Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and Another Appeal [2005] SGCA 47

Case Number : CA 38/2005, 39/2005

Decision Date : 12 October 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J; Yong Pung How CJ

Counsel Name(s) : Alvin Yeo SC, Tan Kay Kheng and Tan Hsiang Yue (Wong Partnership) for the appellant; Anjali Iyer (Anjali Iyer and Associates) and RajMohan (Haq and Selvam) for the respondent

Parties : Karaha Bodas Co LLC — Pertamina Energy Trading Ltd

Civil Procedure – Amendments – Whether court should allow new cause of action to be added to pleading – Whether sufficient overlap between facts supporting existing claim and those supporting new claim – Order 20 r 5(5) Rules of Court (Cap 322, R 5, 2004 Rev Ed)

Civil Procedure – Mareva injunctions – Whether court having jurisdiction over foreign defendant based on defendant's ownership of assets within territorial jurisdiction that could be subject of injunction order – Whether application for Mareva relief may be made where plaintiff having no accrued right of action against defendant – Order 11 Rules of Court (Cap 322, R 5, 2004 Rev Ed)

Courts and Jurisdiction – Court judgments – Declaratory – Requirements for grant of declaratory relief – Whether necessary for plaintiff to have cause of action against defendant – Whether requirement that plaintiff must have locus standi to ask for declaration satisfied

12 October 2005

Judith Prakash J (delivering the judgment of the court):

Introduction

1 The appellant in both appeals, Karaha Bodas Company LLC ("KBC"), is a company incorporated in the Cayman Islands. The respondent in the first appeal, Civil Appeal No 38 of 2005, is Pertamina Energy Trading Limited ("Petral"), a Hong Kong company that is a 99% subsidiary of the Indonesian state oil company, Perusahaan Pertambangam Minyak Dan Gas Bumi Negara ("Pertamina"). The respondent in the second appeal, Civil Appeal No 39 of 2005, is Pertamina Energy Services Pte Ltd ("PES"), a Singapore company that is a wholly-owned subsidiary of Petral.

2 On 22 December 2004, KBC filed Originating Summons No 1646 of 2004 ("the OS") in the High Court in which Petral was named as the first defendant and PES was named as the second defendant. On the same day, KBC obtained a Mareva injunction against both respondents. Petral was prohibited from removing or disposing of any of its assets in Singapore up to the value of US$36,236,581.65 while PES was prohibited from disposing of or removing any of its assets (up to the same value) which it held, as nominee or otherwise, on trust for or on behalf of, or which were controlled by, Petral. A further order was made granting KBC leave to serve the injunction order and a sealed copy of the OS on Petral at its registered address in Hong Kong.

3 Each of the respondents subsequently filed an application to set aside the OS and its service on them and also to discharge the Mareva injunctions granted *ex parte*. These applications were heard together by Choo Han Teck J. On 14 March 2005, he made the following orders in respect of each application:

(a) that the OS as against the relevant respondent, its service on them and all subsequent

proceedings be set aside;

(b) that the Mareva injunction granted *ex parte* on 22 December 2004 against each respondent be discharged; and

(c) that there should be an inquiry as to the damages that each respondent had sustained, if any, by reason of the injunction order.

KBC's appeals against those orders were heard by us on 24 August 2005 and dismissed. We now give the reasons for our decision.

Background

4 KBC is a company incorporated in the Cayman Islands. It was set up to participate in a geothermal resources project in Indonesia. In 1994, KBC made two contracts with Pertamina to produce and develop energy resources in Indonesia and to sell the energy produced. These contracts were subsequently terminated and KBC commenced arbitration proceedings against Pertamina for the damages sustained by reason of the termination. KBC obtained an arbitration award ("the Award") of about US$261m against Pertamina on 18 December 2000, and proceeded to enforce the Award in various jurisdictions, including the US, Canada, Hong Kong and Singapore.

5 KBC registered the Award in Hong Kong on 15 March 2002 and started enforcement proceedings there. It obtained and served a charging and garnishee order ("the Garnishee Order") against Petral on 24 May 2002. A receiver was also appointed by the High Court of Hong Kong (" the Receiving Order") to find out what debts were due from Petral to Pertamina, and consequently to KBC, under the Garnishee Order and to receive moneys becoming due to Petral after 24 May 2002. In December 2004, KBC issued a judgment debtor summons against Petral in Hong Kong to find out the exact amount of the debts due from Petral to Pertamina. Petral's manager, Chan Ting Chung ("George Chan"), was cross-examined before a master of the Hong Kong High Court. The master subsequently ordered that Petral pay KBC US$5.5m as he had ascertained from the evidence that three sums totalling this amount were due and accruing due from Petral to Pertamina as at the date of service of the Garnishee Order.

6 During the same proceedings, George Chan was also cross-examined about money due from PES to Petral. His evidence gave the impression that about US$36m had been sent from Hong Kong to Singapore in order to evade execution of the Garnishee Order in Hong Kong. On this basis, KBC applied in Hong Kong for, and obtained on 21 December 2004, a worldwide Mareva injunction order against Petral to restrain it from dealing with its assets in and outside Hong Kong up to the sum of US$36,236,581.65. The day after obtaining this order, KBC filed the OS that started these proceedings in Singapore and obtained the orders against the respondents described in [2] above. It is pertinent to note that the reliefs claimed by KBC in the OS against the respondents read as follows:

1. A declaration that the sum of US$36,236,581.65 or such other sum, being the total amount which was transferred from [Petral] to [PES] prior to 30 September 2004 is held by [PES], as a nominee or otherwise, on trust for or on behalf of or is controlled by [Petral].

2. An order that [PES] do forthwith repay the said sum of US$36,236,581.65 or such other sum, being the total amount which was transferred from [Petral] to [PES] prior to 30 September 2004 to [Petral] in Hong Kong.

3. Costs of this application be paid by the [respondents] to [KBC].

The decision below

7 The applications made by the respondents to set aside the OS, its service and all subsequent proceedings were stated to be made on the following grounds:

(a) the OS disclosed no reasonable cause of action;

(b) the OS was an abuse of the process of the court;

(c) the OS sought to invoke an extravagant jurisdiction that was unwarranted in the circumstances of the case;

(d) the purported claim was concocted for an improper and illegitimate purpose;

(e) the court had no jurisdiction to grant the claim and remedy sought;

(f) leave for service of the OS on Petral in Hong Kong had been applied for improperly; and

(g) the joining of PES as a party to the action was improper, unnecessary and oppressive.

8 While Choo J did not explicitly state the particular ground on which he had decided to set aside the OS, it appeared from his grounds of decision that he had relied on the lack of a cause of action to do so. During the course of the argument before him, KBC had met the respondents' assertions that there was no cause of action to found the OS by responding that even if this was so, which KBC did not accept, KBC would apply to convert the OS to a writ action and to amend its claim to include conspiracy as a cause of action. The judge did not accept that such an amendment would be possible. He stated at [18] of his grounds (reported at [2005] 2 SLR 568):

> [KBC's counsel] submitted that [KBC's] claim would be amended to include conspiracy as a cause of action. I am of the view that the defect in the case is too serious to be cured by an amendment to the Originating Summons. An allegation of conspiracy requires the strictest pleading and a fully particularised statement of claim. Until all that is accomplished, there is no cause of action that will justify the present injunction from [*sic*] continuing.

9 The judge indicated that he accepted the submissions of the respondents' counsel in respect of the injunction and the order for service out of jurisdiction. He agreed with the respondents' counsel that there was no jurisdiction in this case for the court to grant injunctive relief as KBC's real dispute was with Petral in Hong Kong and the relief that it was asking for in Singapore was ancillary in nature only. Citing *Siskina v Distos Compania Naviera SA* [1979] AC 210 ("*The Siskina*"), *Mercedes Benz AG v Leiduck* [1996] AC 284 ("*Mercedes Benz*") and *Teo Siew Har v Lee Kuan Yew* [1999] 4 SLR 560 ("*Teo Siew Har*"), the judge held that the Singapore court could not grant a Mareva injunction to assist proceedings in a foreign jurisdiction. Moreover, in the circumstances of this case, the court should not exercise its discretion to grant the Mareva injunction as KBC had not satisfied most of the requirements for such relief.

10 As for the order granting leave to serve the OS out of jurisdiction, the judge accepted the respondents' argument that KBC had not satisfied the requirement imposed by O 11 r 2 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) ("the Rules") that a plaintiff asking for leave to effect service on a defendant who was out of the jurisdiction had to have a good cause of action against that defendant. KBC failed in this case because the main relief it had asked for had been a declaration that the sum of US$36,236,581.65 which had been transferred from Petral to PES prior to 30 September

2004 was held by PES, as a nominee or otherwise, on trust for or on behalf of, or was controlled by, Petral. The judge correctly observed that there was no cause of action which allowed the plaintiff to obtain a declaration stating that A owed B money when neither A nor B was the plaintiff. Moreover, KBC had not shown that any of the limbs of O 11 r 1 had been satisfied.

The appeals

11 KBC submitted that the following issues had to be determined in these appeals:

(a) whether the learned judge 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, whether the learned judge erred in finding that the OS could not have been cured by an amendment;

(c) whether the court had jurisdiction to grant the Mareva injunction;

(d) whether the learned judge erred in deciding that KBC did not comply with the requirements for a Mareva injunction; and

(e) whether the learned judge was correct in setting aside the service of the OS on Petral.

When we dismissed the appeals, it was because we broadly agreed with the judge's findings on issues (b) and (c) and considered that his decision to set aside the OS could be supported on other grounds. As a result of these conclusions, it was not necessary for us to deal with issues (d) and (e). We will take the arguments on the first three issues in turn.

Whether the judge erred in setting aside the OS on the ground that there was no cause of action

12 KBC's submissions on this issue were a little confusing. On the one hand, it said that the OS disclosed a reasonable cause of action. On the other hand, it contended that since the OS was, *inter alia*, for a declaration as to status, it did not require to be supported by a cause of action since the law is that a cause of action is not a precondition for a declaration. KBC then cited O 15 r 16 of the Rules which provides that no action or other proceeding "shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby" and said that this "would constitute the basis/cause of action and/or [that] the claim for a declaration constitutes the cause of action". In support, KBC cited *Guaranty Trust Company of New York v Hannay & Company* [1915] 2 KB 536 ("*Guaranty Trust Co*"), *Newport Association Football Club Ltd v Football Association of Wales Ltd* [1995] 2 All ER 87, and *In re S (Hospital Patient: Court's Jurisdiction)* [1995] Fam 26 (High Court) and [1996] Fam 1 (Court of Appeal) ("*Re S*"). In this respect, KBC's submission seemed to be that because O 15 r 16 gives a party the right to make a claim for a declaration without seeking substantive relief as well, making a claim for a declaration would by itself constitute a cause of action. We could not accept this formulation of the law even though we agreed with KBC that it did not need to have a cause of action against the respondents in order to claim declaratory relief. We also noted that KBC did not assert that it had a cause of action that was independent of O 15 r 16.

13 It is a fundamental rule that in every case where a plaintiff claims relief against a defendant, his claim must be founded on a reasonable cause of action. Otherwise, the claim is liable to be struck out. The only exception to this rule is when the plaintiff does not ask for substantive relief against the defendant, in the form, for example, of an order for damages, but instead only asks for a

declaration of right. That is the situation encompassed by O 15 r 16 which states:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

This rule sets out the exception to the general principle. Order 15 r 16 does not in itself mean that a plaintiff who is asking the court to make a declaration of right must thereby be held to have a good cause of action. To hold so would be contrary to well-established law on what constitutes a cause of action. By 1978, it was clear that the controversy over whether a party applying for declaratory relief must also have a subsisting cause of action or a right to some other substantive relief as well was over, since it had been clearly established before then that he need not. See Lord Diplock in *Gouriet v Union of Post Office Workers* [1978] AC 435 at 501 ("*Gouriet*"). In fact, as Lord Diplock observed, relief in the form of a declaration of right would generally be superfluous for a plaintiff who had a subsisting cause of action.

14 Although we accepted KBC's position that it was not debarred from seeking declaratory relief even if it did not have a cause of action, that was not the end of the matter. A plaintiff who asks for declaratory relief must meet certain requirements. The question that arose was whether KBC satisfied all of those requirements. In its submissions, KBC accepted that the following are the requirements that must be satisfied before the court grants such relief:

(a) the court must have the jurisdiction and power to award the remedy;

(b) the matter must be justiciable in the court;

(c) as a declaration is a discretionary remedy, it must be justified by the circumstances of the case;

(d) the plaintiff must have *locus standi* to bring the suit and there must be a real controversy for the court to resolve;

(e) any person whose interests might be affected by the declaration should be before the court; and

(f) there must be some ambiguity or uncertainty about the issue in respect of which the declaration is asked for so that the court's determination would have the effect of laying such doubts to rest.

See: Jeffrey Pinsler, *Singapore Court Practice 2003* (LexisNexis, 2003), para 15/16/4 citing *Salijah bte Ab Lateh v Mohd Irwan Abdullah* [1996] 1 SLR 63 (High Court); [1996] 2 SLR 201 (Court of Appeal) ("*Salijah*").

15 In considering whether the above requirements had been satisfied in this case, we were chiefly concerned with the fourth requirement, that of *locus standi*. As far as an action for a declaration is concerned, the requirement that the plaintiff must have the *locus standi* required to bring the action is the equivalent of requiring a plaintiff in an action for substantive relief to have a cause of action. This is because in order to have the necessary standing, the plaintiff must be asserting the recognition of a "right" that is personal to him. Lord Wilberforce in *Gouriet* ([13] *supra* at 483) was firm that declaratory relief cannot be granted unless:

> the plaintiff, in proper proceedings, in which there is a dispute between the plaintiff and the defendant concerning their legal respective rights or liabilities either asserts a legal right which is denied or threatened, or claims immunity from some claim of the defendant against him or claims that the defendant is infringing or threatens to infringe some public right so as to inflict special damage on the plaintiff.

Lord Diplock elaborated on the basis of this principle in the same case at 501 as follows:

> The only kinds of rights with which courts of justice are concerned are legal rights; and a court of civil jurisdiction is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another party, to protect or enforce the right or to provide a remedy against that other party for infringement of it, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed. So for the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event.

16 Even in *Guaranty Trust Co* ([12] *supra*), a case that KBC had cited as support for the proposition that a cause of action was not required in the context of declaratory orders because of the existence of O 15 r 16, it was made clear by the majority that though the right to claim a declaration was not confined to cases where the plaintiff had a cause of action, such a claim could only be made at the instance of a party who was interested in the subject matter of the declaration (*per* Pickford LJ at 562) or if the claim related to a declaration of some right which the plaintiff maintained he had as against the person whom he had made a defendant to his suit (*per* Bankes LJ at 571). The plaintiff in that case was seeking a declaration from the English Court that the defendant be restrained from suing him in the US. The plaintiff was thus asserting the recognition of a "right" personal to him even if he was not making a "claim" against the defendant in England and, in that sense, had no cause of action in England. As was noted in *Re S* by Hale J ([12] *supra* at 34):

> It is argued on behalf of the plaintiff that declaratory relief can be sought by anyone with a sufficient interest even if that person's own legal rights or liabilities are not in issue. Reliance is placed on the well known words of Pickford L.J. in [*Guaranty Trust Co*]:
>
> > I think therefore that the effect of the rule [the predecessor to R.S.C., Ord. 15, r. 16] is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declaration.
>
> However, it is noteworthy in that case that it was the plaintiff's own legal position which was in issue. Moreover, Pickford L.J. [in *Guaranty Trust Co*] went on to say:
>
> > It does not extend to enable any stranger to the transaction to go and ask the court to express its opinion in order to help him in other transactions.

17 KBC's argument here was that but for its proceedings in Hong Kong, the sum of US$36m plus ("the US$36m") would not have been transferred to PES at all and Petral would not have reduced its trading activities with Pertamina. If there had been no such transfer, the natural result would have been that Petral would continue to owe debts to Pertamina which debts would either have been caught by the Garnishee Order (in respect of any debt accruing due as at 24 May 2002) or by the Receiving Order that appointed the receiver to collect debts accruing after 24 May 2002. Petral's deliberate reduction of its trading activities with Pertamina and the transfer of its money and business to PES defeated the purpose of the foregoing orders. As a result of Petral's conduct, Petral became

less viable to KBC as an asset of Pertamina for execution purposes. KBC argued that in its capacity as the judgment creditor of Pertamina and the party in whose favour the Garnishee and Receiving Orders had been made, it clearly had the *locus standi* to raise, and a real interest in raising, the issues embodied in the OS, particularly in seeking the declaratory order and in having the moneys transferred by PES back to Petral in Hong Kong.

18 The difficulty with the above argument was two-fold. First, the respondents contended that KBC's argument that if Petral had not transferred the US$36m to PES, it would not have reduced its trading activity with Pertamina and would therefore have owed more moneys to Pertamina that KBC could have garnished was a fanciful one, based on speculative wishful thinking. The possibility that Petral would have a greater indebtedness to Pertamina which would be subject to the Garnishee Order could not confer on KBC the *locus standi* required to seek a declaration for a payment order as between two other parties. To accept this argument would mean that any creditor in any jurisdiction, having any speculative claim founded on wishful assumptions of what might have been, would have the right to obtain a Mareva injunction and force moneys to be transferred to a jurisdiction of his choice. We agreed that KBC's claim was a speculative one in so far as it relied on the existence of debts between Pertamina and Petral. In our view, it did not follow that if Petral had not transferred the US$36m to PES, the whole of that sum would have been channelled towards trading activities with Pertamina. Even more so, it did not follow that Petral would eventually owe Pertamina the same amount and that the whole amount would be caught either by the Garnishee Order or the Receiving Order so that it would then be due to KBC. In our judgment, KBC had not established that it had a real interest in the US$36m.

19 Second, there was a more fundamental reason why KBC did not have the *locus standi* to initiate the OS against Petral and PES. In *Salijah* ([14] *supra*), this court held that in order to establish *locus standi*, a plaintiff must show that he had a "real interest" in bringing the action. Related to this was the idea that the court would only entertain a suit for a declaration if there was a "real controversy" between the parties to the action for the court to resolve. This court was there endorsing the principle recited in many editions of the English White Book (derived from Lord Diplock's observation in *Gouriet* (see [15] *supra*)) that the jurisdiction of the court to make declarations of rights was confined to declaring contested legal rights of the parties represented in the litigation. The issue in this case, therefore, was whether KBC had the standing to seek a declaration regarding the rights of two other parties rather than a right it could claim for itself. The consistent position taken by the respondents was that KBC had no such standing because a plaintiff should not be able to commence proceedings seeking a declaration that A owed money to B, when the plaintiff was neither A nor B. This was the position that Choo J adopted as well.

20 We agreed that the proceedings did not disclose that KBC had any right to make a claim to the US$36m in question. As the respondents submitted, the only two parties who had any claim to the said sum were Petral and PES. They had no dispute between them as to the status of the sum. As far as they were concerned, it was (contrary to the impression given under cross-examination in Hong Kong by George Chan) the bottom line net-off position of years of inter-company transactions during which payments were made *inter se* between Petral and PES and to third parties on behalf of each other. KBC had a money claim only against Pertamina for the US$261m and against Petral for US$5.5m. The OS did not relate to either claim. It concerned the US$36m reflected in the accounts of Petral as being due to Petral from PES. KBC had no money claim *vis-à-vis* Petral, much less PES, to the US$36m and, therefore, had no right in respect of which a claim for a declaration could be made. KBC's own legal position was not in issue in any way in the action commenced by the OS and, therefore, as Pickford LJ said in *Guaranty Trust Co* (see [16] *supra*), the right given to it by O 15 r 16 to ask for a declaration would not extend to enabling it as a stranger to the transaction between Petral and PES to ask the court to express its opinion on the correct legal basis obliging PES to repay

the sum to Petral simply in order to help KBC in its other transaction, to wit, the enforcement proceedings in Hong Kong.

21 Quite apart from the observations in *Guaranty Trust Co* and *Gouriet* that were inimical to KBC's case, there was also an authority, directly on point on the present issue, which had resulted in a decision adverse to the stand taken by KBC. In *Meadows Indemnity Co Ltd v Insurance Corporation of Ireland plc and International Commercial Bank plc* [1989] 2 Lloyd's Rep 298 ("*Meadows*"), Meadows, who were reinsurers, sought to obtain a declaration against a bank, which was covered by a specific policy of insurance, declaring that the insurers were not bound to indemnify the bank in respect of any losses suffered by the bank. The English Court of Appeal unanimously came to the conclusion that Meadows as reinsurers had no standing to seek a declaration as against the bank. Neill LJ, albeit somewhat reluctantly, held that he was bound by Lord Diplock's holding in *Gouriet* to find that although Meadows had a direct interest in the validity of the bank's case against the insurers, there was no contested issue between Meadows and the bank and thus Meadows was not entitled to claim the declaration sought. This holding was approved by the High Court here in *British and Malayan Trustees Ltd v Sindo Realty Pte Ltd* [1998] 2 SLR 495 ("*British & Malayan Trustees*"). These cases support the proposition that as there was no issue directly between KBC and the respondents on the status of the US$36m, KBC had no standing to seek a declaration as to the legal rights of Petral *vis-à-vis* PES in relation to the US$36m that had been transferred to the latter. It should also be noted that in *Meadows*, Neill LJ recognised that the courts' jurisdiction to grant declarations did not encompass allowing them to declare the law generally or give advisory opinions.

22 We must, before leaving this issue, deal briefly with *Re S* ([12] *supra*), a case that was much relied upon by KBC in support of its assertion that it did have a sufficient interest to obtain a declaration notwithstanding the lack of a contested legal right. In that case, S, a Norwegian citizen, had suffered a stroke in England and was being cared for in a private hospital there. His son arranged to transfer S to an hospital in Oslo. On learning of the proposed transfer, the plaintiff, an English woman and long-time companion of S, obtained an interim injunction preventing the transfer. Subsequently, she sought a declaration that it was not in S's best interests that he be removed from the jurisdiction. At first instance, the issue of whether the plaintiff had *locus standi* to seek this declaration was resolved by Hale J in favour of the plaintiff on the basis that she had been able to show that her own legal position as prospective carer of S would be affected by the relief sought. Upholding this decision, the English Court of Appeal held that a dispute between rival claimants as to the care of an adult patient incapable of expressing his wishes in respect of treatment or care was a justiciable issue in respect of which the court's advisory declaratory jurisdiction could properly be invoked, and that where such application was brought by a claimant who could demonstrate a genuine and legitimate interest in obtaining a decision against an adverse party, the court would not impose nice tests to determine the claimant's precise legal standing. Sir Thomas Bingham MR, who elucidated the foregoing principle ([12] *supra* at 19), was at pains to state that it could not be suggested that any stranger or officious busybody, however remotely connected with the patient or with the subject matter of proceedings, could properly seek or obtain declaratory or any other relief. Millett LJ, who agreed with the judgment of Bingham MR, also considered (at 22) that Lord Diplock's speech in *Gouriet* (see [15] *supra*) could no longer be taken to be an exhaustive description of the circumstances in which declaratory relief could be granted. Instead, in his judgment, the important thing was that there had to be:

> a real and present dispute between the parties as to the existence or extent of a legal right. Provided that the legal right in question is contested by the parties, however, and that each of them would be affected by the determination of the issue, I do not consider that the court should be astute to impose the further requirement that the legal right in question should be claimed by either of the parties to be a right which is vested in itself.

From the foregoing, it is apparent that a more flexible approach was adopted by the Court of Appeal in *Re S* to the question of how a sufficient interest could be determined for the purpose of obtaining a declaration.

23 KBC sought to persuade us to adopt the approach taken in *Re S*. To do so would have given KBC persuasive grounds to argue that it had the standing to obtain the declaration that it asked for as KBC itself would be affected by the determination of the issue of whether PES was a trustee for Petral or only its debtor. If the moneys were trust moneys, PES could be ordered to transfer them back to Petral and there would then be a likelihood that KBC would be able to recover at least part of the transferred funds as a debt due from Petral to Pertamina.

24 We also noted that the *Re S* approach had been recommended in Zamir & Woolf, *The Declaratory Judgment* (Sweet & Maxwell, 3rd Ed, 2002) over that taken by *Meadows* on the basis that the *Meadows* approach was inconsistent with the philosophy of the disposal of civil proceedings reflected in the English Civil Procedure Rules (c 12) ("CPR"). The passage in question at p 241 states:

> The approach taken by the Court of Appeal in *Meadows*, of requiring the declaration to relate to the claimant's private rights, imposes an unnecessary restriction on the use of declaratory relief … The greater flexibility shown by the Court of Appeal in *Re S* is to be welcomed and it is to be hoped that it will be adopted by the House of Lords if it comes to reconsider the position. The approach in *Meadows* is also inconsistent with the philosophy for the disposal of civil proceedings reflected in Part I of the Civil Procedure Rules, and it may well be that the omission of any reference to "rights" in CPR Part 40.20 will encourage the courts to take a broader view.

25 We were, however, not inclined to adopt the approach of *Re S.* First, CPR Part 40.20 is the rule reflecting the English court's power to grant declaratory reliefs. This is a new rule and it replaced the old rule that was *in pari materia* with our O 15 r 16 which, as it may be recalled, reads:

> No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations *of right* whether or not any consequential relief is or could be claimed. [emphasis added]

The new CPR Part 40.20 differs from the above provision in that it does not state that a declaration has to be "of right". In Singapore, the legislation concerning the power to grant declaratory reliefs still includes the requirement that the declaration be one of right. This restriction has been taken out of the English provisions and the English courts therefore, arguably, have more wide-ranging powers than we do. When Lord Diplock made his famous pronouncement in *Gouriet*, the legislation in force was identical to our O 15 r 16. That same identical provision was in force (and the exact wording was set out in the judgment) when Neill LJ held in *Meadows* that he was bound by Lord Diplock's holding. As a matter of construction of the court's powers, therefore, as far as the Singapore courts are concerned, the approach of Lord Diplock is as authoritative as it ever was. This approach was adopted by the local cases of *Salijah* ([14] *supra*) and *British & Malayan Trustees* ([21] *supra*) where the court agreed that a declaration should only be granted when it concerned the rights of the parties represented in the litigation. We found no compelling reason to change that position.

26 Further, *Meadows* was not cited in *Re S*. There was, accordingly, no discussion as to why, when one coram of the Court of Appeal had considered itself bound by *Gouriet*, another coram should be at liberty to take a different position. On the other hand, the divergence in approach was, most likely, due to the fact that the considerations before that bench in *Re S* were of a completely different nature from those before the court in *Meadows* and those faced by us here. *Re S* was one of a long line of English cases relating to the treatment of patients who had either been rendered

incapable of making decisions about their own welfare by reason of their illnesses or who did not have the mental capacity to make such decisions. As Bingham MR noted, there had been many cases in which declaratory relief had (or would in principle have) been granted to help authorities, relatives or the next friend of the patient in somewhat similar circumstances to those in *Re S* and, as a consequence, Zamir & Woolf in the second edition of their book had commented that these cases constituted the development of a new advisory declaratory jurisdiction. Millett LJ pointed out that the development of this jurisdiction to issue an "advisory declaration" had been necessitated by the lacuna created when the courts in England were deprived of what was known as the "*parens patriae* jurisdiction". Thus, the circumstances that led to such a development were very far from those that faced us in the present case. We did not think that it was right to import and apply the modifications of principle developed to deal with those very differing circumstances to the present case.

27 In the result, whilst we agreed with KBC that the judge should not have set aside the OS on the ground that it disclosed no cause of action, in our judgment, the OS had in any case to be set aside because KBC had no *locus standi* to ask for the declaration it desired.

Whether the judge erred in finding that the OS could not have been cured by an amendment

28 KBC submitted that even if the OS did not disclose a cause of action, the court should have followed its usual course of allowing an amendment instead of taking the drastic action of striking out the whole proceedings. It pointed out that courts are generally strict about exercising the power to strike out under O 18 r 19(1)(*a*) of the Rules and cited cases which held that the court would prefer to allow an amendment rather than take the drastic course of striking out. It argued that it should have been allowed to convert the OS into a writ and to amend its claim to include conspiracy as a cause of action.

29 In view of our finding on the first issue, the cases cited by KBC on the approach taken under O 18 r 19 were not relevant. Those cases dealt with the amendment of a pleading to further particularise and elaborate the cause of action relied on by the plaintiff. In this case, since the plaintiff had no *locus standi* to ask for the declaration, what it was actually seeking to do by the amendment was to add an entirely new cause of action to its pleading. That course is covered by O 20 of the Rules rather than by O 18 r 19. Order 20 r 5(5) allows the addition of a new cause of action to a writ or pleading if that new cause arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed. This provision is applied to an originating summons by O 20 r 7. In *Lim Yong Swan v Lim Jee Tee* [1993] 1 SLR 500, this court held that in determining whether O 20 r 5(5) had been satisfied, the test to be applied was whether there was a sufficient overlap between the facts supporting the existing claim and those supporting the new claim. The court also stated that the overlap of facts between the new cause of action and the original cause of action had to be apparent from the pleading of the applicant.

30 In our judgment, in this case, there was no sufficient overlap between the facts supporting the declaration initially sought by KBC and those supporting a cause of action based on conspiracy. In the affidavit sworn by Mr Michael Joseph Pilkington, KBC's Hong Kong lawyer, and filed in support of the OS, the relevant facts listed were that Petral had taken steps to frustrate KBC's enforcement efforts in Hong Kong by transferring the US$36m to PES, and that that transfer was made with the intention that this money would be repaid to Petral upon the conclusion of the Hong Kong proceedings. As the judge noted, however, an allegation of conspiracy requires the strictest pleading and must be supported by full particulars. In our estimation, the facts listed by KBC in that affidavit were not sufficient to support a conspiracy claim. Indeed, in the draft Statement of Claim prepared by KBC, new facts were pleaded to support the assertion of conspiracy. These facts were that:

(a) even though Petral was supposed to have ceased trading, PES was funding Petral's business such that Petral's business was in effect being carried on in Hong Kong with intent to defraud its creditors; and

(b) that PES and Petral had conspired together to defeat the US$5.5m order in [5] above.

Thus, even if KBC had applied to add a new cause of action to its existing proceeding pursuant to O 20 r 5(5), it would not have succeeded in this application.

Whether the court had jurisdiction to grant the Mareva injunction

31 Choo J held in relation to this issue that a Singapore court has no jurisdiction to grant a Mareva injunction to assist a plaintiff in his proceedings in a foreign jurisdiction.

32 KBC made two arguments on appeal. First, it argued that it was not seeking "free-standing" Mareva relief as its claim was for a declaration that the US$36m be held in trust and not for a Mareva injunction alone. Essentially, this was an argument that it had not asked for the Mareva injunction in order to assist its proceedings against Petral in Hong Kong but to support the declaratory relief sought in Singapore. We found no merit in this argument. KBC had no standing to ask for the declaration. Thus, the declaration did not constitute a valid substantive claim that KBC could rely on. In reality, therefore, KBC wanted the Mareva injunction in Singapore to support its Hong Kong proceedings.

33 KBC's second argument was that even if it were in substance only claiming a Mareva injunction in aid of foreign court proceedings, our courts have the jurisdiction to grant such an injunction. It submitted that the principle established by *The Siskina* ([9] *supra*), 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. It drew our attention to various decisions emanating from various jurisdictions other than the UK in which the validity of that principle had come under attack and suggested that we should follow those decisions rather than continue to adopt the principle. As will be seen from the discussion below, the *The Siskina* principle that KBC wished us to override was only one of three principles established by that case. Before we could consider whether to adopt the approach suggested by KBC, we had to consider whether KBC was entitled to apply for a Mareva injunction against both PES and Petral under the first two principles formulated in *The Siskina.*

34 The facts of *The Siskina* were as follows. The plaintiffs were the owners of cargo shipped on board the Panamanian-flagged vessel "Siskina" owned by the defendants, a Panamanian one-ship company. The vessel was on charter at the time the cargo was loaded and the plaintiffs paid freight to the charterer. The bills of lading issued conferred exclusive jurisdiction on the Genoese court. The charterer failed to pay charter hire to the defendants. The defendants therefore diverted the vessel and discharged the plaintiffs' cargo in Cyprus. They also exercised a lien over the cargo as security for the unpaid hire. The plaintiffs were then obliged to put up security in favour of the defendants to procure the release of the cargo. They also had to incur additional freight to ship the cargo from Cyprus to its ultimate destination. After discharging its cargo, the vessel sank. Thereafter, the defendants' only asset was the proceeds of their insurance policy and that was payable in London. The plaintiffs obtained a Mareva injunction in London over the insurance moneys pending settlement of proceedings in Cyprus where the defendants' claim for a lien over the cargo was being disputed. They also obtained leave to serve the writ out of jurisdiction on the defendants pursuant to O 11 r 1(1)(i) of the English Rules of the Supreme Court (c 54) ("English RSC"). The defendants applied to set aside service of the writ and to discharge the injunction. They were successful on both counts. On appeal, the House of Lords held that there was no jurisdiction to commence substantive

proceedings in England, that the writ and all subsequent proceedings in the action had to be set aside and, consequently, there could be no Mareva injunction.

35 Three legal principles arose out of the decision in *The Siskina*:

(a) O 11 r 1(1)(i) of the English RSC did not allow the English court to 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. To give an example of this principle, if a German with an English bank account knocked down a Frenchman in Paris, the English court would not have jurisdiction to decide a claim by the Frenchman against the German for damages simply because the Frenchman included in his writ a claim for a Mareva injunction against the moneys in the German's English bank account.

(b) There was no jurisdiction to grant Mareva relief unless and until the plaintiff had an accrued right of action.

(c) 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. The statutory power to grant injunctions under s 45 of the English Supreme Court of Judicature (Consolidation) Act 1925 (c 49) did not empower the court to grant free-standing interlocutory relief brought in proceedings claiming only that type of relief.

See Steven Gee, *Commercial Injunctions* (Sweet & Maxwell, 5th Ed, 2004) at para 1.025.

36 When it came to this issue of jurisdiction, it appeared to us that there was a difference between the position of Petral, a foreign entity that would only be susceptible to the jurisdiction of the Singapore court if service on it could be effected pursuant to O 11 of the Rules, and that of PES, a Singapore entity over which the court exercised its ordinary domestic or *in personam* jurisdiction. Taking Petral's position first, it was clear to us that Petral was covered by the first principle of *The Siskina* and that in relation to Petral, KBC's argument that the court had jurisdiction to grant free-standing Mareva relief was irrelevant.

37 The main discussion in the House of Lords focused on the English RSC O 11 r 1(1)(i), a provision that was *in pari materia* with O 11 r 1(*b*) of our Rules. It provided that service of a notice of writ out of England was permissible with the leave of court if in the action began by the writ, an injunction was sought ordering the defendant to do or refrain from doing anything within England. The House held that in order for a plaintiff to avail himself of this provision, the injunction sought in the action had to be part of the substantive relief to which the plaintiff's cause of action entitled him and could not be only an interlocutory injunction that was not founded on a substantive cause of action in respect of which relief was not sought in England. Lord Diplock commenting on O 11 r 1(1)(i) of the English RSC stated ([9] *supra* at 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 pre-supposes 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.* 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. … [T]he thing that it is sought to restrain the foreign defendant from doing in England must amount to the invasion of some legal or equitable right *belonging to the plaintiff in this country* and *enforceable here* by a final judgment for an injunction. [emphasis added]

38 As the respondents submitted, after *The Siskina*, it was settled English law 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 the English court. 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.

39 The issue 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 came up again for consideration in 1995, this time before the Privy Council. In *Mercedes Benz* ([9] *supra*), a Privy Council decision on appeal from Hong Kong, the court affirmed the result in *The Siskina.* In our view, that case deserved close analysis as the factual situation was strikingly similar to that of the present case and the wording of the statutory provisions that the court had to construe, O 11 r 1(1)(b) and O 11 r 1(1)(m) of the Hong Kong Rules of the Supreme Court, was *in pari materia* with our own O 11 r 1(1)(*b*) and O 11 r 1(1)(*m*). The plaintiff in *Mercedes Benz* had instituted proceedings against the defendant, a German national, in Monaco and had then started another action against the defendant in Hong Kong and applied for a Mareva injunction over the defendant's assets there. Lord Mustill, delivering judgment for the majority, decided the case on the point that the Hong Kong court had no territorial jurisdiction over the defendant.

40 Lord Mustill's judgment made clear that when a court was faced with a case that sought to combine both the extra-territorial jurisdiction under O 11 and the Mareva injunction, the court was in fact faced with two questions. The first was whether it had territorial jurisdiction over the foreigner and the second was whether the court had the "power" to make the order. His Lordship explained (at [9] *supra* at 297):

> … the present case combines two jurisdictions, the extra-territorial jurisdiction under Order 11 and the *Mareva* jurisdiction, both of which should be exercised with great circumspection …
>
> It is important at the outset to distinguish two questions. The first is concerned with territorial jurisdiction. The foreigner is outside the jurisdiction. The claim against him has no connection with the home territory. No action against him in respect of that claim is brought, or properly could be brought, before the local court. But he has assets within the territory. Assume for this purpose that *Mareva* proceedings could have been commenced by writ or other originating process, and assume also that such relief could properly be given: i.e., that notwithstanding *The Siskina* [1979] A.C. 210 *Mareva* relief in support of foreign proceedings is permissible. Does the statutory enlargement of its territorial jurisdiction created by Ord. 11, r. 1(1) entitle the court to permit the service of a writ or other originating process claiming such relief on the foreigner out of the jurisdiction, thus compelling him to choose between suffering a judgment in default or appearing before a court which has no other jurisdiction over him to argue that his assets should not be detained?
>
> The second question is concerned with a different kind of jurisdiction; or more accurately, a power. Assume for this purpose that the foreign defendant is someone who can be brought before the English court to answer a claim for a *Mareva* injunction, either because he is present

here or because (contrary to the first defendant's contentions on the first issue) Ord. 11, r.1(1)(*b*) is wide enough to cover all kinds of injunction. Assume also that the matters in dispute have no connection with the English court, and that the plaintiff neither can, nor as in the present case intends to, bring them before that court. Does the court have power to restrain the free disposition of the defendant's assets in England and Wales, to await the conclusion of proceedings brought against that person in a foreign jurisdiction?

Applying the above discussion to the present case, it was apparent that the first question concerned only Petral as the foreign defendant whilst the second question (a question referable to the third consequence of *The Siskina*) concerned only PES which was not a foreign defendant and could be brought before the Singapore court to answer a claim for a Mareva injunction because it was present here.

41 Having set out the two questions, Lord Mustill then indicated that in relation to a foreign defendant, of the two questions, the court should consider the question of territorial jurisdiction first for if the court had no territorial jurisdiction, the second question did not arise. In coming to its decision on this question, the majority of the Privy Council bore in mind that the court had no powers to make orders against persons outside its territorial jurisdiction unless authorised by statute as there was no inherent extra-territorial jurisdiction. Further, it was important to the resolution of the issue that the Mareva injunction was quite a different kind of injunction from any other as it was really a kind of attachment. Thus, in the court's view, it was not enough simply to say that since a Mareva injunction was an injunction, it automatically fell within O 11 r 1(1)(b). The question that had to be asked was whether an extra-territorial jurisdiction grounded only on the presence of assets within the jurisdiction was one which sub-para (b) was intended to assert. The majority of the court answered this question in the negative. This was because, as Lord Mustill explained at 301 and 302:

> [T]he purpose of Ord. 11, r. 1 is to authorise the service on a person who would not otherwise be compellable to appear before the English court of a document requiring him to submit to the adjudication by the court of a claim advanced in an action or matter commenced by that document. Such a claim will be for relief founded on a right asserted by the plaintiff in the action or matter, and enforced through the medium of a judgment given by the court in that action or matter. The document at the same time defines the relief claimed, institutes the proceedings in which it is claimed, and when properly served compels the defendant to enter upon the proceedings or suffer judgment and execution in default. Absent a claim based on a legal right which the defendant can be called upon to answer, of a kind falling within Ord. 11, r. 1(1), the court has no right to authorise the service of the document on the foreigner, or to invest it with any power to compel him to take part in proceedings against his will.
>
> Thus, at the centre of the powers conferred by Order 11 is a proposed action or matter which will decide upon and give effect to rights. An application for *Mareva* relief is not of this character.

In the above passage, the Privy Council was pointing out that neither an application for a Mareva injunction nor the existence of the injunction itself has any connection with, or influence on, the issues to be decided in the substantive action. Whilst a Mareva injunction does give a plaintiff a certain measure of protection, that protection does not enforce any rights that the plaintiff has to obtain substantive relief, but only helps to ensure that when the plaintiff does succeed in obtaining a judgment against the defendant in the jurisdiction, there will be something for the judgment to bite on. As an ancillary matter that does not impinge on substantive rights, the Mareva injunction cannot justify the extension of the court's jurisdiction, generally territorial in nature, to a person who would otherwise be outside it. For completeness, we add that the Privy Council also found that O 11 r 1(1)(m), which permitted service out of the jurisdiction when the claim was brought to enforce any

judgment or arbitral award, was not applicable to the situation before them because there was no judgment against the defendant that was already in an executable form. This was also the situation before us since KBC did not have a judgment in Singapore against Petral in an executable form.

42 There was a minority opinion in *Mercedes Benz*, that of Lord Nicholls of Birkenhead. He held that O 11 r 1(1)(b) would apply to a claim for a Mareva injunction when it comprised the sole relief sought. His opinion was that there was nothing exorbitant about this jurisdiction provided the anticipated judgment was one which would be recognised and enforceable in the forum. We could not accept that decision. We found Lord Mustill's interpretation of O 11 r 1(1)(b) to be persuasive. We agreed that the language of O 11 indicated that it was confined to originating documents which set in motion proceedings designed to ascertain substantive rights. This was borne out by the reference in O 11 r 1 of our Rules to an injunction being sought in "the action" and the fact that O 11 r 2(1)(*b*) requires a plaintiff to state that he believes he had a "good cause of action". To us, as it did to Lord Diplock, that language implied that there must be a pre-existing cause of action to which the injunction was merely ancillary.

43 In the context of Petral, we were satisfied that the principle established by *The Siskina* and reiterated by *Mercedes Benz* regarding the lack of *in personam* jurisdiction over a foreign defendant where no substantive claim was made against him was a sound one and that it should be adopted by us. This court had considered *The Siskina* in a previous decision, to wit, *Teo Siew Har* ([9] *supra*), and accepted it as good law but that was on another point. In the result, we found that the Singapore court had no *in personam* jurisdiction over Petral, a Hong Kong entity with no presence here, simply because it had assets in Singapore.

44 Moving to PES, in our view, the respondents could not rely on the first consequence of *The Siskina* in order to refute KBC's claim for Mareva relief since PES was not a foreign entity but a Singapore incorporated company and thus subject to the ordinary jurisdiction of the Singapore court. The respondents' second argument, however, that it was not possible to obtain a Mareva order in respect of a potential or possible substantive action even though the same, when it arose, would be a cause of action arising within the jurisdiction, was applicable to PES's situation. In this connection, it was established by *The Siskina* and followed by many other cases including *Steamship Mutual Underwriting Association (Bermuda) Ltd v Thakur Shipping Co Ltd* [1986] 2 Lloyd's Rep 439 ("*Thakur Shipping*") that in order to apply for Mareva relief, the plaintiff must possess an accrued right of action against the defendant at the time of the application. In this case, at the time the OS was filed, KBC had no accrued right of action against PES in Singapore or even in Hong Kong for that matter. It had no money claim against PES nor did it have the standing to ask for a declaration that PES was holding money in trust for Petral. It had no judgment against Petral that it had registered in Singapore so as to entitle it to garnish moneys that PES might have owed Petral. The US$5.5m order in Hong Kong, which was the only order for payment of money that KBC had against Petral, had not been registered in Singapore and indeed was not registerable as it was not a final order. It may be that one day, KBC will get a final judgment in some jurisdiction against Petral and may register the same in Singapore and such judgment may then come to be dealt with substantively by the Singapore court. Until then, seeking a Mareva injunction against PES to protect its position would be, as Sir John Donaldson MR put it in *Thakur Shipping* (at 440), obtaining "security for a future cause of action – a cause of action which will give rise to entitlement to monetary relief" and, in our view, that is something that the law does not permit, as to obtain Mareva relief requires one to have an existing legal or equitable right, as *The Siskina* itself made plain.

45 Our decision on the application of the first two principles arising from *The Siskina* was sufficient to dispose of the third issue arising in the appeals. There was a sub-issue relating to jurisdiction to which KBC addressed a substantial portion of its argument on appeal but which could

not be dealt with in this judgment. It would be recalled that the third principle established by *The Siskina* was that the court had no jurisdiction to preserve assets within England in order to support the plaintiff in a claim he was making in a foreign jurisdiction. There has been considerable debate on the extent to which this principle is still in force. That sub-issue did not, however, arise for decision in this appeal. This was because in relation to Petral, there was no personal jurisdiction over it, and in relation to PES, even if there had been an accrued right of action against it, there was no claim being pursued against PES in a foreign jurisdiction. Accordingly, any views that we would express on this issue in this judgment would be *obiter* and would lack context. Thus, they would not give sufficient guidance to the Bar on the extent to which the principle applies in Singapore.