In The Supreme Court of Bermuda

(COMMERCIAL COURT)

CIVIL JURISDICTION

2012: No. 110

BETWEEN:

E.R.G. RESOURCES LLC

Plaintiff

-v-

NABORS GLOBAL HOLDINGS II LIMITED

Defendant

RULING ON INTER PARTES APPLICATION TO SET ASIDE EX PARTE INJUNCTION

(In Chambers)

Date of Hearing: March, 29-30, April 2, 2012

Date of Ruling: April 5, 2012

Mr. Victor Lyon QC, Mr. Jan Woloniecki and Mr. Shannon Dyer,
Attride-Stirling & Woloniecki, for the Plaintiff

Mr. Narinder Hargun, Conyers Dill & Pearman, for the Defendant

Introductory

1. On March 23, 2012, the Plaintiff ("ERG") issued a Generally Indorsed Writ of Summons seeking an order of specific performance of the Share Purchase Agreement between ERG and the Defendant ("Nabors") and dated March 9, 2012 ("the SPA") in relation to the purchase of 100% of the Class A shares in Ramshorn International Limited ("the Shares").

2. On the same date ERG applied ex parte for an injunction restraining Nabors from disposing of the Shares until further order, which I granted that same day following a hearing which lasted just under one hour. Nabors applied by Summons dated March 28, 2012 for Orders that:

> "*1. The Injunction dated 23 March, 2012 be set aside; and*
>
> *2.The proceedings herein be stayed and/or dismissed…*"

3. Mr. Hargun (for Nabors) submitted the Injunction should be discharged and the action dismissed for the following reasons:

    (a) the proceedings were brought in breach of an exclusive jurisdiction clause ("ECJ");

    (b) when there were two sets of proceedings in different *fora*, the practice was that an election had to be made as to which to pursue and one set of proceedings would be dismissed;

    (c) there was serious material non-disclosure;

    (d) on the merits it was a wholly inappropriate case for an interim injunction.

ERG's evidence in support of the Injunction

4. The ex parte application was supported by the First Dunne Affidavit, sworn by ERG's Chief Operating Officer. He deposed, *inter alia*, as follows:

    (a) the SPA initially provided for a March 15, 2012 9.00am Houston time closing but this was extended verbally on March 15, 2012 and formally by agreement signed on March 16, 2012 until 9.00am on March 19, 2012;
    (b) over the weekend certain title and other problems arose;

(c) on March 19, 2012, the parties continued working towards a closing that day, past the agreed closing deadline (as in the case of the first deadline);

(d) at 2.28pm, ERG's counsel emailed Nabors' counsel that ERG was ready and willing to close on the terms of the SPA and the side-letter proposed by Nabors earlier that day;

(e) Nabors responded by indicating it would not close unless ERG abandoned its post-closing monetary claims. Nabors' CEO and General Counsel called Dunne and sought to pressure him into terminating the agreement in return for the $3 million escrow monies;

(f) after this conversation, at 5.16 pm on March 19, ERG received from Nabors 'confirmation' of its termination of the agreement;

(g) the purported termination was invalid and motivated by Nabors to sell the Shares to a higher bidder;

(h) Nabors had wrongfully withdrawn the escrow monies without notice to ERG;

(i) under Texas law and the SPA, Dunne was advised that strict adherence to the closing timetable was not required in the absence of an agreement that time was of the essence and written waivers were permissive not mandatory;

(j) under Bermuda law, Dunne was advised, it was not vexatious to commence parallel proceedings in Bermuda as Nabors was contesting the jurisdiction of the Texas court;

(k) there was a serious issue to be tried as to whether as to whether Nabors had validly terminated the SPA and whether ERG was entitled to specific performance of the SPA as the Shares constituted a unique chattel for which there was no open market so that damages would not be an adequate remedy;

(l) if ERG were to fail at trial in Texas or Bermuda and Nabors were to lose the opportunity to sell the Shares at a better price to another buyer, damages would be an adequate remedy for Nabors;

(m) the balance of convenience favoured granting an injunction restraining the sale of the Shares and this would maintain the status quo;

(n) ERG was willing to undertake to pay any damages which might be occasioned through the grant of injunctive relief.

5. As regards the Texas proceedings, Dunne further deposed as follows:

(a) the SPA contained a Texas governing law clause and a Harris County Texas venue clause (Article 10.3);

(b) on March 20, 2012 ERG filed a petition for a temporary restraining order ("TRO"), a temporary injunction and specific performance of the SPA in the Harris County Texas District Court ("the Texas Court");

(c) Nabors openly admitted during the TRO hearing in the Texas Court that it wished to sell the Shares (which had a base price of $45 million under the SPA) to a third party for $75 million;

(d) the Texas Court refused to grant a TRO and set an *inter partes* hearing date for ERG to seek a temporary injunction from another judge until trial for April 13, 2012;

(e) Dunne was advised by Texan and Bermudian counsel that there were "*significant differences between Texas procedural law relating to the granting of interlocutory injunctions and Bermuda law. In particular, under Texas law the granting of a TRO is an extraordinary remedy which is rarely granted*" (paragraph 8);

(f) No factual findings on the merits of ERG's case were made by the district judge and Nabors' counsel offered no undertakings not to sell the Shares to a third party.

Nabors' evidence in support of application to discharge Injunction

6. The application to discharge the Injunction was supported by the First Peterson Affidavit, sworn by the Associate General Counsel of Nabors Corporate Services Inc., the lead negotiator for Nabors in the transaction with ERG concerning the Shares. With respect to the disputed termination of the SPA, Peterson most significantly deposed as follows:

(a) ERG were never told the deadline would be extended past 9.00am on March 19, 2012;

(b) at 2.28pm ERG announced it was ready to close "*after having been orally informed by me that Nabors would not extend the closing and was terminating the Agreement*" (paragraph 40);

(c) at 3.00pm, when it became clear that funds would not be wired that day, he "*sent a written termination to ERG*" (paragraph 40).

7. As regards the TRO application before the Texas Court, the transcript of the hearing was exhibited to First Peterson which made the following averments about that hearing:

(a) the Texas Court heard argument from both sides before refusing ERG's application;

(b) the judge commented that it appeared that the exclusive remedies clause in the SPA excluded a claim for specific performance and that damages was the only remedy available to ERG.

8. First Peterson (supplemented by Second Peterson) further explained the test for obtaining pre-trial injunctive relief under Texan law and the current status of Nabors' participation in the proceedings before the Texas Court:

(a) the SPA contained an ECJ in favour of the Texas Court;

(b) Nabors on March 23 withdrew its special appearance and voluntarily submitted to the jurisdiction of the Texas Court;

(c) An applicant for a temporary injunction under Texas law must prove:

(i) a cause of action against the defendant;
(ii) a probable right to the relief sought;
(iii) a probable, imminent, and irreparable injury in the interim;

(d) after withdrawing its special appearance on March 23, 2012, Nabors filed an Original Answer and Counterclaim seeking a declaration that

the Texas Court was the exclusive forum for the adjudication of disputes relating to the SPA;

(e) at a March 23, 2012 hearing before Judge Kirkland of the Texas Court, the judge refused to enjoin ERG from taking steps to enforce the Injunction as Nabors initially requested. Accordingly, Nabors indicated that it would apply to this Court to discharge the Injunction.

ERG's reply evidence

9. ERG explained in Second Dunne that it failed to disclose the transcript of the March 20, 2012 hearing before the Texas Court because it was not available at the time of the ex parte Bermuda Injunction hearing.

10. ERG argued through First Gibbs that under Texas law the SPA did not contain an ECJ clause as Nabors contended, but merely an exclusive venue clause applicable to any litigation either party might choose to commence in that state.

The issues in controversy

11. The central controversy appears to me to turn on whether or not Nabors (a Bermudian company) should be restrained by this Court from selling the Shares (in a Bermuda company) to a party other than ERG pending trial of the substantive dispute before the Texas Court in circumstances where :

(a) the Texas Court appears unlikely to grant similar injunctive relief, in part because the availability of such relief is subject to a more restrictive legal test in Texas than under Bermuda law;

(b) it is possible but not obviously clear that the SPA contains a Texas ECJ but it is now common ground that the substantive dispute ought to be tried in Texas in any event and that ERG wishes the Injunction to be continued and the present proceedings stayed pending the conclusion of the trial before the Texas Court;

(c) ERG has given an undertaking in damages in return for being granted the Injunction and its ability to compensate Nabors for any loss has not been challenged;

(d) the Texas Court is best positioned to express a view (at least) or to rule (at best) on whether ERG's claim for specific performance is or is not seriously

arguable under Texas law (the merits test applicable under Bermuda law for obtaining the Injunction) and has scheduled a hearing for a temporary injunction for April 13, 2012;

(e) although this Court can only confidently determine at this stage that each party's respective contentions on the merits appear arguable, the initial observations made by the TRO judge in the Texas Court indicate that the Plaintiff's case on the merits of its specific performance claim under Texas law are not obviously strong;

(f) it is unlikely that Nabors will be able to validly sell the Shares to a third party pending the April 13, 2012 temporary injunction hearing in any event if ERG has a seriously arguable claim for specific performance if the SPA under Texas law;

(g) the failure of ERG to disclose the fact that in refusing the TRO the Texas Court expressed the strong preliminary view that the only remedy available to ERG under the SPA lay in damages constituted material non-disclosure.

12. Whether the Injunction ought to be discharged or continued depends crucially not on the view that this Court takes of the merits of a case which will be determined under Texan law by the Texas Court. Rather the present application turns on the legal principles applicable at common law to the circumstances in which interim injunctive relief should be given to a plaintiff in support of a claim being primarily pursued in a foreign court.

13. The ground shifted quite dramatically between the *ex parte* and the *inter partes* hearings. When the Injunction was initially granted, it appeared that ERG might be compelled to pursue its claim for specific performance of the SPA in Bermuda because of Nabors' challenge to the jurisdiction of the Texas Court. By the time of the hearing of the application to set aside, it was clear that the Injunction was now only sought in aid of a substantive claim being pursued in a foreign court.

Findings: applicable legal principles

14. Mr. Victor Lyon QC on behalf of ERG rightly submitted that the test for the grant of interim injunctive relief under British-based common law has been less onerous since *American Cyanamid-v-Ethicon* [1975] A.C. 396 than the test for equivalent relief under Texas law. This point was essentially common ground. The real controversy centred on whether, because this Court exercised personal jurisdiction over Nabors as a Bermuda

company, ERG could avail itself of the more liberal Bermudian jurisdiction in circumstances where :

(a) the Texas Court had refused urgent TRO relief;

(b) the Texas Court seemed unlikely to grant interlocutory relief; and

(c) the Texas Court had given no indication that it supported ERG obtaining interlocutory relief from this Court in aid of the substantive claim being pursued in Texas.

15. The existence of parallel proceedings simply provides the context against which the traditional considerations as to whether or not to grant interim injunctive relief must be taken into account. Is there a serious issue to be tried on the merits? If so, does the balance of convenience lie in favour of or against the granting of interim injunctive relief? Where interim injunctive relief is sought in one jurisdiction in support of a substantive cause of action which either arises under foreign law or is being pursued in a foreign court[1], in my judgment the applicant is implicitly requesting the local court to assist the foreign court by making an order the foreign court is unable to make because the property affected is subject to the territorial jurisdiction of the local court. Whether or not the foreign court itself would be minded to grant interlocutory relief if it could thus becomes an important factor to take into account in determining where the balance of convenience lies and in deciding how the discretion to grant injunctive relief should be exercised.

16. ERG's counsel invited the Court to approach the application to discharge the Injunction from the standpoint of this Court exercising coordinate jurisdiction with rather than ancillary jurisdiction to the jurisdiction exercised by the Texas Court. This approach may well have been justified when it appeared that Nabors was challenging the jurisdiction of the Texas Court despite the SPA's exclusive venue clause so that it seemed possible that the substantive action might be tried here. However, for the reasons submitted by Mr. Hargun, such an approach to the application cannot be justified now that it is clear that the role played by the Bermuda proceedings is manifestly subservient to the dominant role being played by the Texas Court.

[1] Irrespective of whether or not the local court was also competent to adjudicate the claim.

17. The most compelling authority supportive of such a conclusion is a case upon which ERG itself relied, the Judicial Committee of the Privy Council decision in *Walsh-v-Deloitte & Touche* [2000] UKPC 37 where Lord Hoffman opined as follows:

> "*21.Secondly, Lord Grabiner said that although the writ issued in The Bahamas made substantive claims, the Trustee had made it clear that after obtaining Mareva relief it intended to stay the action and proceed with the action in Ontario. There is no doubt that the court has jurisdiction to make an order in such circumstances: see* Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd *[1993] AC 334. But Lord Grabiner said that, as a matter of discretion, the Bahamian court should not have made a world-wide order solely in aid of proceedings in Canada.*
>
> *22. Their Lordships do not consider that any objection in principle can be made to the exercise of the jurisdiction in this way. It is commonplace that the most convenient forum may not be the place where it is desirable to obtain Mareva relief, either because the defendant resides there and is amenable to the enforcement jurisdiction of the local court, or because the assets are there and notice can be served upon persons (such as banks) who have them under control. As long ago as 1983, in the early days of the English Mareva jurisdiction, Vinelott J. granted an order in aid of proceedings in Ireland: see* House of Spring Gardens Ltd v Waite *[1984] FSR 277 and more recently in* Crédit Suisse Fides Trust SA v Cuoghi *[1998] QB 818 the Court of Appeal made a similar order in aid of proceedings in Switzerland. Their Lordships consider that such international judicial co-operation should be encouraged*..." [emphasis added]

18. The quoted passage demonstrates that when interim injunctive relief is sought from a court in a jurisdiction which has personal jurisdiction over a defendant in circumstances where the substantive action will be tried elsewhere, the interim relief is treated as being granted by way of judicial assistance to the foreign court. The foreign court is considered to be the court exercising primary jurisdiction not in any technical sense; this language looks at the practical reality of where the substantive dispute is being tried. The *Walsh* case was a case where common law principles were engaged; so authorities dealing with statutory or treaty judicial cooperation in the interlocutory injunctive relief field cannot be dismissed out of hand. Indeed, the Judicial Committee of the Privy Council positively held that cases such as *Credit Suisse Trust-v- Cuoghi* [1998] QB 818, which dealt with section 25 of the Civil Judgments and Jurisdiction Act 1982 (UK), were illustrative of the corresponding common law principles. Two passages upon which Mr. Hargun particularly relied taken from such statutory contexts I found to be highly persuasive.

19. Millett LJ (as he then was) observed in *Credit Suisse Trust-v- Cuoghi* [1998] QB 818 at 829 D:

> "*Where an application is made for in personam relief in ancillary proceedings, two considerations which are highly material are the place where the person sought to be enjoined is domiciled and the likely reaction of the court which is seised of the substantive dispute. Where a similar order has been applied for and has been refused by that court, it would generally be wrong for us to interfere. But where the other court lacks jurisdiction to make an effective order….it does not at all follow that it would find our order objectionable.*"

20. Secondly, the following *dicta* of Millett LJ in *Refco Inc.-v- Eastern Trading Co.* [1999] 1 Lloyds Rep 159 were cited with approval by Potter LJ (giving the judgment of the English Court of Appeal) in *Motorola Credit Corporation-v-Uzan et al* [2003] EWCA Civ 752:

> "79. *Millett LJ, however, stated that he would have upheld the judge's decision that it was inexpedient to exercise the jurisdiction conferred by s.25. He stated that in Cuoghi*
>
> > *'The English Court was not asked to exercise a long-arm jurisdiction but to grant relief against a defendant resident in England. Moreover, it was asked to grant relief which the court seized of the main proceedings had no jurisdiction to grant against non-residents but would have granted if the defendant had been resident within its jurisdiction. In the present case this court is asked to grant relief which the court seized of the substantive proceedings would have refused to grant even if the defendants were resident within its jurisdiction and had assets located there. To my mind this latter feature is a very significant factor …*
> >
> > *On any application under s.25 this court must recognise that its role is subordinate to and must be supportive of that of the primary Court. For my part, I cannot see any significance in the distinction between a case where application has been made to the primary Court and has been refused and a case where this Court is satisfied that application to the primary Court would be pointless because it would inevitably be refused. That was not in my opinion the distinction intended to be drawn in Cuoghi. It is the ground on which the application, whether actual*

or contemplated, would be refused which is relevant.

The jurisdiction of national courts is primarily territorial, being ordinarily dependent on the presence of persons or assets within their jurisdiction. Commercial necessity resulting from the increasing globalisation of trade has encouraged the adoption of measures to enable national Courts to provide assistance to one another, thereby overcoming difficulties occasioned by the territorial limits of their respective jurisdictions. But judicial comity requires restraint, based on mutual respect not only for the integrity of one another's process, but also for one another's procedural and substantive laws. The test is an objective one. It does not depend upon the personal attitude of the Judge of the foreign Court or on whether the individual Judge would find our assistance objectionable. Comity involves respect for the foreign courts' jurisdiction and process, not respect for the foreign Judges' feelings. A court which is invited to exercise its ancillary jurisdiction to provide assistance to the court seized of the substantive proceedings need feel no reluctance in supplying a want of territorial jurisdiction but for which the other court would have acted. But it should be very slow to grant relief which the primary Court would not have granted even against persons present within its own jurisdiction and having assets there. Assisting a foreign Court by supplying a want of territorial jurisdiction is plainly within the policy of the Act; assisting plaintiffs by offering them a lower standard of proof is not obviously within the legislative policy. I recognise, however, that the dividing line may sometimes be hard to draw, and that the distinction is not by any means necessarily decisive. I do not wish to be understood to be circumscribing a valuable jurisdiction, but rather to be indicating matters relevant to be taken into account when the court is invited to exercise it."

21. I find that the same broad considerations which arise under section 25 of the UK 1982 Act in deciding whether to assist a foreign court by granting interim injunctive relief apply as a matter of Bermudian common law in analogous situations. Where the jurisdictional competence to grant interim relief exists (both because this Court has personal/territorial jurisdiction over the defendant and a *prima facie* case for the grant of such relief under local law can be made out), there remains a 'residual' discretion to decide whether the relief would properly serve to assist the foreign court. It matters not that in these English cases expediency was being discussed in the specific context of cases where the statute created jurisdiction exercisable in some cases where no jurisdiction was considered to exist at common law.

22. In a purely local common law case, it would suffice to establish jurisdictional competence over the defendant, a serious issue to be tried on the merits and a balance of convenience operating in favour of the grant of the relief, with convenience narrowly defined by reference to the impact of the order on the parties themselves. In a cross-border case where in practical terms interim relief is being sought to preserve rights the plaintiff hopes to acquire under a foreign judgment, an additional discretionary factor comes into play. Although it might often be described as a residual discretion, to my mind it would more accurate to view this factor as forming part of the fundamental legal consideration of whether it is "*just and convenient*" to grant interim injunctive relief under section 19(c) of the Supreme Court Act 1905. The central question which must be asked is whether it is consistent with modern notions of judicial cooperation and respect for foreign courts to grant the interim relief sought in support of a claim being pursued before a foreign court. This will usually likely require an assessment of :

    (a) whether an application has been made to the foreign court so its position on interim relief can be ascertained;

    (b) if an application has been refused by the foreign court whether it was refused on merits grounds or merely because it lacked the jurisdiction to grant such relief; and

    (c) in general terms whether the grant of interim relief by the 'ancillary' court would be justified with a view to assisting the foreign court in its adjudication of the substantive dispute.

23. In my judgment the relevance of the distinction between the UK section 25 cases and the common law position is further diminished because the current common law position now is that interim injunctive relief can be granted generally in support of foreign causes of action wherever this Court has personal or territorial jurisdiction over the relevant

defendant. This was recently affirmed by the unanimous decision of the Eastern Caribbean Court of Appeal in *Yukos CIS Investments Ltd. et al-v- Yukos Hydrocarbons Investments Ltd. et al,* HCVAP 2010/028, Judgment dated September 11, 2011, concurring with the earlier first instance decision of Bannister J (Acting) in *Black Swan Investments I.S.A. v Harvest View Limited and Another*, BVIHCV 2009/399, Judgment dated March 23, 2010[2].

24. The *Yukos* case concerned an application for interim injunctive relief pursuant to a statutory provision similar to our own Supreme Court Act section 19(c). The application made in the British Virgin Islands ("BVI") against BVI companies in support of a substantive claim being pursued in the Netherlands in litigation to which these companies were not party in circumstances in which no application for similar interim relief had been made to the primary litigation court. Bannister J's first instance decision to refuse injunctive relief was upheld on appeal. The exercise of the discretion in the context of parallel proceedings was governed by common law rather than express statutory provisions for judicial cooperation. Despite the differences of detail in the factual context, the following observations made in the majority's judgment[3] are illustrative in general terms of the principles applicable in cases such as the present:

> "*[138] For the reasons cogently articulated by Bannister J. himself in the **Black Swan** case, by Lord Grabiner for the appellants in the present appeal and by Redhead J.A. [Ag.] in his judgment delivered in the present appeal, the BVI court clearly has personal or territorial jurisdiction in the strict sense to grant a freezing injunction or appoint a receiver in respect of the local assets of BVI resident companies in aid of foreign proceedings. Assuming a risk of dissipation can be established, the factors which will make it just or convenient to exercise the jurisdiction to grant such relief will depend upon the specific facts of each case. The judicial discretion to exercise this statutory power is not completely unfettered; the scope of the jurisdictional competence to exercise the statutory discretion is delineated by common law rules governing the circumstances in which such interim relief may be granted.*
>
> *[139] Establishing justice and convenience will ordinarily require, at a minimum, proof of a good arguable case that the applicant will obtain a judgment which will be enforceable (whether by registration, recognition or otherwise) by the local court against the local defendant. Although ordinarily an interlocutory injunction*

[2] Although the appellate case was not relied upon by either counsel, I did refer to it in the course of argument. It is mentioned here essentially for illustrative purposes only and is in no sense a pivotal basis of the current judgment.

[3] Kawaley JA (Acting), Gordon JA (Acting) concurring.

is sought in support of a substantive claim before the court to which the relevant application is made, in the present context this requirement had to be met by reference to (a) the substantive claim before the foreign court, and (b) the prospect that the applicant will obtain a foreign judgment which will entitle him to execute a money judgment against, or control pursuant to a proprietary judgment, the local assets sought to be frozen. In the present case the reasons why the jurisdictional (in the broader sense) requirements were not met for exercising the discretion to grant injunctive relief may be summarised as follows. The jurisdiction to grant an interim freezing order is not ordinarily exercised unless it is necessary to do so in aid of either relief the claimant is likely to obtain from the local court or from a competent foreign court. The relief the appellants are likely to obtain from the Netherlands court will neither entitle them to enforce a money judgment against the respondents' assets nor establish a proprietary claim in respect of any of such assets. The relief sought will entitle them to control Stichting FPH and only indirectly the shares of the BVI respondents; this is presumably why a pre-trial attachment was granted by the Dutch court on 7th July 2010, in respect of the FPH shares.

[140] In some cross-border cases it may well be irrelevant that equivalent interim injunctive relief has not also been sought in the primary litigation court; for instance a local judgment may be in prospect in respect of a claim which cannot be asserted in the foreign proceedings. In the present case, having struck-out the rectification of the register claim, the judge was correct to hold that the failure of the appellants to seek equivalent interim injunctive relief in the Dutch proceedings against the persons who presently control the BVI respondents was a further discretionary factor which mitigated against granting the relief sought. This omission created the distinct impression that far from being asked to assist the Dutch Court, the BVI Commercial Court was being invited to grant relief which would in practical terms impact on legal actors who were before the Dutch and not the BVI Court. Moreover, the BVI Court was being asked to grant such relief, purportedly in aid of the Netherlands proceedings (or a judgment which might be obtained from the foreign court), in circumstances in which it was unclear that the Netherlands court itself would grant similar relief."

25. In summary, whether the primary litigation court would grant similar relief is an important consideration when an application is made for interim relief from a 'satellite' or 'ancillary' court.

26. It did not appear to me to be controversial that where there was a possibility that ancillary proceedings might be needed to enforce any judgment that might be obtained abroad against a defendant in his domiciliary jurisdiction, the local court might properly stay the

local proceedings rather than dismissing them altogether, even if interim relief was refused.

Findings

27. Applying the above legal principles to the facts of the present case, I find that although there is a serious issue to be tried in relation to ERG's claim and the balance of convenience traditionally defined would justify continuing the Injunction in support of a claim being substantively tried in this Court, the Injunction should be discharged for the following reasons:

    (a) ERG has sought to obtain similar interim relief from the Texas Court and has been refused;

    (b) the comments made by the Texas Court in adjudicating the TRO application on March 20, 2012 do not indicate that interim relief was refused on jurisdictional grounds even though the foreign court would otherwise have been minded to grant such relief;

    (c) the Texas Court (Judge Kirkland) was invited by Nabors on March 23, 2012 to restrain ERG from enforcing the Injunction, but declined to do so to enable this Court to adjudicate the present application. This was the second occasion on which the Texas Court considered the interim relief question and gave no indication that it would welcome the assistance of any other court more competent to give the interim relief ERG sought;

    (d) it would be wrong in principle for this Court, applying a lower threshold test, to grant interim relief in support of a claim being substantively adjudicated by the Texas Court in circumstances where there is no evidence that the relevant foreign court would construe such relief as judicial assistance and/or cooperation;

    (e) further and in any event ERG failed to disclose material facts when making its *ex parte* application for the Injunction, namely (i) the fact that there was an *inter partes* TRO hearing; and (ii) the fact that the TRO judge expressed strong doubts about the merits of ERG's specific performance case. These matters were supposedly not disclosed on the grounds that they were legally irrelevant to the original application; it is true that they took on heightened relevance only after Nabors submitted to the jurisdiction of the Texas Court.

However, the judgment as to how relevant these matters were ought to have been made by this Court, not by those instructing local counsel.

28. In the exercise of my discretion I would stay rather than dismiss the entire proceedings as it is clearly possible that ERG may obtain a judgment that can only be enforced in Bermuda where Nabors is resident.

Conclusion

29. The Defendant's application to discharge the Injunction is granted and the action is stayed.

30. Unless either party applies to be heard as to costs by letter to the Registrar within 14 days, the costs of the present application shall be awarded to the Defendant, to be taxed if not agreed and payable forthwith.

Dated this 5th day of April, 2012 _____

KAWALEY CJ