In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2019 No: 322

BETWEEN:

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Plaintiff

And

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Defendant

RULING
(REASONS)

Urgent Ex-Parte Application on Notice for Interlocutory Freezing Order – Mareva Injunctions
Section 19(c) of the Supreme Court Act 1905 and RSC O. 29/1
Part IV of the Bermuda International Conciliation and Arbitration Act 1993

Date of Hearing: Tuesday 17 September 2019
Date of Decision: Tuesday 17 September 2019
Date of Reasons: Thursday 10 October 2019

Plaintiff: Mr. Steven White and Mr. Sam Riihiluoma (Appleby (Bermuda) Limited)

RULING of Shade Subair Williams J

Introduction:

1. This matter concerns the Plaintiff's *ex parte* on notice applications for an interim freezing injunction and an ancillary order for disclosure to be made by the Defendant. These applications are made in furtherance of a final arbitral award ("the Final Award") (which reaffirmed a partial final award made on 6 March 2019 ("the Partial Final Award")) issued under the New York Convention on 9 May 2019 (collectively "the Award").

2. Pursuant to sections 40 and 48 of the Bermuda International Conciliation and Arbitration Act 1993 ("the 1993 Act"), leave for the Award to be enforced in Bermuda was granted *ex parte* by the learned Chief Justice, Mr. Narinder Hargun, on 28 August 2019 ("the Enforcement Order"). Prior to the Enforcement Order, Hargun CJ granted the terms prayed on the Plaintiff's *ex parte* summons, dated 13 August 2019, for sealing and redaction orders preserving the general confidentiality of the Court documents underlying the Enforcement Order ("the Confidentiality Order").

3. The Plaintiff's applications before me were made by *ex parte* summons dated 12 September 2019 with notice to the Defendant made on 12 September 2019. The Defendant's legal representative, Mr. Rod Attride-Stirling of ASW Limited (ASW) was not heard but attended the hearing only for the purposes of a watching brief.

4. At the close of the hearing, I granted the orders prayed on the Plaintiff's 12 September 2019 *ex parte* summons and agreed, at the request of Counsel, to provide this written summary of my reasons for so doing.

Summary of Factual Background

5. As the application before me was made *ex parte*, the underlying facts on which I based my decision were considered without regard to any evidence from the Defendant. Any reliance or reference I make to any of the facts stated on the Plaintiff's evidence are made without prejudice to the Defendant who will be given the opportunity to file its own evidence of the facts and to be heard on an *inter parte* basis, if it so chooses.

6. The backdrop to this litigation begins with the formation of three feeder funds and one master fund (collectively "the AB Funds" or "the Funds"). One of the three feeder funds is a Delaware Limited Partnership and the remaining two are Bermuda exempted mutual fund companies. The master fund is a Bermuda exempted limited partnership. The Defendant, had acted as the investment manager to the AB Funds.

7. Ensuing from an overflow of investor redemption requests leading up to the 2008 global financial crisis, the AB Funds' winding down came to pass in October of 2008 when the Defendant declared it would liquidate the assets of the Funds and distribute the proceeds to the investors. There emerged two distinct classes of investors: (i) voluntary redeemers and (ii) compulsory redeemers.

8. Effective 1 August 2011, this Court sanctioned a scheme of arrangement ("the Scheme") under which a Joint Plan of Distribution of the AB Funds was implemented in Bermuda ("the Plan"). One of the compulsory redeemers did not submit to the Scheme and instead filed an action in the Supreme Court of the State of New York for recovery of its redemption request.

9. The Plaintiff was created on 15 July 2011 pursuant to the Scheme and Plan. It is stated at paragraph 20a of the Plaintiff's written submissions that the Plaintiff was created to represent the AB Funds' investors, constituted by 10 members, being 5 representatives of the Prior Redeemers, nominated from and voted on by the Prior Redeemers, and 5 representatives of

the Compulsory Redeemers, nominated from and voted on by the Compulsory Redeemers. The powers, rights, duties and functions of the Plaintiff were restated in the Plaintiff's written submissions.

10. Under the Plan, the Defendant was tasked to continue as the investment manager of the AB Funds. However, concerns and allegations of breach of the Plan and breach of fiduciary obligation by willful misconduct followed. Particulars included a wrongful payment to itself of USD $30,000,000 of deferred fees which were only permitted to be disbursed upon completion of the liquidation and USD $3,700,000 of distribution fees to which it was not entitled. On 5 July 2016, the Plaintiff, by unanimous vote, sent the Defendant a 30 day notice of termination of its services as investment manager and made a Demand for Arbitration.

11. In this case, no independent arbitration agreement appears to have been made between the parties. However, the Plan contained mediation clauses and arbitration clauses which led to S.9.03 as a final procedural phase of resolution of a dispute between the parties. S.9.03 of the Plan provided that:

    "*Any dispute referred to in Sections 2.09 which cannot be resolved through mediation referenced in Sections 2.09…shall be subject to and decided by arbitration administered by the American Arbitration Association (AAA) in accordance with its Commercial Arbitration Rules, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof pursuant to applicable law. Arbitration shall be conducted in New York, New York.*"

12. On 5 July 2016, the Plaintiff also commenced Court proceedings in the Delaware Chancery Court seeking (1) relief for claims which were not the subject of arbitration and (2) a Status Quo Order in aid of the pending arbitration proceedings (which was granted and upheld).

13. A copy of the Status Quo Order was produced as part of the Plaintiff's evidence[1]. At the nuts and bolts of the Order, the Defendant was restrained from disposing of its assets for anything less than "*reasonably equivalent value*" and it was further prohibited from making change to the structure of its assets. Under the Status Quo Order, the Defendant was also barred from authorizing any distributions or dividends from its own entity or that of any other wholly owned subsidiaries.

<u>The Award made under the New York Convention</u>

14. The Demand for Arbitration included the following seven counts (as recited in the Plaintiff's written submissions):

    Count 1: Interim Order of Specific Performance to Enforce the Plaintiff's Contractual Authority to Transfer Control of the Fund;

[1] FV-2 pages 751 to 754

Count 2: Interim Order of Specific Performance to Provide Fund and Fund Asset Financial and Governing Documents;
Count 3: A Preliminary and Permanent Injunction to Return Deferred Fees to the Fund;

Count 4: A Declaration that the Fund has no Obligation to Indemnify the Defendant or Pay the Defendant's Legal Fees in Relation to the Claims Herein;

Count 5: Money Damages for Breach of Contract;

Count 6: Request for Money Damages to Remedy Breaches of the Defendant's Fiduciary Duties; and

Count 7: Disgorgement of Wrongfully Transferred Plan and Scheme Claims.

15. Under an Amended Demand for Arbitration, Count 8 was added:

Count 8: Money Damages for Unjust Enrichment (In The Alternative):

16. The success of the Plaintiff in the arbitration proceedings is recorded in the 9 May 2019 Final Award which incorporated the Partial Final Award made on 6 March 2019. Certified copies of these awards were exhibited to the second affidavit of one of the US attorneys for the Plaintiff, Mr. FV (sworn on 12 August 2019). In explaining the Defendant's liability under the Award, Mr. FV said at paragraph 5 of his second affidavit:

"*A duly certified copy of the Partial Final Award is at FV-2 pages 1 to 64 and a duly certified copy of the Final Award is at FV-2 pages 65-91. Together, they require for substantial damages in the total sum of $US136, 808,283.00 plus interest and to take certain steps, as set out in further detail in paragraph 34 below. The Awards are binding, enforceable and payable, and have not been paid. Whilst the Defendant has made an application to the Court of Chancery of the State of Delaware (the Delaware Chancery Court) to vacate part (and only part) of the Final Award, it has not obtained a stay of the Final Award pending its application*."

17. Mr. White advised that the first payment batch was due to be paid by the Defendant on 26 March 2019 and the next tier was to be paid by 21 May 2019.To date, no payments have been made by or on behalf of the Defendant in satisfaction of the Awards.

The Motion for Partial Vacatur

18. Further explaining the Defendant's unresolved application before the Delaware Chancery Court for part of the Final Award to be vacated, Mr. FV disclosed in his evidence that on 6 June 2019 the Defendant filed a Motion for Partial Vacatur. Therein, the Defendant is said to have alleged that the Arbitration Panel exceeded its powers in breach of the American Arbitration Association Rules ("the AAA Rules") by purporting to award additional relief after the issuance of the Partial Final Award. Copies of the Motion for Partial Vacatur and

the Defendant's Memorandum were produced by Mr. FV. At paragraph 49 of his second affidavit he deposed:

"*Even if the Motion for Partial Vacatur were to succeed, it only takes aim at the relief awarded for the [B Claim] and the award of prejudgment interest for the period after the date of the Partial Final Award (March 6, 2019). The Defendant does not seek to vacate the Partial Final Award or any of the other damages included in the Final Award*."

19. Mr. FV also stated that the Vice Chancellor will likely rule on its request for judgment on the Partial Final Award and the uncontested portions of the Final Award on 8 October 2019. This was also the return date for the hearing of the Defendant's motion and the Plaintiff's motion for summary judgment.

20. Mr. White informed the Court that the undisputed portion of the Award is the 'lion's share' of the judgment now enforceable in this Court. Mr. White opined that judgment on the 8 October Delaware Chancery Court applications would likely be reserved and subject to appeal proceedings which might last up to 1-2 years before final resolution.

The Enforcement Order

21. Under the Enforcement Order, Part F of the Award was entered as a judgment of this Court. The particulars of the enforceable awarded sums are detailed in the Enforcement Order and relate to the following arbitral claims:

    (1) The T Claim (US$32,313,000 as directed in the Partial Final Award, plus pre-judgment simple interest at the New York statutory rate of 9% (US$ 10,274,502 as at 12 August 2019 and accruing at US$7,967 per day);

    (2) The R (US$14,457,275 plus pre-judgment simple interest at the New York statutory rate of 9% (US$ 8,223,620 as at 12 August 2019 and accruing at US$3,566 per day);

    (3) The Q (US$3,106,414 plus pre-judgment simple interest at the New York statutory rate of 9% (US$121,788 as at 12 August 2019 and accruing at US$766 per day);

    (4) The W Claims (US$449,375 plus pre-judgment simple interest at the New York statutory rate of 9% (US$228,617 as at 12 August 2019 and accruing at US$112 per day);

    (5) The K Claim (US$2,735,41 plus pre-judgment simple interest at the New York statutory rate of 9% (US$880, 877 as at 12 August 2019 and accruing at US$674 per day);

    (6) The H Claim, (US$2,041,644 plus pre-judgment simple interest at the New York statutory rate of 9% (US$526,576 as at 12 August 2019 and accruing at US$503 per day);

    (7) The L Claim (US$48,070,407 plus pre-judgment simple interest at the New York statutory rate of 9% (US$23,054,040 as at 12 August 2019 and accruing at US$11,852 per day); and

(8) The B Claim (US$21,768,743 plus pre-judgment simple interest at the New York statutory rate of 9% (US$8,693,726 as at 12 August 2019 and accruing at US$5,369 per day)

22. Additionally, the awarded sum of US$11,351,850.06 was included in the Enforcement Order representing the legal fees, costs, and expenses incurred in the arbitration. Two further sums of US$94,693.88 and US$887,427.89 were awarded and ordered to be enforced as a judgment of this Court for administrative fees and expenses of the International Centre for Dispute Resolution and compensation and expenses of the Tribunal.

23. At paragraph 5 of the Enforcement Order, the Defendant is required to pay interest on outstanding payments (including prejudgment interest) pursuant to section 9 of the Interest and Credit Charges (Regulations) Act 1975.

24. This is a broad summary of the monetary awards which were entered as a judgment under the Enforcement Order. This underlined the present application before me for a freezing injunction and for an order compelling the Defendant to disclose its assets in Bermuda.

The Application for a Mareva Injunction and Ancillary Disclosure Orders

25. By an *ex parte* on notice summons dated 12 September 2019, the Plaintiff sought the following relief:

    1. *An order in the form attached, pursuant to RSC O. 29, r.1.*

    2. *An order for directions as to:*

        a. *The hearing of any return date*
        b. *The filing and service of the Defendant's evidence for any return date*
        c. *The filing and service of the Plaintiff's evidence for any return date*

    3. *An order for leave to serve the Defendant at its registered office and usual place of business in the United States.*

    4. *An order providing for the costs of the application.*

26. In respect of the application for the freezing injunction, the Plaintiff sought for this Court to order a prohibition on the Defendant or its entities from removing or diminishing any of its assets in Bermuda up to the value of $189,314,946 (i.e. if the total unencumbered value of the Defendant's Bermuda assets exceed $189,314,946, the Defendant would be entitled to remove or dispose of assets in excess of that sum).

27. The Plaintiff also offered the following undertakings to the Court:

a. *If the Court later finds that this Order has caused loss to the Defendant, and decides that the Defendant should be compensated for that loss, the Plaintiff will comply with any order the Court may make but so that this undertaking is limited to the property and assets in the AB Funds on whose behalf it acts.*

b. *As soon as practicable the Plaintiff will serve on the Defendant a summons for the Return Date together with a copy of the affidavits and exhibits containing the evidence relied on by the Plaintiff, if not previously provided to the Defendant prior to the ex parte on notice hearing.*

c. *Anyone notified of this Order will be given a copy of it by the Plaintiff's attorneys.*

d. *The Plaintiff will pay the reasonable costs of anyone other than the Defendant which have been incurred as a result of this Order including the costs of ascertaining whether that person holds any of the Defendant's assets and that if the Court later finds that this Order as caused such a person loss, and decides that the person should be compensated for that loss, the Plaintiff will comply with any Order the Court may make but limited in like manner as undertaking 1 above.*

28. Elaborating on the Plaintiff's undertaking as to damages in respect of loss by the Defendant (para a. above), Mr. White informed the Court that the Plaintiff is indemnified under the Scheme and Plan by the AB Funds. He explained that in terms of any legal expenses or requirement to pay any damages, the indemnity could be called upon. Paragraph b. addresses third party loss. By way of example, Mr. White envisaged the legal expense that might be incurred as a result of service of an Order and the expense of the efforts which might be employed by a third party in search of identifying the assets owned by the Defendant.

29. The disclosure order sought was for affidavit evidence recording all of the Defendant's assets in Bermuda, '*whether in its own name or not and whether solely or jointly owned, giving the value, location and details of all such assets*'.

Pending Proceedings in the Grand Court, Cayman and the Chancery Court of Delaware

30. I was informed by Mr. White that an *ex parte* enforcement summons to enter judgment was being heard on the same day in the Cayman Islands so to run parallel with the hearing before me. The Court was told that an application for an Order to freeze the Defendant's assets in the Cayman Islands and ancillary disclosure Orders pertaining to the Defendant's worldwide assets would also be sought.

31. The Court was also made to understand that there were ongoing 'confirmation proceedings' in the Chancery Court of Delaware (intermittently referred to as "the Delaware Chancery Court" or "the Delaware Court") to give effect to the arbitral awards, a requisite step in the State of Delaware for enforcement of the arbitral awards.

32. In its curial jurisdiction, the Delaware Court is also seized of applications for a partial set-aside of the arbitral awards (see preceding paragraphs under Motion for Partial Vacatur).

The Relevant Law on Mareva Injunctions and Ancillary Disclosure Orders

33. Section 19(c) of the Supreme Court Act 1905 vests a statutory power in the Supreme Court to grant interlocutory judgments where it appears to the Court to be just or convenient to do so:

"…an injunction may be granted, or a receiver appointed, by an interlocutory order of the court in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court thinks just…"

34. The Court's power to make an order for an interlocutory injunction is also sourced from Order 29 of the Rules of the Supreme Court 1985 ("RSC"). An application for the grant of an injunction is made under RSC O. 29/1. The Court also has powers to order the securing of a specific fund in dispute under O.29/2(3) and on such terms as it thinks just under subsection (4).

35. RSC O. 29/1:

29/1 Application for injunction

1 (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.

(2) Where the applicant is the plaintiff and the case is one of urgency such application may be made ex parte on affidavit but, except as aforesaid, such application must be made by motion or summons.

(3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit.

36. The Plaintiff's application was made under RSC O. 29/1. Mr. White did not refer to RSC O. 29/2 because Rule 2 applies to orders governing specific property (including a fund) where a proprietary claim is asserted. So, it does not apply to Mareva injunctions. (In *Dawson-Damer v Lyndhurst Limited [2019] Bda LR 10 p.6* the learned Chief Justice Mr. Narinder Hargun cited the English Court of Appeal decision in *Polly Peck International plc v Nadir and Ors. (No.2) [1992] 4 ALL ER 769* as an illustration of the important distinction between a preservation order and a Mareva injunction:

"*There is, however, an important difference. Equitable tracing leads to a claim of a proprietary character. A fund is identified that, in equity, is regarded as a fund belonging to the claimant. The constructive trust claim, in this action at least, is not a claim to any fund in specie. It is a claim to monetary compensation. The only relevant interlocutory protection*

that can be sought in aid of a money claim is a Mareva injunction, restraining the defendant from dissipating or secreting away his assets in order to make himself judgment proof. But if the identifiable assets are being claimed, the interlocutory relief sought will not be a Mareva injunction but relief for the purpose of preserving intact the asset in question until their true ownership can be determined. Quite different considerations arise from those which apply to Mareva injunctions (per Scott LJ at 776).")

37. In this case, since the Court is concerned with a Mareva injunction, the Plaintiff must prove a real risk of dissipation of assets. The relevance of evidence establishing a real risk of dissipation of assets is supportive of the Court's requirement to find that a refusal of the injunction would involve a real risk that a judgment or award in the Plaintiff's favour would remain unpaid.

38. The test for the granting of an interlocutory injunction, as stated by Lord Diplock in *American Cyanamid v Ethicon Ltd [1975] A.C. 396*, is three-fold: (i) whether there is a serious issue to be tried; (2) whether the balance of convenience is in favour of granting injunctive relief and (3) whether it is just and convenient in all circumstances to grant the order.

39. Going as far back as to the mid-nineteenth century, the practice as explained by Lord Diplock in *American Cyanamid* is to make a Plaintiff who has been awarded an interlocutory judgment subject to an undertaking in damages. In *Tucker v New Brunswick Trading Company of London (1890) 44 Ch. D. 249 at 253*, Lindley L.J. described an undertaking as 'the price of an injunction'.

40. Whilst the practice of requiring undertakings in damages applies to Mareva injunctions, the requirements of a Mareva injunction are greater than that of general interlocutory injunctions. For example, in an application for an interlocutory injunction, the applicant need only show that there is a serious issue to be tried. However, for the granting of a Mareva injunction, it must be shown that the applicant has "a good arguable case". (See paragraphs 29/L/17 and 29/L/43 of the 1999 White Book).

41. The granting of a Mareva injunction is an exercise of judicial discretion. The requirements for the exercise of that discretion in favour of making an order are as follows:

    (i) The plaintiff has a good arguable case on a substantive claim over which the Court has jurisdiction;

    (ii) The Defendant has assets within the jurisdiction;

    (iii) There is a real risk of dissipation or secretion of assets which would render the plaintiff's relief nugatory.

    (See paragraph 29/L/42 of the 1999 White Book)

42. Of course, a judge would not be well enough placed to make positive findings on these factors at the early *ex parte* stage of proceedings. For that reason the Court is only able to consider whether the above factors are apparent.

43. Mr. White submitted that 'a good arguable case' means a case which is "more than barely capable of serious argument and yet not necessarily one which the judge believes to have better than 50 per cent chance of success" (relying on Mustill J in *The Niedersachsen [1983] 2 Lloyd's Rep 600 at 605* which was approved by the Bermuda Court of Appeal in *Locabail International Finance Ltd v Manios and Transways (Chartering SA [1980] Bda LR 26*)

44. As is the case for any application made on an *ex parte* basis, the Plaintiff has a duty to provide the Court with full and frank disclosure so to enable the judge to properly exercise his/her discretion. This calls for the Plaintiff to proceed with the highest good faith and confers a duty on the Plaintiff to make proper inquiries before making the application. Additionally, the Plaintiff is expected to fairly state the points which would foreseeably be made against him by the Defendant. (See paragraph 29/1A/24 of the 1999 White Book).

45. As for the Court's jurisdiction to grant an injunction in aid of enforcing a foreign judgment, it is well-established law that the underlying substantive proceedings or relevant judgment awarded must first be enforceable in Bermuda. In this case, the Enforcement Order (unless set aside) settles that issue for the time being. Mr. White relied on *Mubarak v Mubarak and Twenty First Century Holdings Ltd [2002] Bda LR 63*; *Walker International v Republic of Congo [2003] CILR 457*; *Gidrxslme Shipping Co v. Tantomar-Transportes Maritimos LDA [1955] 1 WLR 299* and *Mobile Telesystems v Nomihold Securities Inc [2011] EWCA Civ 1040*. (Also see *Dawson-Damer v Lyndhurst Limited [2019] Bda LR 10; Black Swan Investments I.S.A.v Harvest View & Others BVIHCV 2009/339 23 March 2010*; cited with approval by Justice of Appeal Kawaley speaking for the majority in the Eastern Caribbean Court of Appeal in *Yukos CIS Investments Limited and Anor. v Yukos Hydrocarbons Investments Limited and Ors., HCVAP 2010/028)*

46. As for the Court's powers to make an ancillary asset disclosure order, this is also an exercise of discretion and each case will ultimately turn on its own merits. Of course, the purpose of ordering the Defendant to disclose its assets is to give effect to the Court's order imposing a freezing injunction. (See paragraph 29/L/48 of the 1999 White Book)

Reasons for Decision:

47. An application for the enforcement of a Convention Award under Part IV of the 1993 Act is procedurally governed by RSC O. 73/10. Without prejudice to the Court's power to direct the issuance of an Originating Summons, an application for leave under section 48 of the 1993 Act may be made on an *ex parte* basis. In this case, the application for the Enforcement Order was made *ex parte* before Hargun CJ.

48. A 14 day period within which a debtor may apply to set aside an enforcement order is prescribed under O. 73/10(6). However, Hargun CJ, exercising the Court's discretion under

subsection (6) to direct any other such period, ordered a 28 day period under term 8 of the Enforcement Order for the Defendant to file any application for a set aside or stay ("the 28 day period").

49. When this application for the freezing injunction and the ancillary disclosure order was heard before me, the Enforcement Order had not yet been served as service had been deferred until after this application had been heard. Thus the 28 day period to set aside the Enforcement Order has not yet expired (and would not have yet expired in any event, even if the Enforcement Order had been served without deferment).

50. Section 42(1) of the 1993 Act provides a general starting position that enforcement of a Convention award 'shall not be refused' unless any of the specified matters under subsections (2)-(3) are proved by the person against whom the enforcement order is invoked. Mr. White described these exceptions as being limited in scope. Section 42 provides as follows that:

Refusal of enforcement

42 (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.

(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves—

(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or

(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(d) subject to subsection (4), that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or

(e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or

(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

(4) A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(f), the Court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security.

51. Hargun CJ would have necessarily had regard to section 42 before granting the *ex parte* Enforcement Order and the Plaintiff had a duty to provide the Court with full and frank disclosure in addressing the Court on Part IV of the 1993 Act. It was equally clear to me that the Court, in granting the Enforcement Order, deferred the service of the Order to the date of this hearing so not to tip the Defendant off and disable the Plaintiff from having an opportunity to seek an *ex parte* freezing injunction (on short notice) to freeze the Defendant's assets in satisfaction of the judgment it had entered on 13 August 2019.

52. It was, thus, at the forefront of my mind that an *ex parte* freezing order would operationally support the *ex parte* Enforcement Order, both of which are liable to be subsequently set aside by the Court after an *inter partes* hearing. The Plaintiff, having already proved the judgment debt itself, was well placed on its path for injunctive relief, as the Orders sought from this Court would ultimately serve to support its efforts to execute the judgment entered. However, a Mareva Injunction imposes a grave constraint on a Defendant and ought never to be imposed for the sake of procedural convenience or as an automatic next-step. This is particularly so since the Order would, in the first instance, be granted without any say-so from the Defendant.

53. In addressing my mind as to whether there was any appearance of a good arguable case, I had regard to paragraph 15 of the third affidavit of Mr. Van Horn where he deposed that the only disputed portions of the Plaintiff's entitlement to damages in the Defendant's motion in Delaware Chancery Court proceedings are in relation to the Barclays Claim and prejudgment interest accruing after 6 March 2019. Of course, the Enforcement Order could be set aside and with it would go any order for the freezing of the Defendant's Bermuda assets. However, at this early stage of the Bermuda proceedings, I must simply satisfy myself whether the Plaintiff's claim is more than barely capable of serious argument.

54. In assessing whether there is a claim more than barely capable of serious argument, I examined the arguments pleaded in the '*Plaintiff's Opposition to Defendant's Motion for Partial Vacatur and Reply in Support of Motion for Summary Judgment Confirming Arbitration Awards and on All Claims*' filed in the Chancery Court of Delaware. In answering to the Defendant's complaint that the Arbitration Panel violated the AAA Rules by modifying its Partial Final Award when it added a paragraph setting out damages for the B Claim, the Plaintiff explained that the insert arose out of a simple clerical error, which is procedurally contemplated under AAA Rule 50. The Plaintiff also outlined its arguments defending the Panel's ability and decision to defer the final pre-judgment interest calculation to be determined under the Final Award, without it being classified as an award modification. More so, the Plaintiff emphasized, that the Panel found in favour of the Defendant in refusing to award compounded interest.

55. I also considered the Plaintiff's rebuttal arguments to the Defendant's complaint that it was not afforded adequate notice of the Plaintiff's pursuit to extinguish the Defendant's interests in B LP. The Plaintiff says that its position on the B claim was clear on the arbitration demand, as well as in the expert reports and throughout the hearing. All of these points impressed me as more than capable of serious argument. Indeed, the Plaintiff is also entitled to point towards the Enforcement Order in support of its submission that there is a good arguable case on a substantive claim over which the Court has jurisdiction.

56. I was also satisfied on the evidence of Mr. FV (third affidavit paragraphs 18-25) that the Defendant appears to have assets in Bermuda. Mr. FV deposed that the Plaintiff was served with documents showing that the Defendant '*had or has interests in entities (and therefore potential assets) in approximately 10 different countries*' including in Bermuda. This was coupled with Mr. FV's exhibit of the Defendant's affidavit evidence in the Delaware proceedings stating that the Defendant, together with its affiliates, manages up to $US14-15 billion in investor capital.

57. I further found on the Plaintiff's evidence that there was an appearance of real risk that the Defendant would dissipate its assets and that a refusal of the injunction would involve a real risk that a judgment under the Enforcement Order would remain unpaid. I had regard to Mr. FV's evidence of three previous occasions where the Defendant appeared to have engaged in efforts to defeat the interests of a creditor.

58. Persuasively, Mr. White contended that a freezing order would run parallel to the Status Quo Order, the polestar of which stood to prevent a structural change or improper disposal of the Defendant's assets. Mr. White also supposed the success of the *ex parte* freezing injunction application in Cayman and submitted that any such order from the Grand Court would also be supportive of the Status Quo Order and bottom line efforts to preserve assets which would be applied to payment of the Award, now judgment.

59. Mr. White also addressed the Court on the limitations of the Status Quo Order as a preemptive strike to a later argument from the Defendant that the Status Quo Order obviated the need for the Defendant's assets to be frozen by further Order of the Bermuda Court. He explained that the Status Quo Order would not necessarily bind third parties in Bermuda nor persons instructed by the Defendant to transfer or dispose of its assets, whereas the draft Penal Order contained in the draft Order for this Court's approval provides for contempt proceedings against those who help or permit a breach of the Order.

60. Mr. White placed a draft order before me containing the terms sought under a Mareva injunction and the supporting disclosure order. He submitted that the Order is broadly reflective of the *status quo* and that its purpose is to prevent the movement of the Defendant's assets out of the jurisdiction and the distribution of cash to affiliated entities. The result is that the Defendant would be restrained from disposing of its assets outside of the ordinary course of its business operations. I accepted these submissions and granted the freezing injunction accordingly.

61. In exercising my discretion I also granted the ancillary disclosure order so to give effect to the Mareva injunction. The scope of the disclosure order was confined to assets secured locally in Bermuda.

Conclusion:

62. Having read the affidavit evidence filed by the Plaintiff and having considered the written and oral submissions before me, I granted the *ex parte* order as prayed for the Mareva injunction and the ancillary disclosure orders.

63. The particulars of the Court's orders are recorded in my Order made on 17 September 2019.

Thursday 10 October 2019

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HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT