January to enable him to give the matter further consideration and obtain instructions.

5. On 22 January Mr Strappini lodged, on behalf of the Government, an application for an injunction, in effect continuing to freeze the funds and also an application for the Government to be permitted to join the proceedings as a Third Party. At the same time there was an application before the Court dated the 12 December from Mr Edwards on behalf of the Plaintiff, seeking the release of funds to assist with certain litigation and the defence of these proceedings. At that hearing I granted on an interim basis a freezing injunction. I acknowledged that the Plaintiff had not been heard on the merits, but I considered there was sufficient risk of dissipation if the FIS were to withdraw its objection to releasing the funds, to justify interim relief. I also permitted the Government to be joined as a Third Party to these proceedings. The issue of withdrawing monies to pay legal fees was adjourned *sine die*. There was some 'toing and froing' concerning the terms of this Interim Order, but in the end it was redacted in a form satisfactory to all the parties. The matter was stood over until 8 March with certain directions being given for lodging of further papers by specific dates between January and March.

6. I resumed the hearing on the 8 March. On the advice of Mr Strappini, the Government of Indonesia had obtained fresh Counsel and Mr Davies of the firm of Ogiers appeared to represent the Third Party. He also filed an application for further relief in accordance with the principle *Norwich Pharmacal -v- Customs and Excise* [1974] AC 133, for disclosure against the Defendant Bank. It was directed that the inter parties application for the injunction to continue and the Orders relating to ancillary matters should be dealt with together at a hearing in May.

7. There was to be a preliminary hearing to review the matter prior to the substantive hearing on 14 May. This was put off and took place on 3 May. Left outstanding from that hearing was the issue of whether Mr Edwards would wish to cross examine Mr Sabda on behalf of his client. He was directed to notify the Court by lunchtime on 8 May if this was required. The Court duly received such notification and convened on the afternoon of 8 May to consider the matter further. The upshot of this short hearing was that clearly Mr Edwards was not in a position to indicate the parameters of any cross-examination because he had not had time to get full instructions. It was therefore left that the matter would be further considered at the opening of the main hearing on 14 May.

The Issue of Risk of Dissipation

8. At the hearing on 8 March, Advocate Shepherd on behalf of the Plaintiff wished to try to persuade me that I could curtail these proceedings by finding in his favour on one particular point. Mr Davies submitted quite fairly, these issues should all be dealt with at the substantive hearing, but I was attracted, as I always am, to considering any issue that could, if successfully argued, bring an end to proceedings without further expense. I accordingly agreed to hear from Mr Shepherd. His short point was that the Third Party had failed to show that there was any risk of dissipation of the assets, which formed the subject to the Application for the freezing order and that therefore one of the key criteria for granting relief had not been met. Mr Shepherd's point centred on he fact, to which I have already alluded, that the Defendant clearly was not going to pay away any of the funds it was holding on behalf of the Plaintiff, without the consent of the FIS, in accordance with the provisions of the Law of 1999. I rejected this argument without calling on Mr Davies to address me, but Advocate Shepherd felt that he had left the door open to revisit the arguments at the substantive hearing. I ruled that in the absence of any new argument, I had adequately dealt with the point, but I agreed that I would include in this judgment my reasons for rejecting the argument that the application was flawed, because the Third Party had shown no risk of dissipation.

9. Mr Shepherd based his argument on the judgment of the Court of Appeal of *Thane Investments Limited -v- Tomlinson [2003] EWCA Civ 1272* which gives support to the point that Freezing Orders are serious infringements of the Defendants' rights and liberties and therefore to be granted with caution. The facts in the *Tomlinson's* case were very different to those here and there was a concern that no evidence had been shown when the e*x Parte Order* was applied for, that *Tomlinson* had either assets or that such assets he had were at real risk of being dissipated in the absence of an injunction being granted.

10. The facts of the further case cited by Mr Shepherd, *Laemthong International Lines Co Limited -v- Artis and Others [2004] EWHC 2226 (Comm.)* are complex and again involve a scenario different from that before me. The issues of dissipation in the latter case are dealt with at paragraphs 58 and 59 of the judgment of Colman J and he analyses the decision in *Thane* in paragraph 60. The short points to be gleaned from this judgment is that where a prospective Defendant is a Company of substance, as was the position described in paragraph 59, the standard of proof required to establish a risk of dissipation is relatively high.

11. None of this seems to me to have a great deal of relevance when considering the facts of the case before me. The Plaintiff clearly wanted to withdraw substantial sums from the accounts with the Defendant in late 2002 by which stage the Defendant had become concerned and referred the matter to the FIS. That body is only dealing with issues relating to criminal conduct and the proceeds of crime and not the broader issues that arise in civil litigation for damages in tort or contract or breach of constructive trusts. I accept that the FIS continued to refuse the Defendant consent to pay out these funds. However, all that could change and it is clear from the conduct of the Plaintiff that it is anxious to take its money away from the Defendant.

12. Mr Shepherd also referred to the support that he claimed could be drawn from analogous proceedings, which have been recently considered in this court in *Messenger Insurance -v- Cable and Wireless plc* (judgment 50 of

2005). In that case, Messenger Insurance was a locally regulated insurance company, which was made the subject of an Administration Order under the supervision of the Royal Court. Cable and Wireless were making serious allegations that monies which Messenger had received in one of its cells (a further and unusual complication here was that Messenger was a Protected Cell Company), had been removed from Cable and Wireless in circumstances where it could allege a proprietary claim to those monies.

13. That particular dispute was being litigated both in Guernsey and in the UK with a large number of different interests being represented. The Bailiff after some hesitation, as was clear from his judgment, took the view that he could safely lift the Freezing Order that had been made here in favour of Cable and Wireless, on the basis that Messenger's affairs were properly subject to competent administration in accordance with an Order of this Court and that the interests of Cable and Wireless were thereby protected. Again, the facts of that case had no similarity with the facts here.

14. It is clear that if, for some reason, the FIS take the view that under the 1999 Law it can no longer justify restricting movement of the monies held by the Defendant on behalf of the Plaintiff, the Defendant would in all likelihood be obligated to comply with the Plaintiff's instructions to pay the money away. It does not follow from any action the FIS might take that any possible claim by the Third Party cannot be proceeded with as the basis on which the Third Party will be making a civil claim to these funds, is inevitably wider than that on which the FIS asserts a right to refuse to authorise release.

15. I did not see that there were any grounds for upholding the Plaintiff's claim that the Third Party had not satisfied the burden of showing that there was a real risk of dissipation and accordingly I did not consider it necessary to call on Mr Davies to address me.

Application to cross examine Mr Sabda

16. The substantive hearing opened on 14 May. Mr Edwards reverted to his application to cross-examine Mr Sabda. Helpfully he had filed an

application, supported by a short skeleton, restricting his application to two areas of Mr Sabda's third affidavit of 26 April 2007 namely:-

> *"(a) paragraphs 1 – 5 in relation to the question of whether:*
>
> *(i) these proceedings have been brought with the proper authority of the Government of the Republic of Indonesia; and*
>
> *(ii) Mr Sabda has been properly authorised by the Government of the Republic of Indonesia to give evidence on its behalf.*
>
> *(b) Paragraphs 8 – 17 in relation to the question of the reasons for the delay in bringing proceedings against Mr Hutomo".*

17. Both limbs of the application were opposed. Mr Edwards submitted with regard to (a) that the fundamental point was that evidence was required to show that despite the Government appearing in the person of the Republic's Ambassador in London, to whom the original invitation to intervene had been directed, I needed to be satisfied further that the central government, if I may call it that, in Jakarta had authorised that proceedings be taken on its behalf and secondly, that Mr Sabda was authorised to appear on its behalf by affidavit. The witnesses Mr Sabda on behalf of the Third Party and Mr Kaligis on behalf of the Plaintiff, who were both lawyers, appeared to have differing views on the meaning and effect of Section 30(2) of the Law no. 16 of 2004. So far as (b) was concerned, the Plaintiff claimed that the true reasons for the delay were not those canvassed by Mr Sabda and that cross examination was necessary, although Mr Edwards was not prepared to elucidate in advance the points upon which he wished to ask Mr Sabda.

18. Mr Davies reminded me of the unusual nature of the application and that there was clear English Authority that permission to cross examine should only be permitted in exceptional circumstances, (*Grupo Torras SA -v- Al*

Sabah [1995] 1 Lloyds Report 374 and Berkeley Hotel Co Ltd -v- Berkeley International (Mayfair) Ltd [1971] FSR 300]).

19. With regard to para (a) of the application concerning authority, I declined to allow cross-examination. I took the view that I should not go behind the apparent authority of the accredited Ambassador of Indonesia who was clearly instructing Mr Davies on behalf of his Government. So far as Mr Sabda was concerned he is merely a witness called by his Government and no issue under our law as to his standing and competence to give evidence seemed to arise. In any event if there was to be a dispute as to what the Law of Indonesia was on the matter, I should have the benefit of the views of an independent expert witness rather than having to reconcile the evidence on law of the only two opposing witnesses to fact, who happened to be lawyers.

20. With regard to (b), I was not prepared to give permission for an unspecified line of questioning of Mr Sabda on delay. I first invited a further affidavit from Mr Kaligis in which he would answer the Third affidavit of Mr Sabda on the subject of delay and offer whatever further observations on the subject he wished to make. In this way the party prejudiced by the continuation of the freezing order would in effect have the last word. This Mr Kaligis did and the matter was closed without further requests for cross-examination of Mr Sabda on the day.

The Third Parties' Case

21. As this was an in effect the first *inter partes* hearing of the application to extend the Freezing Order that is already in existence, it fell to Mr Davies, acting for the Third Party, to open in support of the continuation of the Freezing Order. The evidence in support of his application is to be found in three affidavits sworn by a Mr Sabda who is a senior lawyer on the staff of the Attorney General of Indonesia. Mr Sabda's first affidavit was somewhat sketchy and made reference to a considerable amount of hearsay evidence in the form of articles that had been written in Time Magazine and other more substantial publications concerning the activities of the

Soeharto regime. The Third Party is in a somewhat difficult position as it has very broad canvass on which to develop and sustain an arguable case against Mr Putra, with which to persuade me to continue the Freezing Order against the Plaintiff. I summarise Mr Davies case in the following paragraphs.

22. Mr Soeharto, who is the father of Mr Putra assumed power as President of Indonesia in 1967 and presided over what is described as an autocratic regime until he was forced out of office in July 1998. Words like autocracy and democracy do not always assist in understanding the political structure of a country such as Indonesia, one of the larger and less developed countries of the world. However, the evidence of Mr Sabda points to Indonesia in the years of Mr Soeharto, not enjoying the constitutional checks and balances which are regarded in western eyes as essential for a modern state. Power was centred on Mr Soeharto. He appointed the Judges, he approved people who were to be elected to the Parliament and sadly the old adage about absolute power corrupting seems, if the evidence of Mr Sabda is to be accepted, in whole or in part, to have applied to Mr Soeharto.

23. As long ago as 1971 soon after Mr Soeharto came to power a law (No 3 of 1971) was enacted making it a criminal offence for a person to unlawfully commit an act to enrich himself causing economic or financial loss to the State. In addition civil losses for such behaviour are claimed to be recoverable under Article 1365 of the Civil Code.

24. The picture that is presented is of a society where those with connections with the political leadership had the opportunity to enrich themselves at the expense of the Government or Government owned Corporations engaged in a wide range of economic activity. The main beneficiaries of this corruption were members of the President's own family including his son Mr Putra. A catchphrase has been developed to describe the activities of the Soeharto regime as "*corruption, collusion and nepotism*" (KKN to abbreviate the Indonesian words). The Government through Mr Sabda, have introduced a number of specific areas where they say that Mr Putra

has unjustly enriched himself as a result of widespread corruption in Indonesia at the relevant time.

25. Mr Sabda points out that many of the "victims" of the corruption in which Mr Putra was alleged to be engaged were state owned enterprises or government agencies. Under Article 30(2) of Law No 16 of 2004 the Attorney-General's office is entitled to bring civil proceedings on behalf of these entities for any losses or damages they may have suffered.

26. Turning to specific areas where Mr Putra has allegedly enriched himself, Mr Sabda details a number of alleged irregularities in the way that Pertamina, the State oil company operated. Here he relies on a report produced in September 1999 by Price Waterhouse Coopers (Australia), ("PWC") involving a special audit of Pertamina, following the departure of Mr Soeharto.

27. Pertamina was responsible for managing the oil and gas activities in Indonesia. The PWC report states this:-

> *"Because of Pertamina's success from the size of its operations, it has been targeted by politically well connected individuals or companies to enter into contracts or joint ventures. Some of these transactions have resulted in Pertamina receiving little, if any benefit, incurring increased operating costs or lost opportunities to create additional value".*

28. There are several references to the payment of commissions to bodies related to the Soeharto family and in particular to a company called Perta Oil Marketing Limited which was a company partially owned by Humpuss Inc a Liberian Company controlled by Mr Putra. Also involved in that company was a Mr Hasan who features as the business partner of Mr Putra in a number of enterprises including Sempati Air**.**

29. It is claimed that large sums were diverted from Pertamina by commissions paid to Perta Oil Marketing for services that were of little value to Pertamina. The arrangements were terminated after the fall of Mr

Soeharto, but still it is claimed that Pertamina was induced to purchase Mr Putra's shares in Perta Oil Marketing for a substantial amount in September 1998 when the value of the shares would have been minimal having regard to the fact that it had lost the contracts from which it had previously benefited.

30. There is a further complaint concerning Mr Putra's interposing companies controlled and owned by him into Garuda, the State Airline's contractual arrangements with suppliers of aircraft engines and aircraft, but no quantification of the losses to the Government of Indonesia as a result of these activities is included in Mr Sabda's evidence. Further, the point can be made that the evidence for those irregularities is somewhat thin – a letter from an executive of Garuda to a journalist, which indicates that in both examples it was English manufacturer of the engines for the A330 Rolls Royce and the aircraft manufacturer of the F.100 (presumably Fokker) who appointed Mr Putra as their agents thus ensuring his entitlement to the commissions complained of.

31. Mr Sabda then goes on to review the activities of a body known as BPPC which was permitted by Government decree to establish itself as the monopoly for dealing in cloves in Indonesia. He claims that Mr Putra controlled the activities of BPPC, which became the sole body for purchasing cloves from the farmers and for selling them on to the tobacco companies (apparently cloves are principally used by manufactures of cigarettes). Despite the profitable terms on which BPPC was enabled to buy and sell cloves, still there was at the end of the day a massive shortfall in funds which resulted in the BPPC being unable to pay the farmers as a result of which the Government was obliged to compensate them in the sum of £100,000,000.

32. The next head of complaint by Mr Sabda is the way in which Mr Putra and his companies borrowed money from State banks in circumstances where there was no possibility of repayment. The net result, according to Mr Sabda of a large number of bad debts building up, was that there was a

banking crisis and the currency depreciated from 4,600 rupiah per US dollar in December 1997 to 15,000 rupiah in January 1998.

33. Interestingly at paragraph 32 of his affidavit, when talking about the loans from State Banks, Mr Sabda says this:-

> *"This must be seen against the background of the Humpuss Group is and remains a very substantial conglomerate. Clearly however, some companies in the Group were used for purposes of extracting substantial sums from Banks (including State Banks) and then allowed to fail without repaying these loans".*

34. There is then exhibited a list of companies owned at that time by Mr Putra. Mention is then made of large losses attributable to the National Car Project operated by a company called PT Timor Putra Nasional. It is alleged that Mr Putra was the leading light behind this enterprise through investing through his Humpuss group This operation received large State subsidies and other benefits. Apparently, when it was closed down, as a result of the intervention of the International Monetary Fund in the economic affairs of Indonesia, following the banking crisis, it owed very substantial sums to the Government.

35. Mr Sabda devoted several pages of his affidavit to explaining the PT Goro scam as he calls it. . This is an involved story of fraud in connection with a land deal for the site of a supermarket that one of Mr Putra's companies owned. He and two colleagues were convicted, but the Appelate Court, the original trial Judge having in the meantime been gunned down, overturned his conviction on the grounds that his involvement in the affairs of the company concerned as a Commissioner and not a Director did not make him criminally liable for what happened.

36. Mr Sabda also dwelt on the activities of the Yayasans. These were charitable foundations established to help in the development of Indonesia. Various classes of people were required to contribute to them a percentage of their earnings. It is claimed by the Government that these bodies were used to provide finance for the activities of persons related to Mr Soeharto,

including Mr Putra and that many of the loans made to Mr Putra and his companies, were never repaid to the Yayasans. One example of this is given in the second Affidavit of Mr Sabda involving loans to Sempati Air a private airline owned and operated by Mr Putra, which eventually failed owing substantial sums to its creditors.

37. As I have said, the Government's claims are many and varied. The likely defence to claims as foreshadowed by Mr Kaligis would appear to be that either there it is not Mr Putra but some other individual or company that has benefited or that there has been no corruption of which the Third Party can complain.

38. Mr Davies turned to address me on the proprietary claim that the Government felt that it could mount in respect of the monies held by the Plaintiff. He drew attention to the fact that nowhere in Mr Kaligis' affidavit, which I will consider further when I deal with the Plaintiff's case, is any mention as to the source of the funds held by the Plaintiff. The position over this changed as the hearing progressed, as affidavits were filed from Advocate Shepherd and from a Mr Kadir. Mr Kadir is apparently an associate of Mr Putra's and has been a Director of the Plaintiffs since February this year. He was however, closely involved in earlier dealings with the Plaintiff as a result of his directorship in a Bahamian Company called V Power Ltd.

39. The situation presented in these affidavits is that a sizeable part of the assets of the Plaintiff were derived from the sale of Mr Putra's interests (held at that time through V Power) in the Lamborghini car company, which was bought by Audi in 1998 and the sale of shares in Super Bikes International, which owned rights to hold a series of motor bike grand prix events throughout the world. The Super Bike shares had been owned by another Company of Mr Putra's Motor Bike International Ltd which will feature again later in this judgment. These affidavits are not accepted by Mr Davies as presenting the full picture and in any event Mr Kadir has not been a Director throughout the existence of the Plaintiff company and Mr Shepherd can only assert his belief that the copy minutes with which he

has been provided are compete and correct. The Minutes do reveal a further £8,000,000 million was leant to the company by Mr Putra. Even if the bulk of the monies represent the proceeds of sale of legitimate businesses, the question is still left in the air as to where did Mr Putra get the funds with which to invest in the businesses in the first place. Mr Davies argues strongly that there is evidence from which I can conclude that his client's claim against the Plaintiff can be regarded as proprietary.

The Law

40. Mr Davies went on to address me on the legal principles that should govern my approach to continuing the Freezing Order. The first and most important point is that I must be satisfied that the Plaintiff has got a good arguable case for the substantive claim against Mr Putra. Mr Sabda's affidavit details several areas where the Government would claim to be able to bring proceedings against Mr Putra, although it seems that they have not got very far in prosecuting these up to the present time. The other requirements are that there are assets in the jurisdiction, which of course in this case we know there are. There has also got to be a risk of dissipation. I have already ruled on this point so no further comment is required.

41. In addition, there are further factors that should influence my discretion whether or not to grant a Freezing Order. The first one, which Mr Edwards makes considerable play of is the delay that has occurred in pursuing the Government's claim against Mr Putra. A number of cases were quoted in argument. I do not need to discuss those relating to apparent acquiescence by the Applicant as that issue does not arise here. There has however been a delay in bringing substantive proceedings and even if there is no argument as to acquiescence, the authorities clearly show that one of the issues for the Judge to take into account is the prejudice that has been caused to the Respondent as a result of the delay in bringing an application. Another factor that will cause a Judge to exercise his discretion against an Applicant for a Freezing Order is where there has been material non-disclosure.

42. When Mr Davies dealt with the issue of delay and accepted that little action had been taken since 1998 to recover monies which the government claimed were due from Mr Putra. Mr Sabda in paragraphs 12 to 14 of his affidavit describes briefly the political history of Indonesia since 1998 and points to some of the difficulties that the successive governments and even more successive Attorneys General have had to face in the meantime.

43. Mr Sabda is perhaps even more candid in paragraph 15 of his Third Affidavit:-

> *"This current case is historic for the country of Indonesia, and is evidence of this government's commitment to eradicate corruption in society. This trial marks the first time in the post-Soeharto era that the Government has attempted to secure and retrieve ill-gotten assets of the Soeharto family. There are many obstacles. Most importantly, evidence and documents have been misplaced, destroyed and have disappeared, during the reorganization of the Government and the nearly complete restructuring of the banking system. For example, there was a fire in the Bank of Indonesia offices that destroyed many documents. Even now corruption, while lessening, remains pervasive. Nevertheless, the Government, which has signed and ratified the UN Convention Against Corruption, remains determined with the assistance of its foreign counterparts to track down and recover the funds to which it is entitled. It would therefore be a major setback if it were to be prevented from pursuing these proceedings in Guernsey".*

44. With regard to material nondisclosure, Mr Davies commented on the complaint of Mr Edwards in his skeleton, centred around paragraph 133 – 139 of Mr Kaligis' affidavit, but I felt that it was more appropriate to leave Mr Edwards to address me on this and let Mr Davies deal with the matter in his reply. As I will record when I come to deal with the Plaintiff's case a substantial point that Mr Edwards sought to develop was the failure by Mr Sabda to disclose the contact with the Indonesian Government in 2004 and 2005 evidenced in correspondence between the government and the Defendant relating to Motor Bike. Mr Edwards did not actively pursue

other complaints of material nondisclosure, quite sensibly, as in order to resolve them, I would have to adjudicate on substantial conflicts in the evidence of the two contending witnesses, Mr Sabda and Mr Kaligis.

The Plaintiff's Case Against the Continuation of the Freezing Order

45. Mr Edwards, on behalf of the Plaintiff has produced an affidavit from a Mr Kaligis. This gentleman is evidently a very senior and well-established legal practitioner in Jakarta and acts not only for Mr Putra but also for his father. He challenges the evidence of Mr Sabda and says basically that none of that evidence can be relied upon. The interesting thing about Mr Kaligis' evidence, if one reads his affidavit closely, is that at no stage does he deny the gist of the allegations of Mr Sabda, concerning the alleged corruption that persisted in the Soeharto years. What he takes issue with is matters of detail and suggestions of non disclosure and bad faith on the part of Mr Sabda. Rightly, he draws attention to the fact that there are no proceedings against Mr Putra at the present time in Indonesia.

46. Both Mr Sabda and Mr Kaligis give quite a lot of attention to what was said in Time Magazine and other publications concerning the Soeharto family. Apparently, the former President sued Time Magazine for libel and failed in his action. However, a number of allegations made by Time Magazine were not proven and Mr Kaligis naturally wishes to draw attention to findings, which are favourable to his client's family. I do not think I need involve myself in an in depth review of these articles or the libel proceedings. As Mr Edwards says, the news items contain hearsay, albeit that the material annexed to the various affidavits when taken as a whole, does assist me to get an overall picture of the problem which the Third Party is facing and the wrong that it claims that the Republic of Indonesia has suffered as a result of the activities of the Soeharto family and Mr Putra in particular.

47. As I have mentioned one matter that Mr Kaligis does raise and which gives rise for concern at first sight, is correspondence between the Defendant Bank and the Ministry of Justice and Human Rights in Jakarta. Mr

Kaligis' evidence on this is to be found on paragraphs 106 to 115 of his affidavit. What happened appears to have been that the Plaintiff had approximately $10,000,000 which emanated from Motorbike International. I have had evidence concerning this entity contained in Mr Kadir's affidavit, although I accept that his evidence is challenged by Mr Davies. Motorbike International Limited was a company of Mr Putra's and it in turn owned 50% of the shares in Super Bike International Limited. Accordingly to Mr Kadir, Motorbike received a total of $18,500,000 for these shares and Motorbike transferred $10,250,000 dollars to the Plaintiff on 12 February 1999 and remitted a further $1,680,491 dollars to the Plaintiff on 30 June 1999.

48. The correspondence exhibited by Mr Kaligis at pages 762 onwards, starts with a letter of 10 May 2004 from the law firm of Ihza and Ihza to Mr Zulkarnain Yunus, the Director General of General Law Administration of the Department of Justice and Human Rights. The gist of this is that the Defendant is asking for confirmation that the Government will lay no claim to the funds in the account of Motorbike International Limited with the Defendant. The letter is replied to by the Director General on 28 May and confirmed in a letter from the Minister on 4 June to the effect that no proceedings are traceable concerning Motorbike International Limited in any court in Indonesia and therefore "there is no legal reason for the Government of Indonesia to enquire the fund (sic) that belongs to Motorbike International at BNP Paribas, or perform a legas suit (sic) to BNP Paribas." Curiously the letter ends with the statement that:-

> *"BNP Paribas has no rights to retain the fun (sic) of Motorbike International Limited, unless there is any respective court decision which is final and binding".*

49. There is then a legal opinion furnished by Mr Yunus addressed to BNP Paribas Guernsey Limited, the upshot of which is that Mr Putra has never been reported to be involved in any criminal law suit of money laundering.

50. There is further correspondence from BNP Paribas dated 1 February 2005 and that is replied to by the Ministry of Justice and Human Rights acting through a Mr Hamid Awaludin, the Minister. This says that, based on official information from the Financial Transaction and Analysis Centre of Indonesia dated 28 February 2005, the respective names mentioned as follows: Mr Putra, a Mr Sudjaswin and the deponent to the affidavit in these proceedings, Mr Kadir, are not the subjects of any suspicious transaction reports in Indonesia in relation to monies held in the name of Motorbike International Limited by BNP Paribas in Guernsey.

51. The letter goes on to say that there are no civil or criminal proceedings in Indonesia against Motorbike International Limited, including its directors or its shareholders and there is no Court Order or judgment in Indonesia concerning the company and that there is no legal reason for the government of Indonesia to enquire into its funds.

52. Also exhibited, is an affidavit dated 4th May 2006 from Inspector Bligh of the Guernsey FIS. This recorded the decision of the Defendant to treat no longer the Motor Bike funds as suspicious and pay them away. Although I cannot find it in the papers submitted by Mr Davies, I am quite certain that I saw that affidavit during the course of last autumn when the issue of the writing to the Indonesian Government about this matter first arose. Mr Sabda's explanation as to why the Ministry of Justice and Human Rights responded in this way is not easy to follow. Although he does not directly say so, he is as I take it, suggesting that the people who signed the letter in the Ministry of Justice were in some way connected with Mr Soeharto and his family or otherwise open to influence (see paragraph 72 and 73 of his Third Affidavit), and that they were not authorised to act in the matter. Whatever the truth, I will have to decide whether the fact that this correspondence was exchanged and money was apparently released in respect of the Motorbike transaction, should persuade me that the overall claim of the government against Mr Putra, alleging wrong doing, making a proprietary claim against the assets of the Plaintiff and seeking a Freezing Order should be rejected.

Discussion And Conclusions On Application For Continuation Of The Freezing Order

53. I first have to decide whether the Government has shown an arguable case for a freezing order in respect of the assets of Mr Putra, or in the alternative, a direct proprietary claim against the funds of the Plaintiff as representing the property of the Government. Both claims give rise to difficulty. The second and its relative strengths and weaknesses is going to be more relevant when I come on to the issue of disclosure. To continue the Freezing Order, I must be satisfied that there is an arguable case on one or other of these claims. Civil proceedings against Mr Putra would, it appears, inevitably have to be conducted in the Courts of Indonesia. Mr Sabda does make the point that, under Indonesian law a criminal suit has to be concluded before civil proceedings are commenced. This appears to be the explanation for the apparent inactivity against ex-President Soeharto because the papers show that he is not medically fit to stand trial on criminal charges. As I commented in the hearing, one has to ask that if the ill-gotten gains of the President and his family are as great as contended, why despite the prospective defendant being a frail 79 year old man, who is at least, for the time being incapacitated formally standing criminal trial, robust action has not been taken to deprive him, his family and any cronies, as they are described, of the fruits of their corrupt rule. That is however by the way.

54. No criminal proceedings have started against Mr Putra, save for the PT Goro prosecution referred to earlier. However the enrichment which would appear to have taken place on this occasion is typical of the kind of conduct that is alleged throughout the Third Party's submissions. As Mr Kaligis says, no civil action been commenced against Mr Putra. Nothing said by him assists me in concluding that there is not still a clear civil as opposed to a criminal claim for the loss that Bulog suffered.

55. However, notwithstanding the delay and deficiencies exposed in the evidence that is presented to me by Mr Sabda and the complaints of Mr Kaligis that many of the claims have not been fully particularised and

quantified, the case presented by the Third Party does, in my judgment, reach the threshold of an arguable case. The people of Indonesia, in my view, should have the opportunity through their Government of laying claim to the funds in the Plaintiff in Guernsey on the alleged grounds that they have been proceeds of misappropriation and corruption in which Mr Putra has been involved over a great many years. The action must be progressed, with considerably more vigour than appears to have been displayed up until the present time. Mr Sabda, if he is the officer of Government charged with conduct of this claim, clearly needs a great deal of help in investigating and perfecting proceedings. I do not accept that omissions in Mr Sabda's evidence amount to material non disclosure and in particular I reject the complaint about failure to draw attention to the Motor Bike Correspondence which emanated from another part of Government in 2005.

56. Interestingly, Mr Edwards produced shortly before the end of the hearing, a judgment of Peter Smith J in the Chancery Division dealing with a large number of claims brought by the Attorney General of Zambia against a collection of companies and individuals from the former President of that country downwards. *(Republic of Zambia v. Meere Care and Desai and others [2007] EWHC 952 Ch.)* These bodies were alleged to have stolen money from government coffers during the period of that President's rule. Fortuitously, there were funds and defendants within the jurisdiction of the English courts and no doubt the best that London could offer in Solicitors and Barristers were deployed in presenting the case, which resulted in a judgment running to some 1140 paragraphs.

57. Sadly, no such level of endeavour has been apparent so far from the Indonesian Government. The respected Advocate Strappini, whom the Government first instructed, withdrew, acknowledging that the size of the task was beyond the resources of his small practice, and a larger practice now represents the Government.

58. Mr Strappini made a very interesting and revealing comment when he was acting, to the effect that the problem facing the Government was that the

Soeharto family by virtue of the fact that they had a lot of money still in their possession, had great influence in Indonesia. Mr Davies perhaps was restrained from apparently giving evidence in this way and it might be difficult for Mr Sabda to be as candid on the record in an affidavit. I mention these undertones simply in support of the view that I have taken that with all the perceived deficiencies that Mr Edwards can point to in the case the freezing order should continue. I consider that Mr Sabda is a credible and reliable witness as to the general malaise that existed and I do not therefore feel it necessary to rely on material like newspaper articles to enable me to accept Mr Davies' contention that the Government has an arguable case. Many of the corrupt practices have apparently been terminated following the end of the Soeharto regime, although as we have seen in the case of the Pertamina from the purchase of the shares in Perta Oil Marketing, the power of Mr Putra to influence events seems to have subsisted after his father fell from grace.

59. I am considerably troubled by the attitude revealed in paragraph 15 of Mr Sabda's affidavit. It is not appropriate for the Government of Indonesia, having been notified by this court of the existence of the proceedings by the Plaintiff against the Defendant and the fact that there had been admissions that the money had been that of Mr Putra, to give the appearance of trying to use this small jurisdiction as the lead forum for taking proceedings against Mr Putra. I will come on in a minute to look separately at the position of the Plaintiff, but as I have indicated the most appropriate forum for these claims would appear to be the Indonesian courts in a direct action against Mr Putra by the Government, and of course the Government currently have restricted Mr Putra's movements which will make it all the more difficult to fairly conduct proceedings in a jurisdiction such as this.Because of the peculiar situation that has been revealed by the papers, I cannot allow a Freezing Order to continue without some oversight of the progress of the civil proceedings, which appear to be so long overdue if the Government is indeed genuine in its determination to bring Mr Putra to account. I will at the end of this

Judgment therefore, be laying down terms on which the Order is to continue, but continue it will.

The Proprietary Claim against the Plaintiff Garnet Investments Limited

60. New evidence has been introduced which if it is true - Mr Davies says is inadequate – throws doubt on his suggestion that the money in the Plaintiff came straight from Indonesia shortly after the fall of Mr Soeharto. It seems that Mr Putra was attracted to motor cars and motor sport. We have heard how he was closely involved in the national car project. His wealth apparently enabled him to invest in Lamborghini and in Super Bikes Limited and Mr Kadir and Mr Shepherd are suggesting in their affidavits that a large part of the money in the Plaintiff came from the sale of those enterprises. It can be argued that the fact that the money may have emanated from the sale of legitimate businesses does not put paid to any claim that the money that was originally used to purchase those interests was the proceeds of wrongdoing and corruption.

61. As Mr Sabda says in paragraph 16 of his Third Affidavit, nowhere does Mr Kaligis point to Mr Putra's wealth being derived from sources other than as alleged by the Government. However, that is a long way from proving that the money in the Plaintiff is the property of the Republic. The strength of a proprietary claim in many of the applications that come before this Court is often very clear, for example where the dishonest director in a foreign jurisdiction empties his company's bank account and transfers it straight away to a nominee in these Islands. The position is nothing like so clear here, involving as it does monies that may have been in Mr Putra's pocket and under his stewardship from the days when he became old enough to have a bank account.

62. To establish a proprietary claim there will always have to be an element of tracing and I am not satisfied at this stage, that the Third Party has successfully established a prima facie proprietary claim to the monies held in the Plaintiff. However, I am satisfied that the monies in the Plaintiff is Mr Putra's and that he is the person who has had control over the affairs of

the Plaintiff, including operating its bank accounts and therefore the monies in the Plaintiff should be frozen in order to ensure that any judgments against Mr Putra in respect of any monetary claims that may be established against him personally are not rendered nugatory.

The Third Party's applications for Disclosure

63. When he first appeared in these proceedings Mr Davies tabled an application on behalf of the Third party for both the Plaintiff and the Defendant to give disclosure relating to the affairs of the Plaintiff. This application changed as the hearing progressed and I set out the material parts of the revised application tabled towards the end of the Hearing:-

"b. The following shall be added to the Order of 22 January 2007 as Order 4A:

*"4A. Each of the Plaintiff and Defendant by their duly authorised officers must no later than 4.30pm on **[date]** 2007 provide to the Third Party's advocates:*

4A.l full information within its knowledge as to the name(s) and address(es) of the current and historic beneficial owner(s) of the Plaintiff;

4A.2 copies of all documents within its possession, custody or power and/or if the same be in computer readable form only a reasonable and legible printout thereof, showing:

4A.2.l the identity of the beneficial owner(s) of the Plaintiff at the time of or prior to the opening of any bank accounts or accounts with any similar institutions held in the name of or for the benefit of the Plaintiff; and

4A.2.2 any subsequent changes in the beneficial ownership of the Plaintiff;

4A.2.3 Account Details and/or which are Account Documents in relation to a Relevant Account (as these terms are defined below)

4A.2.4 For the purposes of this Order:

(i) a Relevant Account is an account maintained at a bank or other similar institution (whether the account is past or present, in sterling or any other currency and in whatsoever

name it is or was held) of which the Plaintiff and/or Hutomo Mandala Putra is or was an account holder (joint or sole);

(ii) Account Details in respect of a bank account means the name and address of the bank and branch, the account name, the name of the account holder(s), the account number and the sort code;

(iii)Account Documents in respect of a bank account means the following documents:

a. account opening forms, and due diligence and know your client-type documents;
b. account mandate(s);
c. correspondence between, on the one side, the Plaintiff or the Defendant and, on the other side, the account holder or signatory or any person beneficially interested in the account holder and concerning a Relevant Account;
d. memoranda or notes of discussions between, on the one side, the Plaintiff or the Defendant and, on the other side, the account holder or signatory or any person beneficially interested in the account holder and concerning a Relevant Account;
e. other internal memoranda or records or other documents relating to a Relevant Account;
f. bank statements for the Relevant Account from the date on which such account was opened until the date of this Order;
g. instructions in respect of all transfers into or out of a Relevant Account from the date on which such account was opened to the date of this Order.

4A.5 For the avoidance of doubt disclosure under this order 4A shall include but not be limited to disclosure in relation to accounts GF 820726 J00l, GF 820726 J002, and GF 820726 J003."

c. The following shall be added to the Order of 22 January 2007 as Order 4B:

"4B.l Unless order 4B.2 below applies, the Plaintiff shall by ***[same date as per order 4A]*** *2007 and to the best of its ability and having made all reasonable inquiries inform the Third Party's advocates of all of the Plaintiffs assets worldwide exceeding £1,000 in value whether in its own name or not and whether solely or jointly owned, giving the value, location and details of all such assets;*

4B.2 If the provision of the information required at order 4B.l above is likely to incriminate the Plaintiff, it may be entitled to refuse to provide it, but the Plaintiff is recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of Court and may render the officers of the Plaintiff to be imprisoned, fined or have the assets of the Plaintiff seized.

4B.3 No later than 4.30pm on ***[date 5 working days after disclosure is to be given under clause 4B.l]*** *2007, a duly authorised officer of the Plaintiff must swear and serve on the Third Party's advocates an affidavit setting out the information and documents disclosed amount to full compliance by the Plaintiff with orders 4A and 4B."*

64. Mr Davies wanted such an order regardless of whether I was minded to extend the freezing order. Mr Davies approaches this request on traditional lines. So far as the order against the Defendant is concerned he bases his application on *Norwich Pharmacal* principles. He submits that the Court should be satisfied that the Third party is the victim of wrong doing and that the Defendant has, albeit innocently, become mixed up in wrongdoing and that Lord Reid's words in *Norwich Pharmacal* apply:-

> *"the authorities 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 tortuous 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".*

65. The Jersey Courts have had to consider the application of these principles in *Macdoel and Others v Republic of Brazil and Others [2006] JRC 156 and [2007] JCA 069*. This centred on a request for information to help trace moneys that had been corruptly received by the Mayor of Sao Paolo in connection with some big civil engineering projects, so there was some similarity with the facts of the case before me. The Royal Court made orders against five Jersey financial institutions for disclosure.

66. The opposition to the application came not from the financial institutions themselves, but from the companies, whose affairs were the subject of the

enquiry. (Again in the case before me the Defendant Bank appearing through Miss Le Cras, takes essentially a neutral view, although she does wish to be heard on the practicalities of the programme for implementation of any Order I make. It was therefore for the Plaintiff to make the running in opposing Mr Davies' request and this part of the argument fell to be developed by Mr Shepherd on its behalf).

67. On appeal, the Jersey Court of Appeal upheld the decision of the Court below to grant disclosure. After quoting the Lord Reid principle, Jones JA said this:-

> *"27. It is instructive to notice that Lord Reid does not enunciate the principle in terms of the rights of the person who is seeking disclosure. Instead he points to a duty owed to that person by the person who holds the information. That duty is to assist the "person who has been wronged", and it arises because the person who holds the information has come by it in the course of, albeit unwittingly, facilitating the wrong. It is performed by giving "full information". The particular information that was sought in Norwich Pharmacal was the identity of the wrongdoer, and it is to be expected that the principle would be expressed by reference to the facts of the case under consideration. But, in our opinion, the scope of the principle is not extended if the purpose of the disclosure which is sought in any particular case is, for example, to determine the location of embezzled funds or the methodology of the fraud, rather than the identity of the wrongdoer. In our judgment, where disclosure is sought from a defendant who is alleged to have become innocently mixed up in wrongdoing, the determinative question in any particular case is whether justice requires discovery to be ordered".*

68. A recent example of this Court's approach to Disclosure Orders is to be found in the judgment of Rowland DB in *Tracey and Others v Seed International Limited* unreported 3 November 2003 at pages 73 and 74.

The Court of Appeal commended the Deputy Bailiff's judgment and confirmed that Disclosure Order, subject to a small addition. The Court of Appeal dealt with the relevant questions arising in that case in paragraphs 45 to 48 of its judgment. With regard to making Disclosure Orders where there is no proprietary claim, the Court said this at paragraph 45:-

> *"The power to grant Interim Orders created by the 1987 Law is not to be limited to support of proprietary claims, although no doubt it may be easier to persuade the Royal Court to grant a Disclosure Order when the claim is of a proprietary nature. The Guernsey Court should follow in this regard the approach taken in the Republic of Haiti case by the English Court of Appeal".*

69. The Court of Appeal also endorsed the principle of granting Disclosure Orders with an ambit wider than that of the associated Freezing Order. In this case, the circumstances were again very different. The Plaintiffs who were medical men in the USA had invested in wine through what appeared to be a *male fide* organisation in Holland, which then appeared to have moved money representing the proceeds of these investments around the world. Money had come to Guernsey and was frozen. The Deputy Bailiff took the view that justice required information be given concerning possible payments on to accounts in other parts of the world.

70. *Norwich Pharmacal* was concerned with pursuit of importers (at that stage unidentified) of counterfeit drugs. However, the reference that is often made is to *"identifying the wrongdoer"*. Here the Third Party knows the identity of the wrongdoer Mr Putra, but Mr Davies says that on the Jersey and other authorities he is still entitled to Norwich Pharmacal relief in order to trace other monies that may have come into the accounts of the Plaintiff and been paid away and also to establish the methodology of the wrongdoing, whatever that means in this particular context.

71. Mr Davies claims that the Defendant has a duty to provide full information so as to assist with identifying all other persons connected with the transactions on the account in question. He seeks the information to locate

and preserve what he describes as traceable funds and to decide whether it has grounds to bring actions against the Plaintiff, Mr Putra or other wrongdoers elsewhere. Correctly he says that it is not an obstacle that the information held might not conclusively identify potential Defendants other than the Plaintiff and Mr Putra, or the current location of traceable funds. He then goes on rather curiously to say that the Courts should take a realistic view of how international frauds are conducted and be satisfied on these particular facts that the information sought is likely to assist in the recovery process.

72. Mr Shepherd on the other hand opposes the grant of Norwich Pharmacal relief at this stage. He accepts wrongdoing may have been identified and that Mr Putra would, in those circumstances, fall within the category of being the wrongdoer. However, he does not consider that giving an Order against the Defendant is necessary. He calls in aid, the Judgment of Hoffman J in *Arab Monetary Fund v Hashim (No. 5) [1992] 2All ER at 911*. This is really a case applying the principles of *Bankers Trust v Shapira*. At page 918 Hoffman J says this:-

> *"What are the limits of the **Bankers Trust** jurisdiction? They must, I think, be deduced from the reasoning upon which that jurisdiction, like the **Norwich Pharmacal** jurisdiction, is distinguished from the 'mere witness' rule. It rests upon the proposition that unless the assets in question can be located and secured, the ultimate determination of ownership of those assets may be frustrated by their removal or dissipation and there will be no point in calling on the third party at the trial to produce the required documents or give the requested information. In my judgment, therefore, the first principle of the **Bankers Trust** case is that the plaintiff must demonstrate a real prospect that the information may lead to the location or preservation of assets to which he is making a proprietary claim".*

73. At page 919 he continued:-

> *"Even if the application prima facie falls within the* ***Bankers Trust*** *principle, I consider that the potential advantage of the order to the AMF must be balanced against the detriment to the person against whom the order was sought, not merely in terms of cost (for which he is ordinarily compensated on an indemnity basis by the terms of the order) but by way of invasion of privacy and requiring breach of obligations of confidence to others)".*

Hoffman J also made reference at the top of page 919 to the relative staleness of the matters upon which information is sought and this again is a point that Mr Shepherd makes.

74. My attention was drawn by both Counsel to various parts of *Macdoel*. Both in paragraphs 44 and 46 reference is made to Disclosure Orders being *"a strong thing"* to order adopting the words of Lord Denning in *Bankers Trust* (para 44) and to *"disclosure being only ordered if there is no other source of information that will assist the person wronged"* (paragraph 46).

75. Similar sentiments concerning necessity are to be found in the judgment of Lightman J in *Mitsui v Nexen Petroleum [2005] 3All ER at 511*. See his judgment at paragraph 24:-

> *"In my judgment despite the argument of Mr Carr QC that there is no authority directly on the point, it is clear that the exercise of the jurisdiction of the court under* ***Norwich Pharmacal*** *against third parties who are mere witnesses innocent of any participation in the wrongdoing being investigated is a remedy of last resort. (It is the claimant's case that the defendant is such an innocent third party.) The jurisdiction is only to be exercised if the innocent third parties are the only practicable source of information. The whole basis of the jurisdiction against them is that, unless and until they disclose what they know, there can be no litigation in which they can give evidence: see eg Lord Kilbrandon in* ***Norwich Pharmacal*** *[1973] 2 All ER 943 at 973, 975, [1974] AC 133 at 203, 205. Whilst there is a public interest in achieving justice between disputing parties, there is also a public*

interest in not involving third parties if this can be avoided: see John Donaldson MR in ***Harrington v North London Polytechnic*** *[1984] 3 All ER 666 at 670-671, [1984] 1 WLR 1293 at 1299. The jurisdiction is both exceptional and only to be exercised when it is necessary: Lord Woolf CJ in* ***Ashworth Hospital Authority v MGN Ltd [2002]*** *4 All ER 193 at [57]. The necessity required to justify exercise of this intrusive jurisdiction is a necessity arising from the absence of any other practicable means of obtaining the essential information".*

76. A further point made by Mr Davies is that there is no facility for pre-trial discovery in Guernsey and that is a ground militating in favour of making an order.

77. Mr Davies is also asking for a Disclosure Order against the Plaintiff. He makes the point that he has some doubts as to whether the Plaintiff will be able to give full information and in particular whether it will have on its records its transactions with the Defendant. I know not, but if there was to be an Order to require disclosure from the Plaintiff but not the Defendant, then the Plaintiff could produce what it can and if it is not adequate, reconsideration can be given to making a Disclosure Order against the Defendant which was the banker and investment manager for the Plaintiff. In the normal way, an applicant for a Freezing Order is fully entitled to ask for a Disclosure Order against the party injuncted**.** The Applicant may have little information as to what assets are being covered by the Freezing Order and of course where the Freezing Order is the first against a particular Respondent, frequently worldwide Disclosure Orders are made.

78. Mr Shepherd advances a further argument that even if such Disclosure Orders are justified, either against the Defendant or against the Plaintiff, it is premature to do so having regard to the state of the proceedings against Mr Putra.

Discussion and Conclusions concerning the Application for a Disclosure Order

79. It is clear from what I have said about the application for the Freezing Order and my decision to agree to its continuation, that this is a very

unusual case stemming from positive action on the part of the Defendant and this Court to inform the Government of Indonesia of the existence of assets belonging to Mr Putra in this jurisdiction. Unusually the Third Party knows the value of the assets subject to the Freezing Order because the cause puts a value on them, namely €36,000,000. It appears that more than that sum was originally paid into the company and there is a hint that there have been losses in investments which may be the subject of separate proceedings between the Plaintiff and the Defendant.

80. The account of the Plaintiff has been frozen in the hands of the Defendant since 2002 when the Defendant felt it appropriate to make a Suspicious Transaction Report to the FIS. I have an uneasy feeling that having been given the information as to the existence of assets here belonging to Mr Putra, the Government of Indonesia has jumped at the situation and now is endeavouring to treat Guernsey as the lead jurisdiction in which to pursue Mr Putra. I have referred to hints at this disclosed in Mr Sabda's Third Affidavit at paragraph 15.

81. I am not sure about Mr Davies' point that the position over pre-trial discovery should colour my thinking – justice appears to have been achieved in *Van Leuven v. Nielsen, 1993 GLJ 79* notwithstanding that lacuna.

82. Having found that the proprietary claim is not established at this stage, the question is whether Norwich Pharmacal relief should be ordered against the Defendant so as to assist in identifying assets belonging to Mr Putra, which lie outside those injuncted and the identities of other persons, who may have become mixed up in his wrongdoing. It is clear from a number of authorities that disclosure orders intended to assist with tracing assets are to be given more rarely in monetary claims than in proprietary claims, but in *Republic of Haiti v Duvalier [1989] 1 AllER 456*, where there was clear evidence of attempts to hide assets on the part of the Defendants, Staughton LJ recognised the somewhat hybrid nature of the application then before him (page 465 letter C) Rowland DB followed this reasoning in *Seed* which decision was endorsed by the Court of Appeal

83. Whilst I can see the attraction of the argument that disclosure is claimed to be necessary to attempt to gather evidence in order to establish the proprietary nature of the claim in cases of long term kleptocracy, the colloquialism used to epitomise regimes such as those involving Soeharto, Duvalier, Chiluba (ex-president of Zambia) and the like, I am not satisfied in the particular circumstances of this case that it would be appropriate to order disclosure against the Defendant solely in order to assist the Third Party in establishing a proprietary claim.

84. I note the direction from the Court of Appeal in ***Seed*** to follow ***Duvalier*** and I take that as including an invitation to treat the application as one that concerns what Staugton LJ described as a somewhat hybrid claim. However in this case I consider this is essentially a monetary claim at this time directed at recovering damages from Mr Putra for his tortious acts over many years enriching himself at the expense of the Republic.

85. There are five reasons for my conclusion that in view of the claim being monetary that Discovery against the Defendant at the present time is not appropriate.

86. Firstly, information gathered here from the Defendant is highly unlikely to show where precisely the original funds, which have got into the account came from. The primary evidence of this must be found in the country where all this wrongdoing happened in the first place, and where all the acts of corruption were generated. When this is assembled it may be possible to infer that like the drug trafficker, with no legitimate sources of income who is unable to explain where the money to fund his Porsche came from the inference for the Court will be that all Mr Putra's assets are derived from criminal behaviour. In fact what evidence the Court has so far indicates that a considerable part of the funds received by the Defendant, albeit they may originally have been tainted as the proceeds of corruption, have apparently been laundered over a period of time in funding a couple of legitimate businesses.

87. Secondly, in my judgment, the test of necessity developed in *Norwich Pharmacal* is not met. Disclosure is not necessary to get proceedings under way here or in Indonesia. (Lightman J in *Mitsui*) It is further not shown to me that it is necessary to give this information because there is no other means of discovering the information that Mr. Davies is seeking to acquire.

88. Thirdly the information is going to be stale and is unlikely after this period of time to yield any effective leads. (Hoffman J in *Arab Monetary Fund [No. 5]*).

89. Fourthly, I am further very concerned about the suggestion that the Government should have access to names of other parties who, in its view may have been involved in corrupt practices. One of the problems we have here is that with a corrupt President and first family, irregularity in behaviour towards the finances of the State can easily have percolated through to every level of the community, and indeed Mr. Sabda makes reference to this in his affidavit. I do not consider it appropriate for any names of individuals who have got mixed up in this jurisdiction with Mr Putra's fairly limited financial dealings in the Plaintiff, in that they have advanced to or received from the Plaintiff monies should, without any formal protection, have their names disclosed to the Third Party, which as a Government would be enabled to put it to a wide series of uses. It would be oppressive if having regard to the large number of people who must have become entangled in the alleged wrongdoing of the Soeharto years a few names were extracted as a result of this enquiry in Guernsey and that such persons get given special treatment by the Indonesian authorities. Such persons may not enjoy the level of influence and ongoing protection that Mr Putra and his family appear to have enjoyed.

90. Fifthly despite the safeguards concerning names, the proceedings against Mr Putra have a long way to go and any disclosure could be shown to have been unfair if at a later date the injunction falls.

91. Following on from these five points I remind myself of the novel situation here where the Third Party appears to make this application as a direct result of a notification from this Court. It is important that banks and financial institutions here do disclose to the authorities, situations where they have grounds for concern as to whether the provenance of the funds held for a particular customer are indeed the proceeds of crime or other wrongdoing and that they should make disclosures. Although they would be first to say that they do not want to be havens for international criminal activity all financial institutions here and their clients are very sensitive to issues of confidentiality and I am particularly anxious not to order any names to be divulged unless absolutely necessary for the prosecution of civil proceedings against Mr Putra and his company, particularly when it is the Defendant who made the original disclosure that invited the intervention of the Government. That is why Mr Davies's current application is too wide. I am not therefore persuaded that the justice of the case – the determinative question according Jones JA in ***Macdoel*** – requires me to grant any order directly against the Defendant in the terms sought or otherwise..

92. I continue to give consideration to what, if any, disclosure should be ordered against the Plaintiff.

93. If no Disclosure Order is made the Government will know that there is €36,000,000 of the Plaintiff's funds with the Defendant, but will not be aware of anything else concerning the Plaintiff's activities. Normally of course an application for a Freezing Order would not have even this amount of information at the start of proceedings for a Freezing Order. As I said when considering an order against the Defendant I cannot see that the Third Party requires any more information in order to start proceedings against Mr Putra in Indonesia or, in the special circumstances prevailing here, if it wishes to establish a proprietary claim against the Plaintiff in Guernsey.

94. As I have indicated, I do not accept what Mr Davies says to the effect that information is of necessity required in order to establish whether the

Government has a proprietary claim or not. I have already alluded to the long history of the apparent wrong doing by Mr Putra and the difficulties over identifying after such a long period of time any particular sum of money being the property of the Republic of Indonesia. More to the point and again as previously indicated I cannot see how any information that the Plaintiff may have can help clarify the provenance of its funds. Far more relevant would be the obtaining of information from Mr Putra and other bodies in Indonesia concerning where his funds have gone and then seeking to trace them in the various jurisdictions where they have ended up.

95. Mr Davies asks for the disclosure of information from the Plaintiff in order to identify other wrong doers and persons who have damaged the Republic of Indonesia by looking at the accounts of the Plaintiff. I come back to the point that it is a strong matter to order a bank in this jurisdiction to give information about customers other than the target of this particular Freezing Order who is Mr Putra. Mr Davies is also asking for information concerning the beneficial owners of the Plaintiff throughout its existence. Again the original information furnished to the Government, indicated that the only person involved with the Plaintiff was Mr Putra.

96. I see no reason for any Disclosure Order against the Plaintiff to be used to find out about persons other than Mr Putra, who may have had dealings with the company. I see no reason to allow questioning about the beneficial ownership of the Plaintiff. Both these areas seem to me to be pure fishing so far as the Government is concerned.

97. Having established that the Plaintiff is a repository for funds belonging to Mr Putra and having had information from Mr Shepherd and Mr Kadir, I am just persuaded that the Plaintiff should be required to confirm that evidence through a longer term director or somebody who can speak with greater authority than Mr Kadir and Mr Shepherd and also depose as to what other assets the Plaintiff has held during its existence. I fear that most of this information will be stale, but that it is not in my view fatal to the request. Mr Davies casts doubt on the ability of the Plaintiff through

its directors to provide accurate information and if it has not got records of its bank accounts, which may well be the case, as it does seem on the face of it that Mr Putra was acting as the signing authority and that the directors may not have been fully briefed on what he was doing. The Plaintiff may therefore have to seek assistance from the Defendant to provide duplicates of bank accounts since the incorporation of the Plaintiff and I would hope that the Defendant would use its best endeavours to furnish these to the Plaintiff for onward transmission to the Third Party.

98. Mr Shepherd suggested that this information should not be disclosed at this stage and that we should await the first review of the Freezing Order, which I am proposing will take place in six months time. He is worried concerning any damage that may be caused to innocent parties through the furnishing of information at this stage, when one could envisage the situation in six months when this Court would be faced with a possible situation where no progress has been made with the action against Mr Putra and the Court was minded to lift the Freezing Order.

99. I am not so minded. If the contents of Mr Kadir's and Mr Shepherd's affidavits are correct, which they claim to be, the Plaintiff will have nothing to lose by filing at this stage evidence from someone who can speak with knowledge of the Plaintiff's activities throughout its existence confirming that indeed the only funds with which the Plaintiff has been concerned are those referred to in the Minutes and which have landed up with the Defendant for investment. I note from paragraph 23 of Mr Kadir's affidavit that there is talk of separate proceedings being brought by the Plaintiff against the Defendant in connection with the performance of the Defendant in relation to matters of investment management. That may be an area where it would be appropriate for information to be requested. I would just add that it is possible that the person who is giving oath will indeed by able to give further evidence on other payments to the company and payments out of the company which have not been disclosed by Mr. Kadir or Mr. Shepherd. If that be the case then that information too should be forthcoming at the present time. All these matters will clearly have an

effect on the potential value of the Plaintiff's assets in the longer term and also the amount which the Government can look to recover in due course . As will be apparent from what I have already said concerning individuals other than Mr Putra they are entitled to protection from being identified for the reasons I have explained. And if they appear in the accounting records of the Plaintiff as the source or destination of funds the Plaintiff's officer who is furnishing the information may identify them by letter. All information provided must be confirmed on oath and it will of course be open to the Government on showing grounds to apply for further disclosure as appears appropriate.

100. I confess that I have not found the issues in this unusual application easy. I repeat my thanks to counsel for the helpful and measured way in which they made their submissions written and oral.

POSTSCRIPT:

(a) Following delivery of this judgment with assistance of Counsel an order incorporating its terms was subsequently made on 24th May 2007. This order included the grant of leave to appeal to both Plaintiff and Third Party.

