BRITISH VIRGIN ISLANDS

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

Claim No. BVIHCV2007/0262

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

Claimants

-and-

GOLDEN DYNASTY ENTERPRISE LIMITED (1)
GOLD FACTORY DEVELOPMENTS LIMITED (2)
PLATINUM NET LIMITED (3)
SUNWORLD ENTERPRISES LIMITED (4)
GREAT BASE INTERNATIONAL LIMITED (5)
BOUNTIFUL GOLD TRADING LIMITED (6)
EVER MAPLE TRADING LIMITED (7)
WINTELL ENTERPRISES LIMITED (8)

Defendants

Appearances:
Mrs Sue Prevezer QC and Mr Mark Forte of Conyers Dill & Pearman for the Claimants

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2007: November 09
2007: November 09, 13

JUDGMENT

Introduction

[1] HARIPRASHAD-CHARLES J: By Notice of Application issued on 7 November 2007, the Claimants seek the following:

1. A freezing order restraining the Defendants, and each of them, whether by themselves, their servants or agents or through any other representative from

removing, selling, transferring, interfering with, charging, dissipating or otherwise howsoever diminishing the value of their assets, or howsoever procuring the same until further order of this Court.

2. The appointment of Joint Receivers over each of the Defendants for the purposes of identifying and taking control of their assets.

[2] This judgment is written against the backdrop that the Claimants might be making a somewhat similar application before the Samoan Court. I am of the opinion that the reasons for my decision may be helpful, particularly to that Court.

Background Facts

[3] The background facts present the allegations of the Claimants. For present purposes only, I can do no better than to gratefully adopt them.

[4] The First Claimant, Danone Asia Pte Limited ("Danone Asia") is a company incorporated under the laws of Singapore and a wholly owned subsidiary of Groupe Danone, a French corporation listed on a number of stock exchanges, including Euronet Paris, and SWX Swiss Exchange. Groupe Danone is one of the largest food and beverage companies worldwide.

[5] The Second, Third and Fourth Claimants, Jinja Investments Pte Limited ("Jinja"), Novalc Pte Limited ("Novalc") and Myen Pte Limited ("Myen") respectively are subsidiaries of Danone Asia and also companies incorporated under the laws of Singapore and are subsidiaries of Danone Asia and indirect subsidiaries of Groupe Danone.

[6] Since 1996, Jinja, Novalc and Myen have been used by Danone Asia to enter into various joint venture agreements ("the JV Agreements") and to invest in joint venture companies (collectively "the Danone JVs") in the People's Republic of China ("PRC"). Danone Asia also entered into a Services Agreement ("the Services Agreement") with Mr Zong Qinghou ("Mr Zong"), by which Mr Zong agreed to act as the General Manager of the Danone JVs.

It is the breaches of the JV Agreements and the Services Agreement that are at the heart of these proceedings.

[7] On 9 May 2007, Danone Asia Pte Ltd, Jinja, Novalc and Myen instituted arbitration proceedings before the Stockholm Chamber of Commerce in relation to the abovementioned breaches of the JV Agreements and the Services Agreement. The Respondents to those proceedings are PRC entities, all of which are connected to Mr Zong or the Hangzhou Wahaha Group Ltd ("Wahaha Group"). These various arbitration proceedings (collectively "the SCC Proceedings") are described in detail in Mr Lewis' affidavit and are on going.

[8] Mr Zong is the leading figure in the SCC Proceedings. He is a PRC citizen and is the Chairman and legal representative of the Wahaha Group and of all the corporate Respondents to the SCC Proceedings. The corporate Respondents to the SCC Proceedings appear not only to be managed but also controlled directly or indirectly by Mr Zong, (by his servants or agents) and/or by parties who, the Claimants contend, are his co-conspirators, in particular, his wife Ms Shi Youzhen ("Ms Shi") and his daughter, Ms Zong Fuli ("Ms Zong"). In the SCC Proceedings, the Claimants seek declarations that the Respondents (including Mr Zong) have breached their respective contractual obligations; orders that they cease their breaches, accounts of all profits received by each of the Respondents and damages.

[9] The Defendants to these proceedings in the BVI are all companies incorporated in the BVI pursuant to the BVI Business Companies Act 2004. They each hold shares in certain other PRC companies (collectively referred to in this Judgment and in the Statement of Claim as "the Non JVs") in which Mr Zong and/or Ms Shi and/or Ms Zong and/or Mr Zong's servants or agents are also believed to be employed, concerned or interested, directly or indirectly.

[10] In a nutshell, the Claimants' case in these proceedings is that the BVI Defendants, together with the Non JVs have knowingly assisted in and/or knowingly received monies resulting from the breaches, the subject of the SCC Proceedings, and/or have wrongfully

and with intent to injure the Claimants and/or to cause loss to the Claimants by unlawful means, conspired and/or combined together with the Respondents to the SCC Proceedings (including Mr Zong) to defraud the Claimants and to conceal the fraud and the proceeds of the fraud from the Claimants.

[11] The Claimants alleged that they have evidence that demonstrates that the Respondents to the SCC Proceedings (including Mr Zong) ("the Wahaha Respondents"), through the Non JVs (in some of which the Wahaha Respondents have significant or even controlling shareholdings) have unlawfully been engaged in production or business activities in direct competition with the Danone JVs, in breach of the Respondents' respective contractual obligations to the Claimants, and assisted by and/or using confidential information belonging to the Danone JVs. In particular, the evidence shows that the Respondents to the SCC Proceedings have been engaged in the unauthorised production and sale on a large scale, through the Non JVs, of food and beverage products bearing the "Wahaha Trademarks", (which either belong to or are licensed exclusively to one of the Danone JVs), which are identical or similar to those products sold by the Danone JVs. The effect on the Danone JVs' business of this unlawful competition has been and continues to be significant, both practically and financially.[1]

[12] Further, the Claimants alleged that they have good reason to believe from the evidence that is presently available that the profits and/or assets produced from these unlawful acts of the Respondents and the Non JVs, have been and/or are being diverted and/or concealed from the Claimants by the use of and/or with the assistance of the BVI Defendants. Indeed, the Claimants alleged that the evidence suggests that the corporate Respondents to the SCC Proceedings, together with the Non JVs and the BVI Defendants, all of which (as stated above) are believed to be controlled and/or have been acting at the direction of Mr Zong and/or his co-conspirators, have conspired together to divert and conceal from the Claimants the profits and/or assets produced by these unlawful acts and that this deception has gone so far as to include the use of two Samoan companies, Mega Source Investments Limited ("Mega Source") and Honour Bright Investments Limited

[1] See paragraph 54 et seq of Mr Qin's affidavit in support of this application

("Honour Bright") to hold, respectively, the shares in one of the Defendants, namely Ever Maple Trading Limited ("Ever Maple") and to hold shares of various Non JVs.[2]

[13] The Claimants alleged that in the various interviews Mr Zong has given this last year to the PRC Media (and which are referred to comprehensively in Mr Qin Peng's affidavit), Mr Zong has not in fact contested the fact that the Non JVs are selling identical products to the Danone JVs, in competition with them.[3] In addition, the Claimants alleged that they have evidence of competing products in the market produced by the Non JVs and of Trade Mark Authorisation Letters indicating that Mr Zong has authorised certain Non JVs to use the Wahaha Trademarks, notwithstanding the transfer of these Trademarks to a Danone JV as part of the JV Agreement. On 1 September 2007, the China Business newspaper ran an article summarising the Non JV structure, and although the information does not come from him directly, the research done by the author appears to indicate that Mr Zong is connected to the Non JVs, which are competing with the Danone JVs. Mr Zong is the legal representative of the majority of the Non JVs and the Claimants have evidence of his shareholding in at least 15 of the 63 presently identified as being part of this scheme.

[14] To sum up, Mr Zong appears to take the view that the JV Agreements are no longer working fairly or, at least, sufficiently to his advantage, and that in the circumstances, he is entitled to compete with the Danone JVs through the Non JVs. Mr Zong is challenging the jurisdiction of the Arbitration Tribunal to determine matters concerning the Services Agreement and there are proceedings in the Hangzhou Intermediate People's Court by the Chinese parties to the Services Agreement seeking a declaration that the arbitration clause in the Services Agreement is invalid. However, Mr Zong has not indicated in the Answer filed in the SCC Arbitration under the Services Agreement what his substantive defence (if any) will be should jurisdiction be upheld by the Arbitral Tribunal. The defences of the Wahaha Respondents are little clearer. Those of them that do not have a direct shareholding in the Non JVs claim that they cannot thereby have breached their non compete obligations. There is no indication as to the likely defences of those Wahaha

[2] See Chart appended at page 2 of the affidavit of Mr Qin Peng in support of the application.
[3] See the Web Interview allegedly given by Mr Zong on 8 April 2007 (see page 424 of "QP1") at pages 3-4, and page 6; Mr Zong's alleged interview with Dialogue Program by CCTV at pages 9-10, 21.

Respondents that do have shareholdings, even controlling shareholdings in the Non JVs. All of the Wahaha Respondents deny that they have breached any of their non-compete obligations. In respect of the Non-JVs, the Wahaha Respondents further argue that their subsidiaries or other competing companies are not subject to the jurisdiction of the Arbitral Tribunal or subject to non-compete obligations under the joint venture agreements. It is alleged by the Claimants that from his interviews, Mr Zong's position generally appears to be that he and the "Wahaha Respondents" are entitled to do what they are doing, notwithstanding the express contractual restrictions contained in the JV Agreements and the Services Agreement. In particular, he contends that the Non JVs are using the Wahaha Trademarks legitimately and that the assignment of these Trademarks to the Danone JV was not effective ("the Trademark Dispute"). It is observed that the proceedings in the Hangzhou Intermediate Court challenging the validity of the arbitration clause in the Services Agreement have yet to be served on Danone Asia via the Hague Convention.

[15] In relation to the abovementioned Trademark Dispute, it was drawn to my attention that there are proceedings before the Hangzhou Arbitration Commission in the PRC in respect of the Trademark Transfer Agreement ("the TTA") entered into between the Wahaha Group and Hangzhou Wahaha Food Co Limited (referred to at Paragraph 34 of Mr Qin Peng's statement as "JV1"), the Danone JV which is the exclusive licensee of the Trademarks. The dispute under the TTA is, fundamentally, whether it is valid and whether the Wahaha Group is obliged to transfer the ownership of the Wahaha Trademarks to JV1. The Wahaha Group contends that the TTA has been terminated and JV1 has counterclaimed in those proceedings requesting the arbitral tribunal to render an award to the effect that the Wahaha Group should perform the TTA immediately. The Claimants allege that even if the TTA is held to be invalid (which they denied), and the Wahaha Group continues to be the owner of the Trademarks, such a finding does not absolve the Wahaha Group Respondents to the JV Agreements from complying with their clear contractual non compete obligations in the JV Agreements. It is further alleged that, in any event, under the TLA, JV1 is the exclusive licensee of the Trademarks and the Non JVs are not entitled to use the Trademarks without the consent of JV1. In 2005, certain Non JVs were granted permission to use the Trademarks but only on the basis that they would

operate as genuine "co-packers" operating at arms length and these Non JVs have not been operating as such.[4]

[16] The Claimants alleged that because Mr Zong has effectively managed and controlled the Danone JVs since their inception, and critically, has managed them to the exclusion of the Claimants, and because this dispute is taking place in his home ground, the PRC, Mr Zong appears presently to regard the Claimants' protestations and legal actions as little more than a bother to the continued production of competing products[5]. It is alleged that the Respondents to the SCC Proceedings have re-branded certain of their competing products from "Wahaha" to "Qili", changing the name of the ostensible manufacturer in the process. It is alleged that although this transparent manoeuvre in fact fails to circumvent the Respondents' contractual obligations not to compete with the Danone JVs (because the newly branded products still compete with the Danone JVs and Mr Zong remains in breach of his confidentiality obligations in his Services Agreement), this re-branding would appear to be in flagrant breach of Procedural Order No 1 of the Arbitral Tribunal made on 24 October 2007, which ordered the Respondents not to take any steps that would frustrate any order that the Arbitral Tribunal was to make on the Claimants' application for interim measures of protection, to be heard on 16 and 17 December 2007.

[17] Reference was made to the fact that Groupe Danone and Danone Asia have instituted proceedings in California, in the Los Angeles Superior Court ("the California Proceedings"), against Ms Zong, Ms Shi, Ever Maple (the Seventh Defendant herein), and Hangzhou Hongsheng Beverage Co Ltd (collectively "the California Defendants"). In those proceedings, and consistently with the SCC Proceedings and these proceedings, the Claimants seek to stop the California Defendants from wrongfully interfering with their customer relationships and business prospects in the food and beverage market in the PRC, and allege that the California Defendants (who are not parties to the Arbitral Agreements) have, through the Non JVs, been diverting funds, income streams and profits rightly belonging to the Danone JVs and have unfairly competed against the Danone JVs

[4] See Paragraphs 55-57 of Mr Qin Peng's affidavit for an explanation of "co packing."
[5] See Reports in the China Packaging News dated 31 October 2007 and the China Business News dated 1 November 2007.

in the PRC, using products, brands, suppliers and distribution channels which Danone Asia has spent hundreds of millions of dollars to develop. In the California Proceedings, it is estimated that the Defendants' illegal scheme has caused losses of not less than US$100 million. Again, the California Proceedings are helpfully described in the affidavit of Mr Lewis and are on going.

[18] The California Proceedings, the SCC Proceedings and these proceedings all complement each other. The SCC Proceedings and the California Proceedings focus on the substantive breaches of agreement and the scheme to defraud the Claimants, whilst the BVI proceedings (and the further proceedings to be initiated in Samoa) focus on securing the proceeds of these substantive breaches and of the unlawful scheme and themselves contain a freestanding claim for conspiracy. It is alleged that the BVI Proceedings (and the imminent Samoan proceedings) are not only aimed at preventing the Wahaha Respondents making themselves judgment proof with the aid of the BVI Defendants and the Samoa entities, although they include separate and self standing claims against the BVI Defendants, but also include a claim that they have conspired with the non JVs and other co conspirators, by using confidential information and unlawfully using the Wahaha trademarks to defraud the Claimants.

The applicable legal principles

Jurisdiction to appoint receiver

[19] The jurisdiction to appoint a receiver is found in s 24 of the West Indies Associated States Supreme Court (Virgin Islands) Ordinance, Cap 80. It states:

> "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the High Court or of the judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the court or judge thinks just."

[20] Part 51 of the Civil Procedure Rules, 2000 ("the CPR") also provides for the appointment of receivers. It outlines the procedure by which such applications are to be made.

[21] It is to be observed that prior to the development of the Mareva/freezing order jurisdiction, the jurisdiction to appoint a receiver was rarely used. However, in the last 20 years, the Courts have ordered the regular appointment of interlocutory receivers, of late in circumstances where freezing and disclosure orders alone have not been considered sufficient protection. [6]

[22] Unquestionably, the appointment of a receiver is still often regarded as a remedy of last resort, in particular where a ***trading company*** (emphasis added) is involved and where the capacity to damage is great.[7]

[23] A Receiver may be and is often appointed ex parte where the Court is being presented with allegations of fraud and drastic action is needed to prevent the Court's orders being evaded by the manipulation of offshore trusts and/or other companies formed in jurisdictions where secrecy is highly prized.[8]

[24] There are two classes of cases in which the court may appoint receivers namely: (i) cases in which the applicant already has an existing right. In these cases, the appointment is usually made as a matter of course as soon as the applicant's right is established and there is no need to allege any danger to property and (ii) cases in which a receiver is appointed to preserve property to ensure its proper management pending litigation to decide the rights of the parties. In these cases, the applicant has to allege and prove some peril to property. In the latter case, the court should cautiously exercise its discretion to appoint a receiver. Indeed, the present application falls in the latter category.

[25] The authors of *Kerr on the Law and Practice as to Receivers and Administrators* (17th edition) stated that the main object for the appointment of a receiver is to safeguard or preserve property for the benefit of those who are entitled to it. The authors went on to state:

> "If the court is satisfied upon the materials it has before it that the party who makes the application has established a good prima facie title, and that the property, the

[6] [2000] NSWC 694.
[7] NAB v Bond Brawing Holdings [1991] 1 VB 386 at 840.
[8] ICIC v Adham & Ors [1998] BCC 134 at 136.

> subject matter of the proceedings will be in danger, if left until the trial in the possession or under the control of the party against whom the appointment of receiver is asked for, or, at least, that there is reason to apprehend that the party who makes the application will be in a worse situation if the appointment of a receiver be delayed, the appointment of a receiver is almost a matter of course. If there is no danger to the property, and no fact is in evidence to show the necessity or expediency of appointing a receiver, a receiver will not be appointed. The duty of the court upon a motion for a receiver is merely to protect the property for the benefit of the person or persons to whom the court, when it has all the materials necessary for a determination, shall think it properly belongs. On a motion for a receiver, the court will not prejudice the action, or say what view it will take at trial. Indeed the court will not appoint a receiver at the instance of a person whose right is disputed, where the effect of the order would be to establish the right, even if the court be satisfied that the person whom the demand is made is fending off the claim."

[26] In recent years, this Court has made receivership orders in, inter alia, the following reported cases:

- IPOC International Growth Fund Ltd v LV Finance Group Ltd[9], ex parte receivership appointments were made over a Bahamian company and a Russian company which were allegedly involved in the breach of an option agreement entered into with their BVI holding company. The orders were ultimately discharged on the grounds of *forum non conveniens*. No receivership was ever sought over the BVI Company.

- Spectrum International Holding Ltd v Modern Perfect Developments Ltd and Tennis Management Ltd[10], the Court appointed a receiver over shares in a company, in the context of a winding up on just and equitable grounds, for the limited purpose of voting the shares.

- Kygyz Mobil Tel Ltd v Fellowes International Holdings Ltd[11], a receiver was appointed ex parte for the limited purpose of ensuring compliance with an anti suit injunction that had been made by consent.

[9] Claim No. 140 of 2003, 1 October 2003 and 21 January 2004, CA, 29 September 2005-BVI.
[10] Claim No. BVIHCV2005/0071, 30 May 2005 –per Rawlins J [as he then was].
[11] Civil Appeal No. 25 of 2005, CA 24 April 2005- British Virgin Islands.

- Finecroft Ltd v Lamane Trading Corporation[12] concerned the ex parte appointment of a receiver for the purpose of ensuring compliance with an anti suit injunction. The receivership in this case was not granted on the basis that the Court of Appeal decision in Kygyz was *per incuriam*. The present view is unclear as to whether there is jurisdiction to appoint a receiver merely for the purpose of conducting litigation, as opposed to the safe keeping of assets over which he has been appointed.

[27] In Norgulf Holdings Limited and Incomeborts Limited v Michael Wilson & Partners Limited[13] the Court of Appeal discharged a receivership order that was made on the ground that I equated the threshold test of "a good arguable case" with "a serious issue to be tried,'" perhaps unwittingly, following previous decisions of the Court in Audubon Holdings Limited v The Treasure Island Company Limited and others[14] and Spectrum International Holding Limited v Modern Perfect developments Limited and Another[15]. Rawlins JA in Norgulf Holdings Limited has now helpfully clarified the test stating that his statement in Audubon Holdings and Spectrum International Holding was based on authority which had been overtaken by time. [16] After referring to Mustill J in Ninemia Maritime Corporation v Trave GmbH (The Niedersachsen)[17], he concluded that the threshold test to justify the appointment of a receiver should be at least equal to that which is required for obtaining a freezing injunction, or even a higher threshold. He held that the minimum threshold test for appointing a receiver would require an applicant to have a good arguable case.[18]

[28] There is no doubt that in making a receivership order, particularly an ex parte one, the Court ought to act very cautiously because such appointment is regarded as very draconian. I refer to the statement of Gee on Commercial Injunctions[19] that the appointment of a receiver is more intrusive, more expensive, and less reversible than the

[12] BVIHCV2005/0264, 27 April 2006
[13] Civil Appeal No. 8 of 2007, 29 October 2007.
[14] BVIHCV2002/0227 –judgment delivered on 17 March 2003- per Rawlins J [as he then was].
[15] BVIHCV2005/0071 –Judgment delivered on 3 and 30 May 2005 –per Rawlins J [as he then was].
[16] See paragraph 25 of the Judgment in Norgulf Holdings Limited [supra].
[17] [1983] 1 WLR 1412 at page 1415-1417.
[18] See paragraph 27 of the Judgment delivered on 29 October 2007.
[19] (5th edition, 2004), at paragraph 16.008.

grant of an injunction. When a receivership is appointed, a defendant no longer has control of the assets of the company to continue its operations as a commercial concern although the Claimants have submitted that the BVI Defendants are more or less holding companies and as such, do not trade.

[29] Learned Queen's Counsel, Ms Prevezer submitted that a freezing order would not be sufficient in these circumstances because of the risk of dissipation. She submitted that a Receivership Order provides a number of avenues by which vital information can be gleaned for the purpose of establishing the nature and whereabouts of a company's assets. A receiver will be entitled to access to all relevant documentary information held by a party in relation to the relevant assets, in respect of which the receiver is appointed. A receivership order will typically direct the party in possession of an asset to hand over, in addition to the asset itself, all deeds, documents, books and records relating to that asset.

[30] Learned Queen's Counsel invited the Court to bear the following points in mind in deciding whether or not to grant the receivership order which is being sought namely:

(i) The Defendants are all BVI Companies, so there is less likely to be serious "forum" issues. The Claimants are, at least theoretically, entitled to seek the orders they do over these Defendants in this jurisdiction.

(ii) The orders are not sought merely for the purpose of conducting or policing litigation. There are substantive claims made against the BVI Companies in the litigation and a Court appointed Receiver is sought in order to secure the assets of these companies and to obtain information critical to identifying the source of those assets and their whereabouts.

(iii) There is no evidence to suggest that any of the BVI Companies are trading companies, so the impact of any receivership should be minimal.

(iv) There are serious allegations of fraud and an allegation of common law conspiracy against the BVI Companies, who are believed to be controlled (directly or indirectly) by Mr Zong and to have acted in concert with the Non JVs, the Wahaha Respondents and the California Defendants, being entities also controlled by Mr Zong and/or his wife and/or his daughter and/or servants or agents of Mr Zong.

(v) There are the usual attendant problems of secrecy arising from the incorporation of the Defendants in the BVI.

(vi) The Claimants critically require the information which the Receiver will be able to obtain through the aforementioned powers.

Jurisdiction to make freezing orders and disclosure orders

[31] The jurisdiction of the courts in the BVI to grant Mareva injunctions is based upon section 24 (1) of the West Indies Associated States Supreme Court (Virgin Islands) Act which provides that the court may grant an interlocutory injunction *"in all cases in which it appears to the Court or Judge to be just or convenient to do so".* The language is similar to section 45 (1) of the Supreme Court of Judicature (Consolidated) Act 1925 which formed the bedrock of the creation of the Mareva jurisdiction in England before the section was replaced and amplified by section 37 of the Supreme Court Act 1981.The BVI legislature has not enacted the equivalent of subsection 3 of section 37, which gives the court express power to grant Mareva relief in respect of assets within the jurisdiction, whether or not the defendant is *"domiciled, resident or present"* within that jurisdiction.

[32] Nevertheless, the jurisdiction to grant such relief in respect of assets within or without the jurisdiction and against residents or foreigners was well established in England before the 1981 Act was passed: see Third Chandris Shipping Corporation v Unimarine SA [20]

[20] [1979] Q.B. 645.

and Barclay-Johnson v Yuill [21] (jurisdiction against residents) and Derby & Co. Ltd v Weldon [22] (world-wide restraints). The Courts of the BVI have a similar jurisdiction.

[33] Interlocutory jurisdiction is ordinarily ancillary to substantive jurisdiction and in Siskina (Cargo Owners) v Distos Compania Naviera S.A. ("the Siskina"), [23] the House of Lords decided that a court could not (in the absence of express statutory authority) grant Mareva interlocutory relief unless the defendant was "amenable" to the jurisdiction of the court "in respect of a substantive cause of action." As the proceedings are interlocutory, it is not necessary for the applicant to show that he is likely to succeed in establishing such a cause of action. For the purposes of the threshold requirement, it is sufficient if, upon the material before the court, he appears to have a good arguable case: see Ninemia Maritime Corporation v Trave GmbH (The Niedersachsen). It is then a matter for the court to decide as a matter of discretion, taking into account among other matters the strength or otherwise of the applicant's case, whether it is *"just and convenient"* to grant an injunction.

[34] As regards the Court's jurisdiction to make freezing and disclosure orders, the Court of Appeal's decision in Bekhor v Bilton[24] is the landmark authority. A disclosure order is designed to ensure that the freezing order jurisdiction is properly exercised and secures its objective, which is the prevention of abuse [25]. The general view is that although it is an invasion of privacy to force any party to disclose assets, a freezing order in normal circumstances simply can not be effective without that disclosure[26].

[35] A Freezing order coupled with a disclosure order will more readily be granted where the assets in question are the subject of a proprietary claim than where a Claimant seeks only

[21] [1980] 1 WLR 1259
[22] [1990] Ch. 48.
[23] [1979] A.C. 210.
[24] 1981 QB 923.
[25] See A v C [1981] QB 956.
[26] Motorola Credit Corporation v Uzan [2002] 2 All ER (Comm) 945.

a monetary judgment[27]. The Order is sought to hold the ring with respect to the Defendants' assets wherever they are, until the substantive issues have been tried.

[36] In my judgment, this is an appropriate case for the grant of a freezing order as the Claimants have established that there is a good arguable case and further, that the subject matter of the claim is in danger if left in the possession or under the control of the defendants until the trial. In other words, that there is a substantial risk that the assets will be dissipated. It seems to me that given the fact that this is a proprietary claim and not simply a claim for damages; damages may not be an adequate remedy. The balance of convenience therefore lies in favour of the grant of a freezing order.

Analysis of the law and the facts

[37] The BVI Courts have jurisdiction to make freezing orders and receivership orders simultaneously: see Audubon's case [supra]. The threshold test for the appointment of a receiver has been helpfully clarified by the Court of Appeal in Norgulf Holdings Limited [supra]. The prerequisites for the appointment of receivers are three-fold in nature namely (i) there is sufficient evidence to show a good arguable case; (ii) there is property to be preserved and (iii) the claim is not frivolous or vexatious.

[38] The Claimants appear to have established a good arguable case for the following reasons:

1. In the SCC Proceedings, the Claimants contend that there are incontrovertible claims for breach of contract against the Respondents. They allege that the activities complained of in the SCC Proceedings are clearly fraudulent and the full pleading, when filed in due course, will include particulars which would be sufficient to support a plea of fraud. In the California Proceedings, the plea of fraud is already included in the form of a fraudulent scheme to defraud the Claimants.

2. In the present proceedings, the claims against the BVI Companies are for knowing assistance and knowing receipt. Further, there is a claim of conspiracy and the Court is referred to the Statement of Claim for precise details of these claims.

3. The Defendants are all BVI Companies, believed to be incorporated by or at the direction of Mr Zong, his co-conspirators, servants or agents, for the specific purpose

[27] Repubmic of Haiti v Duvalier [1990] 1 QB 202.

of holding shares in Non JVs. As mentioned earlier, so far as the Claimants are aware, the Defendants are not trading companies.

4. The Claimants alleged that although there are tax advantages for PRC companies when they receive investments from off-shore companies, this tax incentive is an incidental benefit and the real reason for their incorporations is to conceal assets. This can be borne out from the following allegations (i) the conversation between Mr Qin Peng and Mr Zong that he would be unable to find the true identity of the BVI Companies; (ii) the alleged fraudulent use of Mr Chen's forged signature on documents to incorporate companies which Mr Zong has denied but has failed to account how the forged signatures got on to the documents and (iii). it would have been known to Mr Zong, who is an astute and very experienced businessman, that the BVI (and Samoan) confidentiality laws would prevent the Claimants and/or Groupe Danone from finding out the ultimate shareholders of these companies and also from obtaining any information concerning their assets and bank accounts.

5. There are other matters which the Claimants consider to be of importance to the overall issue of the fraud which has been (and continues to be) perpetrated by Mr Zong and/or his co-conspirators, servants and/or agents.

6. The Claimants alleged that monies have been paid, by way of dividend, out of the Non JVs to the BVI Defendants, on Mr Zong's or his co- conspirators' instructions, and that at least some of these monies have been used by Mr Zong and his co-conspirators to invest in new Non JVs (possibly gaining the abovementioned tax advantages by so doing), alternatively are held in bank accounts of the BVI Defendants. In the case of Ever Maple, the 7th Defendant, the Claimants alleged that monies have journeyed yet further up the chain to its Samoan parent, Mega Source. It alleged that that those Non JVs whose shares are held by Honour Bright, have also paid up money by way of dividend to Honour Bright, out of the reach of the Claimants.

7. Given the lengths that Mr Zong and his co-conspirators have gone to set up the BVI and Samoan companies (including restoring a number of the BVI Defendants to the Register at significant cost rather than setting up new BVI Companies[28], it is reasonable to infer that these companies perform some other purpose than simply holding shares in the Non JVs.

8. The Claimants alleged that they have discovered that Mr Zong, as the legal representative, Chairman and General Manager of the Wahaha Group, has clearly used Wahaha Group assets and resources to establish Non JVs and that Mr Zong has caused inaccurate filings to be made with the AIC to conceal this.

9. The Claimants also alleged that Ever Maple holds a 98% interest in Hongsheng, which is directly engaged in the manufacture and distribution of food and beverage products in direct competition with the Danone JVs. Ms Zong is the Legal Representative of Hongsheng, as well as Chair of its Board of directors and Ms Shi holds a 2% interest in

[28] See paragraph 109(a) of Mr Qin Peng's affidavit.

> Hongsheng. Hongsheng in turn owns 100% of New Sales, the sales/distribution company being used by Mr Zong Ms. Zong, Ms. Shi and the Non JVs (at their direction) in place of Health. In the circumstances, it is highly likely that Ever Maple has received monies from Hongsheng and equally likely that it has passed these monies on to Mega Source in Samoa.

[39] Based on the above and the other arguments advanced by the Claimants in their skeleton arguments and oral submissions at the ex parte hearing, in my judgment, they have established a good arguable case to meet the threshold requirement at this stage of the proceedings.

[40] The Claimants alleged that there is a substantial risk of dissipation of the assets held by the BVI Companies because (i) Mr Zong had already told Mr Qin Peng that the Claimants will be unable to discover the true identity of the beneficial owners of the BVI Companies, and (ii) Mr Zong, by the Wahaha Respondents, has already shown himself capable and intent on evading orders made by other courts, namely the Procedural Order No 1 of the Arbitral Tribunal. The alleged recent "re-branding" of "Wahaha" products being produced by the Non JVs in breach of the JV Agreements appears to be an obvious manoeuvre to flout that order, which requires the Respondents to maintain the status quo provided for by the JV Agreements.

[41] For the reasons stated above, I do not think that a freezing order will not be sufficient to preserve the assets pending the determination of the trial. The Receivership, though intrusive and draconian is necessary in a case like this where the Claimants have alleged a substantial risk of dissipation and have made out a good arguable case which appears, by no means frivolous and vexatious. Also, the BVI Companies are said not to be trading companies so disruption or invasion of the companies' interests is minimised. Indeed, a number of the BVI Defendants have only recently been restored to the Register of Companies.

[42] In the premises, the Order of this Court will be:

1. That the Defendants, and each of them, shall be restrained whether by themselves, their servants or agents or through any other representatives whether recognized as such under the laws of this jurisdiction or any other, from removing, selling, transferring, interfering with, charging, dissipating or otherwise howsoever diminishing the value of any of their assets, or howsoever procuring the same until further order of this Court.

2. That Mr Casey McDonald of KPMG (BVI) Limited, 3rd Floor Flemming House, Road Town, Tortola, British Virgin Islands and Ms. Jannie Wong, of KPMG China, 29th Floor, Guangzhou International Electronics Tower, 403 Huan Shi Dong Road, Guangzhou 510095, China (Hong Kong Identity Card No. D659076 (15) and China Travel Document H0879468900) are hereby appointed Joint Receivers ("the Receivers") over the entire assets and undertakings of each and all of the Defendants (wherever situated and in whatever form) and, without prejudice to the generality of this appointment and their appointment as Receivers shall extend to the particular assets mentioned in the Schedule to this Order ("the Defendants' Assets").[29]

Indra Hariprashad-Charles
High Court Judge

[29] See full orders in approved Orders of rhe Court dated 9 and 13 November 2007.