

BERMUDA SUPREME COURT

E.R.G. Resources LLC -v- Nabors Global Holdings II Limited (PDF) 2012 Civil Jurisdiction (Commercial Court) No. 110 [original location: SC Vol. 76 p. 347-362], [2012] SC (Bda) 23 Com (5 April 2012)

INJUNCTION - ANCILLARY PROCEEDINGS IN BERMUDA SEEKING IDENTICAL RELIEF IN TEXAS

In this decision, the Supreme Court set out the parameters to be applied by a Bermuda court in the exercise of its discretion where an injunction is ancillary to the court where the proceedings are being conducted.

ERG launched proceedings in Harris County, Texas and sought a temporary restraining order against Nabors prohibiting the sale of shares in a subsidiary. The Texas Court refused a temporary restraining order. Two days later, ERG issued proceedings in Bermuda claiming identical relief to that claimed in Texas. ERG sought and obtained, *ex parte*, an injunction in its favour against Nabors preventing the disposal of the shares. The following week Nabors applied to have the injunction discharged and sought a stay and/or dismissal of the Bermuda proceedings. At the *inter partes* application the Supreme Court granted Nabors' application, discharged the injunction and stayed the proceedings. It did so on substantive grounds and on the basis that there had been material non disclosure by ERG when it made its, *ex parte*, application to the Bermuda court.

The Court held that the existence of parallel proceedings provided the context against which the traditional considerations as to whether to grant injunctive relief must be taken into account. It held that where interim relief is sought in one jurisdiction in support of a substantive cause of action which either arises under foreign law or is being pursued in a foreign court, the question of whether the foreign court would be willing to grant the interim relief is an important factor in determining where the balance of convenience lies in deciding how the discretion to grant injunctive relief should be exercised.

Applying the decisions of *Walsh -v- Deloitte and Touche* [2000] UKPC 37, *Credit Suisse -v- Cuoghi* [1998] QB 818 and *Refco Inc -v- Eastern Trading Co* [1999] 1 Lloyd's Rep 159 and *Motorola Credit Corporation -v- Uzan et al* [2003] EWCA Civ 752 the Court held that the role played by the Bermuda court in such a case was ancillary to that of the foreign court, the Bermuda court provides assistance to the court exercising primary jurisdiction. In a case such as this the court must, as a practical matter, look at the where the substantive dispute is being tried and must, in the interests of comity recognise that its role is subordinate and supportive of the primary court. In doing so, it will not grant relief either where application had been made to the primary court and refused or where such an application, if made to the primary court would inevitably have been refused.

In this case the Court was satisfied that the Judge in Texas was not willing to grant an interim restraining order and even though the test for whether or not an interim injunction should be granted is less onerous in Bermuda than Texas. In Bermuda, under the classic American Cyanimid formulation, the law requires only that there be an arguable case as opposed to good prospects of success which is the threshold under Texan law. The Court therefore granted Nabors' application.

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