Her Majesty's Revenue & Customs *v* Hashu Dhalomal Shahdadpuri and another [2011] SGCA 30

Case Number	: Civil Appeal No 220 of 2010
Decision Date	: 29 June 2011
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Andre Maniam SC, Joy Tan, Lim Wei Lee and Sim Hui Shan (WongPartnership LLP) for the appellant; S Suressh and James Lin (Harry Elias Partnership LLP) for the first respondent; Chopra Sarbjit Singh (Lim & Lim) for the second respondent.
Parties	: Her Majesty's Revenue & Customs — Hashu Dhalomal Shahdadpuri and another

Civil Procedure

Conflict of Laws

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2011] 2 SLR 967.]

29 June 2011

Chan Sek Keong CJ (delivering the grounds of decision of the court):

Introduction

1 This was an appeal against the decision of the High Court judge ("the Judge") in *Her Majesty's Revenue & Customs v Hashu Dhalomal Shahdadpuri and another* [2011] 2 SLR 967 ("the GD"), in which he:

(a) struck out, pursuant to O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") and the inherent jurisdiction of the court, the claim of the appellant, Her Majesty's Revenue & Customs ("the Appellant"), against the respondents, Hashu Dhalomal Shahdadpuri and Notandas s/o Premchand Jamnadas Udasi @ Nari Premchand (referred to hereafter as, respectively, "the First Respondent" and "the Second Respondent", and collectively as "the Respondents"); and

(b) discharged the Mareva injunction which the Appellant had obtained against the Respondents on 18 May 2010 ("the Singapore Mareva Injunction").

At the conclusion of the hearing, we allowed the appeal. We now give our reasons.

Facts

The parties to the dispute

2 The Appellant is an entity of the UK government and is responsible for, *inter alia*, collecting, accounting for and otherwise managing customs and excise revenue, as well as collecting and managing value added tax ("VAT") in the UK. The Respondents, who are Singapore residents, are the alleged officers and agents of PT Naina Exim Indo ("PT Naina"), a company incorporated in Indonesia.

Background to the dispute

3 The Appellant's claim is in respect of conspiracy by unlawful means ("unlawful means conspiracy") by the Respondents (acting in concert with other parties) to defraud the Appellant through a form of fraud known as missing trader intra-community ("MTIC") fraud, and to conceal such fraud and the proceeds of such fraud from the Appellant.

4 The Appellant commenced an action in England against the Respondents for unlawful means conspiracy to commit MTIC fraud ("the English Action") and obtained a worldwide Mareva injunction against them in that action. Thereafter, the Appellant commenced simultaneous actions in Singapore against the Respondents ("the Present Action") and in Hong Kong against, among others, the First Respondent ("the Hong Kong Action").

5 The conspiracy pleaded by the Appellant in the Present Action arose in the following manner:

(a) A Danish company ("Sunico") was alleged to have been the chief perpetrator of a series of MTIC frauds committed against the Appellant.

(b) Sunico had supplied goods to several suppliers in member states of the European Union ("EU Suppliers"). The EU Suppliers had in turn sold the goods to a trader registered in the UK for VAT (a "UK Importer"). Under Art 28c(A)(a) of the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (EEC Council Directive 77/388/EEC) and s 30 of the Value Added Tax Act 1994 (c 23) (UK) ("the UK VAT Act"), the UK Importer was not required to pay VAT on the goods imported from the EU Suppliers as such imports were zero-rated.

(c) The UK Importer then sold the goods to another party registered for VAT in the UK (a "Buffer"). The UK Importer charged VAT on the goods sold ("output tax"), but directed the Buffer to pay the purchase price of the goods, together with the output tax payable thereon, to a third party outside the UK's jurisdiction (a "Third-Party Recipient"). In the present action, the Third-Party Recipient is Sunico, which is situated in Denmark.

(d) The UK Importer deliberately failed to account to the Appellant for the output tax on the goods sold to the Buffer and subsequently "went missing" (so to speak).

(e) The Buffer sold the goods directly or via a chain of traders to an exporter (an "Exporter"), who paid VAT thereon ("input tax") and exported the goods out of the UK.

(f) The Exporter claimed reimbursement from the Appellant of the input tax which he paid on the exported goods.

(g) PT Naina allegedly introduced some of the EU Suppliers to Sunico and was paid a percentage of Sunico's profits as commission pursuant to a commission agreement. Specifically, Sunico was alleged to have paid some US$14,764,612 as commission to PT Naina between October 2002 and July 2006.

(h) The Appellant claimed that the commission agreement and the commission payments to PT Naina were "not genuine commercial transactions, but instead a mechanism for the division of the proceeds of MTIC fraud amongst co-conspirators", [note: 1] and that the effect of the conspiracy was to "unlawfully divert monies properly payable to the [Appellant] principally to Sunico and thereafter … to its co-conspirators". [note: 2]

(i) The Respondents were alleged to be the representatives of PT Naina, which had concealed the proceeds of the conspiracy. On this basis, the Respondents were said to be jointly and severally liable to the Appellant for damages for conspiracy. The Exporter, however, was not alleged to be a party to the conspiracy.

6 On 18 May 2010, the Appellant obtained the Singapore Mareva Injunction against the Respondents. In June 2010, the Respondents applied to discharge the Singapore Mareva Injunction; they also applied to strike out the Appellant's claim under O 18 r 19 of the Rules as well as pursuant to the inherent jurisdiction of the court.

7 On 23 September 2010, the Appellant filed its amended statement of claim ("the Appellant's amended SOC"). On 28 September 2010, the Judge allowed the Respondents' striking-out applications and struck out the Appellant's amended SOC on the ground that the Appellant's claim offended what he termed "the revenue rule" (*ie*, the rule that "[the] courts will not collect the taxes of foreign states for the benefit of the sovereigns of those foreign states" (see *Dicey, Morris and Collins on The Conflict of Laws* (Sir Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) at vol 1, para 5-029)) as it was, in substance, a claim to recover uncollected output tax. Subsequently, the Appellant requested a further hearing before the Judge. After hearing the Appellant's further arguments on 3 November 2010 and 2 December 2010 (in the latter instance, consequent upon the decision of the Hong Kong Court of First Instance ("the Hong Kong CFI") in *Her Majesty's Revenue & Customs v Shahdadpuri* [2010] 5 HKLRD 690 ("*Shahdadpuri (HK)*") *vis-à-vis* the Hong Kong Action, where the Appellant had made a similar claim based on similar allegations against the First Respondent as the allegations made in the Present Action), the Judge affirmed his decision of 28 September 2010 to strike out the Appellant's claim.

The decision below

8 The Judge held that it was plain and obvious that the Appellant's claim in the Present Action was "in substance and in effect an attempt to recover the uncollected VAT (output tax) … extra-territorially" (see the GD at [30]). As such a claim was contrary to considerations of public policy, the Judge struck out the Appellant's amended SOC pursuant to O 18 r 19 of the Rules (with emphasis on O 18 r 19(1)(*d*)) and the inherent jurisdiction of the court (see the GD at [30] and [41]).

9 The Judge also discharged the Singapore Mareva Injunction on the ground that it was not for the purpose of rendering any assistance to the English Action, and regarded the Appellant's argument to the contrary as "a mere attempt to delay the application of the revenue rule at the expense of the [Respondents]" [emphasis in original omitted] (see the GD at [32]).

The parties' arguments on appeal

The Appellant's case

10 The Appellant's contentions on appeal may be summarised as follows:

(a) A conspiracy claim for MTIC fraud was not a prerogative claim for tax (which would offend the revenue rule), but a private law claim (in tort) for damages for conspiracy. In this regard, the Appellant advanced the following arguments:

(i) The majority of the House of Lords decided in *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174 ("*Total Network*") that the Appellant's conspiracy claim

in that case for what was termed "carousel fraud" (a form of fraud similar to MTIC fraud) was not a prerogative claim for tax, but a claim for damages for conspiracy.

(ii) As between the Appellant and the First Respondent, the Hong Kong CFI decided in *Shahdadpuri (HK)* that the Appellant's claim in the Hong Kong Action was not a claim for tax and, consequently, did not offend the revenue rule.

(iii) The Appellant's claims in *Total Network* and *Shahdadpuri (HK)* could not be distinguished from the Appellant's claim in the Present Action.

(iv) The Appellant's claim against the conspirators (including the Respondents) remained a private law claim for damages in respect of out-of-pocket losses sustained by the Appellant. It was not a claim for tax, irrespective of whether the Exporter was innocent of or party to the conspiracy.

(v) Although the Appellant's losses were measured with reference to payments and/or claims purportedly made in relation to tax, that did not make the Appellant's claim a claim for tax.

(vi) With the Appellant's claim properly characterised as a private law claim for damages for conspiracy, the claim did not offend the revenue rule.

(b) Granting the Singapore Mareva Injunction to aid or assist the English Action would not offend the revenue rule because substantive determination of the Appellant's claim in the English Action would take place only in the UK.

The First Respondent's case

11 The First Respondent's arguments before this court may be summarised as follows:

(a) The law on the revenue rule was clear: the Singapore courts would not enforce the revenue law of a foreign state. In this respect, it was for the Singapore courts to decide whether the Appellant's claim in the Present Action infringed the revenue rule, without having regard to how UK law (the UK being the foreign state concerned in this case) viewed the claim.

(b) The Appellant's claim as pleaded in the Appellant's amended SOC was a claim for unpaid output tax, which the Singapore courts would not enforce, and was thus bound to fail. Hence, this was a plain and obvious case for striking out.

(c) The majority decision in *Total Network*, which the Appellant relied so heavily upon, was not applicable to the Present Action. It also did not support the Appellant's position.

(d) *Shahdadpuri (HK)*, which the Appellant also sought to rely on, was wrongly decided.

(e) The Judge was correct to hold that the Appellant's claim was a plain and obvious attempt to enforce UK revenue law extra-territorially (by recovering, via the Singapore courts, unpaid output tax) and, hence, had to be struck out.

(f) Since the Present Action was geared towards assisting the enforcement of any UK judgment obtained in respect of a revenue claim, this court should not aid such a cause by reinstating the Singapore Mareva Injunction in favour of the Appellant.

The Second Respondent's case

12 The Second Respondent's case was that neither the Judge nor the Appellant had fully addressed the issue of characterisation of the Appellant's claim. The issue, it was submitted, was not whether the Appellant was bringing a private law action or seeking damages for conspiracy, as opposed to recovering unpaid tax. Rather, what mattered was the central interest of the Appellant in bringing the Present Action, *ie*, the substance of the interest which the Appellant sought to enforce (in this regard, the Second Respondent cited, in particular, the Australian High Court case of *Her Majesty's Attorney-General in and for the United Kingdom v Heinemann Publishers Australia Proprietary Limited and another* (1988) 165 CLR 30 ("the *Spycatcher* case") at 46). The Second Respondent argued that the central interest of the Appellant in bringing the Present Action was governmental in nature because the action focused on the recovery of compensation for losses that the Appellant, in its capacity as the UK's tax authority, had suffered in the course of collecting tax payable under the UK's revenue laws and administering those laws. In short, the Second Respondent submitted that the Appellant's claim was one that had its roots in the operation of a UK tax statute, *ie*, the UK VAT Act.

13 The Second Respondent further submitted that the revenue rule rendered the Present Action non-justiciable in Singapore. This was because the Appellant's claim was: (a) peculiar to the Appellant as the UK's tax authority; (b) based on UK revenue law; and, therefore, (c) not maintainable by a private person. The Appellant's claim, it was argued, should properly be characterised as a claim based on or arising out of acts *jure imperii*, and/or as a claim involving the enforcement of a foreign governmental interest (*ie*, the governmental interest of a foreign state). It followed that the Appellant's claim infringed the revenue rule and was not justiciable in Singapore. In the circumstances, it was plain and obvious that the Appellant's claim should be struck out.

14 Finally, the Second Respondent submitted that should the Appellant's claim indeed be found to be non-justiciable in Singapore, it would be impossible for the Singapore courts to reinstate the Singapore Mareva Injunction since the purpose of the injunction was to aid the English Action; therefore, to reinstate that injunction would be to indirectly enforce UK revenue law in Singapore.

The issue before this court

15 Since this was an appeal against the decision of the Judge to strike out the Appellant's claim pursuant to O 18 r 19 of the Rules and the inherent jurisdiction of the court, the sole issue before us was whether it was plain and obvious that the Appellant's claim was a claim for unpaid output tax (according to the First Respondent), and/or a claim arising out of acts *jure imperii* and/or involving the enforcement of a foreign governmental interest (according to the Second Respondent) so as to be unenforceable in the Singapore courts.

16 In the present case, the Respondents invoked:

(a) O 18 r 19 of the Rules, which provides that the court may at any stage of the proceedings strike out any pleading on the basis (*inter alia*) that it "discloses no reasonable cause of action or defence, as the case may be" (see O 18 r 19(1)(*a*)) or "is otherwise an abuse of the process of the [c]ourt" (see O 18 r 19(1)(*d*)); and

(b) the inherent jurisdiction of the court to "make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the [c]ourt" (see O 92 r 4 of the Rules).

17 The law on striking out a claim based on the above two grounds is well established. In the case

of striking out under O 18 r 19 of the Rules, it is done only in a plain and obvious case for striking out (see the GD at [36]–[38] and *Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd and another and another appeal* [2009] 2 SLR(R) 814 at [171]–[173]). In the case of striking out pursuant to the inherent jurisdiction of the court, this court said in *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [22]:

> The term, "abuse of the process of the Court", in O 18 r 19(1)(*d*), has been given a wide interpretation by the courts. It includes considerations of public policy and the interests of justice. This term signifies that *the process of the court must be used* bona fide *and properly and must not be abused*. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all the relevant circumstances of the case. A type of conduct which has been judicially acknowledged as an abuse of process is the bringing of an action for a collateral purpose … In *Lonrho plc v Fayed (No 5)* [1993] 1 WLR 1489, Stuart-Smith LJ stated that, if an action was not brought *bona fide* for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court. [emphasis added]

This court's decision

18 As mentioned at [1] above, we allowed the present appeal at the conclusion of the hearing. This was because, as we shall explain below, we did not think it was plain and obvious that the Appellant's claim in the Present Action was a claim for unpaid output tax and/or a claim arising out of acts *jure imperii* and/or involving the enforcement of a foreign governmental interest.

The argument that the Appellant's claim was a claim for unpaid output tax

The Judge's view

19 The Judge held that the present case was a clear case for striking out under O 18 r 19 of the Rules as the Appellant had pleaded its claim as one to enforce in Singapore VAT (specifically, output tax) payable pursuant to UK revenue law, which claim was contrary to the public policy of Singapore. The Judge pointed out that the Appellant had not alleged that the claims by the Exporter for reimbursement of input tax were fake or illegitimate; further, the Exporter was not alleged to be or sued as a party to the conspiracy. Accordingly, the Judge reasoned, the Appellant's claim for damages for conspiracy was in substance and in effect an attempt to recover extra-territorially the uncollected output tax properly payable to the Appellant. As such a claim was plainly unsustainable under Singapore law, the Judge struck out the Appellant's claim pursuant to O 18 r 19 of the Rules (with emphasis on O 18 r 19(1)(*d*)) and the inherent jurisdiction of the court.

20 Although the Judge characterised the Appellant's claim as "essentially one for [the] recovery of *output* [tax] which the UK [I]mporter defaulted in paying" [emphasis added] (see the GD at [24]), in analysing the nature of the Appellant's claim, he also accepted, as a matter of law, that if the Appellant's claim had been for the recovery of *input* tax, it would have been arguable that the claim might not be regarded as a sovereign claim for the recovery of a revenue debt. In this regard, he said (at [22] of the GD):

> If the claim was indeed against the Exporter, or had at least implicated the Exporter, it might have been arguable that [the Appellant] was in essence making a civil claim for [the] recovery of *input tax* which it had previously collected but had been deceived into reimbursing to the

Exporter. ***Unlike a claim for [the] recovery of unpaid output [tax], such a civil claim might arguably be distinguishable from a sovereign claim for [the] recovery of a revenue debt*** . [original emphasis in italics; emphasis added in bold italics]

Our assessment of the Judge's view

21 In our view, given the Judge's concession on the law as set out in the preceding paragraph, this was not a plain and obvious case for striking out under O 18 r 19 of the Rules as, based on the Appellant's amended SOC, the Appellant's claim could arguably be characterised as, in substance, a claim for the recovery of *input* tax which the Appellant had been deceived into reimbursing the Exporter in the context of the overall scheme of the MTIC fraud allegedly perpetrated by the Respondents. In other words, the Appellant's claim could arguably be characterised as a claim which, according to the Judge himself, might not offend the revenue rule, and which might thus be justiciable by a Singapore court. Our conclusion to this effect should not, however, be regarded as an endorsement on our part of the Judge's proposition that a claim by the Appellant for the recovery of input tax might not, under Singapore law, be a sovereign claim for the recovery of a revenue debt. For the purposes of this appeal, it was not necessary for us to decide whether we agreed with that proposition, and we express no opinion on it in these grounds of decision.

(1) The Judge's emphasis on the Appellant's omission to plead that the Exporter was a party to the conspiracy

22 An important factor which influenced the Judge's finding that the Appellant's claim was in substance and in effect an attempt to recover uncollected output tax extra-territorially was the fact that the alleged conspiracy between the Respondents, as pleaded by the Appellant, did not involve the Exporter. The Judge said at [22] of the GD:

> … [B]ased on the [Appellant]'s claim, the only party that could have wrongfully obtained reimbursements of input tax from [the Appellant] in the whole factual matrix of MTIC fraud would have been the Exporter. If the claim was indeed against the Exporter, or had at least implicated the Exporter, it might have been arguable that [the Appellant] was in essence making a civil claim for [the] recovery of *input* tax which it had previously collected but had been deceived into reimbursing to the Exporter. Unlike a claim for [the] recovery of unpaid *output* [tax], such a civil claim might arguably be distinguishable from a sovereign claim for [the] recovery of a revenue debt. In the present case however, *by omitting the Exporter from the alleged conspiracy ("the material omission"), the [Appellant]'s claim is not in respect of the reimbursements paid out by [the Appellant]*. It was common ground before me that in the absence of conspiracy involving the Exporter as co-conspirator, the UK [I]mporter's failure or default in payment of VAT [*ie*, output tax] does not affect the eligibility of the Exporter to make a *bona fide* reimbursement claim from [the Appellant]. Equally, the failure (intentional or otherwise) on the part of the Exporter to make a claim for reimbursement does not absolve the UK [I]mporter from liability to pay any outstanding output [tax]. *It follows from the material omission that the losses were suffered by [the Appellant] because of the UK [I]mporter's failure to pay output tax, regardless of whether the reimbursements of input tax were wrongly paid out*. The present claim is therefore essentially for the recovery of output tax properly payable (but not paid) by the UK [I]mporter to [the Appellant]. [original emphasis omitted; emphasis added in italics]

23 In essence, the Judge's reasoning was that since the Appellant's claim was not for the recovery of input tax from the Exporter (which claim would arguably *not* be in breach of the revenue rule), it must perforce be a claim for uncollected output tax which one of the conspirators in the chain of transactions had failed to pay to the Appellant. For this reason, the Judge was of the view that the

majority decision in *Total Network* was distinguishable as the Exporter in that case was alleged to be a conspirator in the carousel frauds perpetrated against the Appellant.

24 Apropos this point, it was our view that the Judge (with respect) placed excessive weight on the fact that the Appellant did not allege that the Exporter in the Present Action had conspired with the Respondents to cheat the Appellant. In our view, it was not plainly unarguable that an MTIC fraud must involve every dealer in the chain of transactions, whether an Exporter or a UK Importer, before it could form the basis of a claim for damages for conspiracy. As Blackburne J noted in the English High Court case of *Regalway Care Limited (in liquidation) v Abdul Malik Shillingford (also known as Abdul Malik), AVAH Trading Limited, Victoria Clarke, EBST Limited and Imad Yacoub Shoubaki (First Touch Communications Limited, Direct Communication UK Limited and Vita Moderna Limited, interveners)* [2005] EWHC 261 at [7], "[i]t can happen that one or more of the '[B]uffers' is innocent of any involvement in the fraud: he just happens to have purchased the goods and sold them on". In a similar vein, the Hong Kong CFI held in *Shahdadpuri (HK)* at [24]:

> The fact that potentially innocent [Exporters] might have been involved, presumably to give the scheme some resemblance of legitimacy, does not convert a fraudulent scheme into a legal one, even partially. The plain fact as raised by [the Appellant] in its pleaded case is that it has suffered monetary loss by having paid out on VAT refund claims which are not genuine and which are presented to it fraudulently pursuant to the conspiracy.

25 In the Present Action, the Appellant's case, as pleaded, was that the Exporter was but the last Buffer in the chain of transactions that led the Appellant to reimburse the Exporter for input tax. Regardless of whether the Exporter was innocent of or party to the conspiracy, he would pay the purchase price of the goods concerned plus the applicable VAT (*ie*, input tax) thereon to either the Third-Party Recipient or a Buffer earlier in the chain. The Exporter would then make a claim for reimbursement of the input tax paid, which claim the Appellant would be obliged to pay. The mechanism by which monies were extracted from the Appellant would be exactly the same, regardless of whether the Exporter was innocent of or party to the conspiracy.

26 Of course, in a case where the Exporter was also a conspirator, there would be the additional element of the Exporter making a fraudulent representation to the Appellant in presenting his claim for reimbursement of the input tax paid. But, even if the Exporter were an innocent party, we did not think that it was plain and obvious that the Appellant's conspiracy claim for damages would inevitably fail. In such a scenario, the conspirators would in effect have practised deceit on the innocent Exporter by leading him to believe that the preceding transactions were legitimate and that it was therefore legitimate for the Buffer to include input tax on his (the Exporter's) purchase. The Exporter would then present a claim (which he believed to be genuine) to the Appellant for reimbursement of the amount which he had paid as input tax. But, since the preceding transactions were a sham and were dishonestly initiated in order to extract monies from the Appellant, the Appellant, in making payment on the Exporter's reimbursement claim, would be deceived into reimbursing the Exporter. Hence, whether or not the Exporter was a party to the conspiracy, the Appellant would be out of pocket with respect to the input tax that it reimbursed the Exporter and would, arguably, be entitled to recover those out-of-pocket losses from the conspirators.

27 In our view, the Judge also adopted too narrow an interpretation of the Appellant's pleaded case. As mentioned at [21] above, it was arguable that, in substance, the Appellant's pleaded case was for the recovery of input tax which the Appellant had been deceived into reimbursing the innocent Exporter in the context of the alleged conspiracy by the Respondents (acting in concert with other parties) to defraud the Appellant. The Appellant specifically asserted that its loss crystallised on reimbursement of input tax being made to the Exporter, as can be seen from para 4(n) of the

Appellant's amended SOC:

> … [T]he net effect of MTIC fraud transactions is that:
>
> i. No amount … is received by the [Appellant] from the [UK] [I]mporter … in payment of VAT;
>
> i i . *the [Appellant] nevertheless makes a payment on a VAT repayment claim to the [E]xporter* …; and
>
> i i i . *the [Appellant] consequently suffers loss and damage* which it would not have sustained in a lawful chain of supply.
>
> [underlining in original omitted; emphasis added]

Similarly, para 5 of the Appellant's amended SOC stated:

> The [Appellant] has identified 719 MTIC fraud transaction chains ("the Relevant Transaction Chains") … By reason of the Relevant Transaction Chains, the [Appellant] has suffered loss in the sum of £40,391,100.01, being *the … amount that the [Appellant] has … paid on VAT repayment claims to the [Exporters] in respect of the Relevant Transaction Chains*, without having received any amount in … payment of VAT from the [UK Importers]. [underlining in original omitted; emphasis added]

28 In short, what the Appellant pleaded was that:

> (a) it had suffered loss and damage because it had not received the amount of output tax which the UK Importer should have paid to it, and, yet, the chain of transactions had resulted into its being obliged to reimburse the Exporter for input tax paid by the latter; and
>
> (b) but for the conspiracy, the aforesaid loss and damage would not have occurred.

In this regard, we should point out that the Appellant's pleaded case excluded those transaction chains in which the Appellant had been successful in rejecting the Exporter's reimbursement claims (and thus had not paid out any monies to the Exporter) [note: 3] as, in those instances, the Appellant did not suffer any loss. This is consistent with Ward LJ's observation in *Revenue and Customs Commissioners v Total Network SL* [2007] 2 WLR 1156 (the English Court of Appeal decision which gave rise to the appeal in *Total Network*) at [3] that "the loss crystallises when the trader who exports the goods from the United Kingdom [*ie*, the Exporter] makes a repayment claim".

29 In the circumstances, we were of the view that the Appellant's claim in the Present Action could also be interpreted as a claim for the recovery of input tax which the Appellant had been deceived into reimbursing an Exporter who was an innocent actor in the chain of transactions that was conceived as part of the conspiracy to defraud the Appellant. Such a claim, according to the Judge himself, was arguably *not* contrary to the revenue rule. In other words, it was arguable that the Appellant's claim was not one which was barred by the revenue rule. This was therefore not a plain and obvious case for striking out.

(2) The decision in *Shahdadpuri (HK)*

30 In coming to the above conclusion, we took into account the Hong Kong CFI's decision in

Shahdadpuri (HK) apropos the Hong Kong Action (which was brought against (*inter alia*) the First Respondent, but not the Second Respondent).

31 In the HK Action, the Appellant applied, by way of a concurrent originating summons dated and issued on 18 May 2010 ("the COS"), for an interim injunction in aid of the English Action. The Appellant succeeded in obtaining an *ex parte* Mareva injunction against (*inter alia*) the First Respondent restraining him from removing from Hong Kong or disposing of any of his assets in Hong Kong up to the value of £40m ("the Hong Kong Mareva Injunction"). The First Respondent applied to strike out the COS and discharge the Hong Kong Mareva Injunction, relying on the sole ground that the COS "disclose[d] no reasonable cause of action" (see O 18 r 19(1)(a) of the Rules of the High Court (Cap 4A, Sub Leg) (HK), which is the Hong Kong equivalent of O 18 r 19(1)(*a*) of the Rules).

32 Recorder Jat Sew Tong SC ("the Recorder") rejected the First Respondent's submission that the Appellant's claim was in substance one that sought to enforce the UK's revenue laws. He accepted the decision of the majority of the House of Lords in *Total Network* that the Appellant's claim in that case was a private law claim, stating (at [19] of *Shahdadpuri (HK)*):

> Mr Pun [counsel for the First Respondent] seeks to distinguish [*Total Network*] on the basis that the majority's view in that case was said in the context of the Bill of Rights 1689 argument [as to which, see further sub-para (a) of [37] below]. That may have been so, but *I fail to see why the majority's analysis of the nature of the claim in [*Total Network*] (which is no different from that advanced in this case) does not apply in this case*. Indeed, as Mr Ma [counsel for the Appellant] points out, *the [F]irst [R]espondent's arguments on the nature of the claim are no different from those advanced on behalf of [the defendant in* Total Network*] and firmly rejected by the majority of the House*: see [*Total Network*], pp. 1211D–E, 1213H and 1214B–1215C. [emphasis added]

The Recorder held that the Appellant's claim for "[the] recovery by way of damages [of] the out-of-pocket losses which it ha[d] suffered as a result of the alleged fraud perpetuated by the conspirators" (see *Shahdadpuri (HK)* at [20]) was "capable of giving rise to a judgment which [could] be enforced in Hong Kong under any Ordinance or at common law" within the meaning of s 21M(1)(b) of the High Court Ordinance (Cap 4) (HK). Accordingly, he dismissed the First Respondent's application.

33 In the court below, the Judge held that the decision in *Shahdadpuri (HK)* "offered little assistance" (see the GD at [33]) to the Appellant because:

(a) the Recorder appeared to have been misled by the Appellant's counsel in the Hong Kong Action; and

(b) the Appellant had alleged in the Hong Kong Action that the Exporter was involved in the conspiracy in question, which made that action "significantly different" (see the GD at [35]) from the Present Action, where there was no such allegation.

34 We do not propose to deal with the Judge's reasons for distinguishing the decision in *Shahdadpuri (HK)* as we do not wish to express any view on the correctness or otherwise of the Recorder's decision, which, in any event, is not binding on the Singapore courts. Suffice it to say that *Shahdadpuri (HK)* was decided in favour of the Appellant on what were essentially the same facts as those in the Present Action, save that the Exporter in that case was alleged to have been involved in the conspiracy, whereas no such allegation was made in the Present Action. The Judge regarded this as a material fact. However, as we indicated earlier, the element of the involvement of the Exporter

as a party to the alleged conspiracy might, arguably, not be material to the issue of whether the Appellant could seek recovery from the Respondents as alleged conspirators in a scheme which deceived the Appellant into paying the Exporter's claims for reimbursement of input tax when the Appellant had not received any corresponding output tax.

The decision in Total Network

35 Ultimately, whether or not the Appellant's claim in the Present Action would be contrary to the revenue rule is an issue for our courts to decide at a trial, and not at this interlocutory striking-out stage. This issue is not only a novel one under our law, but also a complex one. In this regard, it is important to bear in mind the context of the majority decision in *Total Network*, which the Appellant relied heavily upon to support its contention that a conspiracy claim for MTIC fraud was not a prerogative claim for tax, but a private law claim for damages for conspiracy.

36 As alluded to earlier (at sub-para (a)(i) of [10] above), *Total Network* involved the Appellant's conspiracy claim in respect of carousel frauds which were similar to the alleged MTIC frauds in the present case. The defendant in *Total Network* was a company incorporated in Spain ("Total Network"). It sold goods to a UK Importer ("Redlaw"), which did not pay any input tax as the goods were zero-rated for the purposes of import into the UK (Spain being part of the European Union). In turn, Redlaw sold the goods to a Buffer and failed to account for the output tax to the Appellant. The goods were sold down a chain of traders in the UK to an Exporter ("Alldech"), which in turn sold and exported the goods back to Total Network, thus completing one full circle. Alldech obtained reimbursement of input tax from the Appellant. The Appellant then brought a conspiracy claim against Total Network to recover a sum equivalent to the amount of tax which the Appellant claimed it had lost as a result of the carousel frauds.

37 Two main issues had to be decided in *Total Network*, namely:

(a) whether the Appellant's claim came within the scope of the prohibition contained in Art 4 of the Bill of Rights 1689 (c 2) (UK) ("the Bill of Rights 1689"), which states that "levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal"; and

(b) whether the Appellant was empowered under the prevailing statutory regime in the UK VAT Act to maintain a claim in private law in the form pleaded, *ie*, in the form of a conspiracy claim.

38 Four out of the five law lords held (Lord Hope of Craighead dissenting) that the Appellant's claim was not a claim for tax or the levying of tax, but a claim for loss caused by fraudulent conspiracy, and therefore did not offend the fundamental constitutional principle enshrined in Art 4 of the Bill of Rights 1689 that no money should be levied for or to the use of the Crown except by grant of Parliament. Three out of the five law lords also held (Lord Hope and Lord Neuberger of Abbotsbury dissenting) that no intention that the Appellant should be barred from recovering damages for conspiracy was to be attributed to the Legislature in the enactment of the statutory scheme set out in the UK VAT Act, and, accordingly, the Appellant could pursue its claim against Total Network.

39 In our view, the majority decision in *Total Network* was not a ruling that *as a general principle of law*, any conspiracy claim for carousel fraud was not a prerogative claim for tax or the levying of tax. Instead, the House of Lords examined the Appellant's claim *in the specific context* of Art 4 of the Bill of Rights 1689, and four of their Lordships held that the Appellant's claim was not a claim for tax or the levying of tax, but a claim for loss caused by fraudulent conspiracy. The characteristics of MTIC fraud may vary depending on the factual matrix of each case. Accordingly, the focus in each

case should be on the specific factual matrix of that particular case, and not on conspiracy claims for MTIC fraud in general as though all MTIC frauds have the same legal consequences.

40 We should also emphasise that the majority decision in *Total Network* was arrived at in the context of a *purely domestic* dispute governed by UK law (that case involved the House of Lords construing and applying UK law). It does not necessarily follow that under Singapore law, the Appellant's claim in the Present Action (which is similar to the claim in *Total Network*) would not be regarded as an indirect revenue claim or as a claim to enforce the interests of the UK government. This particular issue, *as a conflict of laws issue*, has not hitherto been considered by either our courts or, to the best of our knowledge, any common law court. The decision in *Total Network* is not binding on our courts, which, in deciding the aforesaid issue, will have to consider the limits of the conflict of laws rule that prohibits them from entertaining any action to enforce, either directly or indirectly, a penal, revenue or other public law of a foreign state (see *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2009) at para 75.231).

The argument that the Appellant's claim arose out of acts jure imperii and/or involved the enforcement of a foreign governmental interest

41 We turn now to the Second Respondent's submission (as set out at [12]–[13] above) that this was a plain and obvious case for striking out under O 18 r 19 of the Rules because the Appellant's claim should properly be characterised as a claim based on or arising out of acts *jure imperii* and/or as a claim involving the enforcement of a foreign governmental interest, and was therefore contrary to the public policy of Singapore. In this regard, counsel for the Second Respondent made particular reference to the majority judgment of the High Court of Australia in the *Spycatcher* case, and emphasised that this court must have regard to the central interest of the Appellant in bringing the Present Action.

42 In our view, there was no doubt that the Appellant's central interest in bringing the Present Action was to recover the money which it had paid to the Exporter pursuant to the latter's claim for reimbursement of input tax. But, this still raised the question of whether the Appellant's claim could legitimately be characterised as an action to enforce the sovereign rights or interests of a foreign state. To transpose the words of the majority of the Australian High Court in the *Spycatcher* case (at 46) to the context of the present case, the question was whether the Appellant's claim for relief "[arose] out of, and [was] secured by, an exercise of a prerogative of [a foreign state]". Factually, the Second Respondent was correct in submitting that the Appellant's claim arose in the context of the UK VAT Act, but our courts would still have to decide whether the Appellant's claim must *for that reason alone* be held to have arisen out of acts *jure imperii*, and/or to involve the enforcement of a foreign governmental interest. This was a novel and complex issue of law which, in our view, merited a fuller consideration of the revenue rule and/or the rule against enforcing the sovereign rights of a foreign state (given, especially, the evolving environment of increasing cooperation between states to combat transnational crime). Furthermore, we did not have the benefit of the Judge's views on the Second Respondent's arguments on the *Spycatcher* case, except in so far as the Judge decided that a governmental claim included a claim to recover, directly or indirectly, the revenue of a state. For these reasons, we did not think that the Second Respondent's submissions showed that this was a plain and obvious case for striking out under O 18 r 19 of the Rules.

Conclusion

43 For the reasons set out above, we allowed the appeal and set aside the Judge's decision to strike out the Appellant's claim. We also: (a) reinstated the Singapore Mareva Injunction against the Respondents; (b) ordered the costs of the appeal as well as the costs of the proceedings below to be

costs in the cause; and (c) made the usual consequential orders.

[note: 1] See para 8 of the Appellant's Case dated 28 February 2011.

[note: 2] See para 15 of the amended statement of claim filed by the Appellant on 23 September 2010.

[note: 3] See para 7(b) of the letter dated 6 August 2010 from the Appellant's solicitors to the Respondents' solicitors (at vol 2, pp 110–112 of the Appellant's Core Bundle dated 28 February 2011).