Judgment 33/2008 **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) – 3 October 2008 (Two Orders made)**

(i) Freezing and disclosure order – review – Plaintiff's application to discharge the injunction – Third Party's application to lift the stay on disclosure - whether a freezing order may only be made in support of specific litigation in course or under contemplation – injunction extended to 23 May 2009 – leave to appeal granted. (See Judgment 13/2007; reported at 2007-2008 GLR 73)

(ii) Third Party's application to lift the stay on the disclosure order dismissed – costs reserved and leave to appeal granted

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1028

The 3rd day of October 2008 before Sir de Vic Carey, Lieutenant Bailiff, sitting alone.

In the matter of

GARNET INVESTMENTS LIMITED

Plaintiff

- and -

BNP PARIBAS (SUISSE) SA

Defendant

-and-

THE GOVERNMENT OF THE REPUBLIC OF INDONESIA

Third Party

WHEREAS on the 22nd and 23rd of July 2008 the Lieutenant Bailiff sitting alone considered an application by the Plaintiff for an order discharging the Freezing and Disclosure Order made on the 23rd of May, 2007 and an application by the Third Party to lift a stay on the disclosure order which formed part thereof;

AND UPON READING the Third, Fourth and Fifth affidavits of Otto Cornelis Kaligis sworn on 1 April 2008, 1 April 2008 and 21 June 2008 and the exhibits thereto;

AND UPON READING the First-Fifth affidavits of Yoseph Suardi Sabda sworn 19 January 2007, 5 March 2007, 26 April 2007, 2 May 2008 and July 2008 (together with the exhibits thereto) and the two affidavits sworn by Colin Stuart Joseph dated 23 October 2007 and 8 May 2008 filed on behalf of the Third Party

AND UPON HEARING Advocates C H Edwards, for the Plaintiff and Advocate S H Davies for the Third Party, the Lieutenant Bailiff on 2 September 2008 gave Judgment in the terms attached hereto and **ORDERED** as follows:-

1 The Orders of the Royal Court dated 23 May 2007 (the "Freezing and Disclosure Order") as amended by Orders 2 (a) and (b) below shall continue to be in full force and effect.

2 The said Order dated 23 May 2007 be varied as follows:

(a) Order 8 is substituted and replaced with the following:

"8 The injunction will expire at 11:59pm (London time) on 23 May 2009."

3 The Plaintiff and the Third Party are hereby granted leave to appeal generally such leave to have effect from 3 October 2008

4 Costs be reserved.

S M D ROSS
H M Deputy Greffier

Approved Text
29.08.08

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between

GARNET INVESTMENTS LIMITED

and **Plaintiff**

BNP PARIBAS (SUISSE) SA

Defendant

and

THE GOVERNMENT OF THE REPUBLIC OF INDONESIA **Third Party**

Judgment of Lieutenant Bailiff Carey on the Plaintiff's Application for an Order discharging the Freezing and Disclosure Order made on the 23rd May 2007 ("the May 2007 Order")

Dates of hearing: **22 and 23 July 2008**
Judgment delivered: **29 August 2008**

Advocate for the Plaintiff: **C H Edwards**
Advocate for the Defendant: **K Le Cras (excused from attending substantive hearing)**
Advocate for the Third Party: **S Davies**

Cases: -
Ryan v Friction Dynamics [1998]-R-N0.6785
Fourie v Le Roux [2007] 1WLR 320

Texts: -
The Guernsey Law Reports 2007/2008 GLR see Part1 p.73
The Law Reform (Miscellaneous Provisions) (Guernsey) Law 1987

Introduction

1. The initial history of these proceedings is recorded in my Judgment leading up to the May 2007 Order which is now reported in 2007/2008 GLR at page 73, but the full text of which is with the papers filed herein. In addition to granting the Freezing Order on terms I also gave a limited Disclosure Order which I stayed on granting leave to appeal against my decision.
2. The Plaintiff has not proceeded with its Appeal and this has been a matter of concern to the Third Party who is now seeking the lifting of the stay on the Disclosure Order.

3. In my May 2007 Judgment I set out the background to the matter. After argument I was persuaded that it was appropriate to grant the application of the Third Party for a Freezing Order. I was however unhappy about a number of aspects of the case particularly the way in which it appeared that the Third Party had only begun to busy itself with civil proceedings against the Beneficial Owner of the Plaintiff Company (Mr Hutoma Mandela Putra) ("HMP") as a result of this Court's invitation to the Third Party to indicate whether it had an interest in the moneys held with the Defendant in the name of the Plaintiff.

4. I accordingly stipulated that the Freezing Order must be monitored by the Court to see that progress was being made with actions against HMP. I set a date of six months from the May 2007 Order for the first review. By agreement between the parties, the matter has not been

brought back substantively until the present hearing, although Mr Shepherd first sought to persuade me to lift the injunction on 13th May 2008, at which stage I declined to do so in order to give Mr Davies the opportunity of responding to the material that had been filed on behalf of the Plaintiff.

5. So we are now fifteen months on from the making of the original order. I have before me the application from the Plaintiff for the immediate discharge of the injunction. There is filed with the Court the third, fourth and fifth affidavits of Mr Kaligis, HMP's Indonesian lawyer, the fourth and fifth affidavits of Mr Sabda representing the Indonesian Attorney-General and two affidavits from Mr Joseph, who is a partner in the Third Party's London Solicitors appending the pleadings in the two actions that have been brought.

6. The basis upon which the Third Party was making a number of very substantial claims against HMP was explained in Mr Sabda's first three affidavits. The most comprehensive review is in his third affidavit beginning at paragraph 20

The PT Goro property transaction

7. This was at the time of my original judgment, one of those claims that I felt, on Mr Sabda's evidence, was arguable, although it was not the only claim upon which I was relying in order to satisfy myself that the injunction should be granted. The Order I made contained an undertaking from the Third Party to commence proceedings within three months from the date on which the Order became effective (i.e. 23rd May 2007) and this the Third Party succeeded in doing on the last day available to it namely the 22nd August 2007 when it filed substantive proceedings in Indonesia against HMP and others relating to the PT Goro property transaction. A copy of the law suit as filed, was appended to the first affidavit of Mr Joseph dated 23rd October 2007.

8. The suit was filed by the Attorney General of the Republic of Indonesia, described as Public Prosecutor, on behalf of Bulog Incorporation, which I am told is a State owned entity. The main source of information as to the history of the proceedings is Mr Kaligis. In his third affidavit, he appends a translated copy in the English language of the judgement of the District Court of South Jakarta, which was issued on the 28th February 2008. The claim against HMP and the various parties named in the suit was dismissed and HMP was given damages against Bulog for the equivalent of US$550,000.

9. It is accepted that there was an appeal entered by Bulog, but on the 19th March the claim against HMP and others was compromised on terms set out in Mr Kaligis' third affidavit at paragraph 15.

10. There was a statement by Bulog that it would not support the injunction against the assets of the Plaintiff, or the beneficiaries of the assets of the Plaintiff, in particular HMP, would not object to the discharge of the injunction in civil file number 1028 in the Royal Court of Guernsey. Mr Sabda comments that this is curious as Bulog was not a party to the Guernsey proceedings and had no apparent interest therein. In response Mr Edwards points out that the original action sought leave to levy execution on the assets of the Plaintiff in order to satisfy the Judgment that was being sought. I share Mr Sabda's surprise at the wording of the compromise agreement.

11. Be that as it may, there is now no argument that the Bulog action has come to an end as a result of the compromise. Mr Sabda deals with this in his fourth affidavit and says that those who compromised the matter on behalf of Bulog were not authorised to do so by himself as lead attorney, but he accepts that they had apparent authority to do so, so no further point can be taken. In paragraph 5.2, of his fourth affidavit he makes reference to a letter which he drafted, reporting the decision of the District Court to Bulog on 10th March 2008. Paragraph 5 of that letter is interesting in that it refers to an Appeal and then Mr Sabda writes *"should Perum Bulog agree the State Attorney will file an Appeal".* That may have been a matter of courtesy, but it does indicate that the argument as put forward by Mr Sabda to the effect that the Attorney General had the carpet pulled from under his feet in some way, is not entirely convincing.

12. Mr Edwards took me through certain passages of the judgment of the South Jakarta District Court, which was delivered by a panel of Judges and he described the Third Party as having had its nose well and truly bloodied. So far as the terms of the judgment are concerned, all I have is a somewhat rough translation. As will come apparent throughout this judgment, I cannot form a view on the merits of proceedings in Indonesia or whether the courts have reached the right conclusions thereon. I could only attempt to reach such a conclusion if I were furnished with the opinion of an independent expert on Indonesian law. Whilst I respect the fact that both Mr Kaligis and Mr Sabda are professional men, they are not impartial and therefore I cannot rely on their opinions as to law, without full investigation and argument.

The Action relating to the Super Semar Foundation

13. In July 2007, proceedings were commenced against HMP's father, ex- President Soeharto, in connection with monies allegedly misapplied by the Super Semar Foundation. This was one of the yayasans referred to in Mr Sabda's previous affidavits and referred to in my previous judgment. Mr Soeharto died in January 2008 and the action has been continued against HMP and his siblings.

14. According to Mr Sabda, the heirs of the defendant in a corruption case are legally responsible to meet the liabilities of the deceased, unless they disclaim the right to their share in the deceased's Estate. HMP has not appeared in the proceedings against the heirs, although the other co-heirs have. There has been a preliminary judgment of the court in Jakarta to the effect that whilst Super Semar had misused its funds and was ordered to pay compensation to the Third Party amounting to more than US $100,000,000 million, the Court was of the opinion that Mr Soeharto and hence as it now stands, his heirs, were not legally responsible for the unlawful act of Super Semar. This was on the grounds that Mr Soeharto had reported all his activities to the Board of Management of the Foundation and the Board of Management had accepted his report and that as President of the Republic he had reported all his activities to the People's Consultative Assembly and the Assembly had accepted his reports without objection. This decision is now subject to an Appeal, which Mr Sabda says should succeed.

15. The problem about this claim is that it certainly was not in contemplation at the time of the original injunction because Mr Soeharto was still alive. The further problem is that generally, heirs can only be liable for the debts of a deceased person to the extent that they have participated in the Estate. Mr Sabda does pass some doubt on this and without independent expert interpretation as to the effect of the anti corruption legislation in Indonesia, I cannot form a definitive view, but I find it strange that HMP can be found liable for the defalcations of his father over and above anything he becomes entitled to from his father's Estate. I have to accept however that there does seem to be some sort of claim on foot against HMP in respect of the misapplication of funds by the Super Semar Foundation, albeit that it is currently under appeal. All will no doubt be revealed in due time.

The Claim in respect of the P T Timor Putra Nasional Losses

16. Mr Sabda in paragraphs 7 – 24 of his fourth affidavit, outlines the details of this and exhibits some 150 pages of documentation. Whilst this information is relevant as showing that at long last some proceedings are being taken against HMP in respect of the failed National Car Project, I cannot form any view as to their propriety without independent advice. It is perhaps pertinent to record what I understand these proceedings to be. It appears to be that PT Timor Putra Nasional ("TPN") was owned almost entirely by HMP or entities owned and controlled by him. TPN obtained large loans from various banks and was issued with a letter of credit in respect of which HMP provided a personal guarantee, supported by a promissory note.

17. In 1999, there was a banking crisis in Indonesia and the monies due from TPN to the failed banks, which amounted to the extraordinary sum of US $469,000,000, were transferred to a body known as IBRA. There was then a Government decree, which enabled IBRA to sell off the debts owed to it by public auction. A company called Vista Bella bought, at a considerable discount, the right to collect the monies owed by TPN. Not unnaturally, there was a clear stipulation both in the documentation under which the debts were to be bought and the Ministerial Decree, that those purchasing the debts should have no connection with the original debtors.

18. The Third Party now claims to have discovered as recently as the end of 2007, that Vista Bella was funded through PT Humpuss, a company owned by HMP, so that in effect, HMP was the financier for the body that purchased the debt owed by TPN a debt that was guaranteed in part under a personal guarantee from HMP.

19. Proceedings were issued on the 5th May against Vista Bella and others, including HMP, for damages apparently in Tort for the whole of the monies due on the grounds that the assignment to Vista Bella violated the Ministerial Decree, which prohibited any connection between the buyer of the right to claim the repayment of the debt and the debtor.

20. This law suit asks for conservatory seizure on the assets of HMP, including the Plaintiff's account at the Defendant Bank. Although on my reading of the lawsuit, there is some attempt at applying for interlocutory relief by means of obtaining a conservatory order (in this regard I contrast the wording of the PT Goro lawsuit which merely asks for leave to execute the judgment against the Guernsey assets), no order has apparently been obtained of a

conservatory nature. Mr Sabda says this is very difficult under Indonesian law whereas Mr Kaligis quotes that part of the Indonesian code, which clearly deals with conservatory orders. Again I am no expert in Indonesian Law and cannot reconcile any conflict between Messrs Sabda and Kaligis but from the translation filed by the latter of Article 227 of the code (page 65 of exhibit to 5th Kaligis affidavit) I accept that the emphasis may be different to that pertaining in this jurisdiction. I have noted the section in the commentary ("elucidation") which says that the applicant must "*describe actions or events which indicate that the owing person is trying to bring away his assets from the creditor"* This seems more akin to the test that used to apply in Guernsey for obtaining an *arret des biens* than the wider test of a risk of dissipation developed under what used to be called the *Mareva* jurisdiction.

21. In his last affidavit Mr Sabda also refers to the progress of other matters which he had raised in his earlier affidavits and in particular the criminal proceedings relating to the Clove monopoly, which again was mentioned in my previous judgment.

The Plaintiff's case for lifting the Injunction

22. Mr Kaligis in his fifth affidavit at paragraph 6, explains that the Plaintiff is seeking the discharge of the injunction on a number of separate, though interlinked, grounds:-

    1. The lack of any substance to the recent set of proceedings brought by the Third Party against TPN.

    2. The failure of the Third Party to obtain Injunctive Relief in Indonesia.

    3. The existence of extensive assets belonging to HMP in Indonesia which have not been frozen by the Third Party.

23. In his submissions to me, Mr Edwards consolidates these arguments into two basic points. The first is that regardless of the substance of the TPN proceedings, they are new proceedings which were not in contemplation at the time of the May 2007 Order. Indeed it is only since that date that the Third Party has obtained evidence to suggest that Vista Bella was connected with HMP. The second is that the Third Party has not obtained Freezing Orders in Indonesia and has recognised that this is not appropriate because HMP has substantial assets within that jurisdiction and there is no risk of dissipation.

24. Mr Davies excuses the fact that the Third Party has only just discovered about the way in which the Vista Bella purchase of the TPN debt was financed. He draws attention to the sophisticated way in which these matters were hidden and the considerable practical and legal obstacles that are placed in the face of the Third Party in pursuing claims against HMP. So far as the second point, he reiterates the risk of dissipation that there would be in the case of the Guernsey assets if the injunction was lifted. He submits that it is difficult to get Interlocutory Freezing Orders in Indonesia particularly if there is no clear risk of dissipation of any of HMP's Indonesian assets.

25. So far as the further argument that Mr Kaligis advanced, which is not pursued with the same vigour by Mr Edwards, to the effect there is clear evidence that HMP has substantial assets in Indonesia, Mr Davies draws attention to the inadequacy of that evidence as provided in the valuations which are appended to Mr Kaligis' affidavit. In particular it is claimed PT Humpuss owns a substantial portfolio of quoted shares. Without seeing what liabilities that company may have it is impossible, says Mr Davies, to reach a conclusion on such evidence In any event he suggests that the value of shares in Indonesian companies are going to be volatile, particularly at the present time.

26. During the course of argument I raised with Mr Davies how long it was contemplated that this injunction would have to remain in place as it was clear to me that there must be some time limit within which the failure of the Third Party to obtain an enforceable judgment against HMP would result in the Freezing Order being lifted.

27. Mr Davies considered the matter overnight and returned with a proposed undertaking on behalf of the Third Party in the following terms:-

"The Government of Indonesia hereby undertakes as follows:

1. To:

a. commence any civil claims against Hutomo Mandala Putra which are capable of being supported by the Freezing and Disclosure Order granted by the Royal Court of Guernsey on 23 May 2007 (the "Freezing and Disclosure Order") prior to the date on which there is a Final Determination (as defined below) of the claims set out in the proceedings commenced on 5 May 2008 by the Minister of Finance of the Government of Indonesia against PT Vista Bella Pratama, PT Mandala Buana Bakti, PT Humpuss, PT Timor Putra Nasional, Hutomo Mandala Putra and Amazonas Finance Limited (the "TPN Proceedings");

b. prosecute the TPN Proceedings with all due despatch; and

c. prosecute any such other civil claims as may be commenced against Mr. Putra as envisaged by undertaking 1(a) above with all due despatch;

2. For this purpose "Final Determination" shall mean in relation to the TPN Proceedings:

a. a final and binding judgment of an Indonesian Court of competent jurisdiction as follows:-

i. on the expiration of 14 days after judgment is given by the Central Jakarta District Court unless an appeal is filed by any party within that 14 day period; or

ii. on the expiration of 14 days after judgment is given on any such appeal by the High Court of Indonesia unless an appeal is filed by any party within that 14 day period; or

iii. on the giving of a written judgment from the Supreme Court of Indonesia.

b. a final and binding arbitration award which is incapable of further review by any court or tribunal determining all of the issues in the TPN Proceedings against all parties thereto; or

c. a written final and binding settlement of all claims in the TPN proceedings is entered into between the parties thereto which is capable of being enforced by the courts of Indonesia.

3. For the avoidance of doubt:

a. nothing in this undertaking amounts to a waiver of any claims (whether civil or criminal) that the Government may have or may in the future have against Hutomo Mandala Putra or any other person or entity; and

b. nothing in this undertaking shall prevent the Government from applying for any form of interlocutory relief against Hutomo Mandala Putra in Guernsey or any other jurisdiction in support of any claims that are not brought before a Final Determination of the TPN Proceedings; and

c. nothing in this undertaking prevents any party to the order in which this undertaking is recorded (the "Revised Freezing and Disclosure Order") from

seeking a review of the Revised Freezing and Disclosure Order on 7 days' notice to all of the other parties; and

d. in the absence of further order of the Royal Court, the Revised Freezing and Disclosure Order will remain in full force and effect."

28. Such an undertaking would link the continuation of the present Order to the prosecution of the TPN proceedings, but of course it would be left open to the Third Party to bring other proceedings and then to suitably seek further Freezing Orders which would at least mean that there was a new event justifying a new Order.

The Law

29. Mr Edwards made detailed submissions taking up the approach adopted in certain English cases where freezing relief has been sought where no so application has been made in the home jurisdiction if I may be put it that way. I found useful the case of *Ryan v Friction Dynamics 1998-R-N0.6785* and the summary provided by Neuberger J as he then was, in dealing with applications under section 25 of the Civil Jurisdiction and Judgments Act 1982, which I accept is not in issue here but Guernsey Courts are often faced with the problem of what are referred to as overlapping orders (Indeed Neuberger specifically contemplates such situations involving the courts of the crown dependencies).

30. On the requirement that freezing orders may only be made in support of specific litigation in course or under contemplation Mr Edwards quoted a recent decision of the House of Lords in *Fourie v Le Roux 2007 1WLR 320*. I accept the point that Mr Davies makes about this decision being solely concerned with costs, but there are some important points of principle which were restated by their Lordships. Lord Scott in his speech, reminded one that *"without the issue of substantive proceedings or an undertaking to do so, the propriety of the grant of an interlocutory injunction would be difficult to defend"*

31. Lord Bingham's speech is instructive when he says this:-

> *"Mareva (or freezing) injunctions were from the beginning, and continue to be, granted for an important but limited purpose: to prevent a defendant dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. They are not a proprietary remedy. They are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves. They are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign: see Steven Gee, Commercial Injunctions, 5th ed. (2004), pp 77-83.*
>
> *In recognition of the severe effect which such an injunction may have on a defendant, the procedure for seeking and making Mareva injunctions has over the last three decades become closely regulated. I regard that regulation as beneficial and would not wish to weaken it in any way. The procedure incorporates important safeguards for the defendant. One of those safeguards, by no means the least important, is that the claimant should identify the prospective judgment whose enforcement the defendant is not to be permitted, by dissipating his assets, to frustrate. The claimant cannot of course guarantee that he will recover judgment nor what the terms of the judgment will be. But he must at least point to proceedings already brought, or proceedings about to be brought, so as to show where and on what basis he expects to recover judgment against the defendant".*

Conclusions on the continuation of the Freezing Order

32. I am not persuaded that the failure to freeze HMP's assets in Indonesia is in itself fatal to the continuation of the injunction here. I find nothing in the English authorities that prevents such a conclusion. As I have hinted at in paragraph 20 it may well be that a heavier burden is placed on those who seek conservatory relief in that jurisdiction. It may also be that there are other practical constraints placed on HMP, which would make it difficult to remove assets

that are physically located in Indonesia from that jurisdiction. I know not but I am aware that if this injunction is lifted the Garnet assets could be removed from Guernsey to a safe haven (provided one can still be found) in a matter of hours.

33. I am not persuaded that the TPN case is without substance – clearly if Mr. Kaligis is correct it is likely to be struck out fairly quickly. The real concern at first sight was that the circumstances giving rise to the claim apparently only have come to light since the injunction was granted in May 2007. I do not consider that that fact negatives the case of the Third Party to seek to maintain the injunction. It is clearly the sort of claim that this Court had in mind at the time of granting relief as if the allegations are proved to be true it falls into precisely the class of conduct of which the Third Party originally complained, albeit in general terms.

34. Although I need not reach a conclusion thereon at this stage, I am less confident that it would be appropriate to maintain the injunction if the only ongoing proceedings were those relating to defalcations in connection with the yayasans which have been brought against HMP as an heir to Mr Soeharto's estate, for the reason that on the face of it such a claim would not extend beyond the assets that passed to HMP on inheritance, which the shares of the Plaintiff clearly are not.

35. In my last judgment I expressed concern at the delays that had occurred in the Third Party's efforts to pursue HMP for the large sums which he had allegedly accumulated as a result of corruption and unlawful activities during his father's long reign as President of Indonesia. I was worried that the invitation that I had issued to the Government of Indonesia through its Ambassador in London, to say whether or not it wished to intervene and lay claim to the Plaintiff's funds in Guernsey was the sole catalyst to encourage the Third Party to proceed against HMP. I have noted all that Mr Sabda has said in his fourth and fifth affidavits. Activity there has been but little appears to have been achieved. The picture that is painted by Mr Sabda of what has happened since the grant of the injunction, notwithstanding the reports of some litigious activity does not fill me with confidence that the Third Party is capable of pursuing these claims to a successful conclusion. I cannot speculate as to the reasons why matters have not proceeded more successfully. If the situation is as shocking and disgraceful as Mr Sabda makes out why is it that the Government cannot pursue HMP with greater vigour? I come back to Mr Strappini's aside to the effect with the wealth under its control the Soeharto family continues to exert great influence on Indonesian life

36. I revert to the principles of the jurisdiction relating to freezing orders. The practice of this Court in such matters has to a large extent followed that which has developed in England and Wales. One important distinction can be identified in that section1(7) of the Law Reform (Miscellaneous Provisions) (Guernsey) Law 1987 gives power to this Court to grant interim injunctions *"in exceptional circumstances ... notwithstanding that proceedings have not been and are not to be instituted before the Court"* . No light is cast on what are *exceptional circumstances,* but that has generally not proved a problem for Guernsey judges. Over the years many orders have been made to preserve assets sent to the Island for safe keeping as part of its financial services activity and where appropriate orders have been made which are essentially ancillary to those made in other jurisdictions where the main litigation is to proceed. I am of the view that neither section 1(7) or Section 4 upon which Mr Davies lays emphasis – the "just and convenient" principle were otherwise intended to give this Court wider powers than those that have developed in England and Wales. The problem for me is that the circumstances of this case are quite unlike any other one to come before a court here or elsewhere.

37. In the light of the dicta in ***Fourie v Le Roux*** and other authorities referred to in this and previous hearings I have concluded that I cannot, however attractive it may be in the circumstances of this case, where misappropriation of public funds over a long period on the part of HMP is alleged, leave an injunction in place for years rather than months. If I was to accede to Mr Davies proposal on behalf of the Third Party, which I have set out in detail, I fear I would be doing that. Although it may appear arbitrary to do so, I consider that this injunction which was originally granted in early 2007, must have an end date by which there should be an Order of the Indonesian Court or this Court, establishing that the monies, the subject of the injunction, are indeed lawfully to be paid over to the Third Party in settlement

of a judgment against HMP in Indonesia upon which the Third Party is in a position to sue on in Guernsey and to levy execution.

38. Taking the interests of both the Third Party Government and the beneficial owner of the Plaintiff, HMP into account, I consider a fair date for this injunction in its present form to come to an end would be the second anniversary of my substantive judgment confirming the freezing order, namely the 23rd May 2009.

39. Such an approach may seem unusual and Mr Edwards may feel it is unfair to extend the injunction so far ahead, but in my view this is not like the usual case where freezing orders bite on a man's ability to live according to his needs or interfere with his ability to earn his crust. The subject matter of this order appears to be a not insubstantial investment portfolio which we now know is the subject matter of a separate claim in damages by the Plaintiff against the Defendant, on the grounds that the Defendant has failed in the discharge of its professional duties as investment managers. Whilst that action is of no significance to the way in which I dispose of the matter it does point to this particular part of HMP's estate being hived off for long term investment rather than meeting his immediate needs.

40. The other advantage of having a cut off date some way ahead is that it will give either or both of the parties the opportunity of having my decisions reviewed by the Court of Appeal. As we shall see in the final part of this judgment the aggrieved party from last time has not got on with his appeal and this has caused distress to his opponent. Having a clear expiry date should give time to enable the appeal procedure to be pursued with determination on both sides.

41. Just as in *Fourie v Le Roux 2007 1WLR 320*, it would be open for the Third Party to come back to this Court at any time between now and 23rd May next, with a fresh application for injunctive relief. . Whilst the Third Party may before that date have obtained some form of judgment against HMP in Indonesia which entitles it to, in effect, levy execution on the Garnet portfolio by means of enforcement proceedings here and for a short extension to enable such an action to be concluded, my tentative view is that any fresh application *inter partes* must be brought *de novo* and should not be in the form of a further extension to my Order of May 2007.

42. Alternatively, in the light of the limited success that the Third Party has achieved so far in the courts of Indonesia, it may wish to bring free standing proceedings against the Plaintiff as recipient of funds belonging to the Government of Indonesia. That is where it is clearly of interest for the Third party to discover the nature of the fund in the Plaintiff and whether it can establish a proprietary claim thereto. That is all for another day.

The Third Party's Application to remove the stay on Disclosure

43. Mr Davies draws my attention to the fact that the limited Disclosure Order I made against the Plaintiff in my judgment of 23rd May, has not been able to be proceeded with as I granted a stay to the Plaintiff against making such disclosure, pending its appeal against my decision on the Freezing Order.

44. The Plaintiff has not proceeded with that appeal and instead chose to return to the Royal Court to seek to persuade me to lift the Freezing Order immediately. The Government is claiming prejudice by the delay in giving disclosure and wants me to remove the stay on disclosure. I have sympathy with all that Mr Davies is saying, although as I explained in my original judgment, I was only giving very limited disclosure because of the way in which this whole matter arose.

45. The strength of Mr Davies' case is perhaps highlighted by the preceding paragraphs 40 and 41 of this judgment when I made reference to the possibility of attempts to make further applications to this Court. Mr Davies is keen to get information so that the Government can establish what it says is the true position, namely that it has a proprietary claim to the assets of The Plaintiff. As I have made it clear throughout, the Third Party is bound to be in difficulty as a result of the effluxion of time in showing that the monies that have got into the Plaintiff's portfolio came direct thereto from a bank account in the name of the Government. The

proprietary claim in such circumstances is going to be far more complex than the usual one of a dishonest company director or other fraudster. That said, the Third Party is entitled to have the information I have ordered and it is also entitled to have any appeal against my original Disclosure Order determined without delay.

46. At the hearing, I was not minded to lift the stay, simply because it would in any event have to remain in place until the merits of my Order were reviewed by the Court of Appeal. I did not therefore invite argument from Mr Edwards. However, having reached my conclusion on the Freezing Order, I do see that there is an argument that Mr Davies can sustain if he wishes to, that I should be lifting the stay in view of the slow progress made since May 2007 with the appeal and then leave it for Mr Edwards to get the stay reinstated before a Single Judge of the Court of Appeal who will if appropriate be able to lay down guidelines for that discrete issue to come before the Court at an early stage.

47. I do not wish to make any firm decision on this, not having heard from Mr Edwards and I therefore propose to invite further argument on this in early course.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1028

The 3rd day of October 2008 before Sir de Vic Carey, Lieutenant Bailiff, sitting alone.

In the matter of

GARNET INVESTMENTS LIMITED

Plaintiff

- and -

BNP PARIBAS (SUISSE) SA

Defendant

-and-

THE GOVERNMENT OF THE REPUBLIC OF INDONESIA

WHEREAS on the 24th of September 2008 the Lieutenant Bailiff considered an application dated 3 September 2008 by the Third Party to lift a stay on the disclosure order which formed part of an order made on the 23rd of May 2007 in these proceedings (the "Freezing and Disclosure Order") and for the costs of the hearing of the application of the Plaintiff heard on 22nd and 23rd July 2008 (the "July 2008 Hearing");

AND UPON HEARING Advocates C H Edwards, for the Plaintiff and Advocate S H Davies for the Third Party, the Lieutenant Bailiff this day gave Judgment in the terms attached hereto and **ORDERED**:-

5 The Third Party's application to lift the stay on the disclosure order which formed part of the Freezing and Disclosure Order be dismissed; and

6 That the costs of the July 2008 Hearing and the Third Party's application dated 3 September 2008 be reserved;

7 The Plaintiff and the Third Party are hereby granted leave to appeal generally such leave to have effect from 3 October 2008.

S M D ROSS
Her Majesty's Deputy Greffier

Approved Text
3 October 2008

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between	**GARNET INVESTMENTS LIMITED**	**Plaintiff**
	and	
	BNP PARIBAS (SUISSE) SA	**Defendant**
	and	
	THE GOVERNMENT OF THE REPUBLIC OF INDONESIA	**Third Party**

Judgment of Lieutenant Bailiff Carey
on the Third Party's Application of 3rd September 2008

Dates of hearing: **24th September 2008**
Judgment handed down: **3rd October 2008**

Advocate for the Plaintiff: **C H Edwards**
Advocate for the Defendant: **K Le Cras (excused from attending)**
Advocate for the Third Party: **S Davies**

1. Following my Judgment delivered on the 29th August 2008 Mr Davies has brought two further applications.

2. The first is an application for the costs of the Third Party in connection with the hearing of July 2008. Mr Davies' argument is that costs should follow the event in that I declined to lift in its entirety the Order I had made in May 2007 and therefore the Plaintiff had lost and should be required to pay the recoverable costs of the Government. In opposition Mr Edwards says that there are no winners or losers in this case at the present time and that pending their being a definitive outcome to the grant of the original Freezing Order costs should be reserved.

3. It was my intention that the continuation of the freezing order should be regularly reviewed for the reasons that I gave in my original Judgment of May 2007, but I accept that returning for a review is not the same as making an outright application for the Freezing Order to be set aside which the Plaintiff was seeking. I accept that I did not accede to the Plaintiff's application. That in my view does not however entitle the Third Party to its costs. Serious issues were raised on behalf of the Plaintiff to the effect that the Third Party still had not made substantive progress with taking action against the ultimate beneficiary of Garnet Mr Putra ("HMP") and it was because of my reservations over what had happened since the grant of the original Freezing Order that I concluded in effect that there should be a definitive date upon which the Freezing Order would, in the absence of new circumstances, lapse. As I indicated at the end of this hearing I was not persuaded that there should be any order for costs in either direction at the present time. Instead costs should be reserved, leaving it open for either party to take distinct points as to where the incidence of costs over various stages of the proceedings should fall.

4. I now turn to the second application that the stay I imposed on the Disclosure Order should be lifted. In order to deal with this application it is necessary that I go into the history of this particular part of the proceedings. As part of its original application the Third Party sought a fairly wide *Norwich Pharmacal* type order against both the Plaintiff and the Defendant. I dealt with this original application in some length in my original Judgment (paragraphs 63 – 99). In the event I gave limited disclosure as outlined in paragraph 99 and my intention was that such disclosure should be immediate, having in paragraph 98 referred to Mr Shepherd's suggestion that the Disclosure Order should be delayed until the first review of the Freezing Order.

5. I gave leave to appeal against my original order of May 2007 and the Plaintiff duly lodged an appeal and set it down. It went on to deliver its case to the Registrar. The matter came up for hearing before the Court of Appeal in March 2008 which, it will be recalled, was shortly after the *Bulog* Proceedings had been settled. These events rather overtook the appeal and the Plaintiff's Advocates felt the appropriate way to proceed was to seek to adduce evidence from Mr. Kaligis of what had transpired in the *Bulog* Proceedings as fresh evidence so as to lend support to the argument that the whole basis upon which the Freezing Order had been granted was ill founded. That "quick fix" (if I may put it colloquially) suggested solution was in the event doomed because the Court of Appeal could not deal with the matter without having given the opportunity to the Third Party to respond to the proposed fresh evidence.

6. In any event there was a recognition that the only practical way forward was to come back before me and seek a lifting of the original Freezing Order in the new circumstances. Mr Davies makes the point that his clients are prejudiced because of the failure of the Plaintiff to get on with this appeal against my original decision and the subsequent one relating to the Disclosure Order. It is my recollection that in granting leave to appeal I treated the imposing of a Stay on the Disclosure Order as very much an ancillary matter, which followed the Grant of Leave. In July Mr Davies came back seeking the lifting of the Stay on the grounds of the delay that occurred in proceeding with the Appeal and the subsequent prejudice to his clients. He argued that imposing a stay was not appropriate and cited the case of *Motorolla Credit Corporation –v- Cem Uzan and Others 2002 EWCA Civ 989*.

7. Having listened to all Mr Davies had to say I felt that the circumstances in this case were not such that I should be lifting the Stay pending the appeal against both the Freezing Order and the Disclosure Order. I did not feel it necessary to call on Mr Edwards in reply.

8. When I came to write my Judgment I felt that there was an argument to be advanced that the Stay should be formally lifted so as in effect to bring the management of the Appeal under the direction of a Judge of the Court of Appeal. I anticipated that in any event the single Judge would preserve the status quo and re-instate the Stay. I regret that these thoughts, which of course had not been canvassed before Counsel may have been erroneous. The issue before me was simply whether the Stay should be lifted on the grounds that the prejudice to the Third Party of it remaining in force pending the pursuit of the Appeal against the Freezing Order outweighed the risk to the Plaintiff of inappropriate disclosure of information which would not be available to the Third Party in the event that the freezing order was adjudged to have been wrongly granted.

9. In my view my original conclusion to leave the Stay in place reached during the course of the July hearing was rightly concluded at that time and there is no room for re-opening it and indeed it would not be right to adopt the approach that I was canvassing in paragraph 46 of my Judgment of 30th August 2008. Mr Davies' application therefore fails.

