

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**
MISCELLANEOUS PROCEEDINGS No 2557 OF 2010

IN THE MATTER OF THE
MUTUAL LEGAL ASSISTANCE IN
CRIMINAL MATTERS ORDINANCE CAP 525

AND

IN THE MATTER OF

RAFAT ALI RIZVI	1 st Defendant
HESHAM TALAAT MOHAMED AL-WARRAQ	2 nd Defendant
ROBERT TANTULAR	3 rd Defendant
HARTAWAN ALUWI	4 th Defendant
GALLERIA RESOURCES LTD	5 th Defendant
ARLINGTON ASSETS INVESTMENT LTD	6 th Defendant
BLUE HARBOUR INVESTMENT LTD	7 th Defendant
CHINKARA CAPITAL MARKETS LIMITED	8 th Defendant
PROPERTY BANK CENTURY TBK	9 th Defendant
TEXFIELD HOLDINGS PTE LTD	10 th Defendant
FIRST GLOBAL FUNDS LIMITED	11 th Defendant
FIRST GULF ASIA HOLDINGS LIMITED	12 th Defendant
EXPRESSIVE CONSULTANTS INC	13 th Defendant
JASMIN WORLDWIDE LTD	14 th Defendant
BCIC INTERNASIONAL LTD	15 th Defendant
EVERICH HOLDINGS TRADING LTD	16 th Defendant

METICULOUS OFFSHORE INVESTMENT INC	17 th Defendant
AQUARIUS FINANCE ENTERPRISES LTD	18 th Defendant

and

NOMURA INTERNATIONAL PLC	1 st Intervener
ING BANK NV	2 nd Intervener
WESTON INTERNATIONAL ASSET RECOVERY COMPANY LTD	Intended 3 rd Intervener

Before: Deputy High Court Judge J Yau in Chambers

Date of hearing: 21 March 2014

Date of Judgment: 29 April 2014

J U D G M E N T

Background

1. This is an application for leave to appeal against the judgment of the Court dated 29 January 2014 by D1, D2 and D12.

2. These proceedings arose as a result of the collapse of the Bank Century, a public bank in Indonesia, in 2008. The bank was taken over by the Government of the Republic of Indonesia (“the Indonesian Government”) through Bank Indonesia and renamed Bank Mutiara. D1, D2, D3 and D4 are alleged to have illegally caused the collapse of the bank to enrich themselves or other people.

3. The Central Jakarta District Court issued 3 restraint orders in October 2009 and March and July 2010 respectively, ordering the restraint

of the overseas bank accounts of the four defendants, including those in Hong Kong pending final decision of the Indonesian court regarding the confiscation of the assets by way an external confiscation order.

4. At the request of the Indonesian Government, the Secretary for Justice (“the Secretary”) applied to the Court of First Instance in Hong Kong for an order to restrain the bank accounts of the defendants in Hong Kong. On 15 December 2010 a restraint order (“the restraint order”) was made by Reyes J pursuant to section 27, and section 7 of Schedule 2, of the Mutual Legal Assistance in Criminal Matters Ordinance, Cap 525 (“the Ordinance”) which prohibited, subject to certain exceptions, the 18 defendants named in it, whose names appear in the citation, from disposing of, dealing with, or diminishing the value of "any of their property in Hong Kong" including a substantial number of identified accounts held in various banks (“the Property”).

5. The restraint order has subsequently been extended and varied by various orders of the court.

6. By the order of Judge Wright J dated 14 March 2012 receivers (“the Receivers”) were appointed to administer the Property.

7. D1 and D2 were tried in absentia by the District Court of Central Jakarta (“the Indonesian District Court”) and were convicted of corruption and money laundering offences. In the judgment of the Jakarta Court delivered on 16 December 2010 the defendants were ordered to pay restitution of 3,115,889,000 Indonesian Rupiah (US\$286,650,550) and should they fail to pay their assets might be seized to satisfy the order. This is referred to as Verdict 3 in these proceedings.

8. An order was also made to confiscate the assets and money owned or controlled by D1, D2, D3 and D4 as set out in the judgment of the Indonesian District Court. This is referred to as Verdict 5E in these proceedings.

9. On 26 December 2012 the Indonesian Government made a supplementary request to the Secretary for the enforcement of Verdicts 3 and 5E, as an external confiscation order pursuant to section 27 of the Ordinance and the provisions of the bilateral Agreement for Mutual Assistance in Criminal Matters between Indonesia and HKSAR.

Applications of the Secretary

10. By a summons dated 31 January 2013 the Secretary acting on behalf of the Indonesian Government applied to register the Indonesian confiscation order as an external confiscation order pursuant to section 28 of the Ordinance.

11. By an amended summons dated 5 November 2013 the Secretary applied to appoint the Receivers to enforce the external confiscation order as enforcement Receivers upon the registration of the external confiscation order pursuant to section 9 of Schedule 2 of the Ordinance.

12. By a summons dated 31 October 2013 the Secretary also applied for a variation of the restraint order. For the purpose of the present exercise this is irrelevant.

Application of D1, D2 and D12

13. By a summons dated 13 January 2012, D1, D2 and D12 applied to discharge the restraint order against the property held in their names. They also opposed the application of the Secretary to register the external confiscation order.

Judgment of the Court

14. On 29 January 2014 the Court delivered its judgment, allowing the Secretary's applications to register the external confiscation order and the appointment of the Receivers as enforcement Receivers to enforce the external confiscation order. The Court also dismissed the application of D1, D2 and D12 to discharge the restraint order against the property held in their names.

Application for Leave to Appeal

15. By a summons dated 13 February 2014 D1, D2 and D12 apply for leave to appeal the judgment of the Court. The contention of D1, D2 and D12, according to the second affidavit of Ms Siu Nga Yee Ellie filed in this connection, is that they regard the decision of the Court as a final judgment, rather than an interlocutory judgment and that only for the avoidance of doubt and out of abundance of caution, the application for leave to appeal is made.

16. Ms Siu also adds that the intended appeal raises serious and important questions of law and novel points of law which have not been the subject of appellate authority in the past.

Position of the Secretary

17. The Secretary is of the view that the judgment of the Court is final for the purposes of section 14AA of the High Court Ordinance, Cap 4 and Order 59 rule 21(1) of the Rules of High Court, Cap 4A and leave is not required for the appeal. The Secretary also expresses the view that should the Court find it necessary for leave to appeal to be obtained, it holds no objection to the application of D1, D2 and D12.

The Legal Principles

18. As rightly pointed out by the Secretary, in determining whether a judgment or order is final or interlocutory, the relevant authorities are *B+B Construction Ltd v Sun Alliance and London Insurance Plc* (2000) 3 HKCFAR 503 and *Shell Hong Kong Ltd v Yeung Wai Man Kiu Yip Co Ltd & Another* (2003) 6 HKCFAR 222.

19. In *B+B Construction Ltd* case, Chan PJ said (at page 506) :

“...the application test in deciding whether an order of the Court of Appeal is a final or interlocutory order.....involves an examination of the nature of the application to see whether the order made upon such application would, whether it fails or succeeds, determine the whole action. In considering the nature of the application, it is necessary to look not only at its form, e.g. under which order or rule of court it is made, but also the purpose and substance of the application and the issues to be determined by the court.”

20. Although this case concerned judgments or orders made by the Court of Appeal and the relevant provisions in the Hong Kong Court of Final Ordinance, Cap 484, it is the view of the Court that there is no reason why it should not apply to judgments or orders of the Court of First Instance.

21. In the *Shell Hong Kong Ltd* case, it was decided that even if a judgment or order was on a preliminary question of law or construction of document, the judgment or order should still be regarded as a final judgment and not an interlocutory judgment if it determined a substantive part of the trial or went to the root of the case. Chan PJ said that in this connection it was necessary to consider the purpose and substance of the judgment or order, the issue dealt with and determined by the court and the effect of the determination of this issue on the rights of the parties, the further conduct of the proceeding and the final disposal of the whole action and that a broad commonsense approach should be adopted.

22. In the judgment of the Court subject to appeal by D1, D2 and D12, the most important issue for the Court to determine was the applications of the Secretary for the registration and enforcement of the external confiscation order. Once the applications were granted it was inevitable that the application of D1, D2 and D12 for the discharge of the restraint order would be dismissed. The appointment of the Receivers as enforcement Receivers was a natural consequence of the registration and enforcement of the external confiscation order.

23. The Court is of the view that the judgment clearly finally determined the rights of D1, D2 and D12, and indeed, other parties involved, in respect of the property held in their names and specified in the external confiscation order, and is a final rather than interlocutory judgment.

Conclusion

24. The Court is of the view that it is not necessary for D1, D2 and D12 to obtain leave to appeal the judgment of the Court.

25. The Court also likes to add that even if leave to appeal is required it is, as pointed out by D1, D2 and D12, an appropriate case for the leave to be granted.

Costs

26. The Court makes an order nisi that the parties should bear their own costs. In the absence of any application from the parties within 21 days from the handing down of this judgment the order nisi shall stand as final.

(Joseph Yau)
Deputy High Court Judge

Ms Susana Sit, Deputy Principal Government Counsel, for the Secretary
for Justice

Mr Roger Beresford instructed by Reed Smith Richards Butler for the 1st,
2nd and 12th Defendants