

Multi-Code Electronics Industries (M) Bhd and another
v
Toh Chun Toh Gordon and others

[2008] SGHC 193

High Court — Suit No 258 of 2008 (Summons Nos 1998 and 2022 of 2008)
Chan Seng Onn J
4 August; 3 November 2008

Conflict of Laws — Jurisdiction — Discretionary — Principles governing stay of local proceedings on grounds of lis alibi pendens and forum non conveniens — Whether court had jurisdiction to grant Mareva injunction despite stay in favour of foreign jurisdiction — Whether court had jurisdiction to maintain Mareva injunction despite absence of full and frank disclosure by applicant

Facts

On 7 April 2008, the plaintiffs commenced an action in Malaysia against the five defendants for a sum of RM44,188,262.82 arising out of a dispute concerning several escrow and share agreements. The following day, the plaintiffs obtained an injunction in Malaysia against, *inter alia*, the first and fourth defendants preventing them from disposing their assets on a worldwide basis.

On 10 April 2008, the plaintiffs commenced an action in Singapore against, *inter alia*, the first, third and fourth defendants for almost identical relief as that pursued in the Malaysian action. A day later, the plaintiffs obtained an injunction against the first, third and fourth defendants preventing them from disposing their assets located in Singapore.

The first, third and fourth defendants subsequently applied for the Singapore proceedings against them to be stayed on the grounds of *lis alibi pendens* and, in the alternative, *forum non conveniens*. They also applied for the discharge of the Mareva injunctions obtained against them on 11 April 2008.

Held, granting a stay of local proceedings and lifting the Mareva injunction on the third defendant:

(1) This was a clear case of *lis alibi pendens*. Absent any very unusual circumstances, the plaintiffs should have elected just one jurisdiction to pursue their claim to judgment and not put the defendants through unnecessary time, expense and effort to defend themselves more than once on substantially the same matter in two different jurisdictions. Such multiplicity of actions could lead to conflicting judgments, and appropriately the Singapore action was stayed: at [38].

(2) The tort was wholly committed in Malaysia and the escrow agreements were signed in Malaysia and governed by Malaysian law. If the plaintiffs wished to have the tortious and contractual issues tried in Singapore instead, it was for the plaintiffs to show that no significant differences existed between Malaysian law and Singapore law. However, this was not done. After the various factors were considered, the Singapore action was stayed on the alternate ground of *forum non conveniens*: at [49].

(3) Under s 4(10) of the Civil Law Act, the court has a residual jurisdiction to grant or allow the continuation of a local Mareva injunction despite an order staying local proceedings in favour of a foreign jurisdiction. This residual jurisdiction would allow the stayed Singapore action to be revived and carried forward to judgment in the courts in Singapore if, for some reason, the stay was subsequently lifted by the Singapore court: at [77] to [79] and [85].

(4) The prerequisites for the court's jurisdiction under s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) to grant or continue a Mareva injunction are as follows: (a) the plaintiff has to show a reasonable accrued cause of action justiciable in a Singapore court; (b) the court has *in personam* jurisdiction over the Singapore or foreign defendant; (c) there are assets within the territorial jurisdiction of Singapore which could be the subject of a Mareva injunction; (d) substantive proceedings would have to be brought in Singapore against the defendants, although those proceedings might be stayed for various reasons; and (e) the substantive proceedings need not in fact end in a Singapore judgment to ground the jurisdiction of the court to grant the Mareva injunction: at [116].

(5) Given that the plaintiffs had deliberately suppressed and distorted material facts in their *ex parte* application for the Mareva injunction against the third defendant, and in light of the lack of evidence to indicate how and why there was a real risk that the third defendant would dissipate his meagre assets within the jurisdiction, there would be no grave injustice occasioned to the plaintiffs in discharging the injunction: at [138] and [141].

(6) Despite the deplorable conduct of the plaintiffs in relation to the material non-disclosure and distortion of important facts, the first and fourth defendants' lack of probity and propensity to dissipate their assets required that the Mareva injunction against them be maintained. This was a "special case". *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah* [2000] 1 SLR(R) 786 endorsed: at [151] to [154].

Case(s) referred to

Amixco Asia Pte Ltd v Bank Negara Indonesia 1946 [1991] 2 SLR(R) 713; [1992] 1 SLR 703 (folld)

Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd [1989] 3 All ER 65 (folld)

Baiduri Bank Bhd v Dong Sui Hung [2000] 2 SLR(R) 271; [2000] 4 SLR 212 (distd)

Bambang Sutrisno v Bali International Finance Ltd [1999] 2 SLR(R) 632; [1999] 3 SLR 140 (refd)

Bank Mellat v Nikpour [1985] FSR 87 (not folld)

Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334 (folld)

Choy Chee Keen Collin v Public Utilities Board [1996] 3 SLR(R) 812; [1997] 1 SLR 604 (folld)

CIMB Bank Bhd v Dresdner Kleinwort Ltd [2008] 4 SLR(R) 543; [2008] 4 SLR 543 (folld)

Crédit Suisse Fides Trust SA v Cuoghi [1998] QB 818, CA (refd)

Crédit Suisse Fides Trust SA v Cuoghi [1998] 1 WLR 474, HL (refd)

- Eastern Trust, The* [1994] 2 SLR(R) 511; [1994] 2 SLR 526 (folld)
Fourie v Le Roux [2007] 1 WLR 320 (distd)
Front Carriers Ltd v Atlantic & Orient Shipping Corp [2006] 3 SLR(R) 854;
[2006] 3 SLR 854 (folld)
Hooghly Mills Co Ltd, The v Seltron Pte Ltd [1994] 3 SLR(R) 757; [1995] 1 SLR
773 (refd)
House of Spring Gardens v Waite [1984] FSR 277 (refd)
House of Spring Gardens v Waite [1985] FSR 173, CA (refd)
Hyman v Helm (1883) 24 Ch D 531 (distd)
Karaha Bodas Co LLC v Pertamina Energy Trading Ltd [2006] 1 SLR(R) 112;
[2006] 1 SLR 112 (distd)
*King, The v The General Commissioners for the Purposes of the Income Tax Acts
for the District of Kensington; Ex parte Princess Edmond de Polignac* [1917] 1
KB 486 (not folld)
Kirames Sdn Bhd v Federal Land Development Authority [1991] 2 MLJ 198 (refd)
Koh Kay Yew v Inno-Pacific Holdings Ltd [1997] 2 SLR(R) 148; [1997] 3 SLR 121
(folld)
Nikkomann Co Pte Ltd v Yulean Trading Pte Ltd [1992] 2 SLR(R) 328; [1992] 2
SLR 980 (refd)
Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG [1984] 1
All ER 398 (folld)
O'Regan v Iambic Productions Ltd (1989) 139 NLJ 1378 (folld)
Petroval SA v Stainby Overseas Ltd [2008] 3 SLR(R) 856; [2008] 3 SLR 856 (not
folld)
Poon Kng Siang v Tan Ah Keng [1991] 2 SLR(R) 621; [1992] 1 SLR 562 (folld)
Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera SA
[1979] AC 210 (folld)
Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460 (folld)
St Pierre v South American Stores (Gath and Chaves), Limited [1936] 1 KB 382
(distd)
Swift-Fortune Ltd v Magnifica Marine SA [2007] 1 SLR(R) 629; [2007] 1 SLR 629
(refd)
Tay Long Kee Impex Pte Ltd v Tan Beng Huwah [2000] 1 SLR(R) 786; [2000] 2
SLR 750 (folld)
Transtech Electronics Pte Ltd v Choe Jerry [1998] 1 SLR(R) 1014; [1998] 3 SLR
272 (not folld)
Wing Hak Man v Bio-Treat Technology Ltd [2009] 1 SLR(R) 446; [2009] 1 SLR
446 (folld)
Wu Yang Construction Group Ltd v Mao Yong Hui [2008] 2 SLR(R) 350; [2008] 2
SLR 350 (distd)
Yusen Air & Sea Service (S) Pte Ltd v KLM Royal Dutch Airlines [1999] 2 SLR(R)
955; [1999] 4 SLR 21 (folld)

Legislation referred to

Civil Law Act (Cap 43, 1999 Rev Ed) s 4(10) (consd)

International Arbitration Act (Cap 143A, 2002 Rev Ed) s 12(7), First Schedule

Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) s 3
Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 11 r 1, O 18 r 19, O 69A rr 3(1)(c), 4(1)
Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ss 16(1), 16(2), 18(1)
Civil Jurisdiction and Judgments Act 1982 (c 27) (UK) s 25
Contracts Act 1950 (Act 136) (Malaya)
Supreme Court Act 1981 (c 54) (UK) ss 37(1), 37(2), 37(3)
Supreme Court of Judicature Act 1873 (c 66) (UK) s 25(8)
Supreme Court of Judicature (Consolidation) Act 1925 (c 49) (UK) s 45(1)

Gopinath s/o B Pillai/Henry Heng/Charmaine Cheong Siao Hwei (Tan Peng Chin LLC) for the plaintiff;
Murugaiyan Sivakumar/Parveen Kaur Nagpal (Madhavan Partnership) for the first and fourth defendants;
Prabhakaran Nair (Ong Tan & Nair) for the second defendant. Sarjit Singh Gill SC/Arvind Daas Naaidu (Shook Lin & Bok LLP) for the third defendant.

3 November 2008

Chan Seng Onn J:

Introduction and brief facts

1 The plaintiffs' claim against all the defendants in this action was for a total sum of RM44,188,262.82. The first defendant was the managing director of the first plaintiff and director of the second plaintiff at all material times. The first defendant first entered into an escrow agreement on or about 29 March 2007 with the fourth and fifth defendants, both of which he was also a director. He later entered into a supplementary escrow agreement on or about 30 March 2007 without the first plaintiff's authorisation.

2 The escrow agreement and supplementary escrow agreement (collectively "the agreements") allegedly created in the fifth defendant's name for the first plaintiff's benefit an escrow account with Clariden Leu Ltd, where the fourth defendant purportedly had an account under a company called Singapore Holdings Limited. The first plaintiff discovered after investigations that Singapore Holdings Limited was dissolved in 1950.

3 The fourth defendant transferred its money in its alleged account with Clariden Leu Ltd into the escrow account while the first and second defendants, the latter a director of the second plaintiff, uplifted the first plaintiff's fixed deposits in the total sum of RM29,009,917.80 in purported execution of the escrow agreement and paid the said sum to the fourth defendant and other parties without the first plaintiff's authorisation.

4 The first defendant also paid RM2,000,000 from the second plaintiff to the fourth defendant in purported execution of the alleged supplementary escrow agreement without the second plaintiff's authorisation.

5 The fifth defendant produced alleged copies of supporting bank statements from Clariden Leu Ltd with respect to the escrow account. However, Clariden Leu Ltd confirmed that the said bank statements were not issued by them and that they were never privy to the agreements.

6 During the purported execution of the agreements, it was alleged that the third defendant, who was the representative office assistant manager of the first plaintiff at all material times, would, *inter alia*, propose accounting entries for both agreements and journal accounts for the escrow account set up under the agreements to the first plaintiff.

7 Furthermore, the first defendant attempted to register the first plaintiff in the American Depository Receipt Program ("the ADR Program") in or about July 2007 without the first plaintiff's authorisation. In purported registration in the ADR Program, the first defendant paid RM4,200,000 from the plaintiffs to various parties.

8 Apart from payments made under the agreements and the alleged registration in the ADR Program, the first and second defendants made additional payments of a total sum of RM8,978,345 to various parties from the plaintiffs' accounts without the plaintiffs' authorisation for the period from 1 August 2007 to 31 January 2008.

9 At the first plaintiff's meeting of the board of directors on 29 November 2007, the first defendant undertook to recall the first plaintiff's deposits in foreign financial institutions amounting to RM28,603,962 and another investment in a foreign investment fund amounting to RM3,508,670 and credit both sums into the first plaintiff's bank account.

10 Instead, the first defendant presented to the first plaintiff's board of directors on 31 December 2007 two fixed deposit receipts of the total sum of RM32,857,974 allegedly issued by RHB Bank Berhad in the first plaintiff's favour. However, the said two fixed deposit receipts were later ascertained by RHB Bank Berhad to be fraudulent and fictitious.

11 Counsel for the plaintiffs submitted that the defendants (*ie*, the first, third and fourth defendants who were the only three defendants involved in the present summonses) had not, in any of the affidavits filed, disputed the facts which counsel had summarised as set out above.

Plaintiffs' causes of action

12 On 7 April 2008, the plaintiffs commenced an action in Malaysia (“the Malaysian action”) against twelve parties, five of whom were the defendants in the Singapore action.

13 The following day, the plaintiffs obtained an injunction in Malaysia on an *ex parte* basis against, *inter alia*, the first and fourth defendants preventing them from disposing their assets on a worldwide basis (“the Malaysian injunction”). There was no Mareva injunction obtained against the third defendant in Malaysia.

14 On 10 April 2008, the plaintiffs commenced an action in Singapore against, *inter alia*, the first, third and fourth defendants for almost identical relief (“the Singapore action”) as that claimed in the Malaysian Action.

15 The following day, 11 April 2008, on an *ex parte* basis and without prior notice, the plaintiffs obtained an injunction against, *inter alia*, the first, third and fourth defendants preventing them from disposing their assets located in Singapore (“the Singapore injunction”).

16 The plaintiffs' causes of action in the Singapore action included the following:

- (a) the first and second defendants' breach of fiduciary duties and/or breach of trust owed to the plaintiffs;
- (b) the third defendant's breach of contract and/or duties owed to the first plaintiff; and
- (c) all the five defendants as constructive trustees of the plaintiffs had engaged in a conspiracy to defraud the plaintiffs.

17 The first and fourth defendants raised several allegations against the plaintiffs in order to discharge and/or set aside the Singapore injunction. The third defendant aligned himself with the position taken by the first and fourth defendants. Counsel for the defendants informed me that the first, third and fourth defendants had submitted to the jurisdiction of the Malaysian courts and they had not applied for a stay of the Malaysian action. The first and fourth defendants also made no application to discharge the Malaysian injunction against them.

18 In this case, I made an important finding after comparing the actions brought in Malaysia and Singapore by the same plaintiffs against the same first, third and fourth defendants that they largely involved the same issues arising from the same factual matrix (*ie*, the same subject matter). Accordingly, the actions were indeed duplicitous. At the hearing before me, the plaintiffs took the position that they were entitled to actively prosecute the similar actions against these defendants in the courts of both Singapore and Malaysia.

Stay of proceedings in Singapore on the ground of *lis alibi pendens*

19 I heard the applications by the first, third and fourth defendants for a stay of the Singapore action first and then made a decision on the stay applications before dealing with the other applications to lift the Mareva injunction. This was because the result of the stay applications would have a material impact on the arguments of counsel concerning the lifting of the Singapore injunction. If the stay applications were granted, then counsel for the defendants would be able to run the argument that the Singapore injunction should not be allowed to continue exclusively in support of the foreign proceedings in Malaysia. However if the stay was not granted, then obviously the defendants could no longer utilise that argument as the factual scenario would then be that the Singapore injunction would necessarily also be in support of the Singapore proceedings.

20 It should be noted that the defendants did not apply to strike out the plaintiffs' action in Singapore on the basis that no reasonable cause of action had been disclosed in the Singapore action or that it was vexatious of the plaintiffs to bring similar actions against them in two jurisdictions in relation to the same subject matter.

The law governing the bringing of actions against the same defendants by the same plaintiffs in two or more jurisdictions on the same issues that arise from the same underlying factual matrix

21 Counsel for the plaintiffs referred me to *Hyman v Helm* (1883) 24 Ch D 531, where it was held by Chitty J and the Court of Appeal at 531 that:

the action ought not to be restrained, for that there was no *prima facie* inference that the bringing the action abroad, during the pendency of an action in *England* in which the matters in dispute could be determined, was vexatious, since the course of procedure in *San Francisco* might be such as to give advantages to C. of which he was entitled to avail himself, and that the burden lay on B. to prove that C.'s action was vexatious, which he had failed to do.

At 537–538, Brett MR said the following:

It seems to me that where a party claims this interference of the Court to stop another action between the same parties, it lies upon him to shew to the Court that the multiplicity of actions is vexatious, and that the whole burden of proof lies upon him. He does not satisfy that burden of proof by merely shewing that there is a multiplicity of actions, he must go further. ... But it was held in the cases which I have mentioned, that even where the plaintiff brings two actions, one in *England*, and the other in a foreign Court, that then the same *prima facie* case of vexation does not arise, because he might have a reasonable ground for bringing the action abroad, that is to say, it may be of some advantage to him to do so, and if it is of some advantage to him it is not right for the other party to say that the bringing it is vexatious and oppressive as against him. In such a case it lies on the

defendant to shew that in fact there is vexation. He would establish that, if he shewed that the plaintiff could get no advantage whatever by the action abroad greater than he could get by the action in *England*; but it is for the party applying to the Court to shew that.

22 Counsel for the plaintiffs also relied on the case of *Transtech Electronics Pte Ltd v Choe Jerry* [1998] 1 SLR(R) 1014 (“*Transtech*”) where at [16] Judith Prakash J held as follows:

Whilst the courts have accepted that it is undesirable in general for there to be two sets of proceedings in two different jurisdictions involving the same parties and the same issues and arising from the same underlying factual matrix, they do not *ipso facto* prevent one of those actions from continuing. ... The court has always to have regard to the right of a party to invoke a jurisdiction available to him by the law of a particular country and cannot deprive such party of that right without good ground.

23 Counsel for the plaintiffs thus submitted that there was no presumption that the multiplicity of actions was in itself vexatious and it would be for the defendants to prove that the multiple actions brought by the plaintiffs was vexatious. Counsel further submitted that *lis alibi pendens* was not an immutable rule and was subject to the discretionary powers of the court.

24 The plaintiffs further contended that to justify a stay or dismissal of the action in a case of *lis alibi pendens*, the defendants would have to show that the stay would not cause any injustice to the plaintiffs and that the continuance of the action would work an injustice because it would be oppressive or vexatious to the defendant or would be an abuse of the process of the court in some other way: *per* Scott LJ at 398 in *St Pierre v South American Stores (Gath and Chaves), Limited* [1936] 1 KB 382. On the facts, the plaintiffs submitted that no risk of injustice or prejudice would be occasioned to any of the defendants if the action herein was maintained against them. No evidence of the injustice or prejudice was raised by the first, third and fourth defendants in any of their affidavits filed in the action herein. Conversely, counsel submitted that the plaintiffs would suffer a real and substantial prejudice/injustice if the action against the first, third and fourth defendants was stayed or dismissed.

25 Generally, I could not agree with the above submissions of plaintiffs’ counsel as the law in Singapore on this had been settled by the Court of Appeal in *Yusen Air & Sea Service (S) Pte Ltd v KLM Royal Dutch Airlines* [1999] 2 SLR(R) 955 (“*Yusen Air*”). In any event, I could not see what “real and substantial prejudice/injustice” the plaintiffs would be sustaining if the Singapore action was stayed when its Malaysian action remained alive.

26 I further noted that the above comments in the case of *Transtech* ([22] *supra*) relied upon by counsel for the plaintiffs were *obiter* as the facts found by the learned judge were that (a) there were many points of difference

between the Singapore and New York actions brought by the plaintiffs; (b) the parties to the two sets of proceedings were not identical; (c) the causes of action were not the same; and (d) with one exception, the reliefs sought in each action were distinct and arose from different sets of facts. Accordingly, the relevant principles applied by the court were rightly those established for *forum non conveniens* by Lord Goff in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (“*Spiliada*”). Hence, *Transtech* was not a case where the same plaintiffs had brought substantially the same cause of action in two jurisdictions against the same defendants. *Transtech* was also decided prior to the Court of Appeal decision in *Yusen Air* ([25] *supra*) which had subsequently made clear where the evidential burdens lay and what the test was in relation to a situation where the same defendants had to defend substantially the same cause of actions in two jurisdictions brought by the same plaintiffs. Accordingly, I would respectfully decline to follow the *obiter* observations made by the learned judge in *Transtech* on the issue of *lis alibi pendens*. In fact, the Court of Appeal in *Yusen Air* had observed that the learned judge in *Transtech* was apparently of the view (from the passage quoted in [22] above) that a plaintiff who had commenced two sets of identical or substantially similar proceedings against the same defendant would *not* be put to an election because the principles of election enunciated in the case of *Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd* [1989] 3 All ER 65 (“*Australian Commercial Research*”) were not likely to have been brought to the attention of the learned judge. The Court of Appeal basically did not endorse the views of the learned judge in [22] above which were relied upon by counsel for the plaintiffs.

27 In my judgment, this was a clear case of *lis alibi pendens*. *Cheshire and North’s Private International Law* (Oxford University Press, 13th Ed, 1999), stated the following at p 347:

Multiplicity of proceedings

If litigation involving the same parties and the same issues is continuing simultaneously in two different countries, this is referred to as a case of *lis alibi pendens*. In such cases the issue facing the English courts is not simply that of deciding to which of the alternative fora the claimant should have to go to bring his action. Instead, the choice is between, on the one hand, trial in England plus trial abroad (if a stay is refused) and, on the other hand, trial abroad (if a stay is granted). It is very undesirable to have concurrent actions in England and abroad: this involves more expense and inconvenience to the parties than if trial were held in merely one country; it can also lead to two conflicting judgments, with an unseemly race by the parties to be the first to obtain a judgment and to subsequent problems of estoppel. (at p 347)

A stay will also be refused if there is no country which is a natural forum for trial, even if this will mean a multiplicity of proceedings ... The weight to be attached to the factor of multiplicity of proceedings

will depend on the circumstances of the case. It is not a decisive factor in the sense of automatically making a foreign forum clearly more appropriate and shifting the burden of proof to the claimant to justify trial in England. (at p 349)

28 In *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148, the Court of Appeal said at [22]:

Having said that, we have to remind ourselves that, while the same principles and approach apply to every case of this nature, each case turns strictly on its individual facts. Further, in dealing with cases such as the present one, where the appellant had only started proceedings in one jurisdiction, the courts should be more cautious than not in granting injunctions compared with situations, in which a party had commenced actions concurrently in two jurisdictions. In the latter situations, it is understandable that any court should feel uncomfortable about allowing both actions to go on. Not only would the same issue be litigated twice but there would also be the risk of having two different results, each conflicting with the other. And these problems would have arisen simply because one party decided to sue in one place too many. *In such circumstances, courts, including those in Singapore, should prevent the inherent abuse of the different judicial systems in different jurisdictions by compelling that party to choose the jurisdiction that he wants to litigate in. The underlying need to prevent a multiplicity of similar proceedings justifies the courts being more prepared to grant an injunction.* [emphasis added]

29 In *Australian Commercial Research* ([26] *supra*), Sir Nicolas Browne-Wilkinson V-C at 69J said:

In my judgment, where a plaintiff seeks to pursue the same defendant in two jurisdictions in relation to the same subject matter, the proceedings verge on the vexatious. I am not suggesting in any sense that the plaintiff in this case was being deliberately vexatious, but the outcome is vexatious.

30 The above observation of Browne-Wilkinson V-C would be even more pertinent where, as in this case, there were already in place reciprocal enforcement arrangements between Malaysia and Singapore. Yet the plaintiffs saw it fit to bring the same action on the same or substantially the same subject matter first in Malaysia and then later in Singapore. The “outcome” appeared to me to be vexatious and an abuse of process if the Singapore action was not stayed. Given the present state of the law in Singapore on Mareva injunctions brought “solely” in support of foreign proceedings, I could understand the need to bring the Singapore action so that the Mareva injunction in Singapore could be applied for against the defendants who had assets in Singapore. But allowing the action to continue simultaneously in two jurisdictions *after* the Mareva injunction in Singapore had been successfully obtained would be vexatious and an abuse of process if the Singapore action was not stayed thereafter.

31 Browne-Wilkinson V-C further said at 69J and 70A–E:

ANZ UK is anxious that the proceedings should continue in this country and that it should not be forced to litigate in Australia. It has decided, however, not to apply to this court for an injunction to restrain the Queensland proceedings since the power of the court to grant such injunction restraining overseas proceedings is now very carefully circumscribed and, in my judgment, it rightly took the view that no such order could be obtained.

In those circumstances, in my judgment, the plaintiff is required to elect which set of proceedings it wishes to pursue. This is not simply a question of the stay of its action here: the action here must be dismissed if it wishes to pursue the matter in the Australian courts and not here. Accordingly, unless the action here is dismissed (with the consequent payment of costs incurred in the action here), in my judgment one does not get on to the kind of considerations of forum conveniens with which *The Spiliada* was concerned. My view to that effect is supported by Dicey and Morris *Conflict of Laws* (11th edn, 1987) 395, where in dealing with *lis alibi pendens* this passage occurs:

‘The court may be asked to stay an action in England, or to enjoin an action abroad, in two distinct situations: *first, where the same plaintiff sues the same defendant in England and abroad*; and secondly, where the plaintiff in England is defendant abroad, or vice versa. In the *first situation* it is not likely that the court would allow, *except in very unusual circumstances*, the continuation of proceedings by the *same plaintiff* against the *same defendant* for a *similar cause of action* in two different jurisdictions. *The court would put the plaintiff to his election, and stay the English proceedings or enjoin the foreign proceedings.*’

In my judgment that reflects the position, save that in my view it is not a question simply of a plaintiff applying for a stay of its own action: the action must go.

[emphasis added]

32 *Australian Commercial Research* was followed by the Court of Appeal in *Yusen Air* ([25] *supra*) which laid down at [27] the two-stage test for cases where the plaintiffs brought substantially the same action in two jurisdictions against the same defendants on substantially the same causes of action:

In our judgment, when a plaintiff sues the same defendant in two or more different jurisdictions over the same subject matter, the defendant can take up an application to compel the plaintiff to make an election as to which set of proceedings he wishes to pursue. *For the purposes of an election, the considerations of forum conveniens do not come into play.* However, *the defendant would need to demonstrate a duplicity of actions in the different jurisdictions. Once this is established, the burden of proof then shifts to the plaintiff to justify the continuance of the concurrent proceedings by showing ‘very unusual circumstances’.*

If the plaintiff fails to demonstrate such unusual circumstances, he would have to make an election. [emphasis added]

33 It is therefore important to discern between three different situations: (a) where the same plaintiff “A” sues the same defendant “B” in two jurisdictions on substantially the same causes of action; (b) where the plaintiff “A” sues the defendant “B” in Singapore but “A” is the defendant in a suit brought by “B” in a foreign jurisdiction; and (c) where “A” is the defendant in Singapore but is the plaintiff in the suit in the foreign jurisdiction, and “B” is the plaintiff in Singapore but the defendant in the foreign suit. Clearly, the legal principles applicable for situation (a) would be quite different from those applicable for situations (b) and (c).

34 The present facts were those of situation (a). Once the defendants established that the actions were duplicitous (*ie*, situation (a) referred to above), the burden would shift to the plaintiffs to justify the continuance of the concurrent proceedings by showing “*very unusual circumstances*”. When I compared the claims made by the plaintiffs in the two jurisdictions, it was clear to me that the plaintiffs’ actions in Malaysia and Singapore against the same defendants were duplicitous. On these facts and after considering the various factors in favour of having the matter tried in Singapore as were highlighted to me by plaintiffs’ counsel, I could not find any “*very unusual circumstances*” supporting the need to continue with two actions in different jurisdictions on the same or substantially the same subject matter against the same defendants. The plaintiffs were unable to show any extraordinary or special circumstances to justify their duplicitous actions in two jurisdictions running simultaneously to judgment, particularly after the Singapore injunction had been obtained. The plaintiffs had failed to justify the continuance of their duplicitous proceedings against the defendants.

35 During the hearing, I specifically asked if the plaintiffs still intended to continue pursuing their action in both jurisdictions, since they had already obtained a Singapore injunction against the Singapore assets of the defendants. Counsel for the plaintiffs confirmed that they would be maintaining their concurrent actions and vigorously contested the stay applications brought by the first, third and fourth defendants. As such, I was driven to conclude under the circumstances that it was vexatious on the part of the plaintiffs to pursue the defendants to judgment in the courts of both Malaysia and Singapore on substantially the same causes of action. *Prima facie* it was vexatious to do so and I accordingly allowed the stay applications of the first, third and fourth defendants on the ground of *lis alibi pendens*. As was stated at para 933 of Halsbury’s Laws of England vol 37 (Butterworths LexisNexis, 4th Ed Reissue, 2001), the court had three options available to it:

933. *Lis alibi pendens*. ... Where a claim is pending in a foreign court, and a second claim is begun in England between the same

parties claiming substantially the same remedy or relief, the court may adopt one of three courses:

- (1) it may put the claimant to his election with which claim he will proceed; or
- (2) it may stay all proceedings in England; or
- (3) it may grant an injunction restraining the prosecution of the foreign proceedings.

36 Since the plaintiffs did not make any election and the defendants never applied to strike out the plaintiffs' action, I did not specifically address my mind to these issues but only focussed on the defendants' application to stay the plaintiffs' action in Singapore. Just as with protective writs being filed to avoid a time bar limiting an action in Singapore with a subsequent stay of the action applied for by the plaintiffs who had brought similar foreign proceedings against the same defendants, my tentative view would be that even if the defendants in the present action were to apply to strike it out, I would likely stay the Singapore action in preference to striking it out. This is because the Singapore action was brought by the present plaintiffs, *inter alia*, to satisfy the jurisdictional pre-requisites and provide the jurisdictional foundation for the Mareva injunction in Singapore. (This will be analysed in more detail in the later part of this judgment.) If the Singapore action were to be struck out, the whole jurisdictional basis to support the continuance of the Mareva injunction in Singapore might be undermined to the prejudice of the plaintiffs.

37 I noted what the Court of Appeal had enunciated at [32] to [34] in *Yusen Air* ([25] *supra*) that:

32 We agree with the views expressed in an article entitled '*Lis Alibi Pendens: Staying or Discontinuing English Proceedings*' by Smart in [1990] LMCLQ 326 at p 329:

[W]here a plaintiff has commenced proceedings in England and in a foreign court, the plaintiff will generally be required to elect which action he wishes to pursue. If the plaintiff chooses to pursue the matter abroad, the English action will normally be discontinued: where, however, there may be some obstacle to the foreign court's determining the case on its merits (for instance, a challenge to the jurisdiction of the foreign court, as in *Arthur Andersen*) the English court may merely order a stay of its own proceedings.

33 *There may also be other situations where it would be more appropriate to grant a stay than to dismiss the action. One such example is where one of the actions is brought to obtain security by way of an attachment of assets* (see Dicey and Morris *The Conflict of Laws* (12th Ed, 1993) at p 406).

34 It is also our considered view that the plaintiff's election is not the only way to resolve this issue. Apart from compelling the plaintiff to elect, *it remains open to the defendant to take up an application for a*

stay of local proceedings or a restraint of foreign proceedings if the defendant wishes to have the action tried in one of the jurisdictions where the plaintiff has commenced an action.

[emphasis added]

38 In my judgment, the plaintiffs should not have maintained two sets of proceedings relating to the same or substantially the same subject matter, whether within the same jurisdiction or in two different jurisdictions, but should have voluntarily applied to stay one of the actions *after* securing the Mareva injunctions. *Absent any “very unusual circumstances”*, the plaintiffs should have elected just one jurisdiction to pursue their claim *to judgment* and not put the defendants through unnecessary time, expense and effort to defend themselves substantively more than once on substantially the same matter in two different jurisdictions, which would amount to rather oppressive and vexatious behaviour on the part of the plaintiffs. Further, such multiplicity of actions could lead to conflicting judgments. I would agree with Browne-Wilkinson V-C in *Australian Commercial Research* ([26] *supra*) at 73C that in appropriate cases, the plaintiffs might well be made liable for costs on an indemnity basis for the costs thrown away since such costs need never have been incurred at all but for the plaintiffs’ unreasonable actions in continuing substantively the same actions against the same defendants in more than one jurisdiction *after* obtaining the Mareva injunctions.

39 For the reasons given, I stayed the Singapore action against the first, third and fourth defendants on the ground of *lis alibi pendens*. In granting the defendants’ applications for a stay on the ground of *lis alibi pendens*, I did not need to consider any of the principles set out in the *Spiliada*, as they were generally not relevant in applications to stay such duplicitous actions of the plaintiffs.

Alternative ground of *forum non conveniens*

40 I will now deal with the question whether or not to stay the proceedings on the alternative ground of *forum non conveniens*. The trite general principles governing the doctrine of *forum non conveniens* were succinctly set out by the Court of Appeal recently in *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 (“*Dresdner*”) (at [25] and [26]):

General principles governing *forum non conveniens*

The *locus classicus* on the question of when a stay would be granted on the basis of *forum non conveniens* is *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (*‘Spiliada’*), a decision of the House of Lords where Lord Goff of Chieveley, in delivering the leading judgment, laid down certain guiding principles (at 476–478) for determining the question of *forum non conveniens* (*‘the Spiliada test’*). Those principles have been adopted by this court in several cases such

as *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR(R) 345, *Eng Liat Kiang v Eng Bak Hern* [1995] 2 SLR(R) 851, *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Limited* [2001] 1 SLR(R) 104 and *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 (*'Rickshaw Investments'*).

The gist of these principles is that, under the doctrine of *forum non conveniens*, a stay will only be granted where the court is satisfied that there is some other available and more appropriate forum for the trial of the action. The burden of establishing this rests on the defendant and it is not enough just to show that Singapore is not the natural or appropriate forum. The defendant must also establish that there is another available forum which is clearly or distinctly more appropriate than Singapore. The natural forum is one with which the action has the most real and substantial connection. In this regard, the factors which the court will take into consideration include not only factors affecting convenience or expense (such as the availability of witnesses) but also other factors such as the law governing the transaction and the places where the parties respectively reside or carry on business. If the court concludes, at this stage of the inquiry (*'stage one of the Spiliada test'*), that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay. If, at this stage, it concludes that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay, unless there are circumstances by reason of which justice requires that a stay should nevertheless be refused. In this connection, the court will consider all the circumstances of the case. For this second stage inquiry (*'stage two of the Spiliada test'*), the legal burden is on the plaintiff to establish the existence of those special circumstances.

41 The relevant question therefore was whether or not the defendants had shown that there was another available forum (in this case Malaysia) which was *prima facie* clearly or distinctly more appropriate to try the matter than the courts in Singapore. If the defendants had discharged their burden to show that Malaysia was clearly the more appropriate forum, then the burden would shift to the plaintiffs to justify why a stay of the proceedings in Singapore should nevertheless be refused in the interests of justice after all the circumstances of the case were considered. Accordingly, I now proceed to weigh the various connecting factors relevant to the determination of the above question.

Connecting factors in favour of Singapore

42 The plaintiffs submitted that the following factors were in favour of having the action tried in Singapore:

- (a) The "mastermind" behind the transactions was the first defendant. The first and third defendants were both Singapore citizens and residents in Singapore. It would be very convenient for

them to attend the trial in Singapore. The fourth defendant was a company incorporated in Singapore.

(My observation: It was rather magnanimous of the plaintiffs to consider the interests of the defendants when the defendants themselves were more than willing to go to Malaysia for the trial. I could not regard this factor to be of any significance. If there were Singapore based witnesses who were reluctant to travel to Malaysia to testify on behalf of any party, then perhaps that would be a relevant factor of some importance as these witnesses would not be compellable to testify in Malaysia, but not in a case where the defendants themselves were more than willing to go to Malaysia, the place of incorporation of both the plaintiffs, for the trial. If the defendants did not appear in court to defend the case in Malaysia after having been duly served in Singapore with the writ issued out of the jurisdiction of the Malaysian court, they would risk having a default judgment entered against them which would be registrable in the Singapore court for the purpose of enforcement in Singapore. I thus believed that it was not a mere puff when the defendants said that they were willing to attend the trial in Malaysia. It was clearly in their own interest to appear in Malaysia to defend the Malaysian action to avoid an adverse judgment against themselves that would be enforceable in Singapore by way of registration.)

(b) The first and third defendants owned real estate property in Singapore. Conversely, there was no evidence to show that the first, third and fourth defendants had any assets in Malaysia. In fact, the first defendant had affirmed an affidavit in the Malaysian proceedings on behalf of himself and the fourth defendant to state that they did not have any assets in Malaysia.

(My observation: I accepted that the fact that the defendants had property in Singapore was a relevant factor in favour of the plaintiffs though in this case this factor would be much reduced in significance owing to the existence of reciprocal enforcement arrangements between Malaysia and Singapore. I did not regard the additional step of “registration” of the Malaysian judgment in Singapore for the purpose of enforcement in Singapore to be that inconvenient for the plaintiffs or to substantially delay the enforcement process. In my view, the existence of these reciprocal enforcement arrangements, coupled with the Singapore injunction successfully obtained by the plaintiffs against the Singapore assets of the defendants, had largely neutralised this factor.)

(c) The first and fourth defendants had not filed their defences in the Malaysian action. There was serious doubt as to whether they were genuinely in favour of having the action tried in Malaysia.

(My observation: I could not regard this as a factor in favour of trying the case in Singapore after the defendants had been properly served with the Malaysian writ and therefore notified of the Malaysian action against them. In fact, it would be advantageous for the plaintiffs if the defendants chose not to defend themselves in the Malaysian courts, as the plaintiffs could then proceed to obtain default judgment speedily in the Malaysian courts, and apply to register the Malaysian judgment in the Singapore High Court for the purpose of enforcement in Singapore if so needed. Hence, I could not understand why the plaintiffs would be complaining that it was inconvenient for the plaintiffs when the Singapore defendants were not going to defend themselves in Malaysia. I would have thought that the failure of the Singapore defendants to defend the plaintiffs' Malaysian action would be very convenient for the plaintiffs.)

(d) Default judgment had been obtained against the second defendant in Singapore.

(My observation: A stay of the action in Singapore would not prevent the enforcement in Singapore of that Singapore default judgment against the second defendant. This did not disadvantage the plaintiffs at all.)

(e) As the third defendant worked out of the fourth defendant's office in Singapore, the documents relevant to this action would be available in Singapore and not Malaysia.

(My observation: I could not see any difficulty in having these relevant documents under the possession, custody and control of the third defendant being produced in discovery in the action in Malaysia by the third defendant. If any of the defendants refused to make discovery as ordered by the courts in Malaysia, the defendants themselves would risk having their defence struck out and judgment entered against the respective defendants for their contumacious conduct. It would not be too different if the refusal for discovery occurred before the Singapore courts. I could then see no reason for the plaintiffs to complain if they obtained judgment as a result, which was the very objective of their action against the defendants in the first place.)

Connecting factors in favour of Malaysia

43 Counsel for the first, third and fourth defendants submitted that the following factors were in favour of the action being tried in Malaysia:

(a) The documents were mostly in Malaysia.

(My observation: I considered this to be a rather neutral factor. The documents could just as easily be brought to Singapore for the trial.)

(b) The witnesses were mostly in Malaysia.

(My observation: I regarded this factor to favour a trial in Malaysia because of compellability issues. Witnesses resident in Malaysia and not in the employment of the plaintiffs might not necessarily be very cooperative when it comes to having to travel across the Causeway or the Second Link to testify in Singapore.)

(c) The money was disposed of in Malaysia in bank accounts in Malaysia.

(My observation: Again, if evidence from the Malaysian banks were required, it would be easier for the plaintiffs to compel the production of the bank documents if the trial were to be in Malaysia. This connecting factor favoured a trial in Malaysia. In fact, the Malaysian court had granted the plaintiffs an order against the defendants in the Malaysian proceedings for the discovery of certain documents under the Malaysian Bankers' Act.)

(d) The plaintiffs obtained an Anton Piller order in Malaysia and the documents were privileged from use in Singapore.

(My observation: This would be a fairly significant factor in favour of a trial in Malaysia.)

(e) The tort was committed in Malaysia and governed by Malaysian law.

(My observation: See [44] to [50] below.)

(f) The escrow agreements were signed in Malaysia and governed by Malaysian law.

(My observation: See [44] to [50] below.)

My analysis on *forum non conveniens* in relation to the governing law being Malaysian law

44 Plaintiffs' counsel cited the case of *Baiduri Bank Bhd v Dong Sui Hung* [2000] 2 SLR(R) 271 to support the contention that the fact that the proper law of the tort and the escrow agreements was Malaysian law was not a strong factor tipping the scales in favour of having the dispute tried in Malaysia since the defendants had "*not shown any material differences in the laws of the two countries that [would] have a bearing on the enforcement of the guarantee, and how these differences, if any, [would] affect the determination of the dispute at the trial*" [emphasis added] (at [6]). The words in italics in that judgment were a recitation of *Baiduri Bank Bhd's* response to the defendants' stay application. Whilst the court accepted that the connecting factors did not point clearly or distinctly to Brunei as the more appropriate forum for the reasons stated by the bank, they were not the focus of the court's analysis, which centred on the jurisdiction clause explicitly allowing the bank to enforce the guarantee in any other court of

competent jurisdiction. The court eventually considered the reasons cited by both counsel in support of their respective cases and concluded that it could not find any exceptional circumstances amounting to a strong cause to stay the action of Baiduri Bank Bhd in Singapore. The court did not specifically pronounce that the burden was on the defendants (arguing for the matter to be tried instead in Brunei) to show that there were material differences in the laws of Singapore and Brunei that would have a bearing on the enforcement of the guarantee governed by the law of Brunei.

45 As for the plaintiffs' reference to the case of *The Hooghly Mills Co Ltd v Seltron Pte Ltd* [1994] 3 SLR(R) 757 ("*Hooghly*") at [16], where the High Court pronounced that "*the governing law issue was a neutral one ... since no significant difference had been shown by the defendants to exist between Indian law and Singapore law on the sale of goods, no real advantage would be gained by the defendants in having the action heard in India simply because the Indian sale of goods law had to be applied*", it must be noted those observations were made in the context where "*Singapore law governed a substantial portion of the case*" [emphasis added in italics and bold italics]. While on the facts Indian law governed the proper law of the sale contract, Singapore law governed the enforcement of the bill of exchange. In the case of *Hooghly*, the plaintiffs sued in Singapore claiming under the bill of exchange and alternatively claiming the price of the goods sold and delivered pursuant to the sale contract. The defendants on the other hand commenced a suit in India against the plaintiffs and Vysya Bank claiming damages for loss of profit from a sub-sale and an indemnity against the claim of their sub-purchaser. The defendants also alleged fraud and a total failure of consideration to avoid the bill of exchange. The court in *Hooghly* did not stay the plaintiffs' action in Singapore. The court apparently placed the burden on the defendants to show that there was no significant difference between Indian law and Singapore law on "*the sale of goods*" (which the court found was *governed by Indian law*) when it was the defendants who wanted to stay the action in Singapore and have the matter tried in India. The plaintiffs wanted to have the matter tried in Singapore. I believe that the court might have meant to refer to the law not on "the sale of goods" but on the law governing "*the bill of exchange*", which was *Singapore law* and that formed the substantial part of the case, in which event I would have agreed with the position taken by the learned judge. But if indeed there was no mistake and the court had really intended in *Hooghly* to refer to the Indian law concerning the "sale of goods", then I would respectfully disagree with that position because in my view, if a matter was governed by the law of country A, and a party "X" wanted to have that matter tried instead in country B, it would then be for that party "X" to show that there was no significant difference between the applicable law (*ie*, law of country A) and the law of country B which was the country preferred by that party "X" to have the matter tried. It would be wrong to place the evidential burden on the other party "Y", who wanted the matter governed

by the law of country A to be tried also in the same country A, to show that there was no significant difference between the applicable law being that of country A and the law of country B, which was the preference of the other party “Y” for the matter to be adjudicated. The evidential burden should be placed on the proper party “X” wanting a matter (found to be governed by the law of country A) to be heard in another country B to show that there were no substantial differences between the laws of country B and country A concerning that matter. Having said that, I would add that I would subscribe to what Lai Kew Chai J had said in *The Eastern Trust* [1994] 2 SLR(R) 511 at [21], which *Hooghly* cited and applied:

It is clearly advantageous for questions of foreign law to be decided by the courts of that country, and this advantage has been recognised and given due weight in numerous cases. However, the importance of this factor will depend to a large extent on the difference between the applicable law and Singapore law. There will be no real prejudice to either party if the law of the foreign court does not differ significantly from the relevant law of Singapore.

46 However, the evidential burden to show that there was no material difference between the laws of the two jurisdictions must be placed on the correct party when evaluating the factors of *forum non conveniens*. Only after this burden had been discharged by the right party would the court then consider what was stated at para 12-029 of *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 14th Ed, 2006) that:

If the legal issues are straightforward, or if the competing fora have domestic laws which are substantially similar, the identity of the governing law will be a factor of rather little significance.

47 The corollary of the above would be that where the legal issues were not shown to be straightforward, or if the competing forums’ domestic laws were not shown to be substantially similar by the appropriate party whose burden it was to shoulder, the identity of the governing law would be a connecting factor that would be of considerable importance in the evaluation of *forum non conveniens*.

48 I would respectfully associate with what the Court of Appeal in *Dresdner* ([40] *supra*) had observed at [63]:

The reason why, in the consideration of the question of *forum non conveniens*, the issue of applicable law is a relevant factor is because where a dispute is governed by a foreign law, the forum will be less adept in applying that law than the courts of the country of that law, and there could be savings in time and resources in litigating the dispute in the forum of the applicable law.

49 In the present case, the tort was wholly committed in Malaysia and the escrow agreements were signed in Malaysia and both were governed by Malaysian law. If the plaintiffs wished to have the tort and contractual issues tried instead in Singapore, then it would be for the plaintiffs (and not

the first, third and fourth defendants) to show that no significant differences exist between Malaysian law and Singapore law, or that if some differences did exist, the legal issues involved were nevertheless relatively straightforward so that there would not be much difficulty for the tort and contractual issues (governed by Malaysian law) to be tried as a question of fact in Singapore. If the plaintiffs made no effort to do so (as was the case before me), then the court would be entitled to assume for the purpose of weighing the connecting factors of convenience that there would be some differences between Singapore law and Malaysian law in their application to the tort and the escrow agreements, and *prima facie* it would be advantageous for the questions and matters of Malaysian law governing the tort and contractual issues to be decided by the Malaysian courts rather than the Singapore courts.

50 I also noted that in Malaysia, the Contracts Act of 1950 might well be relevant to the contractual issues governing the escrow agreements though this was not highlighted to me by counsel. Foreign law must be tried as a question of fact in Singapore. Using experts on Malaysian law to assist the court would certainly be inferior to the situation where issues of Malaysian law were to be determined without the need for any experts by the Malaysian courts themselves. In Singapore, should an appeal arise, findings of fact by the High Court as to what the position of Malaysian law was on a certain legal issue would be treated as a factual issue by the appellate court, unlike an appeal in Malaysia. In my view, even assuming that the Singapore courts were well equipped to deal with the issues of Malaysian law governing the tort and the escrow agreements, it would remain preferable for these issues to be tried in Malaysia, especially when the plaintiffs here (arguing for the trial to be in Singapore) had not demonstrated that Malaysian law on these issues was not materially different from Singapore law. Without the benefit of any expert evidence on affidavit on this issue, I was simply in no position to assume that no material or significant differences exist in relation to the law of tort and contract between Malaysia and Singapore. Accordingly, I had to weigh this factor of the governing law for the tort and escrow agreements (being Malaysian law) in favour of the defendants and not the plaintiffs, since it was the plaintiffs who had failed to demonstrate that Singapore and Malaysian law had no material or significant differences in relation to the law of tort and contract. In the absence of any such evidence before me, it would be wrong to treat the governing law as being a fairly neutral factor in this case. In my view, the governing law would generally be one of the relevant and significant connecting factors that *prima facie* would point favourably to a trial in the jurisdiction of that governing law. I found support for this from the recent case of *Wing Hak Man v Bio-Treat Technology Ltd* [2009] 1 SLR(R) 446 where Belinda Ang Saw Ean J in dealing with the question whether Singapore or Hong Kong was the natural forum to determine the tort of conspiracy, said (at [24] and [25]):

Natural forum: Singapore or Hong Kong

The main focus under stage one was the issue of the location of the conspiracy. It is common ground that the place of the tort is *prima facie* the natural forum for determining the claim. Goff LJ in *The Albaforth* [1984] 2 Lloyd's Rep 91 ('*Albaforth*') at 96 observed:

Now it follows from those decisions that, where it is held that a Court has jurisdiction on the basis that an alleged tort has been committed within the jurisdiction of the Court, the test which has been satisfied in order to reach that conclusion is one founded on the basis that the Court, so having jurisdiction, is the most appropriate Court to try the claim where it is manifestly just and reasonable that the defendant should answer for his wrongdoing. This being so, it must usually be difficult in any particular case to resist the conclusion that a court which has jurisdiction on that basis must also be the natural forum for the trial of the action. If the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the Courts of that jurisdiction are the natural forum.

The *Albaforth* principle is well established and was recently approved and followed by the Court of Appeal in *Rickshaw Investments* ([17] *supra*). From the point of view of stage one, Andrew Phang JA at [40] observed:

However, we must emphasise that the result that is arrived at through the application of the *Albaforth* principle is only the *prima facie* position and/or a weighty factor pointing in favour of that jurisdiction ... [B]ut this is only one of the factors to be taken into account in the overall analysis, albeit a significant one.

51 After carefully weighing all the relevant connecting factors and for the various reasons given earlier, I was satisfied on balance that the first, third and fourth defendants had discharged their burden to show that Singapore was not the natural or appropriate forum and that Malaysia was clearly the more appropriate forum for the action to be heard. The subject matter of the dispute hardly had any real and substantial connection with Singapore. It had much more to do with Malaysia.

52 The burden now shifted to the plaintiffs to justify why a stay of the proceedings in Singapore should nevertheless be refused in the interests of justice. On this, I noted that the plaintiffs themselves have stated in both the *ex parte* summons and affidavits filed by the plaintiffs in the Malaysian proceedings in support of their application for leave to serve papers out of the jurisdiction of the Malaysian court on the first, third and fourth defendants in Singapore that their action in Malaysia involved a tort committed in Malaysia and that the Malaysian court was the proper forum to determine their claim. It was on this basis that the plaintiffs were granted leave to serve the Malaysian writ out of jurisdiction on the first, third and fourth defendants in Singapore. Now the plaintiffs were asserting to the

contrary just because the defendants had sought to stay their duplicitous action in Singapore. I did not think that the plaintiffs should be blowing hot and cold depending on what suited them. Furthermore, the presence of the Mareva injunction in Singapore (quite apart from the separate application on lifting the Mareva injunction on other grounds which I will be dealing with later) and the availability of reciprocal enforcement arrangements between the two countries should take care of the plaintiffs' concern for enforcement against the defendants' Singapore assets in the event that a Malaysian judgment is obtained.

53 Taking all the relevant circumstances into account, I found that the plaintiffs failed to overcome that burden placed on them to justify that it would be in the interests of justice that the trial of the action should still be in Singapore.

54 Accordingly, I was of the view that the plaintiffs' action in Singapore action should also be stayed on the ground of *forum non conveniens*, quite apart from my earlier decision to stay the action on the ground of *lis alibi pendens*.

The Mareva injunction

55 The plaintiffs contended that the defendants had conducted themselves in a fraudulent and/or dishonest manner with respect to the plaintiffs and that there was a real risk of the defendants dissipating their assets in Singapore. At an *ex parte* hearing before Tan Lee Meng J in the High Court on 11 April 2008, the plaintiffs obtained a Mareva injunction against the defendants which provided, *inter alia*, that:

(a) All the defendants must not remove from Singapore in any way dispose of or deal with or diminish the value of any of their assets in Singapore whether in the defendants' own name or not and whether solely or jointly owned up to the value RM 44,188,262.82.

(b) If the total unencumbered value of the defendants' assets in Singapore exceeded RM 44,188,262.82, the defendants could remove any of those assets from Singapore or dispose of or deal with them so long as the total unencumbered value of the Defendants' assets still in Singapore remained not less than RM 44,188,262.82;

(c) Costs of the application were to be costs in the cause; and

(d) The defendants had to inform the plaintiffs in writing at once of all their assets in Singapore whether in their own name or not and whether solely or jointly owned, giving the value, location and details of all such assets. The information was to be confirmed in an affidavit which had to be served on the plaintiffs' solicitors within 3 days after the service of the injunction order on the defendants.

Jurisdiction to allow the continuation of the Mareva injunction in support of a foreign action after a stay

56 During the *inter partes* hearing before me, counsel for the defendants raised the preliminary issue whether or not the court had the jurisdiction to grant a Mareva injunction in aid of foreign proceedings. Defendants' counsel cited many cases in support of the proposition that the court had no jurisdiction to do so.

57 The important facts to be borne in mind here were that the first and third defendants were Singapore citizens and resident in Singapore. The fourth defendant was a company registered in Singapore. It was not disputed that these defendants had been duly served in Singapore with the writ issued by the Singapore court. Clearly, the Singapore court would have jurisdiction over them. A Singapore injunction had already been granted during the earlier *ex parte* hearing to prevent the defendants from removing, disposing or dealing with any of their assets in Singapore up to the total unencumbered value of RM44,188,262.82. Counsel for the defendants apparently accepted that Tan Lee Meng J had the jurisdiction to grant the Mareva injunction. At the time the Mareva injunction was ordered, it was clearly in support of the Singapore action, although the Singapore action might have been duplicitous in nature because of a similar action brought by the same plaintiffs against the first, third and fourth defendants which was still ongoing in Malaysia. Since there was still a subsisting action in Singapore which the Mareva injunction would have been in aid of, jurisdiction would therefore not be an issue at the time the Mareva injunction was first granted by Tan Lee Meng J.

58 But at the *inter partes* hearing before me, I had decided to stay the Singapore action. This provided the foundation for defendants' counsel to argue that the stay had effectively extinguished the Singapore action and the Mareva injunction was no longer in support of any Singapore action, but could only be viewed as being exclusively in support of a foreign action. If so, then the Singapore injunction should be lifted as it was thereafter wholly in support of the foreign proceedings in Malaysia. In other words, counsel contended that the court ought to set aside the injunction once the action was stayed. There was no longer any basis for the Singapore Mareva injunction.

59 In this judgment, I shall examine closely the preliminary issue: whether or not the court would have the "jurisdiction" to allow the *continuation* of a Mareva injunction despite an order staying the Singapore proceedings in favour of a foreign jurisdiction, *ie*, Malaysia, and if it did, then whether or not the court ought to exercise its discretion (based on the circumstances of the case and the principles which the court would ordinarily follow in considering whether to grant or refuse such an order) to discharge or disallow the continuation of the Mareva injunction after the Singapore action was stayed.

60 To have a full flavour of the various issues, I shall first set out the submissions of counsel.

Submissions of counsel for the first, third and fourth defendants (collectively the “defendants”)

61 The defendants submitted that in the event the Singapore proceedings were stayed, the Singapore injunction ought to be discharged and/or set aside for the following reasons:

(a) In order to obtain Mareva relief, the plaintiffs had to first show, *inter alia*, that there was a valid cause of action over which the court would have jurisdiction: *Singapore Civil Procedure 2007* (Sweet & Maxwell, 2007) at p 551 para 29/1/56.

(b) The court did not have the power to grant a Mareva injunction against the assets of the defendants in Singapore merely in aid of foreign proceedings unless the plaintiffs had an accrued cause of action against the defendants that was justiciable in Singapore.

(c) The *Singapore Civil Procedure 2007* at para 29/1/58 set out the limits to the court’s jurisdiction:

29/1/58 **Limits to the court’s jurisdiction** – In *Karaha Bodas Co. L.L.C. v Pertamina Energy Trading Ltd. and another appeal* [2005] S.G.C.A. 47, the Court of Appeal reaffirmed the application of the *Siskina* principles in Singapore. The court had no jurisdiction to grant a *Mareva* injunction to assist proceedings in a foreign jurisdiction where the plaintiff had no accrued right of action in Singapore.

See also *Swift-Fortune Ltd v Magnifica Marine S.A.* [2006] S.G.C.A. 42 (*‘Swift-Fortune’*), in which the Court of Appeal held that a Singapore Court did not have the jurisdiction to issue a *Mareva* injunction to assist a party in a foreign international arbitration unless it had jurisdiction in some way over it (see paras. 75-79 and the judgment of Lord Mustill in *Siskina (Cargo Owners) v Distos Cia, Naviera S.A., The Siskina* [1979] A.C. 210 at 363; [1977] 3 All E.R. 803, HL).

(d) As Singapore was neither the forum of choice nor the forum most appropriate to adjudicate the dispute, the action was not justiciable in Singapore and the Mareva injunction ought to be set aside. The Singapore injunction could not be justified on the basis of the Malaysian action.

(e) The Singapore injunction, if continued, despite an order staying the Singapore proceedings would effectively operate in aid of the Malaysian proceedings and the Singapore courts did not have the power to grant or maintain the injunction in aid of the foreign proceedings.

(f) If the Singapore action was stayed thereby bringing an end to the underlying cause of action in Singapore, there would be no basis upon which the Singapore injunction could be maintained, it being merely an ancillary remedy to the main action.

(g) The Court of Appeal's decision in *Swift-Fortune* was binding on the court.

(h) The defendants also relied on the Court of Appeal decision in *Wu Yang Construction Group Ltd v Mao Yong Hui* [2008] 2 SLR(R) 350 ("*Wu Yang*") where the court said at [28]:

The law is clear. If no substantive relief is claimed against a party, a freezing order cannot be issued against that party: see *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 and *Fourie v Le Roux and others* [2007] 1 WLR 320. The freezing order should have been discharged on this ground alone.

(i) In the recent case of *Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR(R) 856 ("*Petroval*"), Tay Yong Kwang J in declining to take the law beyond the *Siskina* doctrine said (at [15] and [16]):

The plaintiff invited me to take the path paved by *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 ... where the House of Lords held that it was not a necessary condition for the grant of an interlocutory injunction that it should be ancillary to a claim for relief to be granted by an English court. The plaintiff submitted that it is sufficient to have a cause of action ... *potentially* justiciable in Singapore even if the adjudication will take place elsewhere ...

My reading of the Court of Appeal's judgment in *Swift-Fortune* ... leads me to conclude that the Court of Appeal was sailing with *The Siskina* ... and decided not to travel the *Channel Tunnel* route. ...

Following the Court of Appeal, I similarly and respectfully decline to 'take the law beyond *The Siskina* doctrine' ...

(j) A dangerous precedent would be set if the Singapore injunction was continued. Future foreign litigants would then rely on any ruling made by the court to continue the Singapore injunction as a licence to commence proceedings in Singapore for the sole purpose of obtaining a Mareva injunction against Singapore defendants in aid of foreign proceedings and then consent to a stay of proceedings in Singapore. This was precisely the danger that the court in *Petroval* following the Court of Appeal's decision in *Swift-Fortune* set out to resolutely guard against.

Submissions of counsel for the plaintiffs

62 Just as with the defendants' counsel, counsel for the plaintiffs also helpfully provided detailed written submissions and furnished the relevant

authorities. The plaintiffs' counsel submitted, *inter alia*, the following with which I had no reason to disagree and which would also support the legal principles that I have set out in [116] and the legal analysis that led to my conclusion at [155] below:

(a) *29/1/57 of Singapore Civil Procedure 2007*

A plaintiff is entitled in a proper case to pursue the same cause of action in two jurisdictions in order to get Mareva relief in each, and he is entitled to maintain the Mareva relief in the jurisdiction in which he is not actively suing (*House of Spring Gardens v Waite* [1985] FSR 173, CA, reversing [1984] FSR 277).

(b) *Bambang Sutrisno v Bali International Finance Ltd, ("Bambang")* [1999] 2 SLR(R) 632

The Court of Appeal held that Indonesia was the more appropriate forum than Singapore for the dispute and stayed the proceedings in Singapore. However, it also allowed a Singapore Mareva injunction against the defendant, who was an Indonesian citizen and a Singapore permanent resident, by varying an initially worldwide Mareva injunction at [19]:

Turning to the Mareva injunction, there was hardly any argument before us. The appellant was prepared to accept the continuation of the Mareva injunction affecting his assets in Singapore but contended that it should not be allowed to operate worldwide. There was really no ground for a worldwide Mareva injunction in this case. Accordingly, we varied the Mareva injunction by confining its operation to the assets of the appellant in Singapore pending the resolution of their dispute in Indonesia.

Although there was hardly any argument made by parties' counsel in the above case, the Court of Appeal apparently felt that it nonetheless had the jurisdiction to order a Singapore Mareva injunction even though proceedings in Singapore were stayed. In addition, *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 neither referred to nor overruled *Bambang* if the correct proposition was that a stay of proceedings would lead to an automatic discharge of a Mareva injunction which was earlier granted.

(c) *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818

The above case considered whether a local Mareva injunction could continue even though proceedings took place in another country. In that case, the plaintiff commenced proceedings in Switzerland, alleging the defendant's complicity in the misappropriation of its funds by one of its employees. The plaintiff successfully applied for a worldwide Mareva injunction in England against the defendant, who was resident and domiciled in England. The English Court of Appeal

dismissed the defendant's appeal to discharge and/or set aside the worldwide Mareva injunction.

Although the English Court of Appeal decided according to Art 24 of the Lugano Convention which authorised but did not require a contracting state to make protective orders in support of substantive proceedings pending in another contracting state and s 25 of their Civil Jurisdiction and Judgments Act 1982 allowed the English courts to give effect to the said Art 24, the principles used by Court of Appeal were applicable here.

The English Court of Appeal held at 826G that:

As Lawrence Collins points out in *Essays in International Litigation and the Conflict of Laws* (1994), there is no reason in principle why an English injunction should not restrain a person properly before the court from disposing of assets abroad. The order operates in personam. It is "not grounded upon any pretension to the exercise of judicial or administrative rights abroad, but on the circumstance of the person to whom the order is addressed being within the reach of the court:" see *Kerr on Injunctions*, 6th ed. (1927), p. 11.

...

... But where the defendant is domiciled within the jurisdiction such an order cannot be regarded as exorbitant or as going beyond what is internationally acceptable. To treat it as such merely because the substantive proceedings are pending in another country would be contrary to the policy which informs both article 24 and section 25 ...

A petition by the defendant for leave to appeal from the decision of the English Court of Appeal was dismissed by the Appeal Committee: *Crédit Suisse Fides Trust SA v Cuoghi* [1998] 1 WLR 474.

In the action herein, the first, third and fourth defendants were domiciled within Singapore and, hence, it could not be regarded as exorbitant for the Singapore injunction to continue even though proceedings were to be in Malaysia.

The relevant statutory provisions

63 For convenience, I now set out the relevant provisions that I will be referring to (with emphasis added) before proceeding to examine the various authorities submitted by counsel.

Civil Law Act (Cap 43) s 4(10) ("CLA")

Injunctions and receivers granted or appointed by interlocutory orders

4. ...

(10) A Mandatory Order or an *injunction may be granted* or a receiver appointed by an interlocutory order of the court, either

unconditionally or upon such terms and conditions as the court thinks just, *in all cases* in which it appears to the court to be *just or convenient* that such order should be made.

Supreme Court of Judicature Act (Cap 322) (“SCJA”)

Civil jurisdiction — general

16. —(1) The High Court shall have *jurisdiction to hear and try any action in personam* where —

(a) the *defendant is served with a writ* or other originating process —

(i) *in Singapore* in the manner prescribed by *Rules of Court*; or

(ii) *outside Singapore* in the circumstances authorised by and in the manner prescribed by *Rules of Court*; or

(b) the defendant submits to the jurisdiction of the High Court.

(2) Without prejudice to the generality of subsection (1), the *High Court shall have such jurisdiction as is vested in it by any other written law*.

Powers of High Court

18. —(1) The High Court shall have such powers as are vested in it by any written law for the time being in force in Singapore.

Rules of Court

Cases in which service out of Singapore is permissible (O. 11, r. 1)

1. Provided that the originating process does not contain any claim mentioned in Order 70, Rule 3 (1), *service of an originating process out of Singapore is permissible* with the leave of the Court if in the action —

(a) *relief is sought against a person* who is *domiciled, ordinarily resident, carrying on business or who has property in Singapore*;

(b) an injunction is sought ordering the defendant to do or refrain from doing anything in Singapore (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);

(c) the *claim* is brought *against a person duly served in or out of Singapore* and a person out of Singapore is a necessary or proper party thereto;

(d) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which —

...

(ii) was made by or through *an agent trading or residing in Singapore* on behalf of a principal trading or residing out of Singapore;

...

(r) the claim is in respect of matters in which the defendant has submitted or agreed to submit to the jurisdiction of the Court;

...

Striking out pleadings and endorsements (O. 18, r. 19)

19. —(1) The Court may at any stage of the proceedings order to be *struck out* or amended *any pleading or the endorsement of any writ in the action*, or anything in any pleading or in the endorsement, on the ground that —

(a) it *discloses no reasonable cause of action* or defence, as the case may be;

(b) it is scandalous, frivolous or *vexatious*;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1) (a).

(3) This Rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

The authorities

Section 4(10) of the Civil Law Act (“CLA”)

64 The power to grant Mareva injunctions and receivership orders when “just or convenient” was first established in s 25(8) of the UK Supreme Court of Judicature Act 1873 (c 66) on which s 4(10) of the CLA was based. Section 25(8) of the 1873 UK Act, which was re-enacted virtually unchanged as s 45 of the Supreme Court of Judicature (Consolidation) Act 1925, read as follows:

A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient.

65 Section 37 of the Supreme Court Act 1981 (c 54) in England (the “UK SCA”) replaced s 45 of the English 1925 Act, albeit with some modifications. It would be useful to determine if s 4(10) of the CLA bears any similarity to s 37 of the UK SCA (appended below):

37. Powers of High Court with respect to injunctions and receivers.

(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.

(3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

66 The Court of Appeal at [72] in *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 (“*Swift-Fortune*”) observed that doubts were expressed as to the power of the English court to grant Mareva injunctions against *non-residents*. This led to the enactment of s 37(3) of the UK SCA (which has no equivalent in Singapore) to give the court express authority in this regard.

67 *Leaving aside s 37(3)*, I would agree with Belinda Ang J in *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR(R) 854 (“*Front Carriers*”) at [32] that s 37(1) of the UK SCA was materially similar to s 4(10) of the CLA, although the subsections were worded slightly differently. Hence the pronouncements of the House of Lords in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 (“*Channel Tunnel*”), which construed the power of the court under s 37(1) of the UK SCA *without any reference to s 37(3)*, would be of persuasive authority on the interpretation to be given to the scope of s 4(10) of the CLA. As Belinda Ang J rightly observed at [32]:

... The House of Lords in *Channel Tunnel* ([18] *supra*) held that the court retained in principle its power under s 37(1) of the Supreme Court Act 1981 (c 54) (UK) (‘the UK SCA’) even though the substantive dispute was referred to arbitration (see [44] to [47] below).

***Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 (“*Swift-Fortune*”)**

68 In *Swift-Fortune*, where a Mareva injunction over the Singapore assets of a foreigner was granted in aid of pending arbitration proceedings in London was set aside by Judith Prakash J in the High Court, the Court of Appeal had this to say (at [64]–[66], [92]–[94] and [96]) with respect to s 4(10) of the CLA, which when read with s 18(1) of the SCJA gave the statutory source of the court’s power to grant interlocutory relief, including Mareva injunctions:

Power under s 4(10) of CLA

64 In respect of court proceedings, the source of the court’s power to grant interlocutory injunctions is s 4(10) of the [Civil Law Act] ([2] *supra*). ... This provision gives power to the court to grant only interlocutory injunctions. The power to grant final injunctions is found in para 14 of the First Schedule to the SCJA.

65 There were no legal developments affecting the court’s power under s 4(10) until the early 1980s when, in line with the decisions of English courts under the equivalent English provision, our courts invoked s 4(10) as the statutory source of power to grant Mareva injunctions in court proceedings: see *Art Trend Ltd v Blue Dolphin (Pte) Ltd* ([29] *supra*) at [27], where Lai Kew Chai J said:

Mareva injunctions have been issued by the High Court of Singapore for some years now. They have been issued under s 4(8) of the Civil Law Act (Cap 30). The subsection in terms are equivalent to the former s 45 of the English Supreme Court of Judicature (Consolidation) Act 1925, since replaced and expanded. The latter provision was the basis on which an injunction, later known by the sobriquet Mareva injunction, was for the first time granted in England in May 1975: see Colin Ying, “The Mareva Injunction and Pre-trial Attachment” [1981] 2 MLJ cvii.

In that passage, Lai J noted the correspondence between the Singapore and the English provisions (the latter having been authoritatively interpreted in *The Siskina* ([4] *supra*)). In his article referred to in the quotation above, Colin Ying has argued that s 4(10) allowed a Singapore court to grant Mareva injunctions but subject to the prerequisites laid down by Lord Diplock in *The Siskina*. One such requisite is that the court must have jurisdiction over the substantive claim.

Karaha Bodas Co LLC v Pertamina Energy Trading Ltd

66 In *Karaha Bodas* [32] of her grounds of decision ([1] *supra*):

In *Siskina v Distos Cia Naviera SA* [1979] AC 210, the English 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. This principle was followed in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112, a Court of Appeal decision which held that a Singapore court could not assume jurisdiction over a foreign defendant simply because he had assets within the territorial jurisdiction that could be the subject of an injunction order, and that in order to apply for Mareva relief against such a defendant, the plaintiff has to possess an accrued right of action in Singapore based on an existing legal or equitable right against the foreign defendant. Thus, this court cannot grant Mareva relief in respect of the Singapore assets of a foreign defendant if

the only purpose of such relief is to support foreign court proceedings.

Accordingly, this court set aside the proceedings and the Mareva injunctions: (a) as against Petral, on the ground that there was no substantive claim against Petral at all, whether in Singapore or Hong Kong; and (b) as against PES, on the ground although the court had personal jurisdiction over PES, there was no accrued cause of action in Singapore, or even in Hong Kong against PES.

...

92 We may summarise our view of the state of the law on Mareva injunctions in aid of foreign proceedings in the context of s 4(10) of the [Civil Law Act]. First, *given the facts of the present case*, our decision in this appeal will not take the law beyond *The Siskina* doctrine as applied in *Karaha Bodas*, and confirmed in *Mercedes Benz*. Secondly, the decision in *Front Carriers*, following *Channel Tunnel*, has amplified or extended the scope of s 4(10) to apply to foreign arbitrations where the plaintiff has a recognisable cause of action under Singapore law and the court has personal jurisdiction over the defendant (in Singapore by reason of the defendant having assets within the jurisdiction: see O 11 r 1(1)(a) of the Rules of Court).

93 As this appeal is not against the decision of Ang J in *Front Carriers* (against which a separate appeal has been filed) it would not be prudent for this court to say anything that may be interpreted as either approving or disapproving it as a s 4(10) decision. However, we think that we are entitled to observe that given the differences in the legal framework in Singapore and in England relating to the power of the court to grant interim measures to assist foreign court and foreign arbitral proceedings, there are arguments for and against construing s 4(10) of the [Civil Law Act] to restrict or broaden the types of cases in which the court could or could not grant Mareva interlocutory relief to assist foreign court proceedings or foreign arbitral proceedings. In *Karaha Bodas*, it was not necessary for this court to decide whether the court has the power under s 4(10) of the [Civil Law Act] to grant an injunction in aid of foreign court proceedings where the plaintiff has a pre-existing cause of action against the defendant who has property in Singapore. In that case, the plaintiff did not even have a pre-existing cause of action. Likewise in the present case, *Front Carriers* is the first time a Singapore court has decided that given the two preconditions, *viz*, personal jurisdiction over the defendant and a pre-existing cause of action subject to Singapore law, a court has the power to grant a Mareva injunction under s 4(10) of the [Civil Law Act] in aid of foreign arbitral proceedings. ...

94 We have pointed out earlier that s 4(10) of the [Civil Law Act] has remained unchanged since it was enacted in 1878, and that therefore the legislative intent of s 4(10) has also not changed. The meaning of s 4(10) does not change because social or political conditions have changed. In *Pettitt v Pettitt* [1970] AC 777 at 813, Lord Upjohn said:

Nor can the meaning of a statute have changed merely by reason of a change in social outlook since the date of its enactment; it must continue to bear the meaning which upon its true construction in the light of the relevant surrounding circumstances it bore at that time.

It is therefore open to argument in a future case whether in the context of the political and commercial conditions existing in Singapore in 1878, the legislature of the Straits Settlements had intended s 4(10) to give power to the court to grant interlocutory injunctions in aid of foreign court proceedings, or even less likely in aid of foreign arbitral proceedings.

...

Summary of findings of this court

96 In summary, our findings are as follows:

...

(c) Section 4(10) of the [Civil Law Act] does not confer any power on the court to grant a Mareva injunction against the assets of a defendant in Singapore unless the plaintiff has an accrued cause of action against the defendant that is justiciable in a Singapore court.

(d) Where the plaintiff has such a cause of action against the defendant who is subject to the personal jurisdiction of the Singapore court (as, *eg*, where he has assets in Singapore), *Front Carriers* ([4] *supra*) has decided that the court has power under s 4(10) of the [Civil Law Act] to grant a Mareva injunction in aid of the foreign arbitration to which the substantive claim has been referred in accordance with the agreement of the parties, and by implication, where the substantive claim is tried in a foreign court.

(e) The existence of the court's personal jurisdiction over the defendant in itself does not give power to the court to grant a Mareva injunction in aid of a foreign arbitration.

[emphasis added]

69 The issues dealt with in *Swift-Fortune* in relation to s 12(7) of the International Arbitration Act (Cap 143A) ("IAA") were not relevant to the present facts in this case. What would be relevant and binding on me would be those concerning the ambit and scope of s 4(10) of the CLA set out *in extenso* above.

70 I will first set out the principle behind *Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera SA* [1979] AC 210 ("*Siskina*") doctrine before proceeding to examine in greater detail the decision of the House of Lords in *Channel Tunnel* on the true scope of the *Siskina* doctrine and the interpretation to be given to s 37(1) of the UK SCA (*ie*, the close

equivalent of s 4(10) of the CLA) that was without any consideration of s 37(3) of the UK SCA.

Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera SA [1979] AC 210 at 363 (“Siskina”)

71 What exactly was the underlying principle behind the *Siskina* doctrine? The Court of Appeal in *Swift-Fortune* ([68] *supra* at [73]) distilled the essence of the principle from what Lord Diplock had said at 254 with reference to s 45(1) of the English 1925 Act and the power of the English court to grant injunctions:

That subsection, speaking as it does of interlocutory orders, presupposes the existence of an action, actual or potential, *claiming substantive relief which the High Court has jurisdiction to grant* and to which the interlocutory orders referred to are but ancillary. This factor has been present in all previous cases in which *Mareva* injunctions have been granted. [Court of Appeal’s emphasis in *Swift-Fortune*]

72 Although worded somewhat differently, s 4(10) of the CLA was in substance largely similar to s 45(1) of the English 1925 Act which provided as follows:

The High Court may grant a mandamus or an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do.

73 At [74], the Court of Appeal observed that:

The doctrine in *The Siskina* was subsequently followed and applied in many English decisions and also widely followed in Commonwealth jurisdictions that had imported s 45(1) of the English 1925 Act. It was generally accepted that a court has no power to grant free-standing interlocutory relief brought in proceedings claiming only that type of relief. The plaintiff must have a pre-existing claim or right that is justiciable in an English court and the defendant must be amenable to the jurisdiction of the court. However, according to Steven Gee, *Gee on Commercial Injunctions* (Sweet & Maxwell, 5th Ed, 2004) at p 21, the position in England in relation to free-standing interlocutory relief has been eroded by a succession of developments. ...

74 Belinda Ang J in *Front Carriers* ([67] *supra*) described the principle in *Siskina* as follows at [42]:

The underlying principle in *The Siskina* ([7] *supra*) is the jurisdiction of the court over the substantive claim. There has also to be in existence an accrued cause of action before a plaintiff can obtain a *Mareva* injunction. Hence, no interlocutory injunction is granted prior to the accrual of an anticipated cause of action. The debate which is tied to foreign arbitration proceedings is this: To what extent should a grant of a *Mareva* injunction depend on whether the Singapore court is itself being asked to decide some ‘substantive’ claim against the defendant to the order, so much so that the underlying principle in *The*

Siskina is not met when the substantive dispute between the parties has been or has to be referred to arbitration abroad? ***The issue which arises for discussion in this application is Mr Yap's point that even if FCL [the plaintiff] can show that it has an arguable case that its legal or equitable right has been infringed, no Mareva injunction can be granted because there is no substantive cause of action before the Singapore courts, the substantive dispute having been referred to arbitration.*** [emphasis added]

75 I agreed with the learned judge that the above point (in bold italics) was not considered in *Siskina* ([71] *supra*) but was addressed by the House of Lords in *Channel Tunnel* (see [76] to [81] below). What was required according to *Channel Tunnel* was that there was a justiciable right between the parties that would be recognised by the court though the determination of that justiciable right might be heard in a foreign jurisdiction or by a foreign arbitral tribunal. On this point, the *Channel Tunnel* case would be persuasive authority and I accepted that to be the correct principle to bear in mind for the purpose of interpreting the ambit and scope of the court's jurisdiction under s 4(10) of the CLA to grant the Mareva injunction. The court's jurisdiction under s 4(10) would not be limited only to those substantive actions actually tried before the Singapore courts and which would therefore terminate in a Singapore judgment. If it was so limited, then no Mareva injunction would be possible for any Singapore action that was stayed for trial in another jurisdiction. My own analysis of what *Channel Tunnel* stood for was also consistent with Belinda Ang J's analysis of that case at [44], [45] and [47] (of *Front Carriers* ([67] *supra*)), where she stated:

44 The House of Lords in *Channel Tunnel* dealt with the issue of whether, by reason of *The Siskina*, an English court no longer had power to make an order under s 37(1) of the UK SCA in circumstances where the action was stayed for arbitration abroad. Their Lordships held that even in such circumstances, an English court retained in principle its power under s 37(1). In *Channel Tunnel*, litigation arose out of the contract to build the Channel Tunnel. Disputes were to be resolved by an arbitral tribunal sitting in Brussels. A dispute arose and the builders (the defendants) threatened to stop work. The claimant employers sought an interlocutory injunction (under s 37(1)) to restrain the builders from stopping work while the underlying dispute was referred to Brussels for arbitration. The House of Lords held that the court had jurisdiction to grant such an interlocutory injunction, although it upheld the Court of Appeal's exercise of its discretion not to grant an injunction (see [1992] QB 656). It was argued in the House of Lords that because the underlying dispute between the parties had by contract to be referred to foreign arbitration, based on the authority of *The Siskina*, the English court did not have jurisdiction to grant an interlocutory injunction. Both the speeches of Lord Brown-Wilkinson and Lord Mustill considered this question and, in so doing, analysed the effect of Lord Diplock's judgment in *The Siskina*.

45 Their Lordships rejected the submission that an interlocutory injunction must be ancillary to a claim for substantive relief to be granted in England by an order of the English court. Lord Browne-Wilkinson, with whose remarks Lord Keith of Kinkel and Lord Goff of Chieveley expressed agreement, concluded at 342 that Lord Diplock's speech indicated that 'the relevant question is whether the English court has power to grant the substantive relief not whether it will in fact do so'. He went on to hold at 343 that *The Siskina* did not impose an additional requirement that the interlocutory injunction must be ancillary to a claim for substantive relief that would actually be granted in England, whether by an order of the English court or by some other foreign court or arbitral tribunal. ...

...

47 Lord Mustill in *Channel Tunnel* at 362 observed that, put at its highest, the doctrine in *The Siskina* simply entailed that an interlocutory injunction was 'always incidental to and [dependent] on the enforcement of a substantive right', which must itself be 'subject to the jurisdiction of the English court', before the English court should exercise its power to grant interim relief. Several points may be gathered from Lord Mustill's speech. The injunction has always to be incidental to and dependent on the claim to enforce a substantive right. That substantive right has to be one that the English court will recognise. *But the claim itself need not be brought before the English court especially where the parties have agreed to arbitration to resolve their disputes.* In other words, all that the claimant must establish is that the factual situation on which he relies on to support his claim must be capable of sustaining his proceedings against the defendant and, in this respect, there is a close connection with the substantive law relating to what is recognised as a legally valid cause of action. I should add here that O 11 r 2(1)(a) of the Rules of Court is also to be read in this context. [emphasis in original]

Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334 ("Channel Tunnel")

76 In *Channel Tunnel* (at 341–343), Lord Browne-Wilkinson explained that Lord Diplock had not suggested in *Siskina* ([71] *supra*) that the court had to be satisfied at the time it granted the interlocutory relief that the final order, if any, would have to be made by an English court:

Despite the breadth of these words [referring only to s 37(1) of the Supreme Court Act 1981 above and without any reference to s 37(3)], in the *Siskina* this House laid down certain limits on the powers which it confers. In that case, the plaintiffs were seeking leave to serve the defendants out of the jurisdiction. The only ground on which the plaintiffs could rely under R.S.C., Ord. 11 was the then sub-rule (i) viz. that the writ claimed an injunction against the defendants dealing with their assets within the jurisdiction. Since the contract in question contained a foreign exclusive jurisdiction clause, the only injunction capable of being granted by the English courts in the ordinary course of

events would have been an interlocutory injunction. In that context, Lord Diplock said, at p. 256:

‘The words used in sub-rule (i) are terms of legal art. The sub-rule speaks of “the action” in which a particular kind of relief, “an injunction” is sought. This presupposes the existence of a cause of action on which to found “the action.” A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.’

This passage, read in isolation, suggests that there are only two limits on the general power conferred by section 37 viz. (1) that the court must have personal jurisdiction over the defendants in the sense that they can be duly served either personally or under Order 11 (other than sub-rule (i)); and (2) that the plaintiffs have a cause of action under English law.

However it was submitted for the respondents that two other passages in Lord Diplock’s speech impose a third requirement, viz. (3) that the interlocutory injunction must be ancillary to a claim for substantive relief to be granted in this country by an order of the English court.

It was said that this third limit is to be found in two other passages in Lord Diplock’s speech, at pp. 254 and 256:

‘[Section 37], speaking as it does of interlocutory orders, presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary.’

‘To come within [sub-rule (i)] the injunction sought in the action must be part of the substantive relief to which the plaintiff’s cause of action entitles him; and the thing that it is sought to restrain the foreign defendant from doing in England must amount to an invasion of some legal or equitable right belonging to the plaintiff in this country and enforceable here by a final judgment for an injunction.’

On the basis of that *alleged third requirement*, the respondents contended that since the contract in the present case contains a foreign arbitration clause as a result of which the Arbitration Act 1975 requires the action to be stayed, the court has no power to grant an interlocutory injunction. Although the respondents have been validly served (i.e., there is jurisdiction in the court) and there is an alleged invasion of the appellants’ contractual rights (i.e., there is a cause of action in English law), *since the final relief (if any) will be granted by the arbitrators and not by the English court, the English court, it is said, has no power to grant the interlocutory injunction.*

In my judgment that submission is not well founded. I can see nothing in the language employed by Lord Diplock (or in later cases in this House commenting on the Siskina) which suggest that a court has to be satisfied, at the time it grants interlocutory relief, that the final order, if any, will be made by an English court. The two passages I have quoted refer to the substantive relief being relief which the English court has 'jurisdiction to grant' and to rights 'enforceable here:' see also, at p. 256F 'some legal or equitable right which it has jurisdiction to enforce by final judgment.' These are words which indicate that *the relevant question is whether the English court has power to grant the substantive relief not whether it will in fact do so. Indeed, in many cases it will be impossible, at the time interlocutory relief is sought, to say whether or not the substantive proceedings and the grant of the final relief will or will not take place before the English court.* My noble and learned friend, Lord Mustill, has demonstrated in his speech that in the context of arbitration proceedings whether it is the court or the arbitrators which make such final determination will depend upon whether the defendant applies for a stay. *The same is true of ordinary litigation based on a contract having an exclusive jurisdiction clause: the defendant may not choose to assert his contractual right to have the matter tried elsewhere. Even more uncertain are cases where there is a real doubt whether the English court or some foreign court is the forum conveniens for the litigation: is the English court not to grant interlocutory relief against a defendant duly served and based on a good cause of action just because the English proceedings may subsequently be stayed on the grounds of forum non conveniens?*

I therefore reach the conclusion that the Siskina does not impose the third limit on the power to grant interlocutory injunctions which the respondents contend for. Even applying the test laid down by the Siskina the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant *duly served where such relief is ancillary to a final order* whether to be granted by the English court or *by some other court* or arbitral body.

Finally I should make it clear that I have merely been considering the effect of the decision in the *Siskina* on the assumption that it correctly states the law. The tests it laid down in absolute terms have already received one substantial modification: see *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557; *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58. Moreover, in *South Carolina Insurance Co. v. Assurantie Maatschappij 'De Zeven Provinciën' N.V.* [1987] A.C. 24, Lord Goff of Chieveley (with whom Lord Mackay of Clashfern agreed) reserved the question whether the law as laid down by the *Siskina* (as subsequently modified) was correct in restricting the power to grant injunctions to certain exclusive categories. With respect, I share the same doubts as are there expressed and reserve the question for consideration when it arises.

[emphasis added]

77 I could do no better than to quote *in extenso* the eloquent reasoning of Lord Browne-Wilkinson, which I would most respectfully adopt in its entirety. Thus under the *Siskina* doctrine, the court had the power to grant interlocutory relief based on a cause of action recognised by English law against a defendant *duly served, where such relief is ancillary to a final order* whether to be *granted* by the English court or *by some other court* or arbitral body. Lord Keith of Kinkel and Lord Goff of Chieveley expressly endorsed the above observations of Lord Browne-Wilkinson without any qualifications. Lord Goff remarked that he too was concerned that the jurisdiction to grant an injunction, which was unfettered in the statute, *ie*, in s 37(1) of the UK SCA, should be rigidly confined to exclusive categories by judicial decision. Likewise, s 4(10) of the CLA was also drafted very widely and in much the same terms as s 37(1) of the UK SCA, and its scope should also not be unduly fettered in my view. These observations of the learned Law Lords in the *Channel Tunnel* case also provided the foundation for my view that under s 4(10) of the CLA, the Singapore court would have the power to grant or to continue a Mareva injunction based on a *cause of action recognised by Singapore law* against these defendants who had been *duly served* with the writ or other originating process (hereafter collectively referred to as “the writ”), and hence *in personam* jurisdiction had also been established, although the final order/judgment would be granted by a Malaysian court owing to the Singapore action being ordered to be stayed in favour of the Malaysian courts.

78 At [79], the Court of Appeal in *Swift-Fortune* ([68] *supra*) observed that:

After *Channel Tunnel* and until the enactment of the UK Arbitration Act 1996, the position in England was that the court had power to grant Mareva injunctions in aid of foreign court or arbitral proceedings if the substantive claim was justiciable in an English court. *Channel Tunnel* clarified and circumscribed the doctrine in *The Siskina* to the extent stated, but the prerequisite that the court must have jurisdiction over the cause of action, even if on a *residual* basis, remained intact. [emphasis in original]

79 What was clear to me was that after I had ordered a stay of the action, the court would be regarded as retaining a *residual* jurisdiction over the underlying cause of action and that *per se* was sufficient to ground the court’s jurisdiction to allow the continuation of the Mareva injunction provided that there was all along a substantive justiciable claim that would have been tried in the Singapore court and would have ended with a Singapore judgment had the action not been stayed. In any case, the *residual* jurisdiction would allow the stayed Singapore action to be revived and carried forward to judgment in the courts in Singapore if, for some reason, the stay was subsequently lifted by the Singapore court.

80 Lord Mustill, with whom the rest of the law lords agreed, further said (in *Channel Tunnel* at 344, 358 and 362–365):

The Court of Appeal also held that the court had no power to grant the injunction under section 37(1) of the Supreme Court Act 1981. As I understand it the Court of Appeal would in any event have declined to uphold the grant of an injunction. For my part I consider that such a power does exist, but that it should not be exercised in the circumstances of the present case. Again, therefore, I reach the same conclusion as the Court of Appeal but by a different route.

...

But a national court may also be invited, as in the present case, to play a secondary role, not in the direct enforcement of the contract to arbitrate, but in the taking of measures to make the work of the chosen tribunal more effective. Here, the matter is before the court solely because the court happens to have under its own procedural rules the power to assert a personal jurisdiction over the parties, and to enforce protective measures against them. Any court satisfying this requirement will serve the purpose, whether or not it has any prior connection with the arbitral agreement or the arbitration process. In the present case, *the English court has been drawn into this dispute only because it happens to have territorial jurisdiction over the respondents, and the means to enforce its orders against them.*

...

For present purposes it is sufficient to say that the *doctrine of the Siskina, put at its highest*, is that the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependant on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action. *If the underlying right itself is not subject to the jurisdiction of the English court, then that court should never exercise its power under section 37(1) by way of interim relief. ...*

First, there is the situation where a contract entirely English in all its aspects is subject to an agreement for arbitration in London. This agreement, being a ‘domestic’ arbitration agreement, may be enforced by a discretionary stay under section 4(1) of the Act of 1950. Here, *it is quite clear that the presence of the clause does not deprive the court of jurisdiction over a dispute arising under the contract.* If an action is brought to enforce the contract, and either the defendant does not apply for a stay, or the court decides in its discretion not to grant one, the action proceeds in exactly the same way as if the arbitration clause did not exist. *Moreover even if the court does choose to grant a stay the court retains its jurisdiction over the dispute. If all goes well this jurisdiction will never be exercised, but if the arbitration breaks down the court is entitled to resume seizing of the dispute and carry it forward to judgment.* (Authority for these propositions is scarcely necessary, but mention may be made of *Doleman & Sons v. Ossett Corporation* [1912] 3 K.B. 257 and *Hamlyn & Co. v. Talisker Distillery* [1894] A.C. 202). *It follows that the conditions for the grant of an*

interlocutory injunction are satisfied, since the purpose of the injunction is to support a cause of action which is justiciable before the English court.

The example may now be changed a little, so as to postulate that one of the parties is a national of a state other than the United Kingdom. The arbitration agreement now ceases to be ‘domestic,’ and the stay is no longer discretionary under the Act of 1950 but mandatory under the Act of 1975. Does this make any difference? *None, in my opinion, for the cause of action is still potentially justiciable by the English court, and will in fact be adjudicated upon if the defendant does not apply for a stay, or if the circumstances are such as to bring into play the exceptions in section 1 of the Act of 1975, or if something happens at a later stage which demands the lifting of any stay which has been granted and the resumption of the action before the court. Here again the restrictions on the grant of an interlocutory injunction do not apply.*

... Very often it happens that where there is an arbitration agreement between foreign parties the English court has jurisdiction only because the agreement stipulates that the arbitration shall be held in London, thereby justifying the inference of English law as the substantive proper law of the contract, and hence giving the court jurisdiction over the cause of action under Ord. 11, r. 1(1)(d)(iii). If the seat of the arbitration is abroad this source of jurisdiction is cut off, and the inhibitions created by the *Siskina* authorities will preclude the grant of an injunction. Nevertheless, *if the facts are such that the court has jurisdiction in some way other than the one just described I can see no reason why the additional foreign element should make any difference to the residual jurisdiction of the court over the dispute, and hence to the existence of the power to grant an injunction in support. ...*

For these reasons I consider that although the commencement of the action was a breach of the arbitration agreement, and that in this sense the respondents were not ‘properly’ before the court, this does not bring into play the limitations on the powers of the court established by the *Siskina* line of cases. ...

We are concerned here with powers which the court already possesses under section 37 of the Act of 1981. ...

2. A procedural difficulty

Finally, I must refer to a problem of procedural mechanics, quite unconnected with the ideals of international arbitration. It is this. *If the court stays an action brought in breach of an arbitration clause, how can it grant an injunction in an action which is no longer before it? No difficulty arises where the stay is discretionary, under section 4(1) of the Act of 1950 or under the inherent powers of the court, since the court can grant the injunction first before electing to impose a stay.* This is what happened in *Foster and Dicksee v. Hastings Corporation* (1903) 87 L.T. 736, a case very similar to the present on the facts. This expedient seems however less defensible where the court is obliged by

statute to render up its control of the dispute as soon as the defendant so requires.

Puzzling as this question undoubtedly seems at first acquaintance, I believe on reflection that the answer is straightforward. Once again, it is helpful to approach the matter by stages. Let us take first the case where the English court, before which no proceedings have been brought except for interim relief, makes an order under section 25 of the Act of 1982 in support of an action brought in the courts of a foreign state. Here, it is obvious that the court is not making an order in an English action. By granting the order, the court does not engage itself at all in the resolution of the dispute, but merely seeks to make the resolution of the dispute by the foreign court more effective. It is a free-standing item of ancillary relief. Next, let it be assumed that the foreign proceedings take the shape of an arbitration, rather than litigation. Once again, if the English court grants an interlocutory injunction by way of interim protection under section 37 of the Act of 1981 it is not playing any part in the decision of the dispute, but is simply doing its best to ensure that the resolution by the arbitrators is fruitful.

[emphasis added]

81 The following apposite observations were made by Lord Mustill (at 366) on why the court's powers to grant interim relief were not affected when proceedings were *stayed for arbitration* and his reasons would be similarly applicable when Singapore proceedings were *stayed on account of lis alibi pendens or forum non conveniens*:

Common sense and logic suggest that the analysis must be the same where the application for the interlocutory injunction is associated with the commencement of an action which the court is obliged to stay. Common sense, because it cannot be right that by starting the action the plaintiff automatically forfeits any right to ancillary relief to which he would otherwise be entitled. Logic, because the purpose of the stay is to remove from the court the task of deciding the substantive dispute, so that it can be entrusted to the chosen tribunal. This is what the court is bound to do, by virtue of the New York Convention. But neither the arbitration agreement nor the Convention contemplate that by transferring to the arbitrators the substance of the dispute, the court also divests itself of the right to use the sanctions of municipal law, which are not available to the arbitrators, in order to ensure that the arbitration is carried forward to the best advantage.

I thus see no difficulty in principle in an order which combines a mandatory stay with an interlocutory injunction by way of interim relief.

For these various reasons I consider, here differing from the Court of Appeal, that the court does have power in the present case to grant the injunction for which the appellants contend, notwithstanding that their action has been stayed. Whether this is a power which the court ought to exercise in the circumstances of the present case is an entirely different matter.

Front Carrier Ltd v Atlantic & Orient Shipping Corp [2006] 3 SLR(R) 854
(“Front Carriers”)

82 Belinda Ang J in *Front Carriers* had meticulously analysed why there was a general power conferred on the court by s 4(10) of the CLA read with s 12(7) and Art 9 of the Model Law in the First Schedule to the IAA to grant Mareva relief in support of *international arbitration, whether commenced or anticipated, and irrespective of the seat of arbitration whether in Singapore and abroad*. As the case before me had nothing to do with any arbitration clause or a stay in favour of an arbitration abroad and it only concerned a stay of the Singapore action on the basis of *lis alibi pendens* or *forum non conveniens*, I shall not concern myself with the related issues concerning s 12(7) of the IAA, Art 9 of the Model Law or O 69A r 3(1)(c) and r 4(1) of the Rules of Court. I would, however, associate with the learned judge’s analysis concerning the ambit of s 4(10) of the CLA.

83 At [33] to [35], Belinda Ang J explained that:

33 The power of the High Court to grant Mareva relief is derived from s 4(10) of the Civil Law Act (see *Art Trend Ltd v Blue Dolphin (Pte) Ltd* [1981–1982] SLR(R) 633 at [27]). Wide though the power in s 4(10) is, it is subject to both jurisdictional and other limits, for in the exercise of that power, the High Court still has to have regard to the principles which it will ordinarily follow in considering whether to grant or to refuse an injunction of the type sought by FCL. The High Court’s power is also restricted to the making of orders which the court regards as ‘just or convenient’ to make in exercise of its jurisdiction. Lai J said in *Art Trend Ltd v Blue Dolphin (Pte) Ltd* at [29]:

What is “just and convenient” in any case to a court in exercising its discretion is not possible to, and obviously should not, be encapsulated into a set of rigid principles. Each case must turn on the merits of its facts. But applicants for a Mareva injunction have been required to observe five guidelines: *The Genie* [1979] 2 Lloyd’s Rep 184 at 189 *per* Denning MR.

34 ... a claimant for Mareva relief has to found territorial jurisdiction against a foreign defendant to the injunction before the court can exercise its powers under s 4(10) of the Civil Law Act, failing which the court lacks personal jurisdiction to make such an order because the defendant is resident out of the jurisdiction. This point was emphasised by both Lord Mustill and Lord Browne-Wilkinson in *Channel Tunnel* ([18] *supra*) in relation to the English courts’ powers under s 37(1) of the UK SCA. Personal jurisdiction over a defendant resident outside Singapore depends on service (as to which see s 16(1) of the Supreme Court of Judicature Act). Ordinarily, to establish personal jurisdiction in the case of a foreign defendant, the consideration is whether O 11 of the Rules of Court applies.

35 *The Siskina* ([7] *supra*) is an O 11 case. The reason why the English court in *The Siskina* had no jurisdiction was because the plaintiff was not able to invoke any of the grounds set out in O 11

r 1(1) of the then English Rules of Supreme Court ('the English RSC') to obtain leave to serve notice of the writ outside England on the non-resident defendant.

84 I would respectfully agree with Belinda Ang J in *Front Carriers* in relation to the scope of s 4(10) of the CLA in so far as it related to defendants resident in Singapore duly served with the writ endorsed with a substantive claim even though the Singapore action was subsequently stayed. Although the present case did not involve foreign defendants, however after I had considered the various English authorities which interpreted the *Siskina* doctrine (including what Belinda Ang J had enunciated), my own view would be that the jurisdiction and power of the court to grant a Mareva injunction pursuant to s 4(10) would extend to non-residents with assets in Singapore and properly served with a writ (endorsed with a substantive claim) properly issued out of the Singapore jurisdiction under O 11. *In personam* jurisdiction would have been firmly established, regardless whether or not the action against these non-residents was subsequently stayed.

85 In my judgment, s 4(10) of the CLA conferred a general power on the court to grant Mareva relief, even though the Singapore action was stayed and the continuation of the Mareva relief against the assets in Singapore of the defendants was in a sense in support of *foreign court proceedings* which were continuing. This was, however, provided that certain jurisdictional pre-requisites were met, namely: (a) the court ought in the first place to have clear *in personam* jurisdiction over the defendants for the Singapore action that was brought; and (b) the "stayed" action had not been struck out because there was a reasonable accrued cause of action under Singapore law and the other reasons under O 18 r 19 for striking out did not apply, and the writ had also not been set aside on the basis that the court had no jurisdiction to hear or try the matter. Once these preliminary jurisdictional criteria were satisfied, the court's jurisdiction to grant Mareva relief would then materialise.

86 A stay of a Singapore action ordered by the Singapore court would not *per se* exclude the court's own pre-existing jurisdiction *in personam* over the substantive matter in dispute. Further, unlike an application to strike out an action, an application for a stay would not be on the basis that the court had no jurisdiction whatsoever over the substantive claim or the claim disclosed no reasonable cause of action against the defendants. A stay application would be premised on totally different principles from an application to strike out an action or to set aside a writ.

87 It was significant that the Court of Appeal in *Swift-Fortune* ([68] *supra*) did not approve or disapprove the specific portion of Belinda Ang J's decision in *Front Carriers* holding that s 4(10) applied and gave the court jurisdiction to grant interim injunctions and other interlocutory orders in aid of foreign arbitrations (*ie*, with a seat of arbitration in a foreign state)

where the plaintiff had a recognisable cause of action under Singapore law and the court had personal jurisdiction over a foreign defendant by reason of the foreign defendant having assets within the jurisdiction: see O 11 r 1(a) of the Rules of Court. That also meant that what Belinda Ang J had decided by way of inference, that s 4(10) would also apply to foreign court proceedings in relation to an action which had been stayed in Singapore provided the same jurisdictional pre-requisites were satisfied, was also neither approved nor disapproved by the Court of Appeal in *Swift-Fortune*.

88 Unlike Tay J in *Petroval* (see [61(i)] above) who concluded that the Court of Appeal in *Swift-Fortune* “was sailing with *The Siskina* and decided not to travel the *Channel Tunnel* route”, I was not able to interpret the Court of Appeal to have decided *simpliciter* that the court would have no power under s 4(10) of the CLA to grant any injunction in aid of foreign court proceedings, even when the Singapore defendant or foreign defendant was subject to the *in personam* jurisdiction of the Singapore court and the plaintiff had a recognisable cause of action under Singapore law. The Court of Appeal had clearly left open the question, in the case of a foreign defendant who was duly served with a writ out of jurisdiction (and *a fortiori* a defendant domiciled or resident in Singapore duly served with a writ in Singapore) and who was subject to the *in personam* jurisdiction of the court, whether or not the court would have power under s 4(10) of the CLA to grant or to continue a Mareva injunction over the Singapore assets of the foreign defendant, where no action was taken to strike out the writ under O 18 r 19 or to set aside the writ on jurisdictional grounds. In its summary of findings, the Court of Appeal merely stated what *Front Carriers* had stood for in relation to s 4(10) of the CLA without stating whether or not it endorsed that determination by Belinda Ang J.

89 Since the Court of Appeal had not overruled *Front Carriers* on this aspect concerning the scope of s 4(10), it was therefore open to me to adopt the reasoning of Belinda Ang J in respect of s 4(10) and to take the position that where there was in fact *in personam* jurisdiction against these defendants, and where the action in Singapore was not struck out (*ie*, implying that there was *prima facie* a reasonable subsisting cause of action in Singapore) but merely stayed on the grounds either of *lis alibi pendens* or *forum non conveniens*, I would have the jurisdiction and the discretionary power to grant, or more specifically in this case, to allow the continuation of the Mareva injunction in support of the foreign proceedings before the Malaysian court, which I had determined to be the proper or distinctly more appropriate forum to hear the action. In other words, if the Singapore action was stayed (for whatever reason) and not struck out, I would retain the discretionary power to allow the continuation of any earlier Mareva injunction ordered during an *ex parte* hearing. Needless to say, even after the court had established that it had the jurisdiction and power to act under s 4(10), the court would still have to ascertain that the usual criteria for

exercising its discretionary power to grant or continue such a Mareva injunction were satisfied before actually granting or continuing the injunction.

90 I did not accept the submission of counsel for the defendants that following any stay of the domestic proceedings, it automatically followed that the action had to be regarded as extinguished or essentially struck out and consequently the court's jurisdiction to grant or continue the Mareva injunction disappeared with the imposition of the stay. If the proposition of defendants' counsel were to be accepted, it would entail an automatic lifting of all interim injunctions against the defendants the moment any action was stayed as the court would lose its original jurisdiction it had at the time it first granted the interim injunction. Suppose on the rare occasion the stay was subsequently lifted, would it mean that the court would then automatically regain its jurisdiction? Should the court's jurisdiction in granting the Mareva injunction flip-flop with the imposition or removal of a stay of the action alone? I did not think so. In my view, if an action was struck out or the writ was set aside, then the *Siskina* doctrine would apply in that the court would have no jurisdiction to grant or continue the Mareva injunction as it would then not be ancillary to any subsisting action. A mere stay of an action would not *per se* be a sufficient basis to conclude that the court would necessarily under the *Siskina* doctrine have no jurisdiction nor any power to grant or to continue a Mareva injunction.

***Fourie v Le Roux* [2007] 1 WLR 320 (“*Fourie*”)**

91 I now refer to the very recent House of Lords decision delivered in January 2007 which had similarly examined the *Siskina* doctrine ([71] *supra*). Lord Scott of Foscote succinctly analysed the reason why the House of Lords in *Siskina* had found on the facts of that case that there was no jurisdiction to grant the Mareva injunction. In *Siskina*, there was basically no *in personam* jurisdiction against the *foreign* defendant who had yet to be served with the writ out of jurisdiction and there was also ***no pre-existing cause of action, actual or potential, claiming substantive relief which the court had the jurisdiction to grant*** which could even support the issue of the writ in England, and accordingly the ancillary relief. The writ therefore had to be set aside. This was one of the main reasons why the court held that it had no jurisdiction to issue the Mareva injunction. Lord Scott at [26] said:

... *The Siskina* is a very well-known case and it is unnecessary for me to describe in any detail how the issue about the court's power to grant an injunction arose. Put briefly, a Mareva-type injunction was sought against a ***Panamanian ship-owning company*** to restrain it from disposing of a fund, consisting of insurance proceeds, in England. The claimant for the injunction was suing the company in a Cyprus court for damages and believed the company to have no other assets from which to meet the hoped-for damages award than the fund in England.

No proprietary claim was, or could have been, made by the claimant to the fund. The issue in the case was whether the ‘long-arm’ jurisdiction of the court under RSC Ord 11, r 1 could be invoked. *If it could not be invoked, the proceedings claiming the injunction could not properly have been served on the Panamanian company.* The claimant relied on sub-r (1)(i) which permitted the service of proceedings on a defendant out of the jurisdiction if a claim were made for ‘an injunction . . . ordering the defendant to do or refrain from doing anything within the jurisdiction’. The leading judgment, when the case came to this House, was given by Lord Diplock. He referred [1979] AC 210, 254, to s 45(1) of the Judicature Act 1925 (the predecessor of s 37(1) of the 1981 Act) and said:

‘That subsection, speaking as it does of interlocutory orders, presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary. This factor has been present in all previous cases in which *Mareva* injunctions have been granted . . . it is not present in the instant case.’

Lord Diplock went on, at p 256 to say of Ord 11, r 1(1)(i) that the words used in the sub-rule were ‘terms of legal art’ and that the reference to ‘an injunction’ ‘presupposes the existence of a cause of action on which to found “the action”’. He continued:

‘A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent on there being a *pre-existing cause of action against the defendant arising out of an invasion, actual or threatened, by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court.* The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.’

and concluded that

‘To come within the sub-paragraph the injunction sought in the action must be part of the substantive relief to which the plaintiff’s cause of action entitles him; and the thing that it is sought to restrain the *foreign defendant* from doing in England must amount to an invasion of some legal or equitable right belonging to the plaintiff in this country and enforceable here by the final judgment for an injunction.’

The effect of this, concurred in by the other members of the Appellate Committee, was that the case could not be brought with Ord 11, r 1(1)(i) and *service of the writ on the Panamanian company had to be set aside.* At which point *there was, unarguably, an absence of any*

jurisdiction, in the strict sense, to grant any injunction against the company.

[emphasis added]

92 In my view, the case of *Fourie* did not support the defendants' arguments because the House of Lords basically decided that the court would have *in personam* jurisdiction to grant an interlocutory freezing order to enable the recovery of money awards arising out of foreign proceedings. If there was no underlying proceeding, it would be difficult to defend the propriety of the grant of an interlocutory injunction without the issue of substantive proceedings or an undertaking to do so. If those proceedings were not instituted, the freezing order might lapse or could on application be discharged but that did not indicate that the court had had no jurisdiction to make it. Lord Bingham of Cornhill made clear that a Mareva injunction was a supplementary remedy to prevent dissipation of assets with the intention or effect of frustrating enforcement of a prospective judgment and to protect the efficacy of court proceedings, domestic or foreign. As Mr Fourie failed to point to any proceedings already brought, or proceedings about to be brought, so as to show where and on what basis he expected to recover judgment against the defendant, the freezing order was wrongly made. No claim for substantive relief had been formulated and shown to the judge and the protection for the defendant that ought to have been associated with the grant of a without notice freezing order had been absent. The liquidator had not identified the prospective judgment whose enforcement the defendants were not to be permitted, by dissipating their assets, to frustrate. There had been no directions about the institution of proceedings for substantive relief. In those circumstances, a challenge to the propriety of the making of the order had been entitled to succeed. Accordingly, the appeal against the discharge of the freezing order was dismissed. (See generally the headnote in *Fourie*.)

93 At [25], Lord Scott said:

... The issue is, in my opinion, not whether Park J had jurisdiction, in the strict sense, to make the freezing order but whether it was proper, in the circumstances as they stood at the time he made the order, for him to make it. This question does not in the least involve a review of the area of discretion available to any judge who is asked to grant injunctive relief. It involves an examination of the restrictions and limitations which have been placed by a combination of judicial precedent and rules of court on the circumstances in which the injunctive relief in question can properly be granted. The various matters taken into account by the deputy judge and Sir Andrew Morritt V-C respectively in holding that Park J had no jurisdiction to make the freezing order were really, in my respectful opinion, their reasons for concluding that, in the circumstances as they stood when the matter was before him, it had not been proper for Park J to have made the order. That, in my opinion, is the real issue.

94 On the facts of the present case, there was not only a foreign court proceeding but also a domestic action brought against the defendants both with substantive though almost identical reliefs. Even though the Singapore action was stayed in favour of Malaysia, it could not be said that there was no longer any subsisting substantive action whatsoever that the plaintiffs could never obtain any judgment for enforcement in Singapore. As such, it was not so much an issue of jurisdiction but a question whether the discretion to allow or maintain the Mareva injunction after a stay of proceedings ought to be exercised in favour of the defendants. As Lord Scott had said, provided the court had *in personam* jurisdiction over the person against whom an injunction, whether interlocutory or final, was sought, the court would have jurisdiction to grant it.

95 In my judgment, it would be odd that there was jurisdiction to begin with when the Mareva relief was first ordered. However, upon a stay of the Singapore action, could there be a de-activation of the jurisdiction? I did not think that the court's jurisdiction would be activated or de-activated upon the court's own action to stay the action. Would it mean that if the stay for some reason was lifted, then the court would resume its jurisdiction to re-impose the Mareva injunction? This would be rather extraordinary. Assets could be dissipated by then and a resumption of such jurisdiction might well be a fruitless exercise. The better approach in my view would be to hold that the jurisdiction in the strict sense existed because on the facts of this case, there was *in personam* jurisdiction over the defendants and since there was a substantive cause of action commenced in Singapore, the courts had the power to grant the Mareva injunction and to continue the Mareva injunction though the substantive action in Singapore was stayed in favour of another jurisdiction hearing it. The jurisdiction of the Singapore court to grant a Mareva injunction in Singapore should not in any way be affected by its own stay order.

96 In *Channel Tunnel* ([76] *supra*), the House of Lords rejected the proposition that an English court could never grant an interlocutory injunction where the cause of action was being litigated or arbitrated in proceedings abroad. Lord Browne-Wilkinson at 342 explained:

... Although the respondents have been validly served (i.e., there is jurisdiction in the court) and there is an alleged invasion of the appellants' contractual rights (i.e., there is a cause of action in English law), since the final relief (if any) will be granted by the arbitrators and not by the English court, the English court, it is said, has no power to grant the interlocutory injunction.

In my judgment that submission is not well founded.

97 Lord Browne-Wilkinson concluded that (at 343):

... the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where

such relief is ancillary to a final order whether to be granted by the English court or by some other court or arbitral body.

98 Clearly the facts of the present case were different from that in *Fourie*. I reiterate that the defendants here were not foreign defendants. The first and third defendants were Singapore citizens. They were all domiciled and ordinarily resident in Singapore and had property in Singapore. The fourth defendant was a Singapore registered company and hence was carrying on business in Singapore. They had all been duly served with the writ in Singapore. Clearly, all the defendants were subjected to the *in personam* jurisdiction of the court. Some of these facts could also ground the service of the writ out of the jurisdiction of Singapore if, for instance, the first and third defendants were located overseas and O 11 r 1 had been necessary. On the present facts, there was no necessity to exercise any extraterritorial jurisdiction over these defendants, as they were all resident in Singapore. Further, there was also a justiciable claim against the defendants who were alleged to be involved in a conspiracy to defraud the foreign plaintiffs, who had chosen to sue these defendants in their place of domicile and business in Singapore. Without more details, it would be difficult to know of the full extent of their participation including whether or not any part of their acts of conspiracy had emanated from Singapore.

99 If indeed there was no valid or reasonable accrued cause of action in Singapore or if the Singapore court had no jurisdiction whatsoever to hear and try the action, it would be open to the defendants to apply to strike out the claim in the Singapore action or to set aside the writ. If the defendants were successful, then obviously the Mareva injunction would have to be discharged, there being no remaining suit against them in Singapore. As it stood before me, there was a *prima facie* cause of action in Singapore to support the issue of the writ. Without a proper striking out application from the defendants where the pleadings and all the facts would then be examined in some detail, I would not be prepared to set aside the writ or strike out the action and accordingly discharge the Mareva injunction on a mere assumption that there was no valid or reasonable accrued cause of action in Singapore and therefore, I had no jurisdiction under s 4(10) of the CLA to grant the Mareva injunction. I took the *prima facie* position that there was a reasonable substantive cause of action and the writ had been duly served. On that basis, I had the jurisdiction to grant the Mareva injunction against these defendants who were subject to the *in personam* jurisdiction of the court. If the action was not struck out and it remained alive so to speak, a stay of the action in favour of another more appropriate forum to try the action did not *per se* mean that there was no jurisdiction to grant the Mareva injunction in the first place or to continue it after the stay had been ordered.

100 Whether the court (already seized of the jurisdiction) would in fact exercise its discretion to grant or maintain the Mareva injunction in

support of the action that was stayed in favour of the trial in another jurisdiction would be an entirely different matter and that would depend on the usual factors which will be discussed later (eg, risk of dissipation, probity, whether it was “just and convenient” for the order to be made and so on). As a matter of law and judicial policy, the fact that the action was stayed should not *in itself* be a reason for the court not to exercise its discretion to grant or maintain the injunction. An exercise of judicial discretion in that manner would be contrary to the comity principles especially when the Singapore court clearly had the *in personam* jurisdiction against these defendants and the Mareva injunction was to restrain the Singapore assets of these defendants within its own jurisdiction.

Karaha Bodas Co LLC v Pertamina Energy Trading Ltd [2006] 1 SLR(R) 112 (“Karaha Bodas”)

101 I distinguished *Karaha Bodas* on the facts as the plaintiff there did not have an accrued cause of action against the defendant that was recognisable by a Singapore court. Similarly, I distinguished *Swift-Fortune* ([68] *supra*) on the basis that the plaintiff there did not have an accrued action recognisable by a Singapore court. This factual difference would explain why the Court of Appeal discharged the Mareva injunction against the foreign defendants in those cases.

102 The plaintiff in *Karaha Bodas* did not even have a substantive claim against the Hong Kong-based Petral, whether in Singapore or Hong Kong. Neither did it have an accrued cause of action in Singapore or Hong Kong against PES, although the court had personal jurisdiction by virtue of PES’ status as a Singapore company. Accordingly, the Court of Appeal set aside the proceedings and the Mareva injunctions against Petral and PES.

103 In the present case, the plaintiffs had a pre-existing cause of action and a substantive claim in Singapore against the defendants who were subject to the court’s *in personam* jurisdiction, although that action was subsequently stayed. But the stay did not mean that the plaintiffs did not already have a pre-existing cause of action or an accrued substantive action. Plainly, the plaintiffs here had a recognisable and *potentially justiciable right* against the defendants, even though that right, due to the stay, would be determined in a foreign court. Since there was a justiciable right recognised in Singapore and a substantive action had been brought in Singapore and duly served on the defendants, I had the jurisdiction and power to grant an interim injunction. *Karaha Bodas* did not decide the question whether the court would have the power under s 4(10) of the CLA to grant a Mareva injunction in aid of foreign court proceedings *where the plaintiffs had a pre-existing cause of action duly served on the defendants which had been stayed*.

104 If there was no stay or if the stay were to be subsequently lifted, then the Singapore action would have continued to the end and if the

recognisable justiciable right were to be determined in favour of the plaintiffs, it would result in an enforceable Singapore judgment against the defendants. This judgment could then be used for execution against the Singapore assets of the defendants, which the plaintiffs had now sought to injunct, pending the outcome of proceedings brought in the actions in both Singapore and Malaysia. To view the matter holistically, it could not be said that the Mareva injunction was entirely in support of foreign proceedings as there was still a *residual* part of the proceedings in Singapore, which was revivable under certain circumstances. The Mareva injunction would also have been *residually* in support of the stayed action in Singapore. It might be different if the stayed action in Singapore had been struck out completely, in which case the whole action in Singapore was extinguished. In such a case, the *Siskina* doctrine ([71] *supra*) would be applicable.

***Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR(R) 856 (“*Petroval*”)**

105 In *Petroval*, the substantive causes of action asserted in the Singapore action (which mirrored the causes of action asserted in the proceedings in the British Virgin Islands (“BVI”)) were, *inter alia*, breach of trust, misdirection of funds from Petroval and fraudulent misrepresentation. The defendants were all foreigners with addresses either in the BVI or Switzerland, whereas the first and third defendants here were Singapore citizens and residents in Singapore, and the fourth defendant was a Singapore company. The *in personam* jurisdiction over the defendants in *Petroval* was based on the fact that they had assets in Singapore, and O 11 r 1 would permit service of the writ out of jurisdiction. The court found that the plaintiff had commenced the Singapore action for the sole purpose of obtaining interim Mareva relief, mirroring that given in the BVI action. At [14], the court said that the claims made against the defendants were justiciable in Singapore in the sense that the causes of action were recognised under Singapore law. However, the merits would not be determined in Singapore because the plaintiffs voluntarily applied for a stay. Singapore was neither the forum of choice nor the forum most appropriate to adjudicate on the dispute. The plaintiff wanted the claim to be adjudicated in the BVI and was not seeking any substantive relief here. Accordingly, Tay J found at [17] that this rendered the plaintiff’s cause of action non-justiciable within the *Siskina* doctrine because it was not contemplated that the Singapore court would have any further role in the Singapore action anyway. The result was that there would be no Singapore judgment. At [14] and [18], Tay J decided that:

... In reality, save for the interlocutory relief, the Singapore action has already come to an end because the plaintiff does not want the Singapore court to do anything else besides maintaining the said relief. Any interlocutory relief granted here takes its life from the same or similar relief granted by the BVI court. If the plaintiff had applied for interlocutory relief here before it did in the BVI action, it would also

have failed according to the principles enunciated by the Court of Appeal above.

...

On the jurisdiction point therefore I decided that the Singapore court has no jurisdiction to grant the interlocutory relief sought by the plaintiff. The interlocutory relief was therefore set aside. As that was the only relief that the plaintiff wanted in the Singapore action, the writ of summons, the service thereof and all subsequent proceedings thereto were consequently also set aside.

106 Although it would be tempting to distinguish *Petroval* on the facts simply because the defendants there were foreigners as opposed to the defendants here, there would nevertheless have been *in personam* jurisdiction in the case of *Petroval* if O 11 r 1 was satisfied and there was proper service out of jurisdiction on these foreign defendants who had assets in Singapore. Therefore, the fact that the defendants in *Petroval* were foreigners could no longer be a justifiable distinguishing point should *in personam* jurisdiction be present in both cases. Neither could the fact that the plaintiff in *Petroval* had voluntarily applied for a stay, as opposed to the present case where the court imposed the stay of the Singapore action against the wishes of the plaintiff, make any legal difference to the position that the Singapore actions in both cases in fact would not be tried in Singapore unless the stay was lifted.

107 As I was not able to distinguish the case of *Petroval* on the relevant facts that mattered to the legal principles in issue, I would respectfully decline to follow *Petroval*. In my view, it would be sufficient to have a cause of action that was *potentially justiciable* in Singapore never mind if the adjudication was in fact to take place elsewhere. It would not be automatically fatal to the Mareva injunction if the action was stayed and hence, the action would not be heard in Singapore and terminate in a Singapore judgment. If it were to be otherwise, then all stayed actions could never be supported by any Mareva injunction, and conversely, for every action that was stayed, the Mareva injunction must be correspondingly discharged as the court's jurisdiction would be automatically extinguished with each stay application that was allowed. I did not believe that that would be the correct legal position in Singapore.

Wu Yang Construction Group Ltd v Mao Yong Hui [2008] 2 SLR(R) 350
(“Wu Yang”)

108 In *Wu Yang*, the Court of Appeal viewed that there was no jurisdiction to grant the freezing order because Wu Yang did not have any underlying cause of action in Singapore when it obtained the freezing order pursuant to s 12(7) of the IAA and O 69A of the Rules of Court.

109 However, the present facts were distinguishable from those in *Wu Yang* in that there was a proper action started in Singapore by the plaintiffs

when the Mareva injunction was first obtained. There was substantive relief claimed against the defendants when the Mareva injunction was sought.

Other cases distinguished

110 *Fourie* ([91] *supra*), too, was a case where substantive proceedings were not yet even formalised when an application for a freezing order was made, and it was held that no freezing order would be properly made in the absence of such formulation of the case for substantive relief. *Front Carriers* ([67] *supra*) was also distinguished in *Swift Fortune* ([68] *supra*) at [87] where it was held that there was “a cause of action justiciable in a Singapore court” in *Front Carriers* whereas *Swift-Fortune* did not have such a justiciable right against *Magnifica* when it obtained the *ex parte* Mareva injunction (and would never have had it at any time).

111 I found nothing in the Singapore cases cited by the defendants which ruled that a stay of proceedings automatically led to a discharge of a Mareva injunction. In the said cases, no proceedings existed in Singapore which could lead to a judgment. But for the present stay order of the court, which was an adverse ruling against the plaintiffs who had instituted proceedings in Singapore with the intention of getting a Singapore judgment here, the plaintiffs could well have proceeded to judgment in Singapore.

Stay had no effect on the court’s Mareva jurisdiction

112 In conclusion, a stay of proceedings would not remove this court’s residual jurisdiction to hear the plaintiffs’ cause of action, for instance, if the stay were to be subsequently lifted for whatever reason. Nor could it mean that a cause of action which was initially justiciable was no longer justiciable merely because of a stay order that merely suspended the Singapore proceedings. It did not mean the end of proceedings in Singapore as a striking out would. When an action has been struck out, that puts the Singapore action at an end. Under those circumstances, I can accept the proposition that a Mareva injunction, which has to be an ancillary to a substantive action, could no longer continue. But implicit in a stay of proceedings is the fact that the plaintiffs’ action still subsists. Such a stay could potentially be lifted, for example, where the Malaysian judgment could not be registered and enforced in Singapore because the restrictions on registration in s 3 of the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264) applied.

113 In my judgment, if there had to be an automatic discharge of a Mareva injunction simply because there was any stay of proceedings for whatever reason, it would lead to the serious proposition of having consequential orders in every case such as a lifting of a Mareva injunction with every stay of proceedings and a re-imposition of a Mareva injunction with every lifting of a stay. As I had stated before, I did not think that the court’s jurisdiction to grant a Mareva injunction would be flip-flopping

together with the court's order of a stay or the lifting of a stay. After a stay of the substantive action in Singapore, the Singapore court nevertheless retained a residual jurisdiction which should be sufficient to enable the court to exercise such power in my opinion.

114 Even if the seminal case of *Siskina* ([71] *supra*) were to stand for the doctrine "where a substantive claim must not only be justiciable in an English court but should also terminate in an English judgment" (which I did not believe was the case), then I would state that on the facts of the present case, there was a substantive and justiciable claim in Singapore, and any question as to whether it could terminate in a Singapore judgment would be a hypothetical one which in my view would be answered in the affirmative in our case, had there been no stay. Hence *Siskina* could be distinguished on the basis that the plaintiffs there had no cause of action whatsoever against the defendants that was justiciable in England, but only an arbitral claim outside England. The plaintiffs there issued a writ against the defendants and applied for a Mareva injunction to restrain the defendants from remitting abroad the insurance proceeds that were held in England. No leave could be granted under O 11 r 1(1)(i) to serve the writ out of the jurisdiction unless the plaintiff had a substantive cause of action against the defendant enforceable by an English court. Accordingly, the House of Lords refused leave because there was no jurisdiction to commence proceedings in England.

115 For all the reasons stated, I rejected the defendants' arguments that the court had no jurisdiction nor power to grant a continuation of the Mareva injunction after the action was stayed.

Summary of the legal principles

116 After considering the various authorities, I concluded that the prerequisites for the court's jurisdiction under s 4(10) of the CLA to grant or continue a Mareva injunction in exercise of its discretionary power were as follows:

- (a) the plaintiff would have to show that there was a reasonable accrued cause of action that was recognisable or justiciable in a Singapore court;
- (b) the court had ordinary domestic or *in personam* jurisdiction over the Singapore defendant duly served in Singapore with the writ or the court had *in personam* jurisdiction over the foreign defendant where the writ to be served out of jurisdiction would satisfy O 11 (*eg*, by reason of the foreign defendant having assets within the jurisdiction: see O 11 r 1(a) of the Rules of Court) and that writ had been duly served abroad on the foreign defendant in accordance with the Rules of Court. (See also s 16 of the SCJA for the court's general civil jurisdiction to hear and try any action *in personam*.);

(c) there would have to be assets within the territorial jurisdiction of Singapore which could be the subject of a Mareva injunction order;
and

(d) substantive proceedings would have to be brought in Singapore against the Singapore defendants or foreign defendants, although those substantive proceedings in Singapore might be stayed by the court for, *inter alia*, the following reasons:

(i) a stay as a result of an arbitration clause in favour of a seat of arbitration in Singapore or abroad; or

(ii) a stay as a result of *lis alibi pendens* or *forum non conveniens* in favour of court proceedings in a foreign jurisdiction.

(e) For avoidance of doubt, substantive proceedings initially brought before the Singapore court against the defendants need not in fact be decided by the Singapore court and therefore end in a Singapore judgment to ground the jurisdiction of the court to grant the Mareva injunction. Consequently, the relevant question was whether the court would have the power to grant the substantive relief claimed in the action, and not whether it would in fact grant it. Where the action was stayed, the court would unlikely be in a position to actually grant any substantive relief as the court itself had halted the Singapore proceedings. In such circumstances, I did not think that it would be right that a Mareva injunction (ancillary to the substantive relief) must necessarily be lifted as a matter of course as part of the necessary consequential orders pursuant to a stay, on the ground that there would no longer be any jurisdiction to grant or to continue it. Technically, I would not regard the continuation of a Mareva injunction subsequent to a stayed action as a “free-standing interim relief” given exclusively in aid of foreign proceedings, as the Mareva injunction also provides residuary support to the stayed action since the stay might, in an appropriate case, be lifted by the court though such occasions would be rather rare.

117 In construing that the court had jurisdiction under s 4(10) of the CLA to allow the Mareva injunction to continue upon the satisfaction of the jurisdictional pre-requisites above, I did not think that I was in any way interfering with the processes of the foreign court which I had adjudicated to be the more appropriate forum to try the action. On the contrary, adopting a broader and more generous interpretation of s 4(10) to confer jurisdiction on the court to grant such Mareva injunctions to aid foreign proceedings and to preserve assets in the event that enforcement of a foreign judgment became necessary, would in fact enhance the mutual assistance between the courts of various jurisdictions. This is particularly significant in light of today’s interconnected and “borderless” world, where trade, banking, finance, investments and other dealings, including disputes

that occasionally arise out of such interactions, are no longer confined within separate jurisdictions but are increasingly international or transnational in nature. I did not consider that any objection in principle could be made to the court's exercise of its jurisdiction under s 4(10) in this way having regard to the realities of the modern world today (including the rising incidents of fraudulent cross-border activities) and the increasing need to have international judicial co-operation, especially when the most appropriate place for trying the action might not necessarily be the place where the assets of the defendants were located and where the Mareva relief was required. In interpreting the scope of s 4(10), it would be instructive to bear in mind the following passage from Francis Bennion, *Statutory Interpretation* (LexisNexis Butterworths, 4th Ed, 2002):

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred, since the Act's passing, in law, social conditions, technology, the meaning of words, and other matters.

118 The observations at 341 of Lord Browne-Wilkinson in the House of Lords decision in *Channel Tunnel* ([76] *supra*) were apposite in relation to promoting mutual assistance between the courts of various jurisdictions:

I add a few words of my own on the submission that the decision of this House in *Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.* [1979] A.C. 210 would preclude the grant of any injunction under section 37(1) of the Supreme Court Act 1981, even if such injunction were otherwise appropriate. If correct, that submission would have the effect of severely curtailing the powers of the English courts to act in aid, not only of foreign arbitrations, but also of foreign courts. Given the international character of much contemporary litigation and the need to promote mutual assistance between the courts of the various jurisdictions which such litigation straddles, it would be a serious matter if the English courts were unable to grant interlocutory relief in cases where the substantive trial and the ultimate decision of the case might ultimately take place in a court outside England.

119 In the context of a stay in favour of overseas arbitration, Lord Mustill in *Channel Tunnel* also had this to say in relation to the jurisdiction of the courts to order interim injunctions in support of international arbitrations (at 365):

... The purpose of interim measures of protection, by contrast, is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration.

Defendants' applications to lift the Mareva injunction

120 With the jurisdictional issue out of the way, I shall now deal with the merits of the first, third and fourth defendants' discharge applications that would be relevant to the exercise of my discretion whether to lift the Mareva injunctions that had been earlier imposed. After carefully considering whether or not it would be "just and convenient" in all the circumstances of the case, I decided to discharge the Mareva injunction in respect of the third defendant but not in respect of the first and fourth defendants. I now state my reasons.

121 At this juncture, it would be convenient to mention a subsidiary point. The defendants were not precluded from subsequently making an application to set aside or discharge the Mareva injunction after an action had been stayed. The court would also have the power to hear an ancillary application to discharge the Mareva injunction even though a stay of the action had been ordered. An application to discharge a Mareva injunction made by the defendants before any stay was ordered would also not amount to a step taken in the proceedings that would prejudice their application for a stay. I found support for these propositions of law in *Kirames Sdn Bhd v Federal Land Development Authority* [1991] 2 MLJ 198.

The court's function in a discharge application

122 The judge hearing an *inter partes* application to discharge an *ex parte* injunction on the ground of the plaintiffs' failure to make full and frank disclosure would not be sitting in appeal over the decision of the first judge who granted the injunction at the *ex parte* hearing. The court would have to determine whether, on the full facts and arguments presented by both parties, the injunction should be continued or discharged, or a fresh injunction be issued: *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah* [2000] 1 SLR(R) 786 ("*Huwah*") at [19]. If the defendants successfully showed that there had been misrepresentations, suppression of material facts or material non-disclosure by the plaintiffs in relation to the obtaining of the injunction, then the court hearing the discharge application would make such order as it deemed fair and just in all circumstances: *Huwah* at [19].

Plaintiffs' obligation to make full and frank disclosure of material facts

123 Where an *ex parte* application was made for a Mareva injunction, the plaintiffs would have an obligation to make full and frank disclosure of all material facts: *Huwah* at [21]. The Court of Appeal in *Huwah* adopted Warren L H Khoo J's observation in *Poon Kng Siang v Tan Ah Keng* [1991] 2 SLR(R) 621 ("*Poon*") where the learned judge expressed the applicant's duty to make full and frank disclosure as follows at [40]:

'Material' ... does not mean decisive or conclusive. What is required is that the applicant should make full and frank disclosure of all facts and matters which could or would reasonably be taken into account by the

judge in deciding whether to grant the application. This includes any defence that the applicant has reason to believe may be advanced by the other side. He has in general to put his case fairly before the court. This is all trite law.

124 The Court of Appeal added that the duty to disclose applied not only to material facts known to the applicant but also such additional facts which he would have known if he had made proper inquiries. The extent of the inquiries would depend on the facts and circumstances prevailing in the case.

125 Counsel for the third defendant cited *The King v The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington; Ex parte Princess Edmond de Polignac* [1917] 1 KB 486 where Warrington LJ stated thus (at 509):

It is perfectly well settled that a person who make an ex parte application to the Court – that is to say, in the absence of the person who will be affected by that which the Court is asked to do – is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it.

126 Scrutton LJ added (at 514):

... [I]t has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex-parte statement he should make a full and fair disclosure of all the material facts ... the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement.

127 In *Bank Mellat v Nikpour* [1985] FSR 87 at 90–92, Donaldson LJ said:

This principle that no injunction obtained *ex parte* shall stand if it has been obtained in circumstances in which there was a breach of the duty to make the fullest and frankest disclosure is of great antiquity. Indeed, it is so well enshrined in the law that it is difficult to find authority for the proposition; we all know it; it is trite law. ... [T]he court will be astute to ensure that a plaintiff who obtains an injunction without full disclosure – or any *ex parte* order without full disclosure – is deprived of any advantage he may have derived by that breach of duty. ... The rule requiring full disclosure seems to me to be one of the most fundamental importance, particularly in the context of the draconian remedy of the *Mareva* injunction. It is in effect, together with the *Anton Piller* order, one of the law's two 'nuclear' weapons. If access to

such a weapon is obtained without the fullest and frankest disclosure, I have no doubt at all that it should be revoked.

128 The above suggests that upon a material non-disclosure, the court has no alternative but to set aside the *ex parte* Mareva injunction. Clearly, the Court of Appeal in *Huwah* ([122] *supra*) did not advocate such a strict automatic discharge based on the above principles. At [25], the Court of Appeal held that even where material non-disclosure was established, the court had the discretion whether or not to discharge the interlocutory injunction without looking into the merits. In *Nikkomann Co Pte Ltd v Yulean Trading Pte Ltd* [1992] 2 SLR(R) 328 at [43], the Court of Appeal considered whether any non-disclosure:

... is of such materiality as to justify or require the immediate discharge of the interim orders without examination of the merits. This depends on the importance of the fact to the issue which was to be decided by the judge hearing the *ex parte* application.

129 The court would therefore have regard to the nature and circumstances under which the non-disclosure or distortion of information was made, as well as the materiality of the non-disclosure or distortion in influencing the relevant issues before the judge hearing the *ex parte* application. If the information was of sufficient materiality then the court would have to further consider whether or not the material non-disclosure or distortion in question was inadvertent or innocent, or whether it was deliberate and intended to mislead the court into granting the *ex parte* injunction. If it was the latter, the court would be much more likely exercise its discretion to discharge the Mareva injunction immediately as it would be an abuse of process to mislead the court during an *ex parte* hearing into granting the Mareva injunction. Only in very extenuating circumstances (for instance where serious injustice would be caused to the plaintiffs) would the court be prepared to excuse the plaintiffs, and to allow the *ex parte* injunction to continue or to grant a fresh injunction after full and proper disclosure upon a subsequent application. This would be despite the plaintiffs' earlier deliberate suppression of material information or deliberate distortion of material information to mislead or deceive the court at the *ex parte* hearing. That the court had the jurisdiction to do this was clear from [37] of *Huwah* ([122] *supra*). In exercising its discretion, the court would have to be conscious of and consider the proportionality of the adverse impact on the plaintiffs should the Mareva injunction be permanently discharged as against the degree of culpability of the plaintiffs' actions in the *ex parte* application. The rather onerous effects of the Mareva injunction on the defendants would have to be put into the balance and factored together with these considerations as well. The court could also modify or impose additional terms to the Mareva injunction should it not be discharged.

My reasons for lifting the Mareva injunction against the third defendant

130 I found that the plaintiffs had deliberately suppressed and distorted material facts in their *ex parte* application for the injunction against the third defendant. This would have given an erroneous impression to the court hearing the *ex parte* application that the third defendant was dissipating his assets and evading the plaintiffs. Paragraph 71 of Mohd Nadzir's affidavit, affirmed on 10 April 2008 and filed in support of the plaintiffs' application for the Mareva injunction, stated that "*To the best of the Plaintiffs' belief, the 1st, 2nd and 3rd defendants' whereabouts remain unknown and they are currently uncontactable*".

131 However at p 2 of the writ of summons, the plaintiffs indicated the address of the third defendant's HDB residence. In the writ of summons and at para 65(b) of Mohd Nadzir's first affidavit, the plaintiffs vouchsafed that the third defendant owned property in Singapore at "324 Yishun Central #10-291 Singapore 760324." In fact, the plaintiffs knew exactly where the third defendant stayed because the third defendant had applied on 27 April 2007 for employment as the "representative office manager" of the first plaintiff. In the application form also exhibited in the affidavit of Mohd Nadzir, the third defendant had declared his present address as follows: "Present Address: Blk 324, YISHUN CENTRAL, #10-291, SINGAPORE 760324"(the "Yishun" address). The first plaintiff also exhibited its letter of appointment to the third defendant dated 2 May 2007 which stated that the third defendant's address was at Yishun. I presumed that the first plaintiff had mailed the appointment letter to the third defendant at his Yishun address as stated in that appointment letter.

132 Further, the plaintiffs in preparing for the Mareva application made two electronic database searches on the third defendant. The exhibits on these searches were buried at pp 368 and 369 towards the end of the very thick 369-page affidavit filed in support of the Mareva injunction application. The LAWNET2 ACRA "Due Diligence Search-BizNet (People Profile Information)" search revealed that the third defendant was a Singapore citizen who had changed his address on 25 Sep 2006 to the Yishun address. The IRAS tax portal PTEVLEnquiry search results also disclosed that the third defendant and his wife owned the property at the same Yishun address and they were paying a property tax rate of 4% on an annual value of \$7,800. The fact that they were paying a concessionary property tax rate of 4% on the annual value for the Yishun address should have indicated to plaintiffs' counsel that the third defendant and his wife were owner occupiers of that Yishun HDB flat. With plentiful evidence showing unequivocally that the third defendant and his wife were residing at that Yishun property, it astounded me that Mohd Nadzir could have affirmed on behalf of the plaintiffs that the third defendant's whereabouts remained unknown and that the third defendant was currently uncontactable, unless the plaintiffs had ulterior motives for doing so.

133 At the hearing, counsel for the plaintiffs even had the temerity to explain to me that what was stated in the third defendant's application form only showed that the third defendant owned the property but it did not indicate that he was staying there. I rejected this explanation without hesitation.

134 In *Poon's* case ([123] *supra*), Warren Khoo J's observations on the overall conduct of the plaintiffs' case at [61] were regrettably also applicable here:

When the non-disclosure was brought to their attention, rather than seeking to make amends, they adopted a rather pugnacious attitude, seeking to justify what plainly was not justifiable. There was not a hint of contrition for their omissions, not in the affidavits, not in counsel's submissions. Their premeditation before the fact was thus compounded by what borders on obduracy afterwards. It is doubtful whether they even accepted that they had been wrong. This was altogether a rather unhelpful attitude for them to adopt ...

135 By affirming that the third defendant's whereabouts remained unknown (which implied that his whereabouts were never known) and that he was uncontactable, it amounted not only to a deliberate non-disclosure of the true facts but it was also a distortion of the material facts which were intended to mislead the court at the *ex parte* hearing into believing that the third defendant's whereabouts were indeed unknown. The plaintiffs would have the court believe that the third defendant was uncontactable when he had all along been residing there at his HDB flat with his wife and two young children. I accepted the submission of counsel for the third defendant that the third defendant was presently a taxi driver and he had all the while been residing at that HDB address. Counsel for the third defendant said that the plaintiffs had outrageously feigned their ignorance of the third defendant's contact address and whereabouts in an effort (a) to deliberately mislead the court into believing that the third defendant engaged in conduct to dissipate his assets and had gone missing; and (b) thereby to secure the grant of the Singapore injunction against him. In my view, there was sufficient basis for such a submission.

136 In this case, the plaintiffs went far beyond the failure to make a full and frank disclosure of material facts when it actually set out to mislead the court on material facts. This could not be condoned and I was clearly minded to set aside the *ex parte* Mareva injunction without more. The facts suppressed by the plaintiffs were material for the learned judge dealing with the plaintiffs' *ex parte* application. Plainly, they were material facts which could or would reasonably be taken into account by the learned judge in deciding whether or not to grant the injunction. The deliberate suppression and distortion of the material fact concerning the present whereabouts of the third defendant could or would have affected the judge's impression of the third defendant as someone who was trying to evade the plaintiffs and

who had been dissipating his assets so that any judgment obtained by the plaintiffs would be merely a paper judgment.

137 Although the full facts were eventually before me at the *inter partes* hearing, nevertheless I still exercised my discretion to discharge the Mareva injunction. I had considered the merits but not in any great detail before I made the final decision to discharge the injunction. This was done as a prudent step to check if there would be any grave injustice if the injunction were to be discharged and whether the “punishment” for the “culpability” by way of the discharge would have been disproportionate. After a broad examination, I did not think it was. In the affidavit disclosing assets that was filed, the third defendant had hardly any assets to speak of apart from the HDB flat. With only meagre assets, what real risk would there be of any dissipation? If the third defendant had hidden assets for instance in his wife’s name, I would harbour doubts that he would be still be driving a taxi for a living. In the case of the third defendant, I did not think that the discharge of the Mareva injunction would have made much of a difference to the plaintiffs’ position in ensuring the continued existence of the third defendant’s assets to satisfy any judgment subsequently obtained. On the other hand, counsel submitted that the third defendant suffered the following hardship:

- (a) the third defendant could not seek an appointment as a full time taxi driver. As his bank accounts were frozen, he would not be able to satisfy an important pre-requisite to becoming a full time taxi driver, which was, the ability to pay the rental of the taxi on time through a functional bank account;
- (b) the third defendant was unable to accept payment of taxi fares from passengers who choose to pay their fares either via credit card or NETS; and
- (c) the third defendant and his family members suffered tremendous emotional distress.

138 On the whole, the plaintiffs failed to provide sufficiently reliable evidence to indicate, demonstrate or enable an inference to be drawn on how and why there was a real risk on the part of the third defendant in dissipating his meagre assets within the jurisdiction or in transferring his meagre assets out of the jurisdiction to stultify any judgment given. As Mustill J had stated in *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen* [1984] 1 All ER 398 at 406:

... It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of different forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its

corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there.

139 The Court of Appeal in *Choy Chee Keen Collin v Public Utilities Board* [1996] 3 SLR(R) 812 (“*Choy*”) said at [21] that a mere possibility or unsupported fear of dissipation was therefore insufficient. In *O’Regan v Iambic Productions Ltd* (1989) 139 NLJ 1378, which was cited in *Choy’s* case, Sir Peter Pain expressed the following view (at 1379):

There are numerous paragraphs in the authorities relating to Mareva injunctions which make it plain that unsupported statements and expressions of fear carry very little, if any, weight. The court needs to act on objective facts from which the court can infer that the defendant is likely to move assets abroad or dissipate them within the jurisdiction. Here, there is nothing of that nature in the documents at all ...

140 Neither was there any grave injustice. I did not think from the evidence disclosed that the plaintiffs had a good arguable case against the third defendant. I could not see any reliable evidence of knowing participation of the third defendant in the alleged tort of conspiracy committed by the others against the plaintiffs. In the summary of the evidence, the tenuous link to the third defendant was that he, as the representative office assistant manager of the first plaintiff, had allegedly proposed accounting entries for the agreements and journal accounts set up under the agreements. I was not sure if he, as a mere employee, actually knew what was going on and he could well be made use of by the other defendants. In *Amixco Asia Pte Ltd v Bank Negara Indonesia 1946* [1991] 2 SLR(R) 713, the Court of Appeal expressed the test of “a good arguable case” as follows (at [18]):

It was common ground that a good arguable case for the purpose of a Mareva injunction was one which was more than barely capable of serious argument, but not necessarily one which the judge considered would have a better than 50% chance of success: see *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH und Co KG* [1983] 1 WLR 1412 at 1471A–F.

141 Accordingly, in this situation where there was deliberate suppression and distortion of material facts, I did not think any grave injustice would be occasioned to the plaintiffs on the facts if I were to discharge the earlier *ex parte* Mareva injunction and refuse any fresh Mareva injunction against the third defendant after the full facts were before me. The “punishment” I imposed for the “culpability” of the plaintiffs was not in my view disproportionate in any way. For all the above reasons, I fully discharged

the Mareva injunction against the third defendant with no other conditions attached.

My reasons for not lifting the Mareva injunction against the first and fourth defendants

142 As was stated above, the Singapore injunction against the first and fourth defendants was obtained by the plaintiffs on an *ex parte* basis without prior notice to the first and fourth defendants after the Malaysian action was commenced and after the worldwide Malaysian injunction was obtained against them.

143 The first and fourth defendants' counsel submitted that the injunction should be set aside and/or discharged on the following grounds:

- (a) The plaintiffs failed to establish the requirements on which such relief might be granted, *ie*, they failed to:
 - (i) make full and frank disclosure of all material facts;
 - (ii) show a good arguable case over which the court would have jurisdiction;
 - (iii) show that the fourth defendant had assets in Singapore;
 - (iv) demonstrate a real risk of dissipation of assets in Singapore.
- (b) Given all the facts and circumstances of this case, the grant of Mareva relief was inappropriate.

144 As with the third defendant, the first and fourth defendants vehemently complained that the following material facts were omitted by the plaintiffs from the affidavit filed in support of the application for the injunction:

- (a) The Malaysian action had been commenced by the plaintiffs.
- (b) The plaintiffs were claiming identical relief in the Malaysian action, as was claimed against the first and fourth defendants in the Singapore action. The Singapore action accordingly was wholly duplicitous.
- (c) A worldwide Malaysian Mareva injunction had been obtained against the first and fourth defendants.
- (d) The Malaysian injunction was obtained in respect of assets located worldwide. As such, assets located in Singapore were already within the scope of the Malaysian injunction. The Singapore injunction was thus wholly duplicitous.

145 Although the plaintiffs ought to have averred to the following material facts in the affidavit filed in support of the application, I noted that Mr Gopinath Pillai, counsel for the plaintiffs, had instead affirmed an

affidavit that at the *ex parte* hearing before Tan Lee Meng J on 10 April 2008, he had, *inter alia*, informed the court that:

- (a) Similar proceedings had already been commenced in Malaysia against the defendants as well as other parties.
- (b) The instructing solicitors in Malaysia had instructed them that the Malaysian court had ordered a worldwide injunction against the first, second and fourth defendants prohibiting their disposal of assets.
- (c) The Malaysian court had granted the plaintiffs an order against the defendants in the Malaysian proceedings for the discovery of certain documents under the Malaysian Bankers' Act.

146 In my opinion, the proper way should be for the plaintiffs to disclose in some degree of detail, together with the appropriate supporting documents, the matters complained of in the actual affidavit filed in support of the Mareva injunction. That would then make clear the full ambit of the disclosure in the event of a future challenge by the defendants to discharge the Mareva injunction on the ground of material non-disclosure. If counsel at the *ex parte* hearing were simply to rely on "evidence from the bar" for his material disclosure, the gist of which was to be later affirmed in his affidavit of what he had orally told the judge, it would be difficult to ascertain the actual extent of the material facts which he did or did not orally disclose to the judge. This approach is certainly far from satisfactory but on the facts of this case, I was prepared to overlook the non-disclosure of these material facts in the supporting affidavit for the *ex parte* injunction having regard to the fact that the judge had been orally apprised of the Malaysian proceedings. Thus, I did not exercise my discretion in favour of the first and fourth defendants to discharge the injunction on this ground.

147 However, the same could not be said of the deliberately suppressed and distorted material facts in the affidavit affirmed in support the injunction application against the first defendant. These facts would have similarly given an erroneous impression to the court at the *ex parte* hearing that the first defendant was dissipating his assets and evading the plaintiffs because, and I reiterate here that, Mohd Nadzir's affidavit had affirmed on 10 April 2008 at para 71 that "*To the best of the Plaintiffs' belief, the 1st, 2nd and 3rd defendants' whereabouts remain unknown and they are currently uncontactable*".

148 Again there was clear evidence obtained by the plaintiffs that the first defendant was staying at 18 Lewis Road Singapore 258603. Buried at p 360 in the affidavit of Mohd Nadzir was a LAWNET2 ACRA "Due Diligence Search-BizNet (People Profile Information)" report revealing that the first defendant was a Singapore citizen with an address at 18 Lewis Road Singapore 258603 and that he was a director, shareholder or manager of

some 46 companies with many of them still “LIVE”. The plaintiffs even took the trouble to make a Singapore Titles Automated Registration System (STARS) search to establish that 18 Lewis Road was a sizable freehold property of some 1255.7m² in the Tanglin District and that the first defendant and one Lucy Lung were the joint tenants. This was exhibited at pp 362 to 367 of the affidavit. Even if the plaintiffs did not know that the first defendant was staying at that property, they could easily visit that property to confirm if the first defendant was staying there. In a highly urbanised city state such as Singapore, locating a fairly large landed property in Lewis Road should pose no difficulty whatsoever. I was therefore rather surprised that the plaintiffs had made all the effort to do the electronic database searches, but could not be bothered to check if the first plaintiff in fact stayed or was contactable at the Lewis Road property.

149 In my view, the plaintiffs had similarly misled the court that the first defendant’s whereabouts were unknown and that he was uncontactable. It was a material distortion of the facts. It similarly amounted to a deliberate and calculated manoeuvre on their part, which betrayed a lack of good faith. I was deliberating whether to lift the Mareva injunction against him in the same way that I had done for the third defendant on account of the deliberate suppression and distortion of the pertinent and material facts, which ought not to be condoned. On account of such unacceptable conduct by the plaintiffs, I could have exercised my discretion not to consider the merits of the case for the Mareva injunction and to discharge it without more. However, in light of the very substantial alleged fraud of over RM44m, I believed that in the interests of justice I ought to consider the matter as a whole before making a final decision whether or not to discharge the injunction, lest there was any grave injustice caused by the discharge. In particular, I considered whether or not the “punishment” of discharge would far outweigh the “culpability” of the deliberate material non-disclosure and distortion of important facts.

150 I then invited the plaintiffs’ counsel to present to me the most incriminating evidence he had that would show that *prima facie* the first and fourth defendants were instrumental in this very substantial alleged fraud of over RM44m. I carefully examined the documentary evidence, traced the funds flow and was satisfied that there was *prima facie* evidence (or for that matter, more than *prima facie* evidence) of their participation in the alleged fraud. It appeared to me that the mastermind of the alleged fraud was the first defendant and he was also using, *inter alia*, the fourth defendant as a vehicle in his fraudulent conspiracy against the plaintiffs.

151 It would not be necessary for the purpose of this judgment to set out the various pieces of documentary evidence that I had examined to arrive at my conclusion. It is sufficient for me to state that there was reliable evidence to show that the first defendant had produced false fixed deposit receipts and, through the fifth defendant, false bank statements in order to

mislead the plaintiffs into thinking that the first defendant had fulfilled his undertaking given at the board meeting and had complied with the alleged agreements. The plaintiffs clearly had more than an arguable case against the first and fourth defendants. I would not need the plaintiffs to show me further evidence of the propensity or the risk of dissipation of assets to maintain the Mareva injunction against them. The probity, honesty and integrity of the first and fourth defendants, their trustworthiness and reliability to engage in fair dealing had already been called into question because of the nature of the claim based on their participation in a conspiracy to defraud. The risk of dissipation of assets was no longer in the realm of mere possibility or imagination. In my view, it was very real in the case of the first and fourth defendants, given what they had done to defraud the plaintiffs as alleged.

152 Despite the deplorable conduct of the plaintiffs in relation to the material non-disclosure and distortion of important facts, I was not prepared to exercise my discretion in favour of these alleged fraudsters on the *special facts* of this case and lift the Mareva injunction so that they could be free to further dissipate their ill-gotten gains. For instance, although the Lewis Road property was mortgaged, it would not be possible to know if there was any net asset value remaining in the property for dissipation through a re-mortgage. Even with a current valuation report on the property, one would not be able to establish that there would be a positive or negative asset value in the future because of the cyclical fluctuation of property prices. Nothing could be certain of the actual sum remaining until after a discharge of the outstanding mortgage through a sale of the property or otherwise. I further noted that the first defendant was a director, shareholder or manager of some 46 companies in Singapore, many of which were still “LIVE”.

153 Given the character, integrity and probity of the first defendant which could be inferred from the nature of the alleged claims against him, I formed the view that there would be a real risk of dissipation of his personal assets and shares, including the assets in any of those defendant companies that he controlled. I believed that he was probably also controlling the fourth defendant company. The Mareva injunction would aid to prevent further dissipation.

154 Adopting the words of Lord Mustill in *Channel Tunnel* at 367, the balance of advantage plainly favoured the continuation of the grant of the Mareva relief after carefully weighing all the relevant factors and circumstances based on the documents produced to me, including the fact that the Malaysian court itself had also granted a worldwide Mareva injunction against these two defendants. My order in allowing the Mareva injunction in Singapore to continue in respect only of the Singapore assets of these two defendants resident in Singapore would certainly be in line with the spirit of international comity and would assist in dealing with

international fraud where the perpetrators would have no qualms in using multiple jurisdictions to hide, dissipate and launder their ill gotten gains through their fraudulent cross-border activities. In any event, I was not being asked to exercise a long-arm jurisdiction against any foreign defendants as the first and fourth defendants were in fact resident in Singapore and the injunction was limited to their Singapore assets. After taking account of all the relevant considerations, it was in my judgment “just and convenient” to allow the continuation of the Mareva injunction against the first and fourth defendants, which power I had would be derived from s 4(10) of the CLA. In my opinion, severe prejudice and grave injustice would be occasioned to the plaintiffs were the Mareva injunction to be discharged. The “punishment” of discharge far outweighed the “culpability” of the deliberate non-disclosure and distortion of material facts. Accordingly, I dismissed the application of the first and fourth defendants to lift the Mareva injunction as this was indeed “*a special case*”. Before coming to this decision, I had noted what the Court of Appeal had said in *Huwah* ([122] *supra*) at [35]:

It is necessary to drive home to the parties and their solicitors the point of the serious consequences of non-disclosure. Where there is suppression, instead of innocent omission, it must be *a special case* for the court to exercise its discretion *not* to discharge the *ex parte* injunction. [emphasis added]

Orders made

155 For the reasons stated above, I made the following orders:

(a) With respect to the various applications of the third defendant in Summons No 2022/2008/K, I discharged the Mareva injunction obtained on 11 April 2008 prohibiting the disposal of the third defendant’s assets in Singapore. I granted the third defendant leave to withdraw his affidavit filed on 22 April 2008 setting out his assets in Singapore. I also stayed the action against the third defendant. Costs of the third defendant for these applications, if not agreed, were ordered to be taxed on a standard basis and paid by the plaintiffs.

(b) With respect the first and fourth defendants’ summons in Summons No 1998/2008/A, I allowed their application to stay the action but I dismissed their application to discharge the Mareva injunction obtained against them on 11 April 2008. I ordered each of the parties to bear their own costs for this summons.

Reported by Tan Sze Yao.