

8. CONFLICT OF LAWS

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Introduction

8.1 For 2005, there are six cases which will be examined in this review.

8.2 As in previous years, it is useful to note that conflict of laws cases sometimes relate to other areas of law. In these situations, this review will only examine those parts of the case that are relevant to the field of conflict of laws.

8.3 For the sake of completeness, it is appropriate to mention that two cases reported in 2005 have already been reviewed last year. These cases are *Ang Ming Chuang v Singapore Airlines Ltd* [2005] 1 SLR 409 and *Herbst Ehad v Sampoerna Putera* [2005] 1 SLR 82.

Jurisdiction

8.4 There is one case relating to questions of jurisdiction in the context of conflict of laws. This case primarily raises issues of procedure but also addresses the question of which jurisdiction's laws govern the validity of service of process under O 11 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed).

8.5 In *Pacific Assets Management Ltd v Chen Lip Keong* [2006] 1 SLR 658, the plaintiffs and the defendant entered into a convertible loan agreement. The defendant was subsequently in breach for failing to redeem the conversion shares and the plaintiffs instituted action in Singapore and obtained permission to serve the writ on the defendant in Malaysia. The defendant's Malaysian solicitors wrote confirming their authority to accept service, and service pursuant to this agreement was duly effected through a private agent. Such service was acknowledged by the defendant's solicitors.

8.6 The defendant's solicitors subsequently returned the documents served and cancelled the acknowledgement stamp at the back of the documents. The defendant went on to obtain an *ex parte* declaration from the Malaysian courts that the service of the writ was irregular. The defendant

then applied in the Singapore courts to set aside service and the defendant's contention was that the method of service used in this case was not in accordance with Malaysian law.

8.7 The court identified the main issue as whether a writ served pursuant to an *ad hoc* agreement to accept service was sufficient to invoke the court's jurisdiction under O 11 of the Rules of Court. To this, the court opined that parties in a case could reach an *ad hoc* agreement as to the terms of valid service, and service according to these terms would be sufficient to invoke the jurisdiction of the Singapore courts under O 11.

8.8 On the facts, the court found that the defendant's Malaysian solicitors' letter confirming their authority to accept service qualified as an *ad hoc* agreement to accept service and also specified the manner of service. Therefore, service according to its terms was sufficient to invoke the jurisdiction of the Singapore courts. This finding was sufficient to dispose of the defendant's application.

8.9 However, the court went on to consider the alternative argument that the *ad hoc* agreement did not constitute an agreement as to the manner of service. As such, service had to be conducted in accordance with Malaysian law in order to be valid. The defendant's argument was that service of foreign processes in Malaysia had to be done in accordance with O 65 of the Malaysian Rules of the High Court 1980 (PU(A) 50/1980) ("RHC") and that service through a private agent was not prescribed by O 65 and therefore not in accordance with Malaysian law. For support, the defendant relied upon a Malaysian Court of Appeal decision, *Ngan Chin Wen v Panin International Credit (S) Pte Ltd* [2003] 3 MLJ 279. For a brief commentary on this case, see Azmi Sharom, "Private International Law in the Malaysian Courts" (2005) 9 SYBIL 253 at 254. The Singapore court considered this and related cases and concluded that the Malaysian decisions were not consistent on this point.

8.10 One of the key arguments against the validity of service through a private agent was that it was an exercise of the judicial powers of a foreign court beyond its territorial limits and an encroachment on the sovereignty of Malaysia. To this, the Singapore court disagreed and opined that the writ served outside Singapore is more a notification to the defendant that an action has been commenced against him in Singapore than an exercise of judicial powers of the court. Further, there are safeguards in the form of O 11 of the Rules of Court to control service of process that may encroach upon the sovereign rights of a foreign country.

8.11 The Singapore court also drew support from *Malayan Banking Berhad v Ng Man Heng* [2005] 1 MLJ 470 where Syed Ahmad Helmy J opined that O 65 of the RHC only operated when a request was received from a foreign tribunal requesting assistance to effect service. It did not, however, prohibit service of foreign process by a private agent. As such, the Singapore court concluded that service of a writ in Malaysia through a private agent was in accordance with Malaysian law and therefore valid.

8.12 It is useful to make a few observations about this case. First, it is submitted that the approach of the Singapore court in determining this issue is correct. The question of validity of service is a matter of evidence and procedure and the Singapore court as the forum would apply the *lex fori*, ie, Singapore law in answering this question. This is clear from the judgment. Any consideration the Singapore court had of Malaysian law was in so far as the Singapore Rules of Court providing that service had to be in accordance with Malaysian law.

8.13 What is less clear and is useful to make explicit is that the question of validity of service is a question that can and has to be asked in both Singapore and Malaysia. The judgment of the Singapore court essentially dealt with the validity of service from the Singapore perspective. Since the conclusion of the Singapore court in this case was that service was valid, this clears the way for the plaintiffs to continue their action in the Singapore courts. Presumably, in the absence of any response on the part of the defendant, the plaintiffs would seek and obtain a default judgment. This is, however, when the problem occurs. Often, as in the facts of this case, the Malaysian defendant does not have assets in Singapore which means that in order to enforce the judgment obtained in the Singapore courts, the plaintiffs would have to seek enforcement in Malaysia, either by way of common law enforcement or by registering the judgment under the Malaysian Reciprocal Enforcement of Judgements Act 1958 (Act 99). It is at this point that the validity of service will be called into question by the Malaysian court, whether as part of the requirements of common law enforcement or the public policy objection.

8.14 This means that where a Malaysian defendant only has assets in Malaysia, ie, enforcement of any judgment obtained in Singapore has to be in Malaysia, having the Singapore court finding that service was valid is a Pyrrhic one if the Malaysian courts will not find the same way. Of course, this is not something that is within the control of the Singapore courts. It is hoped that with the dissenting judgment of Abdul Aziz JCA in *Ngan Chin Wen v Panin International Credit (S) Pte Ltd* (*supra* para 8.9) and the decision

of Syed Ahmad Helmy J in *Malayan Banking Berhad v Ng Man Heng* (*supra* para 8.11), the Malaysian courts will adopt a similar analysis and bring resolution to this issue.

Stay of proceedings: *Forum non conveniens*

8.15 There were two cases relating to stay of proceedings. The first was *The Rainbow Joy* [2005] 1 SLR 589 (HC), [2005] 3 SLR 719 (CA). In this case, the appellant plaintiff was a Filipino engineer employed on board the *Rainbow Joy* which flew the flag of Hong Kong and was owned by the respondent defendant. The appellant signed two employment contracts. The first was in the Philippines Overseas Employment Administration (“POEA”) standard form which provided for the choice of Philippine law and the exclusive referral of all disputes to the National Labour Relations Commission (“NLRC”) or arbitration in the Philippines for determination. The second was to comply with the laws of Hong Kong.

8.16 In the course of his work, the appellant suffered an injury to his right eye. He initially commenced arbitral proceedings before the NLRC against the respondent for US\$80,000. The appellant subsequently commenced proceedings against the respondent in the Singapore courts for US\$460,000 and withdrew the initial arbitral proceedings.

8.17 The respondent applied for a stay of proceedings on three grounds. The first was that the appellant was required to resolve the dispute through arbitration in the Philippines. The second was that there was an exclusive jurisdiction clause in favour of the Philippines and the appellant was required to proceed there. Finally, the third ground was that the action should be stayed in favour of the Philippines on the ground of *forum non conveniens*.

8.18 The assistant registrar granted the respondent’s application on the third ground, *ie*, that Philippines was the natural forum for the dispute. On appeal to the High Court, Tan Lee Meng J upheld this decision. The appellant appealed to the Court of Appeal on two grounds.

8.19 First, the appellant argued that *forum non conveniens* did not apply where the adjudicating body referred to in the Philippines was not an “ordinary court of law” (at [12]). Second, even if *forum non conveniens* did apply, the circumstances in this case did not justify a stay because the respondent, *inter alia*, had no real defence to the claim.

8.20 On the first ground, the Court of Appeal first referred to the *locus classicus*, *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (“*The Spiliada*”) and affirmed the principle that a stay will be granted on the basis of *forum non conveniens* where “the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action” (at [14]).

8.21 The court went on to emphasise that the doctrine of *forum non conveniens* was based on the principle of comity between nations and that each nation had the sovereign prerogative to determine and delineate the processes by which disputes within its jurisdiction should be resolved. While the forum in that country would normally be a court of law, that country was free to create and prescribe special forums to resolve some or all disputes. Comity between nations required the recognition of such alternative forums. The court referred to three cases from Canada and the United States where proceedings were stayed in favour of arbitration boards, industrial tribunals and an accident compensation tribunal. As such, the court held that the application of *forum non conveniens* was not limited to situations where the competing forum was a court of law.

8.22 A number of observations can be made at this point. It is clear that the court took a broad view of what constituted a forum even though the principle from *The Spiliada* referred to the appropriate forum “for the trial of the action”. This means the court also took a broad view of what constitutes a trial and this clearly includes arbitration boards and specialised tribunals.

8.23 What is not clear is whether any limitations are imposed when a foreign body is available for consideration as an alternative forum for the purposes of *forum non conveniens*. In “Natural Forum and the Elusive Significance of Jurisdiction Agreements” [2005] Sing JLS 448, Yeo Tiong Min poses the example of a “foreign tribunal that does not observe the rule of law or natural justice or may be subject to political interventions” (at 450). Does this disqualify the foreign tribunal from even being considered at stage 1 of *The Spiliada* test? To do so would seem to go against the tone of comity adopted in the judgment. Yeo suggests, and the writer agrees, that it would be more appropriate to assimilate this question into the second stage of whether the plaintiff will be denied substantial justice in the competing forum.

8.24 So far, the alternative fora considered involve courts of law, arbitration boards or specialised tribunals, all of which are adjudicatory bodies. By way of hypothetical example, suppose the competing forum was one which by default solved all problems by mediation and that the bulk of

connecting factors pointed to that forum. Does comity require the courts to stay proceedings in Singapore on the basis of *forum non conveniens* in favour of non-adjudicatory processes elsewhere? In his judgment in the Court of Appeal in *The Rainbow Joy* (*supra* para 8.15), Chao Hick Tin JA (as he then was) states (at [18]) that “it is not for any country to question why [another] country should prescribe such unusual dispute resolution mechanisms or procedures”. This seems to suggest that the court will stay proceedings in this context. However, in the very next sentence, Chao JA states (*ibid*) that “the notion of comity will be subverted if the forum of one country does not give credence to an alternative forum which has been created and *accorded adjudication powers* by another country” [emphasis added].

8.25 Therefore, it would appear that for now, the courts will only stay proceedings in favour of another adjudicatory body elsewhere. On the assumption that the hypothetical competing forum mentioned above exists, it is submitted that as a matter of principle, the dictates of comity should require the extension of stays to processes which are non-adjudicatory. This would be in line with the worldwide trend towards alternative and appropriate forms of dispute resolution and this should include both adjudicatory and non-adjudicatory forms of dispute resolution. Of course, one would be hard-pressed to think of a jurisdiction where problems were by default solved through non-adjudicatory processes.

8.26 For the sake of clarity, it is important to note that the above discussion focuses on an application for a stay based on *forum non conveniens*. It is a separate question from that of an application for a stay based on an enforceable mediation clause in a contract.

8.27 On the second ground, the Court of Appeal rejected the appellant’s argument that the respondent did not have a defence to the claim. This “no defence” argument is one that is commonly used in stay of proceedings based on an exclusive jurisdiction clause. At a factual level, the court opined (at [28]) that this was not an open-and-shut case and there were clearly issues of liability and quantum of damages to be addressed.

8.28 More importantly, the court rejected the argument of “no defence” as it related to a stay of proceedings based on *forum non conveniens* because it was not relevant and at this point in the proceedings, the court should not have to go into the merits of the case. In doing so, the court opined that the juridical basis for a stay of proceedings based on *forum non conveniens* was different from a stay based on an exclusive jurisdiction clause. The former was about identifying the more appropriate forum whereas the latter

involved a party seeking to be excused from a contractual obligation as contained in an exclusive jurisdiction clause. In order for the party to succeed in this latter situation, it must show exceptional circumstances amounting to strong cause and the argument that the defendant has no defence to the claim goes towards establishing exceptional circumstances.

8.29 There are a number of noteworthy points regarding statements of *obiter* here. First, the Court of Appeal has clarified that the argument of “no defence”, as it relates to stay of proceedings based on exclusive jurisdiction clauses, goes to establishing the existence of exceptional circumstances and is not a method of bypassing the exceptional circumstances test.

8.30 Second, while the court does assert that the two types of stay of proceedings proceed from different juridical bases, it is not clear what exactly the distinction is. On the face of it, both types of stay require the satisfaction of different tests. Yet, both are jurisdictional questions posed to the court. Both are asking the court to stay the exercise of its jurisdiction, albeit for different reasons. They should therefore be approached similarly. While it is permissible to take into account different factors or to accord different weight to similar factors in the two types of stay applications, it is submitted that the court should not be asked to consider questions of merit at this stage. Therefore, in this respect, the writer agrees with the court’s view that the argument of “no defence” is not relevant to a stay of proceedings based on *forum non conveniens*.

8.31 The writer would go on to submit that there should equally be no place for the argument of “no defence” as it relates to a stay of proceedings based on an exclusive jurisdiction clause. However, this submission is not as wide-reaching as it may first appear. It is submitted that the argument of “no defence” is relevant in a stay of proceedings based on an exclusive jurisdiction clause in so far as it goes to show that the defendant does not genuinely desire trial in the contractually chosen forum and this in turn constitutes exceptional circumstances amounting to strong cause. In other words, the “no defence” argument supports the inference of exceptional circumstances. *The Jian He* [2000] 1 SLR 8 would be an example of such a case.

8.32 However, if the plaintiff, by arguing “no defence” is asking the court to decide on the merits of the case at this stage, the writer maintains that this is objectionable. The view expressed above is consistent with the decision in *The Rainbow Joy* (*supra* para 8.15) and it is hoped that the courts will adopt this distinction in future cases. For a more in-depth discussion on the “no

defence” argument, see Yeo, “Natural Forum and the Elusive Significance of Jurisdiction Agreements” (*supra* para 8.23 at 452–458).

8.33 As part of the appellant’s submissions on connecting factors in *The Rainbow Joy*, one point deserves a brief mention. The appellant had argued that both the contract and tort claims were governed by the law of Hong Kong. Presumably this was to reduce the number of connecting factors to the Philippines. The Court of Appeal rejected this argument and held that both the contract and tort claims were governed by Philippine law. Of interest is this conclusion that the tort claim was governed by Philippine law. As acknowledged by the court, ordinarily, the law of the flag country (Hong Kong) should apply in relation to a tort committed on board a vessel on the high seas. However, in this case, the court opined that where there is a specification of a governing law in the contract of employment, this should prevail. It is not clear from the judgment whether this conclusion was reached as a result of the application of some variation of the exception to the double-actionability rule or the *lex loci delicti* or a pure application of the choice of law applying to all tort claims arising from the relationship to that contract. Considering that the double-actionability rule is often difficult to apply, any further illumination by the courts on this point in future would be welcome.

8.34 The second case relating to stay of proceedings was *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR 494. The plaintiff was a Malaysian registered company to whom the defendant, a Singapore national, furnished a personal guarantee for a loan provided to a manufacturing company. The plaintiff commenced proceedings against the defendant in the Singapore courts for a sum due on the guarantee. The defendant applied for a stay of proceedings on the ground that the Malaysian courts were the more appropriate forum. The plaintiff appealed against the decision to grant the stay of proceedings.

8.35 As a starting point, Andrew Phang Boon Leong JC (as he then was), briefly reviewed the principles governing the stay of proceedings on the basis of *forum non conveniens*. Counsel for the plaintiff had conceded that the majority of connecting factors pointed to Malaysia as the natural forum and that his client was unlikely to succeed under the first limb of the test from *The Spiliada* (*supra* para 8.20). Instead, counsel for the plaintiff relied on the second limb of the test and argued that since the defendant had no arguable defence to the action, *ie*, there being no triable issues in Singapore and in Malaysia, the application for stay should be denied and judgment ought to be given for the plaintiff. Put another way, the proposition of the plaintiff was

that in circumstances where summary judgment would be granted under an O 14 application, an action should never be stayed and judgment must be given in favour of the plaintiff. In support of this proposition, counsel for the plaintiff relied on cases involving exclusive jurisdiction clauses.

8.36 On this, Phang JC noted that there was no exclusive jurisdiction clause involved and implicit in this is that the argument of “no defence” is generally used in situations involving exclusive jurisdiction clauses. He then referred to the recent Court of Appeal decision in *The Rainbow Joy* (*supra* para 8.15) and noted Chao JA’s views on the different juridical bases governing stay of proceedings based on *forum non conveniens* and on an exclusive jurisdiction clause, and that the argument of “no defence” had no place in an application for a stay based on the former. It therefore followed that the plaintiff’s argument should fail. This was sufficient to dispose of the appeal. However, Phang JC went on to proffer some thoughts on the interaction between the doctrine of *forum non conveniens* and O 14 of the Rules of Court.

8.37 Phang JC emphasised the distinction between matters of jurisdiction and matters of substantive merit. An application for stay of proceedings was a matter of jurisdiction which came prior to matters of merit of which an O 14 application was an example of. This was especially so in Singapore where an application for an O 14 summary judgment could not be made until after a defence had been filed by the defendant and served. However, allowing the plaintiff’s argument to succeed at this jurisdictional stage of proceedings was to allow the plaintiff to seek to obtain a summary judgment by the backdoor. The “no defence” argument went to the substantive merits of the case and therefore had no place at the jurisdictional stage of the proceedings. This analysis also supported the rejection of the plaintiff’s argument.

8.38 The writer agrees with this analysis and with the decision in this case. It is interesting, however, that the court did not question the appropriateness of the “no defence” argument as it relates to a stay of proceedings based on an exclusive jurisdiction clause. It should follow from the analysis of the court that if the “no defence” argument is one going to the merits of the case and therefore has no place at the jurisdictional stage, and an application for a stay is a jurisdictional question, then it should equally have no place in an application for a stay based on an exclusive jurisdiction clause. Having said that, the writer has less difficulty with the argument of “no defence” going to show that the defendant did not genuinely desire trial

in the contractually agreed forum. This point has been made earlier (at paras 8.31–8.32) and the writer will not belabour it.

Choice of law

8.39 The one case relating to choice of law was *State of Johor v Tunku Alam Shah ibni Tunku Abdul Rahman* [2005] 4 SLR 380. As a preliminary comment, it is important to note that this review will only focus on the conflict of laws aspect of this judgment.

8.40 This case involved a testamentary disposition in 1895 by the late Sultan Abu Bakar of Johor. In his will, he left a property in Singapore, Tyersall, to his son Tunku Ibrahim (later Sultan Ibrahim) “as State property”. Tyersall was compulsorily acquired and the sum of \$25m was awarded as compensation in June 2004. The first and second plaintiffs were the State of Johor and the present ruler of Johor, respectively. They argued that by conveying Tyersall as “State property” in his will, Sultan Abu Bakar had intended that the property was to pass with the throne of Johor upon the death of a reigning ruler and that it should not devolve to the estate of any ruler upon his death. As such, they sought an order that the compensation from compulsory acquisition be paid to them.

8.41 There were various defendants. Of significance is the first defendant who claimed a share of the compensation on the ground that he was one of the beneficiaries of Sultan Ibrahim’s estate. His argument was that Tyersall did not become “State property” as a result of Sultan Abu Bakar’s will because the bequest of Tyersall contravened Muslim law and was invalid.

8.42 There seem to be two aspects to the first defendant’s submissions. The first is that Muslim law applied to Sultan Abu Bakar’s will because it was governed by the law of Johor. In the alternative, even if the will was governed by Singapore law, Muslim law applied as it was part of Singapore law.

8.43 On the first aspect, the court concluded that with regards to testamentary dispositions over immovables, the *lex situs* applies. In this case, that would be the law of Singapore.

8.44 On the second aspect, the court considered the judgments of the courts of the Straits Settlements and concluded that the court was bound by the Court of Appeal judgment of the Straits Settlements in *Sheriffa Fatimah binte Aboobakar bin Mahomed Al Mashoor v Syed Allowee* (1883) 2 Kyshe (Eccles) 31. From the authorities, it followed that Muslim law on succession

was not part of the *lex situs* in 1895 and therefore Sultan Abu Bakar's will was valid.

8.45 The first finding must be correct. Of some interest is whether the court, when applying the *lex situs*, was referring to the domestic rules of the *lex situs* or the choice of law of the *lex situs*. If it was the latter, then the court can be said to be applying some form of *renvoi*. In this case, it did not make much of a difference as the *lex situs* was the *lex fori*. As such, it also did not provide clarity as to which type of *renvoi* Singapore subscribes to.

8.46 On the second finding, while it is not likely to commonly encounter legal issues of this nature, it is still useful to have clarified that Muslim law, at least as it relates to wills executed by Muslims, did not form part of Singapore law until 1968. The determination of this and the other issues in this case led the court to find that the second plaintiff was entitled to the compensation sum.

Interlocutory proceedings

8.47 There were two cases relating to interlocutory proceedings. The first case was *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2005] 2 SLR 568 (HC), [2006] 1 SLR 112 (CA) and this related to Mareva injunctions.

8.48 The appellant plaintiff had entered into two contracts with an Indonesian state oil company, Pertamina. These contracts were subsequently terminated. The appellant obtained an arbitration award against Pertamina and proceeded to enforce the award in Hong Kong by obtaining a charging and garnishee order against the first respondent which was a Hong Kong company that was a 99% subsidiary of Pertamina. In the inquiries that followed from these orders, it appeared that US\$36m had been sent from Hong Kong to the second respondent in Singapore. The second respondent was a wholly owned subsidiary of the first respondent. It was suspected that this sum was sent to evade execution of the garnishee order.

8.49 By way of an originating summons ("OS"), the appellant applied and obtained in Singapore a declaration that the second respondent held the sum in trust for and was to repay the said sum to the first respondent. A Mareva injunction was also obtained against both respondents. Both respondents applied to set aside the OS and to discharge the Mareva injunction. These applications, which were successful, led to the appeal. The appellant argued that:

- (a) the court had erred in setting aside the OS on the ground that there was no cause of action;
- (b) if the OS did not disclose a cause of action, the court had erred in finding that the OS could not have been cured by an amendment; and
- (c) the court had the jurisdiction to grant the Mareva injunction.

It was not necessary for the court to consider two other grounds of appeal because of the way it decided on the second and third issues.

8.50 The first two grounds of appeal dealt more with matters of procedure and will not be considered in this review. Suffice it to say that on the first ground, the court upheld the decision of Choo Han Teck J in setting aside the OS, albeit for a different reason. Instead of setting aside the OS on the basis that there was no cause of action, the Court of Appeal set it aside on the basis that the appellant lacked the *locus standi*. On the second ground, the court opined that even if the appellant had sought to add a new cause of action to its proceedings, it would not have succeeded because there was an insufficient overlap between the facts supporting the initial declaration sought by the appellant and the facts supporting what the appellant proposed to be a cause of action based on conspiracy.

8.51 On the third ground, Choo J in the High Court had held that a Singapore court had no jurisdiction to grant a Mareva injunction to assist a plaintiff in his proceedings in a foreign jurisdiction. On appeal, the appellant made two arguments. First, it argued that it was not seeking a Mareva injunction only to assist in its proceedings in Hong Kong but that the Mareva injunction was to support the declaratory relief sought in Singapore. The Court of Appeal rejected this argument on the basis of its earlier finding that the appellant did not have the standing to ask for a declaration.

8.52 Second, the appellant argued that the principle established in *Siskina v Distos Compania Naviera SA* [1979] AC 210 (“*The Siskina*”), that a Mareva injunction could be granted only when the plaintiff had a substantive claim over which the court had jurisdiction, should not be followed. In other words, the appellant’s case was that the Singapore court should grant a Mareva injunction in aid of proceedings in a foreign court.

8.53 On this point, the Court of Appeal first examined the three legal principles established in *The Siskina*. First, a court (in that case, the English

court) could not assume jurisdiction against a foreign defendant on the merits of a claim just because the defendant had assets in England and the plaintiff had asked for a Mareva injunction against these assets. Second, there was no jurisdiction to grant Mareva relief unless and until the plaintiff had an accrued right of action. Third, there was no jurisdiction to preserve assets within the jurisdiction of the court which would be needed to satisfy a claim against a defendant, if it eventually succeeded, regardless of where the merits of a substantive claim were to be decided. In other words, the court was not empowered to grant free-standing interlocutory relief brought in proceedings claiming only that type of relief.

8.54 The court then went on to make a distinction between the first respondent, a foreign entity, and the second respondent, a Singapore entity. With regards to the first respondent, the court observed that the first principle of *The Siskina* was directly applicable. After *The Siskina*, it was clear that a plaintiff could never get a Mareva order which was essentially ancillary to proceedings that were pending in a foreign court where the defendant was not within the *in personam* jurisdiction of that court. In other words, an English court would only grant a Mareva injunction in respect of a dispute which was being substantially litigated in England in which some legal or equitable right of the plaintiff was being invaded and which could be protected and enforced within England by a final judgment in England. The issue of whether the court could assume jurisdiction over a foreign defendant simply because he had assets within the territorial jurisdiction that could be the subject of an injunction order was considered in *Mercedes Benz AG v Leiduck* [1996] AC 284 (“*Mercedes*”).

8.55 In that case, Lord Mustill opined that where the court was faced with an application for a Mareva injunction over a foreign defendant on the basis of that defendant having assets within the jurisdiction, it was important to distinguish between the question of whether the court had territorial jurisdiction over the foreign defendant and the question of whether the court had the power to grant the injunction. The questions were separate and both needed to be exercised with caution. If the court decided that it did not have territorial jurisdiction over the foreign defendant, then the court need not consider the second question. Put another way, the Mareva injunction is an ancillary matter that does not impinge upon substantive rights and cannot justify the extension of the court’s jurisdiction.

8.56 The Court of Appeal approved of the principles enunciated in both *The Siskina* and *Mercedes* and found that it did not have jurisdiction over the first respondent.

8.57 With regards to the second respondent, the court opined that the second principle from *The Siskina* was applicable. In order for the appellant to satisfy the second principle, it was necessary for it to have a cause of action accrued against the second respondent at the time of the application. The court found that no cause of action had accrued and as such it could not grant Mareva relief over the second respondent.

8.58 There are a number of noteworthy comments that can be made. First, the Court of Appeal has clearly endorsed the principles from *The Siskina* and *Mercedes* in that the Mareva injunction is an instrument that should be confined to proceedings in Singapore. It is submitted that this is the right approach considering the potentially far-reaching nature of the Mareva injunction and the need to maintain international comity. It is useful to note that in the UK, *The Siskina* and *Mercedes* have been superseded by s 25 of the Civil Jurisdiction and Judgments Act 1991 (c 12) (UK) and r 6.20(4) of the Civil Procedure Rules 1998 (UK).

8.59 Second, the court seems to have rejected Lord Nicholls of Birkenhead's minority opinion in *Mercedes* in which he opined that the court could grant a Mareva injunction when the cause of action was one that could have been brought in the courts of the forum or if the judgment was one that would have been recognised and enforceable in the courts of the forum. By doing so, the Court of Appeal seems to be only willing to exercise jurisdiction where there is an executable foreign judgment as opposed to a prospective one.

8.60 Third, the court seems to have hinted that it might be inclined to grant a Mareva injunction in support of declaratory relief. Of course, presumably, the applicant must still satisfy the principles from *The Siskina*.

8.61 Finally, the court explicitly refrained from commenting upon the third principle established by *The Siskina*, *ie*, that the court had no jurisdiction to preserve assets within the forum in order to support the plaintiff in a claim he was making in a foreign jurisdiction. While the Court of Appeal acknowledged that there was debate as to whether this principle was still in force, since any views it could make would be *obiter*, it elected to reserve its opinion until a more appropriate time.

8.62 The second case relating to interlocutory proceedings was *Beckett Pte Ltd v Deutsche Bank AG* [2005] 3 SLR 555. In this case, the respondent had provided a loan to Asminco. This loan was secured by the appellant's shares in another company and Asminco's shares in Adaro. Asminco

defaulted on the loan and the respondent sold the shares to DSM. The appellant had initially obtained discovery of certain documents against the respondent. This was subject to the usual implied undertaking not to use the documents for purposes other than in the initial suit. Subsequently, the appellant applied to be released from the implied undertaking and to be allowed to use the discovered documents to apply for an injunction in Indonesia to restrain DSM from selling the Adaro shares. At first instance, the assistant registrar allowed the application. On appeal, Woo Bih Li J reversed the assistant registrar's decision as he was concerned that disclosing the documents in Indonesia could render the respondent liable to criminal prosecution there (see [2005] 3 SLR 39). The appellant appealed against Woo J's decision.

8.63 The starting point for this is the principle established in *Riddick v Thames Board Mills Ltd* [1977] QB 881, *ie*, where a party to litigation has been ordered to give discovery, the discovering party may not use the discovered documents and the information obtained for a purpose other than pursuing the action in respect of which discovery is obtained. The principle seeks to balance the public interest that there should be full and complete disclosure in the interest of justice and protecting the individual's interest of privacy. This implied undertaking is owed to the court and can be modified by the court in exceptional circumstances. This is established when two conditions are satisfied. First, cogent and persuasive reasons must be furnished for the request. Second, it must not give rise to any injustice or prejudice to the party who had given discovery.

8.64 At the end of the day, the Court of Appeal in *Beckett Pte Ltd v Deutsche Bank AG* dismissed the appeal and it would appear that the appellant had not satisfied either of these two conditions. On the first condition, the court opined that there was relatively little chance for DSM to sell the pledged shares to a *bona fide* purchaser for value without notice. The court took into account that the appellant had itself written to potential buyers and inserted notices in major newspapers giving notice of its interest in the shares. What is not clear here is the basis upon which the court applied the *bona fide* purchaser principle. The court stated that this principle is settled law and, presumably, is the case in Singapore. However, why would the court apply Singapore law to this case? While not entirely clear from the facts of the case, the pledged shares were presumably Indonesian. It is arguable that matters relating to priority of titles to shares would be governed by the law of the place where the transactions took place. On the facts, this would point to Indonesian law. Of course, one possible explanation

is that, in the absence of proof of Indonesian law, the courts presumed Indonesian law to be the same as that of Singapore.

8.65 On the second condition, the court was concerned that, should the implied undertaking be waived, the respondent would be exposed to a real risk of prosecution in Indonesia. The court took into account the conduct of the appellant and its lawyers as well as the likely actions of the Indonesian authorities. This therefore constituted a prejudice to the respondent and leave was denied.

8.66 This decision is interesting in that it shows that when deciding whether to order a release from an implied undertaking, the court will, as part of its discretion, take into consideration the possibility of foreign prosecution. By doing so, it appears that, while not extending the forum's principle of privilege against self-incrimination to the possibility of foreign criminal prosecution, the court is nonetheless applying this principle extra-territorially through its general discretion.