Swift-Fortune Ltd v Magnifica Marine SA
[2006] SGHC 36

Case Number : OS 261/2005

Decision Date : 01 March 2006

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Toh Kian Sing and Ian Teo (Rajah and Tann) for the plaintiff; S Mohan and Bernard Yee (Gurbani and Co) for the defendant

Parties : Swift-Fortune Ltd — Magnifica Marine SA

Civil Procedure – Mareva injunctions – Whether court having jurisdiction to issue Mareva injunction over Singapore assets of foreigner in support of foreign arbitration – Section 12(7) International Arbitration Act (Cap 143A, 2002 Rev Ed)

Civil Procedure – Service – Application for leave to serve out of jurisdiction originating summons taken out under International Arbitration Act – Requirements to be satisfied under Rules of Court – Order 11 r 1, O 69A r 3, O 69A r 4 Rules of Court (Cap 322, R 5, 2004 Rev Ed)

1 March 2006 *Judgment reserved.*

Judith Prakash J:

Introduction

1 This is an application to set aside the originating process by which these proceedings were commenced and the order of court granting leave to serve the same out of the jurisdiction as well as for a discharge of the Mareva injunction granted against the defendant. I was the judge who, on 8 March 2005, made the orders that the defendant now contests.

Background

2 The defendant is Magnifica Marine SA, a Panamanian company. At all material times, it owned one ship, a Panamanian-flagged vessel called *Capaz Duckling* ("the vessel"). On 31 August 2004, the defendant entered into a memorandum of agreement ("MOA") with the plaintiff herein, Swift-Fortune Ltd, a Liberian company, whereby it agreed to sell the vessel to the plaintiff for US$9.5m.

3 The payment terms set out in the MOA required the plaintiff to place a 20% deposit (US$1.9m) with Den Norske Bank ASA ("DnB Bank") in Singapore and for DnB Bank to hold the deposit in the joint names of the plaintiff and the defendant and release it only in accordance with joint written instructions from both parties. Neither party acting alone could, therefore, deal with that money. Under cl 3 of the MOA, the purchase price was to be paid in full to the US-dollar client account of M/s Clyde & Co ("Clyde & Co"), solicitors, at Standard Chartered Bank, Battery Road. Payment was to be made on delivery of the vessel but no later than three banking days after the vessel was in every aspect physically ready for delivery.

4 As the purchase money was to be held and transferred over in Singapore, legal completion of the sale, which encompassed the transfer of title and other documents against the payment of the balance of the purchase price, was to take place in Singapore at the offices of DnB Bank. Physical delivery of the vessel was, however, to be given to the plaintiff at a safe port in China at the time

when legal completion occurred in Singapore.

5 The MOA provided that it was to be governed by and construed in accordance with English law and that any dispute arising out of it would be referred to arbitration in London.

6 It was agreed under the MOA that the defendant would deliver the vessel by 6 December 2004. Clause 14 of the MOA provided that if the defendant failed to complete the legal transfer of the vessel by that date, the plaintiff had the right to cancel the MOA. The clause further provided that whether or not the plaintiff cancelled the MOA, the defendant had to make compensation to the plaintiff if the failure to deliver the vessel on or before 6 December 2004 was due to the proven negligence of the defendant.

7 The vessel was not delivered by 6 December 2004 and the delivery date was subsequently extended four times at the request of the defendant. The plaintiff acceded to all these extensions on the basis that such agreement was without prejudice to the plaintiff's rights to make claims for compensation for late delivery of the vessel pursuant to cl 14 of the MOA.

8 Around 23 November 2004, an explosion took place on board the vessel and it sustained some damage. The vessel then called at Acapulco, Mexico to attend to the injured crew and the damage caused by the explosion. The vessel did not leave Mexico until 15 January 2005. Subsequently, the parties entered into negotiations on a reduction of the purchase price to take into account the damage caused to the vessel by the explosion and the loss sustained by the plaintiff by reason of the delayed delivery. The parties reached a settlement as regards the explosion damage but no agreement was reached on the delay claim. The purchase price was reduced by US$200,000.

9 The vessel arrived at the port of Jingtang in China on 17 February 2005. On or about 24 February 2005, the parties agreed to a further extension of the delivery date to 9 March 2005. On 4 March 2005, the defendant's solicitors sent an e-mail to various parties, including the plaintiff's solicitors and the vessel's mortgagee, setting out the procedure for what was called "the Closing Meeting" at which title to the vessel would be transferred against payment and coincident with which delivery of the vessel would take place in China. The e-mail reflected the understanding that the Closing Meeting was scheduled for 8 March 2005. The parties proceeded on this basis until the evening of 7 March 2005 when the plaintiff's solicitors requested the defendant's solicitors to postpone delivery of the vessel by one day to 9 March 2005 because of some delay in the remittance of the balance of the purchase price to the account of Clyde & Co in Singapore. The defendant agreed to this request.

10 On 8 March 2005, the plaintiff commenced the present proceedings. The originating summons ("the OS") that it caused to be issued was in Form 8, which was then the form for an *ex parte* originating summons issued pursuant to O 7 r 2 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) ("the Rules"). When I heard the application for the injunction that same day, I did not notice the form of the OS but having now noticed it, I consider that the plaintiff should not have used that form. In view of the nature of the proceedings, the plaintiff should instead have used Form 6 (now Form 4) which is the form applicable where there is a plaintiff and a defendant and where the appearance of the defendant is required. Whilst I mention this point, nothing turns on it at this stage since the defendant did not apply for the OS to be set aside on the basis of the irregularity in the form used.

11 The OS contained a number of prayers for relief. The main reliefs sought were that:

(a) the defendant be restrained by injunction from removing or in any way disposing of or dealing with or diminishing the value of its assets in Singapore up to the value of US$2.5m. This

prohibition was to apply also to money held on behalf of the defendant and in particular any money held by DnB Bank and in the client account of Clyde & Co; and

(b) the plaintiff be at liberty to serve a sealed copy of the OS, the supporting affidavit and any order made in the proceedings on the defendant at its address in Panama and at an address in Taiwan.

The plaintiff did not take out a summons in chambers in the originating process as would usually be the case (and which I think would have been the proper procedure for the plaintiff to have followed) but procured an urgent hearing of the OS itself before me in order to obtain the interim injunction and the leave to serve the proceedings out of the jurisdiction. The application in respect of service was made pursuant to O 11 rr 1(*a*), (*b*) and/or (*e*) and/or (*p*) of the Rules.

12 I was informed that the matter was extremely urgent because the "Closing Meeting" was scheduled for the next day and once the balance of the purchase price had been paid to the defendant and the deposit released to it, the funds would leave Singapore and the plaintiff would have no security for its claim for damages as a result of the defendant's repeated breaches of contract in relation to the delivery of the vessel. The plaintiff was concerned, for various reasons detailed in the affidavit, that the purchase moneys would be dissipated and there would be no assets against which an arbitration award in the plaintiff's favour could be enforced. On completion, a major part of the purchase moneys would be paid to the mortgagee of the vessel to procure the discharge of the mortgage and the balance left in the defendant's hand would be in the region of US$2.9m. After hearing counsel for the plaintiff, I granted the injunction as requested and gave leave to the plaintiff to effect service out of jurisdiction. I ordered the plaintiff to fortify the undertaking as to damages by providing security in the sum of US$100,000 and, further, to serve a notice of arbitration on the defendant by 14 March 2005. I also permitted the plaintiff to withhold service and/or notification of the injunction order until after the Closing Meeting had taken place and the vessel had been delivered to the plaintiff both legally and physically. I was aware at the time I granted the injunction that the substantive dispute between the parties would be settled by arbitration in London in accordance with the terms of the MOA and that no substantive claim would be brought in this court by the plaintiff against the defendant. At that time, I did not accord that fact much significance.

The present application

13 On 7 April 2005, the defendant filed the summons in chambers that is now before me. By this application, the main orders that the defendant is seeking are the following:

(a) that the *ex parte* OS dated 8 March 2005 and the order of court dated 8 March 2005 granting leave to the plaintiff to serve the OS on the defendant out of jurisdiction, the service thereof and all subsequent proceedings herein be set aside and/or dismissed;

(b) a declaration that this court does not have jurisdiction over the defendant in these proceedings in respect of the subject matter of these proceedings or the relief or remedy sought by the plaintiff in these proceedings and further, that this action be dismissed;

(c) that the order of court dated 8 March 2005 and any Mareva injunction granted therein against the defendant be discharged and/or set aside or, alternatively, that the said order be varied to reduce the limit of the Mareva injunction to US$1.25m; and

(d) that, in the event that the order of court dated 8 March 2005 and the Mareva injunction

granted therein are set aside, there be an inquiry as to the damages, if any, the defendant may have sustained by reason of such injunction and an order that the plaintiff do pay such damages.

14 At the first hearing of the application, Mr S Mohan, counsel for the defendant, informed me that the defendant would concentrate on four broad issues in support of the application. These were:

(a) Whether the plaintiff had properly satisfied the requirements of O 69A rr 3 and 4 read with O 11 r 1 of the Rules. The defendant argued that in order for the court to validly assert jurisdiction over it, the burden was on the plaintiff to show that at least one of the limbs of O 11 r 1 specified in the supporting affidavit was satisfied at the time the plaintiff's *ex parte* application was made on 8 March 2005. The defendant further argued that in fact none of the limbs relied on by the plaintiff was applicable to the defendant or to the proceedings on that date, and therefore the court had no jurisdiction over the defendant and ought not to have granted the plaintiff's application for leave to serve the defendant out of the jurisdiction.

(b) Whether the plaintiff was guilty of bad faith or material non-disclosure or unfair presentation of law and facts in its *ex parte* application and if so, whether the injunction order should be set aside.

(c) Whether the real motive of the plaintiff in obtaining the injunction was to obtain security for its claim.

(d) If the injunction order was not set aside, whether the limit of the order should be reduced to such sum as would reflect the true quantum of the plaintiff's claim.

15 In the course of the argument, it however became clear to me that in dealing with the issue of service, I would also have to determine whether the appropriate order to be observed in the context of the application for leave to serve proceedings abroad was O 11 r 1 read with O 69A or O 69A alone. Additionally, before the other issues posited by the defendant can be considered, there is an important preliminary issue on the very ability of the plaintiff to ask for injunctive relief in the factual circumstances of the case. This issue is whether this court had the power to issue a Mareva injunction over the Singapore assets of a foreigner in support of a foreign arbitration. At my request, both Mr Mohan, and Mr Toh Kian Sing, counsel for the plaintiff, prepared additional submissions on these new issues and dealt with them in a clear and detailed manner.

Service out of the jurisdiction: which is the applicable rule?

16 The OS is intituled:

In the matter of Section 12(7) read with Section 12(1) of the International Arbitration Act (Cap 143A)

And

In the matter of Order 69A of the Rules of Court

It was also stated in the affidavit of one Mr Alexander W Rutherfurd filed in support of the OS that the application was made pursuant to the provisions of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA").

17 Order 69A of the Rules is itself entitled "International Arbitration Act" and was drafted in

order to specify the procedures to be followed when parties institute proceedings or make applications pursuant to the provisions of the IAA. It is a relatively new order, having been inserted into the Rules only after the passing of the IAA in 1994. It specifically deals with service abroad and these procedures are embodied in O 69A r 4 which bears the heading "Service out of jurisdiction of originating process". Yet, when it came to the obtaining of leave to serve the proceedings on the defendant abroad, the plaintiff relied initially only on the provisions of O 11. In the course of the arguments, the plaintiff changed its position and contended that O 69A r 4 was the only rule that applied to the service abroad of proceedings taken out under the IAA whilst the defendant argued that although O 69A had to be looked at, the effect of O 69A r 4 was that a plaintiff applying for leave to serve out of the jurisdiction had also to satisfy at least one of the limbs of O 11 r 1 as well.

18 It would be helpful to an understanding of the relevant provisions if I set out both O 69A r 3 and O 69A r 4 in full.

Matters for a Judge in Chambers (O. 69A, r. 3)

3.— (1) Every application or request to the Court —

(*a*) to hear an application otherwise than in open Court under section 22 of the Act;

(*b*) for leave to enforce interlocutory orders or directions of an arbitral tribunal under section 12 (6) of the Act;

(*c*) for interlocutory orders or directions under s 12 (7) of the Act;

(*ca*) to reinstate discontinued proceedings under section 6 (4) of the Act;

(*d*) for leave to enforce an award under section 18 or 19 of the Act; or

(*e*) for leave to enforce a foreign award under section 29 of the Act,

shall be made to a Judge in Chambers or the Registrar.

(2) Any application to which this Rule applies must, where an action is pending, be made by summons in the action, and in any other case by originating summons.

(3) Where the case is one of urgency such application may be made ex parte on such terms as the Court thinks fit.

Service out of jurisdiction of originating process (O. 69A, r. 4)

4.— (1) Service out of the jurisdiction of the notice of an originating motion or the originating summons or of any order made on such motion or summons under this Order is permissible with leave of the Court whether or not the arbitration was held or the award was made within the jurisdiction.

(2) An application for the grant of leave under this Rule must be supported by an affidavit stating the ground on which the application is made and showing in what place or country the person to be served is, or probably may be found; and no such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Rule.

(3) Order 11, Rules 3, 4 and 6 shall apply in relation to any such summons, notice or order as is referred to in paragraph (1) as they apply in relation to a writ.

19 For the sake of following the argument, I also reproduce relevant portions of O 11 itself:

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

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

…

Manner of application (O. 11, r. 2)

2.— (1) An application for the grant of leave under Rule 1 must be made by an ex parte summons in chambers supported by an affidavit in Form 12 stating —

(*a*) the grounds on which the application is made;

(*b*) that in the deponent's belief the plaintiff has a good cause of action;

(*c*) in what place or country the defendant is, or probably may be found;

…

(2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of Singapore under this Order.

20 Moving to the analysis, first, looking at O 69A r 4(1) and paraphrasing it appropriately, it would be noted that this rule can be divided into two parts. The first part of the rule is that there can be service out of jurisdiction of an originating summons or originating motion taken out under O 69A or of an order made under O 69A with the leave of the court. The second part of the rule is that such leave may be given whether or not the arbitration was held or the award was made within the jurisdiction. To determine the types of originating summons covered by O 69A r 4(1), one must look back to O 69A r 3 and the list set out in sub-paras (*a*) to (*e*) of r 3(1). As is immediately apparent from a perusal of these sub-paragraphs, all the applications described are applications which have been expressly provided for by the provisions of the IAA. Of particular relevance to this case is O 69A r 3(1)(*c*) which provides that an application for an interlocutory order or direction from the court under s 12(7) of the IAA is covered by O 69A r 3 and, therefore, where service out of the jurisdiction is required, by O 69A r 4. The plaintiff's action fell squarely within the provisions of O 69A rr 3(1) and 3(2). Thus, as far as service was concerned, in order to obtain leave to serve abroad, the plaintiff would have to convince the court to give it leave under O 69A r 4(1).

21 On the face of it, it would therefore appear to have been incorrect for the plaintiff to have referred to O 11 when it asked for leave to serve the OS on an *ex parte* basis. Mr Toh took a two-pronged approach to this issue. On the basis that O 11 applied, he made copious submissions justifying service under a number of the sub-paragraphs of O 11 r 1. He then made the alternative, and diametrically opposite submission which was that the limbs of O 11 r 1 were not relevant in the case of the service of an originating summons under O 69A r 4 and that only the provisions of O 69A r 4 needed to be satisfied. Mr Mohan's stand on this issue was that even if O 69A r 4 was the primary

rule to be observed in this case, it incorporated O 11 r 1 and the plaintiff therefore had the additional burden of satisfying both O 69A r 4 and showing that its case also fell within a limb of O 11 r 1.

22 Mr Mohan submitted that it is clear from O 69A r 4(2) that the requirements of O 11 r 2(1)(*a*) and O 11 r 2(1)(*c*) and O 11 r 2(2) have been incorporated into it. That explains why neither O 11 r 1 nor O 11 r 2 is referred to in O 69A r 4(3). The wording of O 69A r 4(2) is that an "application for the grant of leave under this Rule must be supported by an affidavit stating the ground on which the application is made …". That wording mirrors the requirement of O 11 r 2(1)(*a*) just as the last sentence of O 69A r 4(2) mirrors the requirements of O 11 r 2(2). It is O 69A r 4(2) that sets out the conditions for the grant of leave to serve the process out of the jurisdiction and this sequence again mirrors the requirements of O 11. Order 11 r 1 provides that service *ex juris* of an originating process is "permissible with the leave of the Court". Order 11 r 2 then sets out the conditions that must be satisfied for the grant of leave.

23 To Mr Mohan, it is clear that when O 11 rr 1 and 2 are juxtaposed against O 69A r 4, O 69A r 4(2) mirrors the requirements of O 11 r 2(1)(*a*) and O 11 r 2(1)(*c*) and O 11 r 2(2). Order 69A r 4 cannot be read in isolation or in vacuum and it is significant that O 11 r 1 applies to all originating processes except those containing the claims provided for in O 70 r 3; there is no other exception to the application of O 11 r 1. Otherwise O 11 r 1 itself would have expressly excluded its application to any originating process issued for a claim under O 69A r 3. Therefore, he argued, it is plain that under O 69A r 4, to obtain the grant of leave which is permitted under O 69A r 4(1), the applicant must state the ground (*ie*, which limb of O 11 r 1) that applies and satisfy the court that such limb applies to the standard of a good arguable case. To construe the provisions otherwise would be illogical and would lead to absurdity as the phrase "ground on which the application is made" in O 69A r 4(2) would have no meaning. Unless there are clear words ousting the application of O 11 r 1, the court should not assume that that rule was meant to be excluded from application under O 69A r 4.

24 I do not accept Mr Mohan's submission on this point. I think that his interpretation gives a strained reading to the words of O 69A r 4. The plain reading of the provision supports the interpretation that this rule is intended to be the only rule to be looked at when an originating process covered by O 69A r 3 has to be served outside the jurisdiction. First of all, there is the very fact that a rule has been enacted in O 69A on the point. If O 11 was intended to apply to such applications, there would be no O 69A r 4. But, under sub-rule (1) therof, it is provided that service out of jurisdiction of O 69A r 3 proceedings is permissible with leave of court. Then, sub-rule (2) sets out the conditions to be observed when such an application is made and also specifies that leave cannot be granted unless the person making the application satisfies the court that it is "a proper one for service out of the jurisdiction" under the rule. Finally, we get sub-rule (3) which specifically incorporates O 11 rr 3, 4 and 6 which are the rules dealing with alternative modes of service of originating process abroad (O 11 r 3), service of originating process abroad to foreign governments, judicial authorities, and Singapore consuls or by other methods of service (O 11 r 4), and undertaking to pay expenses of service incurred by the Minister (O 11 r 6). The significance of O 69A r 4(3) is two-fold. The first point is that since it specifically mentions certain sub-rules of O 11, the usual construction would be that those sub-rules that are not mentioned are not to be considered incorporated by reference in the same way or even incorporated by implication. The second point is that the three rules so incorporated relate to the execution of the service of process once leave has been granted and do not deal at all with the grounds for granting of leave. This makes it clear that the grounds for granting of leave set out in O 11 have nothing to do with O 69A r 4 and have no relevance to the consideration of the court under O 69A r 4(2).

25 The fact that the words in O 69A r 4(2) "no such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the

jurisdiction under this Rule" mirror the words in O 11 r 2 cannot mean that O 11 r 1 is incorporated into O 69A r 4(2). There is no reason why an application that is made under a particular piece of legislation cannot have specific rules on service, distinct from the rules that are applicable generally to other causes of action. It is not a *sine qua non* for service abroad that an O 11 r 1 limb must be satisfied. It is noteworthy in this connection that O 11 itself did not always contain those limbs. There was a period of time starting in February 1992 and ending on 31 July 1993 when O 11 itself did not have any such limbs and in order to obtain leave to serve out of the jurisdiction, the applicant had only to satisfy the court that it had jurisdiction to try the action by virtue of certain statutory provisions or contractual arrangements. The rules relating to service abroad depend on the current applicable statutory provisions and it is rational for there to be different provisions for different situations.

26 In my judgment, when a plaintiff takes out an originating process covered by O 69A r 3 (or for that matter, O 69A r 2), in a case in which the defendant is out of the jurisdiction, in order to obtain leave to serve that application out of the jurisdiction, he must comply with O 69A r 4(2) and satisfy the court that the case is a proper one for service out of the jurisdiction under O 69A r 4 itself. He need not go further and establish that the facts of the case bring it within one or more of the limbs of O 11 r 1.

Has the plaintiff made out a case for ex jurisservice of the OS under Order 69A rule 4?

27 As it appears from O 69A r 4(2), an application for the grant of leave under O 69A r 4 must be supported by an affidavit stating the ground on which the application is made and showing in what place or country the person to be served is, or probably may be found. In this case, the affidavit filed on behalf of the plaintiff in support of the *ex parte* application for leave did state the place where the defendant could probably be found. The affidavit also stated that the application was made pursuant to O 11 rr 1(*a*), (*b*) and/or (*e*) and/or (*p*). Mr Rutherfurd, the deponent, did not expressly state the ground on which the application was made. He said that he believed the plaintiff had a good cause of action on the merits of the claim and also that it could obtain leave to serve the OS out of the jurisdiction based on the facts of the case set out in the affidavit. In arguments made during the hearing of the *ex parte* application, Mr Steven Chong, SC, counsel for the plaintiff, submitted briefly on why the facts of the case brought it within the various limbs of O 11 r 1.

28 Since I have held that the correct rule to be observed is O 69A r 4, it would seem that the grant of leave initially was questionable since the supporting affidavit did not comply with all the requirements of O 69A r 4(2). I have now to consider the matter afresh in the light of these requirements and bearing in mind that where leave to serve abroad under this rule is concerned, the court is not trying to fit the facts into one small category or another but must be convinced that the applicant has sufficiently shown that the case is a proper one for service out of jurisdiction under O 69A r 4 itself. The burden of establishing a "proper case" thus lies on the plaintiff.

29 There is judicial guidance on the approach to be taken when considering this test. In *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 393, the Court of Appeal, endorsing the approach of Woo Bih Li JC (as he then was) in the court below, held that the test for the case being a proper one for service out of jurisdiction is the same test prescribed in O 11 r 2 and therefore the applicant must show, first, that there are merits in the case and, second, that Singapore is the *forum conveniens*. Woo JC had said that the guide for a proper case under O 11 r 2(2) was that the forum chosen must be the most appropriate forum in which the case can most suitably be tried in the interests of all parties and for the ends of justice, and that what constituted a proper case under O 11 r 2(2) was persuasive as to what constitutes a proper case under O 69A r 4(2) as the requirement of a proper case is identical in both provisions and both provisions deal with the question of service out of

jurisdiction (see *PT Garuda Indonesia v Birgen Air* [2001] SGHC 262 at [32] and [34]).

30 Mr Toh submitted that this was a proper case for two reasons. The first was that the action had a Singapore connection in that the defendant had assets in Singapore in the form of its interest in the escrow account established here for the purposes of the MOA and also, legal completion of the sale was, under the MOA, bound to take place in Singapore. Secondly, he submitted that Singapore was the jurisdiction which had the closest connection with the issues involved in the action. In this respect, Mr Toh emphasised that the action here was not an action on the merits of the plaintiff's claim against the defendant for breach of contract, but was an action for a Mareva injunction. Accordingly, the most important connecting factor in the case had to be the presence of the bank deposit against which the Mareva injunction could operate. The *Spiliada* test used in such circumstances required the court to identify the appropriate forum for the trial of the case. Mr Toh's point was that Singapore was the only forum in which a Mareva injunction application could have been taken out because of the presence of that bank deposit. At the material time, the defendant had no other assets apart from the deposit and proceeds of sale in Singapore. (In parenthesis I note that this argument was not quite factually correct since, the material time being 8 March 2005 which was before the completion of the sale, the defendant then owned the vessel which could possibly have been the subject of an arrest or attachment though such action was not attractive since it would have interfered with the sale.) Further, the defendant had failed to identify another forum in which the case may be more suitably tried for the interests of the parties and the ends of justice. In this case, the ends of justice would be better served by allowing service of the OS out of the jurisdiction as otherwise, the plaintiff would be left without a realistic remedy against the defendant since the latter had no assets other than the vessel (which was under mortgage) and was practically insolvent.

31 The way that Mr Toh put his argument brings us to the heart of this case. Mr Toh's argument is predicated on the assumption that a plaintiff who is a party to a foreign arbitration agreement and who has to settle substantive disputes with the defendant in such foreign arbitration proceedings is, nevertheless, entitled to ask a Singapore court to grant him Mareva relief (which is an interlocutory form of relief) against the Singapore assets of the defendant notwithstanding that that defendant might be a foreigner with no presence in Singapore apart from the assets which the plaintiff seeks to attach. Therefore a decision that Singapore is the forum with the most substantial connection to the issue in dispute would be accepting that Mr Toh's assumption is correct. But is that assumption correct? To decide that I must turn immediately to a consideration of the next issue.

Does the Singapore High Court have jurisdiction to grant a Mareva injunction in support of foreign arbitration proceedings?

32 In *Siskina v Distos Compania Naviera SA* [1979] AC 210, the English House of Lords decided that a court could not (in the absence of express statutory authority) grant Mareva interlocutory relief unless the defendant was "amenable to the jurisdiction of the court" in respect of a substantive cause of action. This principle was followed in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR 112, a Court of Appeal decision which held that a Singapore court could not assume jurisdiction over a foreign defendant simply because he had assets within the territorial jurisdiction that could be the subject of an injunction order, and that in order to apply for Mareva relief against such a defendant, the plaintiff had to possess an accrued right of action in Singapore based on an existing legal or equitable right against the foreign defendant. Thus, this court cannot grant Mareva relief in respect of the Singapore assets of a foreign defendant if the only purpose of such relief is to support foreign court proceedings. Accepting Mr Toh's argument would mean that the regime that applies to foreign court proceedings does not apply to foreign arbitration proceedings and therefore, the Singapore court can assume jurisdiction over a foreign defendant who is a party to a foreign

arbitration agreement and assist the plaintiff who is or will be prosecuting that foreign arbitration by granting interlocutory injunctive relief against that defendant's assets in Singapore notwithstanding that no substantive relief can be applied for since the parties have already agreed to submit their disputes to a foreign arbitral tribunal. Mr Toh recognised that such a situation could only exist if there was express statutory authority that gave the court a power in relation to foreign arbitration proceedings that it does not have in relation to foreign court proceedings. His submission was that this power has been granted to the court by the IAA and in particular, by s 12(7) of the IAA.

33 At this juncture, it is useful to set out the relevant parts of s 12(1) and s 12(7). Those provisions state:

> **Powers of arbitral tribunal**
>
> **12. —** (1) Without prejudice to the powers set out in any other provision of the Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for —
>
> (*a*) security for costs;
>
> (*b*) discovery of documents and interrogatories;
>
> (*c*) giving of evidence by affidavit;
>
> (*d*) the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;
>
> (*e*) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;
>
> (*f*) the preservation and interim custody of any evidence for the purposes of the proceedings;
>
> (*g*) securing the amount in dispute;
>
> (*h*) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
>
> (*i*) an interim injunction or any other interim measure.
>
> …
>
> (7) The High Court or a Judge thereof shall have, for the purpose of and in relation to an arbitration to which this Part applies, the same power of making orders in respect of any of the matters set out in subsection (1) as it has for the purpose of and in relation to an action or matter in the court.

34 Mr Toh's submissions went as follows. First, s 12(7) of the IAA falls within Part II of that statute. Section 5(1) provides that Part II applies only to an arbitration which is an "international arbitration" within the meaning of that term as defined in s 5(2). Three kinds of "international arbitration" are described in s 5(2) and nowhere in the definitions is it made an element of an "international arbitration" that the seat of the arbitration must be Singapore. In the present case, as the arbitration agreement and the parties to it meet more than one of the criteria set out in s 5(2),

the arbitration they have agreed to falls within the definition of "international arbitration" for the purposes of Part II of the IAA.

35 Mr Toh then pointed out that s 12(7) expressly refers to "an arbitration to which this Part [*ie*, Part II] applies". In other words, s 12(7) expressly covers international arbitrations as defined in s 5(2). He argued that to read s 12(7) narrowly so as to exclude from its purview an arbitration that has its seat outside Singapore would not be justified by the plain language of the sections concerned.

36 Next, it was submitted that the words "as it has for the purpose of and in relation to an action or matter in the court" mean that the court has the same power in respect of an arbitration as it would have if the matter were proceeding in the High Court itself. In addition, s 7(1)(*a*) of the IAA contemplates that a ship may be arrested in Singapore for the purposes of obtaining security for an arbitration taking place elsewhere and, under s 6(3) of the IAA, the court has the power, when staying an action in court because the parties had agreed to arbitrate their disputes (whether such arbitration is to take place in Singapore or abroad), to grant interim or supplementary orders in relation to any property which is the subject of the dispute referred to arbitration.

37 Accordingly, it was submitted, the IAA contemplates that the powers of the Singapore court could be invoked to aid or support arbitration where the seat of the arbitration was located in another country. There could be no reason to read s 12(7) narrowly as that would not have been consistent with what Mr Toh termed "the *schema*" of the IAA. He also relied on the observation of Lord Browne-Wilkinson in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 ("*Channel Tunnel*") at 341 to the effect that given the international character of much contemporary litigation and the need to promote mutual assistance between the courts of the various jurisdictions which such litigation straddles, it would be a serious matter if the English courts were unable to grant interlocutory relief in cases where the substantive trial and the ultimate decision of the case may ultimately take place outside England. He submitted that Singapore courts too should be ready to aid foreign arbitrations in order to encourage mutual assistance between courts. In this connection, if s 12(7) were to be read narrowly, the court would not be able to assist foreign arbitrations by invoking powers similar to those contained in ss 12(1)(*a*) to 12(1)(*i*), for example, order the discovery of documents or the preservation of assets located in Singapore.

38 In reply, Mr Mohan submitted that in construing s 12, the court should apply a purposive approach in the same way as it would to the interpretation of other legislation pursuant to s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed). In this regard, s 4 of the IAA itself provided that whilst reference might be made to documents of the United Nations Commission on International Trade Law ("UNCITRAL") and its working group for the preparation of the Model Law in relation to the interpretation of the Model Law, this permission should not affect the application of s 9A for the purpose of interpreting the IAA.

39 In adopting a purposive approach, the court can and should, said Mr Mohan, take into account the mischief the legislation was designed to remedy. The IAA was passed in 1994 based in large measure on the recommendations of a Law Reform Committee ("the Committee") that had considered the UNCITRAL Model Law, legislation in other jurisdictions and the law then existing in Singapore. The terms of reference of the Committee were to examine existing laws relating to commercial arbitrations in Singapore in the light of international developments in international commercial arbitration and to make recommendations for the reform or revision of such existing laws. In its report, the Committee believed that it had dealt with most of the core issues which could be the basis of a new legislative framework for international arbitration in Singapore. This in fact came to pass: the draft bill that was proposed to Parliament and which was eventually passed was substantially based on the Committee's recommendations. It would therefore be appropriate to look at

the comments made in the Committee's report as an aid to the purposive interpretation of s 12 of the IAA.

40 From the Committee's comments, it is clear that the main purpose of the IAA (and the adoption of the Model Law) was to promote international commercial arbitrations in Singapore. In relation to curial support for international arbitrations, paras 31, 46 and 49 of the report indicate that the objective of s 12 was to increase the powers of arbitral tribunals (and provide corresponding curial support for orders made by the arbital tribunal) in relation to international arbitrations in Singapore. Mr Mohan noted that the draft bill prepared by the Committee did not contain s 12(7) or an equivalent provision. On its second reading, however, the draft bill was amended to include s 12(7) [then numbered s 12(6)] to avoid any doubt as to whether the court had power to issue interlocutory orders in respect of international arbitrations. In Mr Mohan's submission, this provision was not intended to confer on the court any new or wider powers or to extend or to apply to any arbitrations whose seat was outside Singapore.

41 Further support for his submission on the purpose of the IAA was obtained by Mr Mohan from the Parliamentary Report of 25 July 1994. This showed that when the bill was read in Parliament for the second time, the explanation given to the House by the Parliamentary Secretary to the Minister for Law as to the rationale for this legislation, was that the adoption of the Model Law which provided a sound and internationally accepted framework for international commercial arbitrations, would appeal to foreign businessmen and lawyers who may be unfamiliar with local concepts of arbitration and thus it would promote Singapore's role as a growing centre for international legal services and international arbitration.

42 Considering the various arguments, I should first of all say that I do not agree with the submission that s 12(7) was introduced as merely a declaratory provision for the avoidance of doubt as to the court's powers. Arbitration is a method of private dispute resolution which takes place outside the curial regime. Whilst the courts have long exercised a supervisory power over domestic arbitrators and arbitrations, they do not, under common law, have any inherent powers to assist such arbitrators in the gathering of evidence or in any other of the matters set out in s 12(1) of the IAA. The courts had to be given such powers by statute. It is worth remembering that the Arbitration Act (Cap 10, 1985 Rev Ed) that was in force in 1994 (and which had been the law since 1953, having been taken from the equivalent English statute) and which applied to domestic arbitrations contained a specific provision (s 27(1)) that stated that the High Court had, for the purpose of and in relation to a reference, the same power of making orders in respect of any of the matters set out in the Second Schedule as it had for the purpose of and in relation to an action or matter in the court. The matters set out in the Second Schedule were very similar though not identical to the matters now set out in s 12(1) of the IAA. Thus, when Parliament came to consider and pass the IAA, it realised that just as the courts could assist domestic arbitral tribunals they should be able to assist the international arbitral tribunals that were being encouraged by the IAA. Therefore, it was logical to give the High Court the same powers in relation to such arbitrations as it had in relation to domestic arbitrations. Parliament then inserted s 12(7) into the IAA and, significantly, in drafting it, chose a form of wording that was similar to that used in s 27(1) of the Arbitration Act (Cap 10, 1985 Rev Ed). That wording (in the form of s 12(6) of the Arbitration Act 1950 (c 27) (UK)) had long been interpreted in England as not giving the courts power to make orders in respect of foreign arbitrations: see, for example, *Channel Tunnel* ([37] *supra*).

43 The question remains whether in giving the courts power to assist international arbitrations, Parliament intended to permit them to be able to do such things as order security for costs or make orders for discovery of documents or for the preservation and interim custody of evidence not only for an international arbitration that had its seat here (a so-called "Singapore international arbitration")

but also for a foreign international arbitration that was being or would be conducted outside of Singapore. Singapore legislation has, generally, only territorial effect and therefore unless it specifically provides otherwise, it must be read as applying only to persons and bodies that are ordinarily subject to to Singapore law. An arbitral tribunal conducting an arbitration outside Singapore which is subject to a foreign law is not such a body. This being the case, although s 5(2) of the IAA does not make it an element of the definition of "an international arbitration" that the arbitration agreement must provide for arbitration in Singapore, that limitation can be implied because the Singapore legislature has no power to make rules relating to foreign international arbitrations. Secondly, Parliament does not appear to have considered the possible extra-territorial ramifications of the legislation during the debate in Parliament. That debate was concentrated on encouraging Singapore international arbitrations and no mention at all was made of assisting foreign arbitral tribunals. This is not surprising since the conduct of foreign arbitrations is not a matter which would naturally concern it.

44 Looking at s 12 itself too, its application to foreign international arbitrations is not immediately apparent. The first thing that strikes one is that it is entitled "Powers of arbitral tribunal". The first subsection sets out the list of matters on which an arbitral tribunal is empowered to make orders. In sub-s (2), an arbitral tribunal is given the power to administer oaths. Subsection (3) permits the arbitral tribunal to adopt inquisitorial processes. Subsection (4) gives guidance on how the arbitral tribunal shall exercise its power to order a claimant to provide security for costs under sub-s (1)(*a*) and sub-s (5) empowers the arbitral tribunal to award interest and any relief or remedy that the High Court could have awarded in proceedings before it. In sub-s (6), an order or direction made by an arbitral tribunal shall, if leave of the High Court is obtained, be enforceable in the same manner as a court order. It is clear that all these subsections are dealing with the powers of an arbitral tribunal of a Singapore international arbitration. So, Mr Toh would have me hold that the court's power to give orders in relation to international arbitrations is contained in the last subsection of a section that hitherto applied only to Singapore international arbitrations. In my mind, that placement is one of the indicators that Parliament was simply seeking to assist such arbitrations and not trying to expand the law and give the High Court a power that it had never previously had in relation to foreign arbitrations.

45 I have also noted Mr Toh's submission in relation to ss 6(3) and 7(1) of the IAA. Section 6(3) allows the court upon staying proceedings that have been commenced in the court in breach of an arbitration agreement to make such orders as it may think fit in relation to any property which is the subject matter of the dispute. Section 7(1) is similar in that where such a stay is given, the court may, when property has been arrested, order that the property arrested be retained as security for the satisfaction of any award made on the arbitration or that the stay be conditional on the provision of equivalent security for the satisfaction of any such award. In my mind, these sections do not indicate that Parliament intended to give the courts general powers to assist foreign arbitrations. There are two reasons for this. First, both sections contemplate a situation in which the parties initiating the proceedings concerned have validly invoked the court's jurisdiction in respect of a substantive dispute that is amenable to that jurisdiction and therefore, had the application for a stay not been requested, the court could have gone on to deal with the merits of the dispute and enter a final judgment in respect of the same. Such final judgment would have an impact on the property referred to in s 6(3) or the arrested vessel mentioned in s 7(1). Thus, it is not unreasonable to give the court power to make its stay conditional on terms relating to such property or vessel. Secondly, in relation to s 7(1) itself, it bears mentioning that this was the result of a specific recommendation of the Committee. It considered that provision should be made to allow ships arrested under the High Court's admiralty jurisdiction to be used as security for pending foreign arbitrations. In the Committee's view, such arrests of ships for maritime claims were widely accepted by shipowners and allowing them to be made available as security in foreign arbitrations would not add to the shipowners'

burden nor discourage shipowners from using the facilities of the Port of Singapore or render Singapore any less attractive as a venue for international maritime arbitrations. There is nothing in the Committee's report to indicate that in making this recommendation, it was considering giving the court power to issue a Mareva injunction against assets in Singapore to support a foreign arbitration. That is an entirely different form of relief from the well-established rights of arrest of a vessel to support a maritime claim.

46 The other point is whether Art 9 of the Model Law itself should affect the interpretation of s 12(7) since the Model Law (with the exception of Chapter VIII thereof) has the force of law in Singapore. Article 9 states:

> *Arbitration agreement and interim measures by court*
>
> It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

Article 9 is one of the few articles of the Model law that, by Art 1(2), applies to an international arbitration whether or not the place of arbitration is within Singapore (see Art 1 (2)). One possible interpretation of Art 9 is that it confers jurisdiction on the court to give interim measures of protection. Another is that it is merely a permissive article that allows parties to international arbitrations to apply to domestic courts for protection where the relevant domestic law already has provisions making such protection available to arbitrants.

47 The Court of Appeal in Hong Kong considered the effect of Art 9 in *The Lady Muriel* [1995] 2 HKC 320. That case involved a dispute between the owner of the vessel *Lady Muriel* and its charterer over the vessel's seaworthiness. The charterparty provided that all disputes should be referred to arbitration in London. The charterer obtained an order from the High Court of Hong Kong that it be allowed to inspect the vessel which was in Hong Kong waters. At that time, the English arbitrators had been appointed and were seized of the dispute. The owner appealed on the ground, *inter alia*, that the judge had no jurisdiction to make the order. The Court of Appeal decided that under its inherent jurisdiction, a court in Hong Kong did have the power to grant an interim measure of protection under Art 9 of the Model Law but that such relief should not be granted to a party to an international commercial arbitration with its seat outside Hong Kong unless the court was satisfied that the justice of the case necessitated the grant of relief in order to prevent serious and irreparable damage to the applicant. For present purposes, what is significant about the case is that the court did not see its jurisdiction springing from Art 9 itself notwithstanding that that article is part of Hong Kong law.

48 In Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 2nd Ed, 2005), the author comments (at para 2-097) that few details can be found in Art 9 regarding the different types of interim measures that are available, due to their multitude and diversity in different countries, and that this is an issue best dealt with in the separate countries' national civil procedure codes. He also states that a number of adopting jurisdictions have made the useful addition to Art 9 of listing the details and types of court-ordered interim measures allowed under their laws. An example given is of the Model Law as adopted in Zimbabwe. There, a specific sub-article has been added detailing the types of relief that a court may grant if an application for interim protection is made.

49 By analogy, it would be possible to make an argument that s 12(7) is the specific provision in our law that gives effect to the intention behind Art 9 of the Model Law. In my judgment, however,

that is an interpretation that would run far beyond the intention of the legislature as disclosed in the various materials which I have made reference to. It bears reiterating at this juncture that the courts do not have any inherent powers to make orders to aid any proceedings except those that take place before them. Specific jurisdiction has to be given to the courts to enable them to make orders to assist foreign court proceedings. As noted above, the courts even required specific statutory provision to enable them to make orders to assist arbitrations within the jurisdiction. If Parliament had intended to effect such a far-reaching change in the law as would allow our courts to make orders to assist foreign arbitrations notwithstanding that they would still be powerless to aid foreign court proceedings, the legislation would have been clearly worded to effect such a drastic change and it would not be necessary to imply it from the use of the words "arbitrations to which this Part applies" or from the fact that Art 9 of the Model Law itself envisages that courts may make such orders.

50 The interpretation that I have given to s 12(7) means that the court has no power to make orders to assist a foreign international arbitration except in the limited situations covered by ss 6(3) and 7(1) where an action could be started within the jurisdiction because the defendant or the vessel concerned was amenable to the court's jurisdiction. Such an action could not be started simply because the defendant, although a foreigner, had moneys within the jurisdiction. So, these sections do not help Mr Toh. The effect of the interpretation that Mr Toh argues for would be to allow foreign-owned assets in Singapore that have been placed here for reasons that have nothing to do with any dispute between their owners and third parties to be subject to the risk of attachment if their owners have arbitral disputes abroad with such third parties. I would require more proof than Mr Toh has been able to provide before I would feel comfortable in holding that it was Parliament's intention to change the law to allow such attachments.

51 In this connection, I must also refer back to O 69A r 4(1). It would be recalled that the second part of that rule states that leave to serve may be given irrespective of whether the arbitration was held or the award was made in Singapore. Whilst this phraseology does indicate that in certain situations leave may be given for foreign service of an originating process relating to a foreign international arbitration, I do not think that this language indicates that the court has jurisdiction to make an order under s 12(7) of the IAA in respect of a foreign international arbitration. The phrase "whether or not the arbitration was held or the award was made within the jurisdiction" whilst obviously including foreign international arbitrations must refer to completed arbitrations and therefore must be read in the context of O 69A r 3(1)(*e*) which relates to the enforcement of foreign awards and O 69A r 3(1)(*d*) which relates to the enforcement of awards under s 18 or s 19 of the IAA.

52 Mr Toh cited authorities from various jurisdictions in an effort to persuade me that if a Singapore court granted an interim remedy (such as a Mareva injunction) to aid an arbitration that is to be commenced elsewhere, it would be acting in a manner consistent with the position taken in other Commonwealth jurisdictions. None of these authorities is binding on me nor indicative of the legal position in Singapore as it currently stands. I would, however, like to comment on some of them as not all the decisions Mr Toh cited go as far as he would like this court to.

53 In *Channel Tunnel*, the House of Lords held that the English court had power to grant an interim injunction under s 37(1) of the Supreme Court Act 1981 (c 54) (UK) ("the English s 37(1)") in support of a cause of action which the parties had agreed to be the subject of a foreign arbitration, notwithstanding that proceedings in England had been stayed so that the agreed method of adjudication could take place, since the cause of action remained potentially justiciable before the English court despite the stay. However, as a matter of discretion, the injunction sought in that case was not granted because it was the same relief which would be claimed from the panel and the arbitrators and therefore if the court were to grant the injunction, it would largely pre-empt the

decision of the panel and the arbitrators. Mr Toh placed great emphasis on this case because some of their Lordships expressed views in favour of granting interlocutory relief to assist foreign proceedings because of the international character of much contemporary litigation and the doctrine of comity. I do not think, however, that this decision is of assistance here.

54 First, the statutory provision that the House of Lords relied on to found jurisdiction (*ie*, the English s 37(1)) states that:

> The High Court may by order (*whether interlocutory or final*) grant an injunction … in all cases in which it appears to the Court to be just and convenient to do so. [emphasis added]

Academic commentators have argued that it was the introduction of this section in 1981 that permitted the courts to grant free-standing interlocutory relief in proceedings claiming only that type of relief. There is no provision in Singapore legislation that is equivalent to the English s 37(1) to permit such freestanding relief for foreign arbitrations or court proceedings. Secondly, even Lord Mustill who asserted such right in *Channel Tunnel* accepted that the court should never exercise its power under the English s 37(1) by way of interim relief unless the underlying right (*ie*, the cause of action of the plaintiff concerned) was subject to the jurisdiction of the English court. In *Channel Tunnel*, although the parties had agreed that disputes between them were to be submitted to arbitration in Brussels, the English court retained a residual jurisdiction over the dispute because the English court had territorial jurisdiction over the respondents and the means to enforce its orders against them. *Channel Tunnel* therefore does not stand for the doctrine that an English court can grant an interlocutory injunction in respect of disputes which have been referred to foreign arbitration notwithstanding that the party against whom the injunction is sought is a party over whom the court has no territorial jurisdiction.

55 The next jurisdiction referred to was Hong Kong and, here again, *The Lady Muriel* ([47] *supra*) was referred to. In that case, the court was influenced by the reasoning of the *Channel Tunnel* and, as I have noted, considered that it had an inherent jurisdiction to grant interim protection in aid of a foreign arbitration. It is significant, however, that the order asked for in *The Lady Muriel* was an order to inspect the vessel itself while it was in Hong Kong waters. The applicant there did not ask for an injunction restraining the removal of property. In holding that it had the inherent jurisdiction to grant the order asked for, Godfrey JA considered (at 324) that it was closely analogous to an order in the Anton Piller form, a form of order which was of course made under the inherent jurisdiction of the court. The court did not, opine that it had inherent jurisdiction to grant the type of order asked for here.

56 Thirdly, Mr Toh cited the Canadian position and referred to *Trade Fortune Inc v Amalgamated Mill Supplies Ltd* [1994] 113 DLR (4th) 116. That was a case where the Supreme Court of British Colombia upheld a garnishee order given in respect of the defendant's bank account so as to ensure that if an arbitration award was given in the plaintiff's favour, there would be assets against which such an award could be satisfied. Bouck J held that the concept of "interim protection" under s 9 of the International Commercial Arbitration Act, SBC 1986, c 14 (Can) (a section that is *in pari materia* with Art 9 of the Model Law) included the right of an arbitrating party to obtain a garnishee order before judgment in order to secure funds for payment of the eventual arbitration award. His judgment was, therefore, focused on understanding what was meant by "an interim measure of protection" and did not discuss the issue of jurisdiction to invoke garnishee proceedings to secure foreign arbitrations. This is not surprising as the objections to the application were focused on the argument that since the contract provided for arbitration in London, the plaintiffs had no right to bring a concurrent action in British Colombia and garnish the disputed debt. The issue that is before me was, therefore, not considered by the court.

57 Fourthly, moving on to New Zealand, *Leucadia National Corporation v Wilson Neill Ltd* [1994] 7 PRNZ 701 ("*Leucadia*") was cited because the New Zealand Court of Appeal granted an interim injunction restraining corporate restructuring which would have led to a disposal of assets while arbitration was ongoing in California and in so doing, McKay J adopted the decision of *Channel Tunnel*. However, as McGechan J in the subsequent New Zealand case of *Sundance Spas NZ Ltd v Sundance Spas Inc* [2001] 1 NZLR 111 ("*Sundance Spas*") noted, *Leucadia* was a case where the New Zealand court very clearly had jurisdiction over the foreign party as it had come to the court as plaintiff, invoking the court's jurisdiction in the first place and even seeking jurisdiction on the guarantee in question. No question of valid service upon a foreign party arose. As far as *Channel Tunnel* was concerned, also, jurisdiction based on service was not in question and it was accepted that the respondent was subject to the *in personam* jurisdiction of the English courts. In *Sundance Spas*, McGechan J himself refused to issue a Mareva injunction against a foreign defendant where the plaintiff and the said foreign defendant had agreed to arbitrate their disputes in California so that the proceeding was *forum non conveniens* in New Zealand. The New Zealand position therefore is no different from ours.

58 Finally, a Bahamian case, *Walsh v Deloitte & Touche Inc* [2001] UK PC 58; 2001 WL 1560797 was referred to. There, the Privy Council upheld a worldwide Mareva injunction given by the courts of the Bahamas and in doing so observed that although the plaintiff had, after obtaining Mareva relief, wanted to stay the Bahamian action and proceed with an action in Ontario (2001 WL 1560797 at [22]):

> Their Lordships do not consider that any objection in principle can be made to the exercise of the jurisdiction in this way. It is commonplace that the most convenient forum may not be the place where it is desirable to obtain *Mareva* relief, either because the defendant resides there and is amenable to the enforcement jurisdiction of the local court, or because the assets are there and notice can be served upon persons (such as banks) who have them under control. As long ago as 1983, in the early days of the English *Mareva* jurisdiction, Vinelott J granted an order in aid of proceedings in Ireland: see House of Spring Gardens Ltd v Wait [1984] FSR 277 and more recently in Crédit Suisse Fides Trust SA v Cuoghi [1998] QB 818 the Court of Appeal made a similar order in aid of proceedings in Switzerland. Their Lordships consider that such international judicial co-operation should be encouraged.

With due respect, the actual decision upholding the injunction is unimpeachable as the defendants in that case were resident in the Bahamas and thus were served with the writ within the jurisdiction, and also the writ contained a substantive cause of action against the defendants which could have been prosecuted to completion in that jurisdiction. It was no doubt the intention of the plaintiff to prosecute the Canadian proceedings in preference to the Bahamian proceedings but that in fact had not been done by the time the appeal came on for hearing before the Privy Council. There was therefore no doubt as to the jurisdiction of the Bahamian court to grant the injunction issued and their Lordships' comments on the encouragement of international judicial co-operation were strictly *obiter*.

59 Thus, having considered the various authorities cited by the plaintiff, it does not appear to me that there is a marked trend among foreign jurisdictions to permit their courts to issue injunctive orders to assist proceedings taking place elsewhere. The courts that are most in favour of extending such help are the English courts but, even there, it has been noted that the ability to assist is limited by the necessity of the dispute or disputants having such connection with England that the English courts would be able to exercise a residual jurisdiction over it. I do not consider therefore that the conclusion that I have come to on the inability of the Singapore courts to help in such situations would point to the Singapore courts being insular in their approach as the plaintiff has suggested.

Conclusion

60 As the Singapore court does not have the jurisdiction to issue a Mareva injunction to assist a party to a foreign international arbitration, the Singapore court cannot be the *forum conveniens* for the consideration of such an issue. Accordingly, this would not be a proper case for granting service of the originating summons outside the jurisdiction under O 69A r 4. I should not have made the order that I did on 8 March 2005. Accordingly, I set aside that order and the service of the OS on the defendant out of jurisdiction. I further declare that this court does not have jurisdiction over the defendant in these proceedings in respect of the subject matter of the same and dismiss the action. The Mareva injunction and other orders of court made on 8 March 2005 against the defendant are also set aside. The plaintiff shall pay the defendant its costs of this application and of the action. In view of the conclusions I have reached, I do not find it necessary to deal with the other issues raised by the defendant.