BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO: BVIHCV2007/0262

Between:

(1) DANONE ASIA PTE LIMITED
(2) JINJA INVESTMENTS PTE LIMITED
(3) NOVALC PTE LIMITED
(4) MYEN PTE LIMITED

Applicants/Claimants

-and-

(1) GOLDEN DYNASTY ENTERPRISE LIMITED
(2) GOLD FACTORY DEVELOPMENTS LIMITED
(3) PLATINUM NET LIMITED
(4) SUNWORLD ENTERPRISES LIMITED
(5) GREAT BASE INTERNATIONAL LIMITED
(6) BOUNTIFUL GOLD TRADING LIMITED
(7) EVER MAPLE TRADING LIMITED
(8) WINTELL ENTERPRISES LIMITED
(9) CENTRAL INTERNATIONAL INVESTMENT HOLDINGS LIMITED
(10) TRILLION SINO INVESTMENTS LIMITED
(11) WU TIANYAO
(12) CHAN TAT HO
(13) WU YAN JIAN
(14) HE PING
(15) LIANG LE PING
(16) WU CHU KUN
(17) CHEN YI FENG
(18) MA NAM KIT
(19) CHAN CHUN HING

Respondents/Defendants

Appearances:

Mr Mark Forté and Mr Richard Evans of Conyers Dill & Pearman for the Claimants
Mr Stephen Moverley Smith QC of XXIV Old Buildings, London and Mr Christopher Young of Harney Westwood & Riegels for the First to Ninth Defendants

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2008: June 19
2008: June 25, 27, July 03

CATCHWORDS

Commercial Law – Claimants obtained ex parte freezing and receivership orders – Express Undertaking not to use disclosed material save with the permission of the Court – Application to be released from such undertaking for specified purposes namely related proceedings- Applicable test – Permission sought in relation to reports of court appointed receivers – Permission to use future documents.

HEADNOTE

Cs obtained *ex parte* freezing and receivership orders against Ds. At the *inter partes* return date, an express undertaking was given by Cs "*not to use without the permission of the Court any documents or information obtained by them from the Receivers for any purpose save in these proceedings to trace and preserve assets.*" Cs applied to the Court for permission in order to use specified documents, including Ds' defence, an affidavit, and report of the receivers for use in related foreign proceedings, alternatively for such other related proceedings as they might bring. Cs also invited the Court to grant permission to use future evidence and future receivers reports for these purposes.

HELD:

(1) When considering an application for permission to use restricted documents, the court must be satisfied that it is just and convenient to make such an order and that it will not occasion injustice to the opposing party (***Crest Homes PLC v. Marks*** **[1987] 1 A.C. 829** and **Dadourian Group International Inc et al v. Simms et al (No 2) [2007] 1 WLR 2967 applied**).

(2) The principle of comity towards foreign courts must also come into play. Applying all of these principles, and considering all relevant factors, it was appropriate that permission be given to use the existing documents in the classes sought for use in the specified foreign proceedings. However, it was not appropriate to give permission in respect of future documents: Cs would need to apply in the future if permission were sought in respect of them.

JUDGMENT

Introduction

[1] **HARIPRASHAD-CHARLES J:** The Danone-Wahaha dispute, a story of a once seemed ideal relationship which has now gone vitriolic, is back on foot after a period of suspension. Danone and Wahaha formed their first joint venture ("JV") in China in 1996. Over the years, the number of JV's grew substantially and the annual sales rose from a few million renminbi to more than ¥14 billion (US$2 billion). In 2006, Danone held a 51 percent stake in the JV's and appointed Mr Zong chairman of the JV's board. News of the Danone-

Wahaha dispute - in which Danone accuses Mr Zong, his family and his associates of secretly setting up a parallel network of competing companies (the so-called non-JV's) - burst into the public arena in April 2007. Since then, the parties have attempted unsuccessfully to negotiate their disputes. To date, they have initiated a number of lawsuits and arbitration cases within China and six other jurisdictions including Los Angeles, California ("the US proceedings"), the British Virgin Islands and Samoa.[1]

[2] The present application is the restored hearing by the Claimants for permission to use *specified documents* from these proceedings for *specified* (and *related)* purposes namely related proceedings ("the Application").

Procedural history

[3] On 9 November 2007, on an ex parte application by the Claimants (collectively "Danone"), the Court appointed Receivers ("the Receivers") over the assets of the First to Eighth Defendants. On 29 November 2007, it continued the Receivership subject, amongst other things, to an Undertaking by the Claimants ("the Undertaking") not to use without the permission of the Court any documents or information obtained by them from the Receivers for any purpose save in this action to trace and preserve assets.[2]

[4] The Court had previously granted permission for use of information generated in the BVI including Share Registers before other tribunals. Today, the following can be stated as the position governing the use of information in these various actions:

1. all parties have freely used the SCC documentation in other jurisdictions without objection;

2. all parties are free to use all information in the US Proceedings save for such limited information as is governed by a limited Protection Order;

[1] For background facts – see: judgment delivered on 9 and 13 November 2007 BVIHCV2007/0262 – Danone Asia Pte Limited and Or v Golden Dynasty Enterprise Limited and Or. [unreported] –British Virgin Islands.
[2] See Schedule 2, paragraph 3 of the Order of 29 November 2007.

3. all parties are free to use information from the Samoa Proceedings without limitation.

[5] On the other hand, the BVI Court has granted permission on an application by application basis (as by reason of the Undertaking given by Danone, it was necessary to do). Danone now seeks (as one of the forms of relief sought under the Application) to have a wider (although still restricted, and not wholesale) permission granted for specific reasons in order to allow what it says, at the very least, a level playing field of information to be before each of these competent jurisdictions in order to serve the best interests of justice.

[6] Against this background, Danone is of the view that the relief sought in the Application is both proportionate and essential to enable it to seek redress for the loss that it has suffered. Danone says that it is plain (from, for example the evidence filed by the Receivers[3] in the recent application by the Defendants for variation of the 29 November 2007 Order) that the Defendants have failed to co-operate with the Receivers, contrary to their obligations by reason of this Court's Orders.

The application for permission to use documents in other proceedings

[7] In the present Amended Application filed on 10 June 2008, Danone is seeking permission to use:

1. Copies of the Share Registers of the Seventh, Eighth and Ninth Defendants ("the Share Registers");

2. The Second Report of the Receivers herein dated 21 December 2007 and any further such reports as they arise ("the Receivers' Reports");

3. The Defence of the First to Ninth Defendants ("the Defendants") dated 7 May 2008 ("the Defence");

4. The affidavit of Mr Wu Weiqiang dated 21 December 2007 ("Mr Wu's affidavit") and any further evidence served unless specifically restricted from doing so by Order of this Court.

[3] First affidavit of Casey McDonald filed on 3 June 2008.

[8] The purposes for which permission is sought are as follows:

1. Proceedings in other jurisdictions relating to the events and dealings which are the subject of the proceedings herein and/or for the purpose of obtaining interim or final relief or taking enforcement action in connection with those matters.

2. Alternatively, conducting such proceedings and taking such steps before:

(i) the Superior Court of the State of California;

(ii) the Supreme Court of Samoa, held at Apia; and

(iii) the SCC Arbitration

as Danone considers expedient in order to preserve the assets of the Defendants to the proceedings herein.

[9] In the alternative, it seeks a declaration that permission is not required in respect of (i) the Second Report of the Receivers and any further such reports as they arise; (ii) the Defence of the Defendants and (iii) the affidavit of Mr Wu and any further evidence served unless specifically restricted from doing so by order of this Court.

[10] The grounds relied upon in support of the Application are contained in the Amended Notice of Application and are as follows:

a) The Share Registers of the Seventh, Eighth and Ninth Defendants have been disclosed to Danone by the Joint Receivers appointed over the assets of the First and Eighth Defendants by the Order of this Court dated 9 November 2007 and continued by Order dated 29 November 2007 ("the 29 November 2007 Order"), and over the affairs of the Ninth Defendant ("Central") by the 20 November 2007 Order.

b) The said disclosure was made pursuant to the powers of the Joint Receivers under the said Orders for the purpose of tracing and/or preserving the Defendants' assets.

c) The information contained in the Registers would go directly to proving the fact of Mr Zong and his family's involvement in a network of offshore companies, which is alleged as part of the ongoing fraud against Danone in this and the existing proceedings in California and Samoa.

d) Further, the use of the Share Registers in the related proceedings referred to above is required in the interest of comity, for the reasons set out in the first affidavit of Angel Garganta and supported by the first affidavit of Bruce Friedman.

e) Moreover, such an Order is consistent with and complementary to the Supreme Court of Samoa dated 14 December 2007. Such Order having been granted at a full *inter partes* hearing. It is also consistent with the extensive overlap of relevant issues before these proceedings and those of other jurisdictions, not least those in the SCC Proceedings where even BVI Counsel for the Defendants appear to be copied into correspondence with the tribunal.

f) The **Receivers' Reports** set out the details of the Receivers' investigations into the identification and preservation of the assets that are the subject matter of the claim herein. Moreover, given that it is the result of investigations by this Court's own independent officers, its contents would therefore be a highly valuable tool to other Courts seized of related disputes, in identifying and preserving the said assets. Specifically, the California Court will likely be considering the Receivers' request for recognition in order to lend whatever assistance it can to the BVI Receivers' investigations.

g) It is just and expedient that the Claimants be permitted to use the said material in the manner sought.

Defence and affidavit of Mr Wu

[11] At the hearing before me on 19 June 2008, Learned Queen's Counsel for the Defendants, Mr Moverley Smith submitted that the Defendants are proud of their Defence filed in this action and they stand by it. As a result, he has no difficulty with it being used in the SCC arbitration and the Samoan and Californian proceedings, if the Tribunal and those courts permit such use. The same applies to Mr Wu's affidavit.

[12] Unquestionably, this has narrowed some of the issues between the parties. However, there are still a few outstanding matters to be determined namely whether:(i) the Share Registers of the Seventh, Eighth and Ninth Defendants and the Second Report of the Receivers as well as future reports of the Receivers should be used in the existing proceedings and (ii) any further evidence served unless specifically restricted from doing so by order of this Court.

[13] Before I address these matters, it may be an opportune time to consider the threshold objection raised by the Defendants.

Threshold Objection – Breach of Undertaking

[14] The Defendants complained that Danone has deliberately and contumeliously breached the Undertaking which it gave to this Court and consequently, it should be precluded from making the present Application. The breach is said to have arisen from the following: in their Amended Statement of Claim dated 28 May 2008 filed in the SCC Proceedings, Danone has, without obtaining permission, deliberately used information which it obtained from the Receivers to make allegations against the Defendants. Paragraph 186A states:

> "The Claimants are aware of further connections of the BVI and Samoan companies with non-JV's (including through the 11th BVI company, which we are unable to name) through documents filed by the Defendants in the BVi Proceedings and reports filed with the BVI Court by the Receivers appointed over the BVI Companies. The Claimants cannot disclose this information to the Tribunal without leave of the BVI Court."

[15] Paragraph 187C is in similar terms.

[16] Mr Moverley Smith QC argued that "*the Claimants [Danone] cannot disclose this information without leave*" in the very same document which provides such disclosure. He submitted that the mere fact that Danone did not detail the "further connections" does not detract from the fact that in order to make the allegation, information obtained from the Receivers had been used, in breach of the Undertaking.

[17] Learned Queen's Counsel argued that as a result of the breach of the Undertaking, Danone should be precluded from making the present Application. In support of this submission, he cited the English Court of Appeal case of **Raja v van Hoogstraten**.[4] In that case, the claimant issued an application notice for the committal of Mr van Hoogstraten. The grounds stated in the application notice were that Mr van Hoogstraten was in contempt of court in that he had breached certain court orders. The threshold issue before the Court of Appeal was whether Mr van Hoogstraten should be heard on his appeals in circumstances that he was making no attempt to purge his contempt which the trial judge

[4] [2004] EWCA Civ 968.

had found established. After hearing arguments, the Court of Appeal proceeded to hear the substantive appeals.

[18] It is beyond dispute that a court may refuse to hear a party who **has been found to be in contempt** and who has made no effort to purge that contempt: see **Hadkinson v Hadkinson**[5], **Astro Exito Navegacion SA v Southland Enterprise Co Ltd [The Messiniaki Tolmi]** [6] and **X Ltd v Morgan Grampian (Publishers) Ltd and others**.[7] But it is now recognised that there is no general rule that a court will not hear an application for his own benefit by a person in contempt unless he has first purged his contempt, so that, in order to avoid the application of that rule the party in contempt must bring himself within some established exceptions. The approach which the court should adopt is now found in the judgment of Lord Bingham in **Arab Monetary Fund v Hashim and others**[8] where he said:

> "From those speeches it is, I think, clear that it is wrong to take as a starting point the proposition that the court will not hear a party in contempt and then ask if the instant case falls within an exception to that general rule. It is preferable to ask whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders."

[19] In the present application, the Defendants alleged that Danone has provided no explanation at all for their conduct and that the Court should not countenance such contumelious conduct which betrays a derisive disrespect for the authority of the Court; particularly in circumstances where the Undertaking in question was a fundamental prerequisite for making, and continuing, the receivership order.

[20] Mr Forté succinctly submitted that if Danone is in breach of any Order of the Court, then the Defendants should at the very least, file an application to that effect so that Danone could be given an opportunity to respond. He noted that the allegation (a) is unparticularised, and until proper particulars are given, the allegation cannot properly be

[5] [1952] P 285.
[6] [1981] 2 Lloyd's Rep 595.
[7] [1991] 1 AC 1.
[8] 21 March 1997 [unreported]

addressed; (b) has taken until now to be raised – the Amended Statement of Claim is dated 28 May 2008; and in any event, Danone denies that there has been any breach.

[21] For my part, if the Defendants are of the opinion that Danone has deliberately breached the Undertaking which it gave to the Court, the proper course is firstly, to file an application supported by an affidavit. Danone will then have an opportunity to respond and put forward its case. It is not proper for the Defendants to ambush Danone with such a serious allegation for the first time at this hearing. Further, even if Danone were in breach of the Undertakings, the Court, as the sole arbiter of facts, is the proper body vested with the powers to make such a determination; not the Defendants. As I see it, there is no merit in this submission.

The evidence

(a) Danone's evidence

[22] Danone relied upon the following affidavits:

a) First affidavit of Angel Garganta filed on 19 December 2007;[9]
b) First affidavit of Peter Turner filed on 4 December 2007;[10]
c) Tenth affidavit of Jayson Wood filed on 10 June 2008;[11]
d) Second affidavit of Peter Turner filed on 11 June 2008 [12] and.
e) First affidavit of Bruce Friedman filed on 12 June 2008.

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[23] I turn to the affidavit of Mr Wood. He is a solicitor in the employ of Conyers Dill & Pearman, British Virgin Islands and is authorized to make this affidavit. The gist of his affidavit is contained in paragraphs 2 and 3 and focuses on the issue of comity. Mr Wood referred to the Order of 14 December 2007 by the Supreme Court of Samoa which is in substantially the same terms as that sought by the present application. Paragraph 6 of that Order stated:

> "It is directed that the receiver and the plaintiffs may use information filed or otherwise disclosed in the course of these proceedings for the purpose of

[9] Tab 6 - Index to Bundle for hearing on 19 June 2008.
[10] Ibid –Tab 3
[11] Ibid –Tab 7
[12] Ibid –Tab 9

> proceedings in other jurisdictions relating to the events and dealings which are the subject of these proceedings and/or for the purpose of obtaining interim or final relief or taking enforcement action in connection with those matters."

[24] At paragraph 3, Mr Wood averred:

> "Comity between courts of competent jurisdiction militates towards this Honourable Court making an Order in the terms sought by the Notice of Application herein. The making of an identical order in this jurisdiction would assist the Courts in the various jurisdictions who are trying issues of facts, connected by the fraud which has been perpetrated on the Claimants [Danone]."

[25] On 11 June 2008, Mr Peter Turner swore a second affidavit in these proceedings. He confirmed that the Share Registers and the Second Report of the Receivers dated 21 December 2007, and any further such reports as they arise will be used in the SCC Proceedings and will not be used for any other purpose.

[26] The essence of the affidavit is that for this Court to allow some degree of permission as has been the case before now in previous applications before this Court, but at the same time to have the benefit of unfettered discretion to use all documentation from the Samoa proceedings and significant tranches of information from the US Proceedings is to set the BVI Proceedings aside so as to make reference to a full picture not only difficult but incomplete. By way of example, he referred to paragraph 186 of the Amended Statement of Claim and pointed out that full cross references are drawn to the share ownership details in the Samoan holding companies, but limited and qualified reference has been made to the BVI information.[13]

[27] At paragraph 6, Mr Turner referred to paragraphs 177 to 199 and 210 of the Amended Statement of Claim and the importance of the Share Registers and further information from the Receivers. He stated that because of the restriction imposed by the BVI Court, he is unable to provide full information to the SCC Tribunal.[14] At paragraph 9, he stated the fact that he is unable to refer to certain information that should rightly be before the SCC

[13] See paragraph 5 of Turner's Second Affidavit.
[14] Ibid, paragraph 7 and 8.

Tribunal hampers the good administration of justice. He emphasized that Danone should be allowed to refer to any documents which are relevant to the issue to be determined in the SCC proceedings.

[28] Mr Turner stated that the Share Registers and the information from the Receivers are all documents of record and contain facts which are crucial in the SCC Proceedings as the nub of Danone's case is that Mr Zong, his family and associates have been involved in a fraudulent scheme using the non JV's and offshore companies in the BVI and Samoa to take business away from Danone and the JV's. The evidence showing the involvement of Mr Zong, his family and associates in the offshore companies is important to proving that they are the instigators of the fraud. Further, it is their submission that the timing of changes in the offshore structure and ownership of various non JV's is significant, coming as it did soon after Danone commenced the SCC Proceedings.[15]

[29] At paragraph 12, Mr Turner averred to the Chinese public records that the Third Defendant, Platinum Net Limited, seems to have transferred shares that it owned in Hangzhou Children's Clothing Co. Ltd to a company called Pinerich International Limited in March 2008 when the interlocutory injunction to prevent dissipation of assets was still in force. Mr Turner believes that such matters should be put before the SCC Tribunal so that it could properly assess the credibility of Mr Zong and the cogency of the evidence put forward by the Defendants in those proceedings.

[30] The final evidence in support of this application is the First Affidavit of Bruce Friedman, a partner in the law firm of Bingham McCutchen LLP, Danone's attorneys in proceedings before the Superior Court of Los Angeles ("the US Proceedings"). He took over after Mr Garganta left. Generally, he concurred with everything contained in Mr Garganta's affidavit. At paragraph 5 of his affidavit, he deposed that *"the US Proceedings will be greatly assisted by any papers submitted by the parties in the course of the BVI Proceedings, just as the US Proceedings are open to the public and for use elsewhere unless specifically restricted*. "

[15] Ibid, para 10.

[31] Mr Friedman attested at paragraph 6, that he understood that the Receivers have indicated that they intend to seek recognition in the US Courts in order to facilitate their request for information from Ever Maple, a company over which the BVI Court has granted a receivership order. According to him, it would be a significant exercise of comity if the BVI Court were to permit what was being said as a matter of record in the BVI Proceedings by the parties, to be heard in the US Proceedings which has offered the parties full opportunity to have almost all of its filings available for use in the BVI Proceedings. He stated that the fact that the information is available to the US Courts does not mean that the US Court will blindly permit its use. Mr Friedman is prepared to give an undertaking that the information will not be used by Danone for any other purpose than that currently permitted by the BVI Order and in the course of the US proceedings, to the extent not ruled out by the US Court.

(b) The Defendants' evidence in opposition

[32] The Defendants filed an affidavit of Andrew Thorp of Harneys in opposition. Learned Counsel for Danone, Mr Forté dubbed the affidavit as a curious one, whose expressed[16] purpose is: "*to draw to the Court's attention the submissions filed in the SCC Arbitration in relation to the Claimants' request therein for the production of documents*". He submitted that the affidavit is silent as to the intended use of documents in any other tribunal[17] and in short, it appears to raise the argument that the purpose for which permission is sought under this application is to provide the SCC with documentation that it itself does not have the power to order by way of disclosure. Mr Forté submitted that even if that is correct, it is hardly determinative of the Application; indeed the relevance of the argument is not immediately apparent. Moreover, it has always been Danone's position in respect of such applications that the question of the admissibility, relevance and probative value of material that this Court permits to be used is a matter for the tribunal[18] in which it is sought to be introduced.

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16 Para 3 of Affidavit of Andrew Thorp sworn to on 17 June 2008.

17 Harneys had been asked to confirm that this affidavit represents the totality of the evidence in opposition to the Application. They have not replied, and therefore it must be assumed that it is.

18 In this judgment, I use this term generically, to include Courts and tribunals.

[33] Mr Forté next submitted that Paragraph 4 of the affidavit contains an unparticularised allegation that Danone is in breach of its undertaking not to use material for any other purpose. As to this allegation, Mr Forté said it:

a) is unparticularised, and until proper particulars are given, the allegation cannot properly be addressed;

b) has taken until now to be raised – the Amended Statement of Claim is dated 28 May 2008;

c) is denied, in any event – there has been no breach.

[34] Paragraph 7 of the affidavit in effect states that disclosure is premature. Danone argued that all necessary conditions have been met; in any event, this argument does not prevent this Court from granting the relief sought in the Application.

[35] At paragraph 8, the Defendants asserted that none of the First to Ninth Defendants is a party to the SCC Arbitration or accordingly subject to the jurisdiction of the Arbitral Tribunal to make orders against them. They contended that Danone appears to be using the receivership as a tool to extract for their use, documents and information which would not otherwise be available to them under the rules applicable in the SCC Arbitration. Danone says that the argument that the BVI material is not relevant in the SCC is unsustainable as it is clear from the second affidavit of Mr Turner that much of the information regarding the ultimate ownership of the Non-JVs is set out in the BVI materials. This is directly relevant to the issue of whether the Defendants [Respondents in the SCC Arbitrations] were competing - if they are the ultimate owners of the Non-JVs then they are competing. In any event, relevance of the material to the SCC is a matter for that Tribunal.

The applicable legal principles: use of documents

[36] I start off from the premise that the Court is not unfamiliar with the applicable principles in relation to the restrictions placed on a party in relation to the use of documents obtained in proceedings, and particularly the prohibition on using them for "*"any collateral or ulterior*"

purpose"[19]. Indeed, the Court, on the two under-mentioned occasions, had to consider this very same issue.

(i) On 10 December 2007, the Court granted permission to use the copy share register of D1, D2, D6 for the purpose of submission before the Stockholm Chamber of Commerce ("the SCC").

(ii) On 11 December 2007, the Court granted permission to use the same copy share registers for the purpose of submissions in proceedings before the Supreme Court of Samoa (in applying for a receivership order over Trillion Sino Investments Limited).

[37] I also state from the outset that there is a difference between a party trying to obtain documents for a purpose for which he is not entitled to them and using documents that have come properly into his possession.

[38] In the present application, Danone seeks the release of the Share Registers and the Receivers' Report. It is therefore incumbent on Danone to satisfy the court, based on the materials, that is appropriate to make the orders sought.

[39] The leading authority on undertakings not to use documents obtained by disclosure for any collateral or ulterior purpose remains the opinion of the House of Lords in **Crest Homes PLC v Marks** [supra]. In that case, the claimants applied for leave to use documents obtained pursuant to earlier Anton Piller orders. The intended purpose was to consider whether or not to commence proceedings for committal, and if so advised, for the purpose of pursuing such proceedings. The judge refused permission. On appeal, the Court of Appeal reversed that decision on the grounds that statutory provisions[20] required that the judge's order should be set aside. The House of Lords "*found some difficulty in following the reasoning of the Court of Appeal in this respect*"[21], and for different reasons, set aside the judge's order, thus granting permission to use the documents as requested.

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[19] Per Jenkins J in Alterskye v Scott [1948] 1 All E.R. 469, cited in, *inter alia*, Crest Homes PLC v Marks [1987] 1 A.C. 829.

[20] Section 72 of the Supreme Court Act 1981 (UK).

[21] Per Lord Oliver of Aylmerton, at 855B-C.

[40] Lord Oliver of Aylmerton emphasized the importance of giving effect to the undertaking when he said:[22]:

> "My Lords, I would not wish anything said in your Lordships' House to be thought to detract from the integrity of the implied undertaking given to the court on behalf of a party obtaining an order for discovery. Nevertheless, in the very special circumstances of this case, I find myself unimpressed by the arguments adduced on behalf of the appellants."

[41] His Lordship further stated at page 860:

> Your Lordships have been referred to a number of reported cases in which application has been made for the use of documents obtained under *Anton Piller* orders or on general discovery for the purpose of proceedings other than those in which the order was made. Examples were *Halcon International Inc. v. Shell Transport and Trading Co.* [1979] R.P.C. 97 and *Sybron Corporation v. Barclays Bank Plc.* [1985] Ch. 299. I do not, for my part, think that it would be helpful to review these authorities for they are no more than examples and they illustrate no general principle beyond this, that the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery. As Nourse L.J. observed in the course of his judgment in the instant case (ante, p.840G), each case must turn on its own individual facts. In the instant case, the determinative point to my mind is that it is purely adventitious that there happened to be two actions. That has been brought about partly by purely technical considerations and partly, as Crest allege, by the appellants' failure to make full and frank disclosure under the 1984 order, and the fact that the parties to the two actions are not identical is quite immaterial. The cause of action is the same in each and the first and second appellants are defendants in both. The remaining defendants could equally well have been joined as defendants in a single set of proceedings. Thus it is a pure technicality that the 1985 order happens to have been made in proceedings other than those in which Crest seek to move to enforce the undertakings."

[42] In **Omar v Omar**[23], on the Claimants undertaking not, without leave of the Court to use information disclosed, save for following and preserving the assets, the Claimants applied for leave to use those documents for two purposes namely (i) to amend their existing claim to add claims against a further defendant, and second in support of parallel proceedings

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[22] At 857H-858A

[23] [1995] 1 WLR 1428.

(both described by Jacob J as "allied purposes"). Having considered the leading English authorities (including **Crest Homes PLC**, Jacob J concluded at 1436[24]:

> "In the present case the use of the discovered documents for a personal claim seems to me to be entirely a legitimate purpose – within the "broad purpose" of the original discovery. Such a claim is not in substance collateral at all: the object of the personal claim, as of the proprietary claim is to see the estate put right. The facts giving rise to both claims are broadly the same. Moreover, the fact that the personal claim has not so far been asserted is adventitious – it could easily have been included in the writ and the statement of claim from the outset. I think there are compelling and cogent reasons why leave should be given."

[43] Dealing with the Mareva relief leave, Jacob J continued (at page 1437):

> For the same reasons as I think it appropriate to grant leave to use the documents in the English case, I think it appropriate to grant leave for corresponding foreign cases. I am aware that in foreign jurisdiction there may not be the same degree of judicial control over the use of such documents. In some other case that might matter but not here I think. I have been through the documents – they do not disclose anything which, apart from providing further evidence to bring the wife and mistress to book, is likely to be commercially sensitive[25].

[44] In **SmithKline Beecham v Generics**[26], Aldous LJ in quoting extensively from the House of Lords in **Crest Homes** said at page 1314, para. 37:

> "The most important consideration must be the interest of justice which involves considering the interest of the party seeking to use the document and that of the party protected by the CPR 31.22 order. As Lord Oliver said, **each case will depend upon its own facts** [emphasis added]. But a material consideration must be whether the documents could have been obtained under CPR 31.17 This rule enables the court to order disclosure from the third parties if the documents were likely to support the Claimants' case and discovery was necessary to dispose fairly of the claim."

[45] It seems to me that the following principles on the use of documents can be derived from the above cases:

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[24] At 1436H
[25] At 1437D-F.
[26] [2003] 4 All ER 1302, CA.

a) The undertaking not to use documents obtained through disclosure for any collateral or ulterior purpose is not one that should be detracted from. However release from that undertaking may be ordered in special circumstances.[27]

b) It is necessary for the applicant seeking such release to demonstrate cogent and persuasive reasons why the undertaking should be released. Such release must not cause injustice to the person giving disclosure.

c) The use to which disclosed documents may properly be put with leave depends upon the purposes for which and the circumstances in which they were disclosed.

d) Each case must turn on its own facts.

e) The most important consideration must be the interest of justice which involves considering the interest of the party seeking to use the document and that of the party protected by the undertaking.

f) A material consideration is whether the documents in question could have been obtained on an application for disclosure.

[46] The recent Court of Appeal decision of **Dadourian Group International Inc et al v. Simms et al (No 2)**[28] is extremely instructive even though the case was concerned with a worldwide freezing order. The Order contained undertakings not to use disclosed material for any other purpose, save with the permission of the Court.

[47] The Court of Appeal conducted a detailed analysis of the applicable test for the granting of a release. The intended purpose for which release was sought in **Dadourian** was the issue of committal proceedings. However, the case is important because the general principle which can be derived from it is that an applicant need **not** demonstrate "exceptional circumstances"; rather the test is whether it is just and convenient to grant the release.[29]

Declaration that no permission is required for certain classes of document

(i) Submissions by Counsel on Receivers' reports

[48] At paragraph 2 of the Amended Notice of Application, Danone seeks a declaration that no permission is required in respect of (i) the Second Report of the Receivers dated 21

[27] See Dadourin – the test is whether it is just and convenient to grant the release.
[28] [2007] 1 WLR 2967.
[29] See paragraphs 19 and 20 of the judgment.

December 2007 and any further such reports as they arise; (ii) the Defence of the Defendants dated 7 May 2008 and (iii) the affidavit of Mr Wu dated 21 December 2007 and any further evidence served unless specifically restricted from doing so by order of this Court.

[49] The Defence and Affidavit of Mr Wu are no longer in issue. However, the Defendants vociferously objected to the release of any reports of the Receivers, both current and future on a number of grounds which are contained in the affidavit of Mr Thorp and further elucidated by oral and written submissions.

[50] However, Danone submitted that the restriction imposed by paragraph (3) of the Schedule to the 29 November 2007 Order does not affect the Receivers' reports as they are a different genre of document. As such, Danone does not even need permission for its release. He contended that the Receivers' reports are documents created by the Court's own officers, principally to inform the Court of the progress of the receivership. In that context, he argued that they do not fall within the scope of the prohibition of the Order although he accepted that the Court would have jurisdiction to prevent their use outside these proceedings. This is precisely what Danone is seeking. Therefore, it goes without saying that Danone has adopted the proper procedure of making an application to this Court (which I think is necessary) to use the Receivers' reports in extant proceedings in the SCC Tribunal and the Samoan Court as well as the US Court.

[51] Learned Counsel for Danone submitted that the current Report of the Receiver sets out the details of the Receivers' investigations into the identification and preservation of the assets that are the subject matter of the claim herein. Moreover, given that it is the result of investigations by this Court's own independent officers, its contents would therefore be a highly valuable tool to other Courts seized of related disputes, in identifying and preserving the said assets. Specifically, the US Court will likely be considering the Receivers' request for recognition in order to lend whatever assistance it can to the BVI receivers' investigations.

[52] Mr Forté submitted, further that there is a real issue of comity at play. He argued that the Defendants seek to use the restriction contained in the 29 November 2007 Order, in order to prevent competent tribunals from receiving the proper, full picture in respect of the BVI proceedings. If they succeed in this aim (which it is submitted cannot be a proper purpose for the restriction on the use of disclosure), comity is seriously eroded. The Defendants will have permitted a fellow tribunal of justice not to be given the full picture, despite the close inter-relationship between issues. That, he submitted, would be deeply invidious. A legitimate question for this Court to ask itself is would it, in a reversal of the situation, wish to see the disclosure in question in order to assess for itself its relevance and probative value?

[53] Learned Counsel submitted that when the Receivers' reports are before the foreign tribunals, they are the tribunals which will ultimately determine issues of relevance and probative value for themselves (although it is Danone's case on the unchallenged evidence that the disclosure is relevant). Nothing that this Court may do in relation to granting permission/release ties the hands of those tribunals.

[54] The Defendants vociferously challenged the application for permission to use the Receivers' reports in the existing proceedings before the SCC Tribunal and the Samoan and US Courts. They argued that (i) the Receivers have obtained and will obtain information and documentation not through any bi-lateral disclosure process but pursuant to their powers and positions as officers of the court; (ii) the information and documentation obtained by the Receivers was, or should have been obtained for the limited and specific purpose of enabling them to identify and preserve the assets of the Defendants and (iii) the Receivers' reports are confidential documents produced by the Receivers to assist the Court rather than benefit either party to the litigation.

[55] Learned Queen's Counsel, Mr Moverley Smith argued that there are no special circumstances identified in the evidence supporting the Application or otherwise, that could justify the suggested use of the Receivers' current and future Reports in any present and future litigation Danone chooses to commence against any person, subject to any caveat

that they "relate" in some wholly undefined way to the events and dealings which are the subject of the current action.

[56] He further submitted that it is not in the interests of justice that confidential reports produced by court officers should be freely deployed by a party in other proceedings in circumstances where:

a) The report contains information and/or exhibits documentation from third parties who will have no opportunity to object to disclosure;

b) The information and/or documentation has been and/or may in the future be obtained under compulsion and is or may not have otherwise been obtainable by Danone in any disclosure application made in other proceedings;

c) The receivers' appointment is subject to a discharge application. If the application is successful but Danone has meanwhile been given permission to use the Receiver's Reports in other litigation, it will not be possible for the Court to restore the position to the *status quo ante*; and

d) The fact that the Receivers' Reports are to be used in evidence in other proceedings may hinder the Receivers in the discharge of their obligations to the Court. In particular, their ability to report freely and fairly to the Court may be compromised if there is the possibility of what they say being used in foreign proceedings, but subsequently found to be wrong.

[57] Learned Queen's Counsel forcefully argued that the Court should not give permission to Danone to use the Receivers' Report - current or future as Danone has not shown any cogent and persuasive reasons as to why the Undertaking should be released. He submitted that the only evidence which deals in any way with the Receivers' Reports is the evidence of Mr Turner contained in his second affidavit wherein he stated that "*the basis of Danone's case is that Mr Zong, his family and associates have been involved in a*

fraudulent scheme using the non JV's and offshore companies in the BVI and Samoa to take business away from Danone and the JV's. The evidence showing the involvement of Mr Zong, his family and associates in the offshore companies is important to proving that they are the instigators of the fraud. Further, it is their submission that the timing of changes in the offshore structure and ownership of various non JV's is significant, coming as it did soon after Danone commenced the SCC Proceedings.[30]

[58] Mr Moverley Smith submitted that what Danone is attempting to do is to use what are said to be "facts" set out in the "information from the Receivers" as evidence in the SCC arbitration of the involvement of Mr Zong, his family and associate in the offshore companies in the alleged "fraud". Learned Queen's Counsel pointed out that (a) there is no evidence at all in relation to the need to use "information from the Receivers" in proceedings other than the SCC arbitration; and (b) there is not an iota of evidence as to the need to use such information and documentation as might be contained in any future reports of the Receivers.

[59] According to Learned Queen's Counsel, Danone has produced nothing to identify "facts" by reference to paragraphs of the existing Receivers' Reports nor has it shown that by reference to the relevant rules of procedure that any such "facts"; not being primary evidence would be admissible in any event.

[60] The Defendants insisted that Danone is now attempting to use evidence that the Receivers have gathered up in their duty to preserve and secure the Defendants' assets to build up their own case against the Defendants in the SCC arbitration and that is a distressing concern to them as the Receivers are independent officers of the Court.

[61] Learned Queen's Counsel also implored the Court to follow the approach adopted in **Smithkleine Beecham** that Danone would be able to obtain the information by way of disclosure were it to make an application in the "other proceedings."

[30] Ibid, para 10.

Court's considerations

[62] It is perhaps important to revert to the Order that the Court made on 29 November 2007. Paragraph (3) of Schedule 2 provides: *"Not to use without the permission of the Court any documents or information obtained by them from the Receivers for any purpose save in these proceedings to trace and preserve assets.*"

[63] Thus, Danone has given an Undertaking not to use any documents or information which it obtains from the Receivers for any purpose other than in these proceedings. *A release from this undertaking will require Danone to show that it is just and convenient to do so.*[31] Danone now requires the Receivers' Report to put before the SCC Tribunal and the Samoan and US Courts.

[64] The main issue which has arisen before this Court is whether Danone has made out a proper case for leave to use admittedly confidential documents obtained by court-appointed Receivers for a collateral purpose namely for specified and related proceedings when the report contains (i) information and/or documentation from third parties who will not have an opportunity to object to disclosure; (ii) the information and documentation has been and/or may in the future be obtained under compulsion and is or may have otherwise been obtainable by Danone in disclosure application made in other proceedings; (iii) the receivership' appointment is subject to a discharge application and (iv) the ability of the Receivers to discharge their obligations fully to the Court.

Information and documentation from third parties

[65] The Defendants contend that the Report contains information and/or documentation from third parties who will not be given an opportunity to object to disclosure. This is true but ultimately, the court needs to carry out a balancing exercise - the most important consideration being the interest of justice which involves considering the interest of the party seeking to use the document and that of the party protected by the undertaking. It is important to note that the report was generated by the Court's own officers intended to assist the Court with the progress of the receivership.

[31] See Arden LJ in Dadourin at para. 20.

Disclosure

[66] The starting point is CPR 28.17. That rule provides that a party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it was disclosed unless – (a) the document has been read to or by the court, or referred to, in open court; or (b) (i) the party disclosing the document and the person to whom the document belongs; or (ii) the court gives permission. CPR 28.17 (2) gives the court the power to restrict or prohibit the use of the document which has been disclosed even if the document has been read to or by the court, or referred to in open court.

[67] CPR 28.17(1) restates the well-established common law principle that a party to litigation is deemed to have given an implied undertaking to the court that documents disclosed for the purposes of legal proceedings will not be disclosed for a collateral purpose save with the leave of the court or the part making disclosure.[32]

[68] In this case, Danone has not only given an implied undertaking but an express one not to use the documents disclosed without the permission of the Court, hence the reason why it has applied to the Court seeking release from this undertaking. By virtue of their duties as Receivers, these court-appointed independent officers have produced their Second Report in December 2007. Danone wishes to use the report in related proceedings before the SCC Tribunal and the Samoan and US Courts.

[69] The Defendants are of the view that the information and documentation has been and/or may in the future be obtained under compulsion and is or may have otherwise been obtainable by Danone in disclosure application made in other proceedings.

[70] The general principle for granting leave is that the court will not do so save where it is just and convenient so to do and where the release will not occasion injustice to the person giving discovery. Thus, cogent and persuasive reasons have to be shown to the satisfaction of the court: And unquestionably, each case will turn on its own peculiar facts and circumstances.

[32] See Disclosure, Matthew & Malek, 2nd edn. Para.13:01

[71] In deciding whether to grant permission to use the Receivers' Reports, the Court must bear in mind the most important consideration: the interest of justice which involves considering Danone's interest vis-à-vis that of the Defendants. The summary of Danone's case is that Mr Zong, his family and cohorts have been involved in a fraudulent scheme using the non JV's and offshore companies in the BVI and Samoa to take business away from Danone and the JV's. The evidence showing the involvement of Mr Zong, his family and cohorts in the offshore companies is important to proving that they are the instigators of the fraud. Further, it is their submission that the timing of changes in the offshore structure and ownership of various non JV's is significant, coming as it did soon after Danone commenced the SCC Proceedings.[33]

[72] The Defendants appear to raise the argument that the purpose for which permission is sought under this application is to provide the SCC with documentation that it itself does not have the power to order by way of disclosure. In my judgment, even if that is correct, it is hardly determinative of the Application. At the end of the day, the question of the admissibility, relevance and probative value of material that this Court permits to be used is a matter for the tribunal[34] in which it is sought to be introduced.

Other issues

[73] The Defendants also raised the issue that the Receivers' appointment is subject to a discharge application. This is very true. But, unless and until the receivership is discharged, the order remains in full force, to be obeyed by every party to the proceedings including the Receivers whose primary mandate to the Court is to report on the progress of the receivership.

[74] The allegation by the Defendants that if the Receivers' Reports are to be used in evidence in other proceedings it may hinder them in the discharge of their obligations to the Court is groundless. There is not a shred of evidence to support it. The Defendants also alleged that the Receivers' ability to report freely and fairly may be compromised if there is the

[33] Ibid, para 10.
[34] In this skeleton, we use this term generically, to include Courts and tribunals.

possibility of what they say being used in foreign proceedings, but subsequently found to be wrong. That is speculative.

[75] Next, the Defendants contended that the purpose for which Danone wish to use the disclosure is to build their case against them in the SCC arbitration. They say that Danone is seeking to use the Receivers as their own private investigators and the Court should not tolerate or encourage that. This is a bare allegation.

[76] Taken into consideration the guiding principles whether to grant permission to use documents or information obtained from the Receivers, in my judgment, there are cogent and persuasive reasons why the Undertaking should be released. There are also cogent and convincing reasons for the Receivers' Second Report to be placed before these various tribunals. The Receivers' Report, though confidential, is central to the continued efforts of Danone to seek redress (in applicable tribunals wherever they might be located) in respect of the legal wrongs that it alleged it has suffered.

[77] Finally, it must be noted that the Receiver's Report is intended to be placed before other courts to assist them. I do not think that any tribunal will blindly adopt the report.

[78] The issue of comity also comes into play. As we know, the present position regarding the use of information in these various actions is that this is the only Court which has granted or refused permission to use on an application by application basis. The other Courts have freely permitted all parties to use the information in other jurisdictions without objection save for the US Courts which have imposed such limited information as is governed by a limited Protection Order. As Mr Wood succinctly puts it, "it would be undesirable to have orders placing different restrictions on the use of information being produced in the receiverships in the different jurisdictions…."

[79] For my part, comity demands that such a situation should not be permitted to occur as between courts of civilized and friendly states. So, this Court will permit use of the

Receivers' Second Report in the SCC proceedings as well as the Samoan and US Proceedings.

Release/permission in respect of the specified documents

[80] Happily, this issue proved less contentious than that of the Receivers' Reports. The Defendants have accepted that the position in relation to the Share Registers is different. The Court has already permitted Share Registers to be used in this very case. On 10 and 11 December 2007 respectively, this very Court granted permission to use the Share Registers in the SCC proceedings and the Supreme Court of Samoa.

[81] The necessity and utility of using the material in the US proceedings is evidenced by the first affidavit of Mr Garganta and Mr Friedman.

[82] The same arguments apply, in general terms, to the use of the material for the SCC proceedings. Danone refers to the first and second affidavits of Mr Turner.

[83] The Defendants submitted that Danone has produced no evidence at all in relation to the Samoan proceedings and thus failed to satisfy the requirement that special circumstances need to be shown and cogent and persuasive reasons advanced before permission can be given. The gist of Mr Wood's affidavit focuses on the issue of comity and that comity militates towards this Court permitting the use of the Share Registers.

[84] It must be understood that the Share Registers are documents of record. The grounds for their release are fully set out in Paragraphs (a) to (e) in the grounds at paragraph 10 of this judgment which I need not reiterate.

[85] Based on my previous ruling in December 2007 (there being no appeal of that decision), I will permit Danone to use copies of the Share Registers of the Seventh, Eighth and Ninth Defendants in the SCC arbitration as well as in the Samoan and US Proceedings.

Permission/release for future proceedings

[86] This appears to be a blanket permission/release which this Court will not entertain at the present moment.

Further affidavit evidence save receiver's affidavit evidence

[87] The Defendants have properly not objected to the use of Mr Wu's affidavit in the SCC arbitration and the Samoan and US Proceedings if the Tribunal and those courts permit such use. Our Civil Procedure Rules ("CPR") place no restrictions upon their use or otherwise– see CPR 30.

[88] The Defendants state that the evidence filed in this action may also be subject to the restrictive provisions of CPR 28.17 and/or CPR 29.12. I do agree but I see no reason why further evidence (in the form of affidavit evidence of the parties) cannot be used in other extant proceedings as they arise. There is no need to burden the Court with numerous applications when the Rules are so clear. Parties ought to be guided by the Rules.

[89] I think that I made it clear that further evidence of the Receivers may fall under the restriction contained in paragraph 3 of Schedule 2 of the 29 November 2007 Order and as such, permission may be necessary for its release.

Wide terms of order sought

[90] Danone seeks permission not only to use the Second Report of the Receivers but any further such reports as they arise. They seek that as a pragmatic solution and a way forward in order to save time and costs.

[91] The Defendants argued that such an Application is in the widest possible terms, permitting Danone inter alia, to use, in any present or future proceedings anywhere which have some relation to the present action, any information or documentation, contained in or annexed to any report of the Receivers in the action.

[92] Surely, time and costs will be saved but the Court ought not to make such a blanket unlimited Order. The Receivers' Reports are confidential in nature and therefore, they ought not to be released without permission.

[93] In relation to other future proceedings, not yet contemplated, it is difficult to make such a broad order. The Court at present is unable to form any view as to whether what is sought goes beyond what could otherwise be obtained by applying the relevant procedural rules.

[94] Based of the fore-going, I make the following Order.

Order:

[95] It is hereby ordered as follows:

1. Pursuant to the undertakings given at Schedule 2 of the Order dated 29 November 2007, the Claimants be permitted to rely upon the use of:

   a) Copies of the Share Registers of the Seventh, Eighth and Ninth Defendants ("the Share Registers");

   b) The Second Report of the Receivers herein dated 21 December 2007;

   for the purposes of conducting such proceedings and taking steps before

   - the Superior Court of the State of California;
   - the Supreme Court of Samoa, held at Apia; and
   - the SCC Arbitration

2. The issue of the liability for costs is adjourned to Thursday, 3 July 2008 at 10.00 a.m.

[96] For the avoidance of any doubt, the time to appeal will begin to run from 3 July 2008.

Indra Hariprashad-Charles

High Court Judge