

HCMP 2557/2010

**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

BETWEEN

SECRETARY FOR JUSTICE

Plaintiff

and

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
NOMURA INTERNATIONAL PLC	1 st Intervener
ING BANK NV	2 nd Intervener

Before: Deputy High Court Judge J Yau in Chambers

Date of Hearing: 7 April 2014

Date of Judgment: 16 May 2014

J U D G M E N T

Introduction

1. This is an application by the Secretary for Justice (“the Secretary”) to adjourn sine die its application to register the confiscation order issued by the Central Jakarta District Court on 16 December 2010 as an external confiscation order against the property held in the name of D4, D17 and D18, pending the outcome of the continuing criminal proceedings in Indonesia against D4 and the making of any further confiscation orders against their property in Hong Kong, with the liberty of either party to apply to restore.

2. As part of the application, the Secretary also asks for the Hong Kong restraint order against the property of D4, D17 and D18 be continued.

3. In this connection, leave is given by the Court for the Secretary to adduce further evidence by filing the affirmation of Mr Wagiman, an investigator of the Criminal Investigation Department of the Indonesian National Police, dated 10 January 2014, and the affirmation of Mr Cahyo Rahadian Muzhar, Director for International Law and Central Authority, Ministry of Law and Human Rights, Republic of Indonesia, dated 25 March 2014.

Background

4. 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.

5. 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 4 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.

6. At the request of the Indonesian Government, 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”).

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

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

9. 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 Indonesian District 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.

10. 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.

11. 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

12. 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. Included in the application which concerned D4, D17 and D18 were account number 207598 with the UBS AG Bank held in the name of D17 and account number 70088 with the Credit Suisse AG Hong Kong Branch held in the name of D18.

13. 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.

Position of D4, D17 and D18

14. D4 is wanted for prosecution by the Indonesian authorities. According to the 11th affirmation of Detective Senior Inspector Harding (“DSI Harding”) D4 is the beneficial owner of the 2 bank accounts held by D17 and D18 and these accounts are under the effective control of D4.

15. In his first affirmation DSI Harding deposes that a company by the name of Antaboga Delta Sekuritas (“ADI”) was controlled by D4 and D3 through a company called PT Aditya Reksautama which was the

majority shareholder of ADI. D3 and D4 made use of PT Aditya Reksautama and ADI to set up fraudulent investment schemes which were sold through Bank Century. The proceeds were laundered, inter alia, by paying into different bank accounts and investments in Indonesia and overseas including Hong Kong.

16. D4, D17 and D18 and the other defendants opposed the application of the Secretary to register the confiscation order of the Indonesian District Court and asked for the restraint order against their property be discharged. The hearing was fixed for 11 to 15 November 2013. D4, D17 and D18 had in fact not taken an active part in the proceedings until the time very near to the hearing and D4 filed an affirmation only a few days before the hearing.

17. On the first day of the hearing the Secretary asked for an adjournment in relation to the case of D4, D17 and D18 on the ground that it and the Indonesian Government needed time to consider the factual issues raised in the affirmation of D4 and to decide what further action to be taken. The 3 defendants opposed the application for adjournment. After hearing the submissions, the Court granted the adjournment and ordered the matters to be brought up for mention on 20 January 2014 to decide how the case was to be dealt with.

18. In this connection the Court allowed the application of the Secretary for the restraint order in respect of the property held in the names of D17 and D18 to continue. The Court also made orders about filing of evidence and costs.

19. The Court then proceeded to deal with the applications of the Secretary in respect of the rest of the defendants and delivered its judgment on 29 January 2014.

Grounds of Application to Adjourn Sine Die

20. On 20 January 2014 the Secretary applied to have the case in respect of D4, D17 and D18 adjourned sine die which was opposed by the 3 defendants. A date was fixed for arguments by the parties which is the present hearing.

21. The application to adjourn sine die is based on the affirmations of Mr Wagiman and Mr Muzhar. According to the affirmation of Mr Wagiman the criminal investigations against D4 are continuing and as a result of such investigations the Indonesian National Police (“INP”) has come to the conclusion that D4 had made use of ADI, in which he and D3 were indirect shareholders, as a vehicle for fraud, embezzlement and money laundering. The INP have also investigated the role of D4 in the fraudulent transfer of Bank Century’s assets to ADI and the misappropriation of such assets.

22. Mr Wagiman deposes that D3 and D4 are married to sisters of the same family and had business connections. D4 is wanted by the Indonesian government for the offences of fraud, embezzlement and money laundering and has been on Interpol red notice for arrest since June 2009. A request has been made to Singapore, where D4 has recently been surfaced, for his arrest, and should it be declined proceedings will commence against D4 in absentia. According to the affirmation of Mr

Muzhar, such request has indeed been declined by the Singaporean government for the reason that the extradition treaty signed by the governments of the 2 countries have not yet been ratified

23. Mr Muzhar also deposes that the INP has attempted to interview D4 on 21 and 28 March 2014 by issuing investigation summonses to him but D4 has not responded to the first one. In the event of D4 failing to attend the second one and subject to the final decision of the Indonesian Attorney General's Office ("AGO"), criminal prosecution will be instituted against him. Should he refuse to return to Indonesia to attend trial he would be tried in absentia in accordance with the Indonesian Criminal Procedure ("KUHAP").

24. Both Mr Wagiman and Mr Muzhar say that the Indonesian authorities intend to ask the Central Jakarta District Court to order the confiscation of the assets of D4 including the 2 bank accounts in question and they ask the application of the Secretary to register the external confiscation order against the assets of D4 be adjourned sine die and the Hong Kong restraint order of the 2 bank accounts to remain in force, pending the outcome of the criminal process in Indonesia.

Objections of D4, D17 and D18

25. D4, D17 and D18 contend that D4 has never been convicted of any criminal offence and the proceedings against D1 and D2 in which the Indonesian District Court made the order to confiscate the assets of D4 did not involve D4 at all. They further point out that in the alleged fraudulent investment schemes involving ADI, D1 and D2 were not

implicated as a party. D4, D17 and D18 argue that the confiscation order of the Indonesian District Court against them cannot be registered in Hong Kong.

26. D4, D17 and D18 submit that the intention of the Secretary is clearly not to pursue its summons dated 31 January 2013 for the registration of the confiscation order of the Indonesian District Court but to wait for the making of any further confiscation orders in criminal proceedings yet to be instituted against D4. D4, D17 and D18 contend that there is no good reason for the summons of the Secretary to be adjourned sine die as there is no certainty as to how and when the proposed proceedings against D4 might proceed and there is no certainty as to when they might be determined and, more significantly, it is not known whether D4 might be convicted. D4, D17 and D18 ask for the summons to be set down for arguments and determined forthwith.

27. Despite the assertion of D4, D17 and D18 that the criminal proceedings against D1 and D2 did not involve D4, it is disclosed in the affirmations of DSI Harding and Mr Wagiman that D4 perpetrated fraudulent investment schemes through ADI and made use of Bank Century to market the schemes. Mr Wagiman further deposes that there have been investigations by INP into the role of D4 in such matter and it appears that assets belonging to Bank Century might have been fraudulently transferred to ADI at the direction of D3 and possibly the agreement of D4. As such, the Court is of the view that it is, contrary to the contention of D4, D17 and D18, an arguable issue whether the confiscation order of the Indonesian District Court can be registered in Hong Kong.

28. D4, D17 and D18 argue that there are no continuing proceedings against D4 in Indonesia and the charges the Indonesian Government is currently in the process of bringing against D4 concern matters totally different from those matters alleged against D1 and D2 in the criminal proceedings in which the confiscation order was made by the Indonesian District Court.

29. The restraint order against the property of D4, D17 and D18 was granted by the Hong Kong court pursuant to the affirmation of DSI Harding on the basis of the fraudulent investment schemes perpetrated by D4 through ADI and Bank Century. According to the affirmations of Mr Wagiman and Mr Muzhar, after D4 has recently surfaced in Singapore, steps have been taken by the INP to summon D4 to return to Indonesia for investigation interviews and to have him extradited back to Indonesia from Singapore. Failing both, the INP will ask the AGO to institute criminal proceedings against D4 in absentia and will ask the Indonesian court to confiscate the assets of D4 including those in Hong Kong.

30. It is the view of the Court that what the Indonesian authorities have been doing are continuation of the investigations into the criminal allegations against D4 which formed the basis of the restraint order against the bank accounts of D17 and D18 issued by the Hong Kong court. The Court therefore does not agree that there are no continuing proceedings against D4 in Indonesia. More importantly, it can be argued that any ensuing prosecution instituted against D4 and any confiscation order made are directly related to the Hong Kong restraint order.

31. It can therefore be further argued that such confiscation order can be made subject of an application for registration in Hong Kong as an external confiscation order, whether or not such prosecution and confiscation order have any connection with the proceedings against D1 and D2.

32. The Court does not intend to go into depth of these matters at this stage as they may become issues of contention in the trial, if any, in Hong Kong. It suffices to say that they are some of the factors that have persuaded the Court to grant the application to adjourn sine die.

No Unreasonable Delay

33. Although there is no certainty that proceedings will be instituted against D4 in Indonesia, according to the affirmation of Mr Muzhar the INP intends to recommend prosecuting D4 in absentia in the beginning of April 2014 if he fails to return to Indonesia and should the AGO agree with the recommendation, proceedings can be commenced in about 6 months. It follows that if everything goes as deposed it will become known whether D4 will be prosecuted in absentia in no more than 6 months from now. This is obviously not an unreasonably long delay.

No Unfairness or Prejudice

34. The Court of course also has to consider whether adjourning the hearing sine die would cause any unfairness or prejudice to D4, D17 and D18. As rightly pointed out by the Secretary, D4 himself admits in his own affirmation that he has known since 2009 that he is wanted by the Indonesian Government and since 2010 that his bank accounts have been

restrained in Hong Kong. Despite so, he has taken no step to resolve the matters with the Indonesian authorities and only as late as a few weeks before the registration hearing in Hong Kong did he take up the matter in the Hong Kong proceedings.

35. The continuing investigations by the Indonesian authorities clearly afford an avenue for D4 to explain and to clear himself of the allegations against him. Even if criminal prosecution is eventually instituted against him, he can still proclaim his innocence in a court of law which is the best forum to decide whether he is guilty of the allegations made against him by the Indonesian authorities.

36. Whether D4 is to be prosecuted and, if prosecuted, the result of the prosecution, will surely have a significant bearing on the course of action the Secretary will take in respect of the 2 bank accounts being restrained. The Court cannot see how waiting for the outcome of the criminal proceedings and the prosecution of D4 in Indonesia, if any, will cause unfairness or prejudice to D4. On the contrary, the Court is of the view that it is in the best interests of D4 that the Secretary be allowed to consider such outcome before deciding how to deal with the case of D4, D17 and D18.

Judgment of the Court in respect of Other Defendants

37. Another reason for the hearing regarding D4, D17 and D18 to be adjourned sine die is that the judgment of the Court in respect of the registration and enforcement of the external confiscation order against the rest of the defendants is being appealed by the parties and the decision of

the higher court may also be one of the determining factors of how the Secretary will proceed with the case against D4, D17 and D18.

Conclusion

38. The application of the Secretary to adjourn sine die its summons to register the confiscation order of the Indonesian District Court in respect of the assets of D4, D17 and D18 as an external confiscation order, pending the outcome of the continuing criminal proceedings in Indonesia against D4 and the making of any further confiscation orders against their property in Hong Kong, is granted. In this connection, the restraint order in respect of the 2 bank accounts in question is to continue until further order by the court. It is also the order of the Court that parties are at liberty to apply to restore the hearing of the summons.

Costs

39. The costs of this hearing be reserved.

(Joseph Yau)
Deputy High Court Judge

Mr Wayne Walsh, Deputy Law Officer and Ms Susanna Sit, DPGC, for the Secretary for Justice

Mr Peter Duncan, SC, instructed by Haldanes, for the 4th, 17th and 18th defendants