The “Engedi”
[2010] SGHC 95

Case Number : Admiralty in Rem No 233 of 2008 (Registrar's Appeal No 296 of 2009)

Decision Date : 25 March 2010

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Timothy Tan and Gho Sze Kee (AsiaLegal LLC) for the appellant; Leona Wong (Allen & Gledhill LLP) for the respondent.

Parties : The "Engedi"

Arbitration

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 166 of 2009 was allowed by the Court of Appeal on 6 July 2010.]

25 March 2010

Judith Prakash J:

Introduction

1 This was an appeal by Capital Gate Holdings Pte Ltd (“the intervener”) against the assistant registrar’s decision in Summons No 2101 of 2009, granting the application of T.S. Lines Ltd (“the plaintiff”) to stay Admiralty in Rem No 233 of 2008 (“the Action”) in favour of arbitration in London pursuant to s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (“the IAA”). EP Carriers Pte Ltd (“the defendant”) was not a party to the appeal.

Background

2 On 22 May 2007, the plaintiff as disponent owner entered into a charterparty with the defendant as charterer for the use and hire of the vessel *TS BANGKOK*. The charterparty provided that disputes arising out of the agreement would be referred to arbitration in London:

> CLAUSE 51 – ARBITRATION: BIMCO STANDARD LAW + ARBITRATION CLAUSE 1998
>
> This contract shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this clause.
>
> The arbitration shall be conducted in accordance with the London Maritime Arbitration Association (LMAA) terms current at the time when the arbitration proceedings are commenced.
>
> …

3 A dispute arose between the plaintiff and defendant after a grounding incident on 10 November 2008 that resulted in damage to the *TS BANGKOK* relating to claims against the plaintiff by the

registered owner of *TS BANGKOK* in respect of which the plaintiff sought an indemnity from the defendant. The plaintiff claimed, in addition, a sum of US$42,753.94 as outstanding charges and expenses under the hire statement. On 2 December 2009, the plaintiff commenced proceedings *in rem* in respect of those claims against the "EAGLE PRESTIGE" which was a vessel then belonging to the defendant ("the Vessel"). However, in late December 2008, after the issue of the plaintiff's writ but before it was served, the defendant transferred ownership of the Vessel to the intervener for US$1.00 and "other good and valuable consideration". The Vessel was renamed the "ENGEDI". Just before the transfer the vessel was mortgaged to the United Overseas Bank Ltd ("UOB") and more than US$8m was outstanding under the mortgage. I am given to understand that upon the transfer this mortgage was discharged and subsequently the intervener granted a new mortgage in favour of UOB.

4 On 17 February 2009, the defendant was placed in provisional liquidation. Notwithstanding the defendant's insolvency, the plaintiff obtained leave of court on 27 February 2009 to continue with the *in rem* proceedings and to arrest the Vessel. Its *ex parte* application for leave was expressly made without prejudice to the plaintiff's rights to arbitrate. The plaintiff arrested the Vessel on 27 February 2009. The defendant entered appearance on 9 March 2009. Later that same month, on 31 March 2009, the plaintiff filed an application seeking an order that the Vessel be appraised and sold *pendente lite* ("the Sale Application").

5 The intervener obtained leave to intervene on 14 April 2009. On the basis that it was the owner of the Vessel at the time she was arrested, the intervener applied, *inter alia*, to set aside the arrest (Summons No 1777 of 2009) ("the Setting Aside Application"). While that application succeeded before the assistant registrar, it was overturned on appeal. It is now pending the decision of the Court of Appeal. Meanwhile, on 5 June 2009, the Sale Application was heard and allowed. The Vessel has since been sold for S$2,525,000.00.

6 Presently, there are also two other ongoing matters related to the action.

(a) On 3 March 2009, following the arrest of the Vessel, UOB lodged a caveat against the release of the Vessel and payment out. UOB claims as mortgagee of the Vessel under the new mortgage granted by the intervener. Its claim exceeds the sale proceeds available. It brought an action on 3 September 2009 seeking judgment against the defendant and the Vessel and a declaration that the Vessel was encumbered by the mortgage securing moneys due to it (Admiralty in Rem No 302 of 2009). The defendant did not enter appearance. The plaintiff intervened in those proceedings on 4 November 2009 and is defending UOB's claim. The plaintiff disputes the assertion that UOB's claim as mortgagee ranks above its claim in terms of priority.

(b) The plaintiff and the registered owners of the *TS BANGKOK* are engaged in arbitration proceedings relating to the grounding incident in which that vessel sustained damage.

Proceedings before the assistant registrar

7 On 5 May 2009, the plaintiff went before the assistant registrar in Summons No 2101 of 2009 seeking an order, *inter alia*, that all further proceedings in the Action were to be stayed under s 6 of the IAA save for the Sale Application and an application that the intervener provide security for costs of the Setting Aside Application.

8 In response, it was argued that the stay should not be granted because the plaintiff had not sought leave of court before commencing arbitration proceedings against the insolvent defendant even though s 299(2) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") required that leave be sought. It was also argued that the arbitration agreement was incapable of being

performed because its performance would affect the intervener's rights and as such a stay could not be granted under s 6 of the IAA. Further, the intervener argued that s 6 of the IAA referred to the court's power to stay the proceedings "so far as the proceedings relate to the matter" and those words could not refer to the *in rem* action which the interveners were defending. In other words, the court was not obliged to grant a mandatory stay of the *in rem* action even if it was obliged to grant a mandatory stay of the *in personam* aspects of the claim.

9 The assistant registrar did not accept that s 299 of the Companies Act required parties to seek leave before commencing arbitration against a company after the commencement of a creditor's voluntary winding up. He held that that section only applied to actions and proceedings in a court. The assistant registrar also rejected the submission that there were two separate claims, one *in rem* and the other *in personam*. He held that the "matter" to be stayed would include the *in rem* aspect of the claim as that was not divisible from the *in personam* aspect. On the basis that the plaintiff had not taken a fresh step in the proceedings in the present Action, and on the basis that the arbitration agreement was neither inoperative nor incapable of being performed, the assistant registrar allowed the application and granted the stay of this action.

The intervener's appeal

10 On appeal before me against the assistant registrar's decision to grant the stay, the intervener reiterated its arguments based on s 299 of the Companies Act and the effect s 6 of the IAA had on the *in rem* and *in personam* aspects of the plaintiff's claim. It also submitted that the appeal ought to be allowed because the parties to the arbitration agreement were different from the parties to the Action and the interveners could not be compelled to arbitrate even though the plaintiff had, belatedly, indicated willingness to let the intervener participate in the London arbitration.

The plaintiff's/respondent's case

11 The plaintiff's case was that the appeal ought to be dismissed because s 6 of the IAA provided for a mandatory stay except where the arbitration agreement was null and void, inoperative or incapable of being performed. Since the assistant registrar had not found any of those exceptions to exist on the facts, the court could not refuse to grant the stay. It submitted that it did not require leave of court under s 299 of the Companies Act, and in any event, the necessary leave of court had already been obtained when the court allowed it to proceed with the Action even after the defendant went into provisional liquidation. Furthermore, as the plaintiff's claim was against the defendant and not the interveners, the intervener had no *locus standi* to defend the claim at arbitration. In any case, the parties to the action were not different from the parties to the arbitration as the intervener's defences were limited to those available to the defendant.

My decision

12 After hearing the parties' arguments, I decided that the appeal ought to be allowed in so far as the proceedings had been stayed. The stay order granted below was set aside. I now state my reasons.

Section 6 of the IAA

13 Section 6 of the IAA provides:

> 6. —(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other

party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

(2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

(3) Where a court makes an order under subsection (2), the court may, for the purpose of preserving the rights of parties, make such interim or supplementary orders as it may think fit in relation to any property which is the subject of the dispute to which the order under that subsection relates.

(4) Where no party to the proceedings has taken any further step in the proceedings for a period of not less than 2 years after an order staying the proceedings has been made, the court may, on its own motion, make an order discontinuing the proceedings without prejudice to the right of any of the parties to apply for the discontinued proceedings to be reinstated.

(5) For the purposes of this section and sections 7 and 11A —

(a) a reference to a party shall include a reference to any person claiming through or under such party;

(b) "court" means the High Court, District Court, Magistrate's Court or any other court in which proceedings are instituted.

14 Subsection (1) sets out the threshold requirements that need to be met before the court is bound to grant a stay of legal proceedings in favour of international arbitration. First, an international arbitration agreement must exist. Second, a party to that agreement must institute court proceedings against another party to the same agreement. Third, the proceedings must be in respect of a matter which is the subject of the agreement. Fourth, the party seeking a stay must have entered appearance in the court proceedings. Fifth, the party seeking a stay must do so before delivering any pleading or taking any other step in the proceedings.

15 Once these requirements are met, the court will be obliged to grant a stay of court proceedings unless it can be shown that the arbitration agreement is (a) null and void, (b) inoperative or (c) incapable of being performed. While the stay is mandatory, the court may grant the stay on such terms or conditions as it thinks fit. Importantly, however, the court's power to stay the proceedings only extends so far as the proceedings relate to matters which are the subject of the arbitration agreement between parties. It has no power under s 6 of the IAA to stay proceedings that fall outside that ambit.

Whether actions in rem fall within the ambit of s 6 of the IAA

16 Under this head, the intervener submitted that the *in rem* claim was not a matter that was the subject of the arbitration agreement between the plaintiff and the defendant and as such the court was not obliged to grant a stay of the *in rem* claim pursuant to s 6 of the IAA even if the *in personam* claim against the defendant ought to be arbitrated in London. In response, the plaintiff submitted that it was artificial to maintain a distinction between the *in rem* claim and the *in*

personam claim when doing so would lead to a multiplicity of proceedings in regard to what was essentially the same claim. Counsel for the plaintiff argued that as the threshold requirements under s 6 of the IAA had been proved and none of the exceptions applied, a stay of further proceedings in the Action ought to be granted.

17 In coming to my decision on this issue, I was conscious of the traditional distinction maintained between an admiralty action *in rem* and an action *in personam*. The action *in rem* operates only against the *res*, but once the defendant enters an appearance, he submits to the jurisdiction of the court and from then onwards the action continues as an action *in rem* against the *res* and *in personam* against the shipowner defendant (see *The "Damavand"* [1993] 2 SLR(R) 136 at [18]; *The Fierbinti* [1993] SGHC 319; *The August 8* [1983] 2 AC 450). While an action *in personam* and an action *in rem* may involve the same cause of action, it must be stressed that the defendants of the respective actions are regarded as different parties. In *Kuo Fen Ching and Another v Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 2 SLR(R) 793 at [23], the Court of Appeal specifically rejected the proposition of the House of Lord in *Republic of India and another v India Steamship Co Ltd (No 2)* [1998] 1 AC 878 that in substance the owner of the *res*, and not the *res* itself, was the defendant to an action *in rem*.

18 Having determined this, I turned to consider whether the threshold requirements in s 6(1) of the IAA had been fulfilled in respect of the action *in rem*. In this evaluation, I took cognisance of s 7 of the IAA which provides:

> **Court's powers on stay of proceedings**
>
> 7. —(1) Where a court stays proceedings under section 6, the court may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest, order —
>
> (a) that the property arrested be retained as security for the satisfaction of any award made on the arbitration; or
>
> (b) that the stay be conditional on the provision of equivalent security for the satisfaction of any such award.

19 Pursuant to the above provision, upon the grant of a stay of proceedings, the court has power to order that property previously arrested be retained as security for the satisfaction of an arbitral award. In other words, the commencement of an action *in rem* in Singapore to arrest a ship would not necessarily constitute a waiver or repudiation of the right to arbitrate. Nonetheless, I was of the view that I was not obliged to grant a stay of the action *in rem* pursuant to s 6 of the IAA because there was no arbitration agreement between the plaintiff and the notional defendant of the *in rem* action which was the *res*. Of course, in most instances, this distinction has no practical effect. Upon the stay of the *in personam* aspect of the proceedings in court, parties practically always decide to proceed to arbitration without pressing the *in rem* claim concurrently in court so as to avoid the spectre of a multiplicity of costs and decisions. This is a sensible decision since where the owner of the *res* and the defendant to the *in personam* claim are one and the same, the theory of *res judicata* and issue estoppel will also operate to prevent parties from mounting different arguments in relation to the *in rem* claim and the *in personam* claim. In such cases too, the court if requested to, would almost inevitably grant a stay of the *in rem* action under its discretionary powers so as to prevent a multiplicity of proceedings.

20 In the present instance, however, I regarded the distinction to be of the utmost importance

because the owner of the *res* was no longer the defendant, but the intervener. In other words, the *in rem* claim was not identical to the *in personam* claim. If the plaintiff and defendant were to proceed to arbitration, and the *in rem* action in Singapore were to be stayed, the intervener would not be able to protect its interest. The intervener would not have any rights in the arbitral process except those voluntarily conferred on it by the plaintiff and the defendant, *ie*, the parties to the arbitration agreement. This was important particularly since the defendant was insolvent and was unlikely to defend the arbitration in London. At the time parties appeared before me, the defendant had not participated in the arbitration proceedings. Also, although the plaintiff indicated at a late stage of the proceedings (only on the adjourned hearing) that it was willing to let the intervener participate in the arbitration, the process of arbitration is a consensual one and a party may not be forced to arbitrate against its will. The intervener had indicated that it wanted to proceed with litigation in Singapore, not arbitration in London. In any event, the arbitral tribunal would have no jurisdiction to hear the *in rem* claim. In my view, therefore, the *in rem* claim could not be a matter that was a subject of the arbitration agreement between the plaintiff and the defendant falling within the ambit of s 6 of the IAA.

21 On another note, as summarised in *Singapore Court Practice 2009*, (Jeffrey Pinsler gen ed) (Singapore: LexisNexis, 2009) at para 70/16/2, the purpose of the procedure for intervention is to enable a party, who is not already a party to the *in rem* action but with an interest either in the property under arrest or the sale proceedings in court representing the property arrested or whose interest may be affected by any order made in the *in rem* action, to intervene in the action for the purpose of protecting his own interest. An intervener does not prosecute his own claim in an action in which he intervenes but protects his interest in the property by defending the action *in rem*. The intervener is permitted to set up such defences as the owner of the ship could have set up had it defended the action (*The "Sin Chuen No 112" (Union Bank of Taiwan and others, interveners)* [2007] SGHC 72 at [6]). The purpose of the procedure for intervention would not be achieved if the plaintiff here was able to exclude the intervener from participating in the defence by removing the dispute to arbitration despite arresting property owned by the intervener or in which it had an interest capable of permitting an intervention.

22 The overarching purpose of the IAA is to promote Singapore's role as a growing centre for international legal services and international arbitration (see *Singapore Parliamentary Debates, Official Report* (31 October 1994) vol 63 at col 627 (Associate Professor Ho Peng Kee, Parliamentary Secretary to the Minister for Law)). I did not think that the drafters of s 6 of the IAA intended for that provision to be used as a means of depriving third parties of their right to protect their interests. The plaintiff was always free to commence arbitration proceedings in London against the defendant. However, having acted to arrest the Vessel which was owned by the intervener, it could not, in my view, then turn around and tell the intervener (or, for that matter, any other party who intervened) that it had no right to participate in the defence because the plaintiff and defendant had an arbitration agreement which provided for arbitration in London. In some sense, if there is a risk of a multiplicity of proceedings, that has been created by the plaintiff's choice to commence an action *in rem* against a *res* which may be subject to the rights of others. In other words, the plaintiff cannot eat its cake and have it too.

23 As an aside, I would note that before me, the option of the intervener funding the defendant's defence in the arbitration in London was explored. I was given to understand, however, that that was not the practical solution it would otherwise have been because the liquidators of the defendant had indicated to the intervener that they would require to be secured with costs up front should this route be taken and the intervener had difficulty in meeting that condition.

24 The intervener drew my attention to the case of *The "Soeraya Emas"* [1991] 2 SLR(R) 479 to

support the proposition that the *in rem* claim could be heard separately from the *in personam* claim. In that case, the defendant shipowners had consented to a judgment being entered against them. After the consent order was obtained, an interested party obtained leave to intervene. The intervener then applied to set aside the consent order and, in the alternative, it asked for a declaration that the order was not binding on it. Karthigesu J held that the intervener could not be bound by the consent order as at the time the order was made, it had not entered appearance and did not give its consent to the judgment.

25 In response, the plaintiff cited the case of *Pemunya Kapal MV Brihope & Others v Emmanuel E Okwuosa & Others* [1997] 1 MLJ 453. Shankar JCA, delivering the judgment of the court, rejected the decision in *The "Soeraya Emas"*. He dismissed the intervener's appeal to set aside a judgment passed against the defendant on the ground that the intervener could have intervened before the application for summary judgment was heard but elected not to do so. He held that if the intervener had come in good time, he could have defended the action in place of the shipowner should the shipowner himself fail to appear. However, as the intervener was attempting to set aside a final judgment to which he was not a party, he could not take defences which the owner had not taken because he was no longer defending the claim in place of the shipowner. He could only assert his interest and the judgment *in rem* had to stand.

26 I did not have to reconcile the above decisions as neither dealt directly with the issue before me. Instead, both cases dealt with the situation where the intervener was attempting to set aside a judgment *after* it had been entered. The issue in the case before me was entirely different. The intervener was asserting his right to defend the *in rem* action despite an agreement between the plaintiff and defendant to arbitrate an *in personam* claim based on the same facts. At the time of the hearing, no judgment had been passed on either claim, whether in the Singapore courts or by the arbitral tribunal in London. There are, however, some passages from the judgment of Karthigesu J, himself a very experienced admiralty lawyer, which I found fortified the view I had taken. At [29] and [31] of his judgment, Karthigesu J stated:

> 29 The principle has been clearly established but it will be noted that Lord Brandon in *The August 8* ([19] *supra*) was concerned to emphasise by stating it more than once in the passage I have quoted above that the action continues against him (the shipowner who has entered an appearance) not only as an action *in rem* but also as an action *in personam*. I apprehend that what Lord Brandon was careful to preserve was that an admiralty action *in rem* did not cease to be an admiralty action *in rem* simply because the defendant shipowner had entered an appearance. The following words of his judgment bear repeating to which I give emphasis: "*the action continued not only in rem against the property proceeded against, namely, the ship, but also in personam against the shipowners themselves*".
>
> …
>
> 31 In my view the learned assistant registrar failed to appreciate this important principle and the refinement given to it by Lord Brandon in *The August 8*. Had he appreciated it he would not have fallen into the error of applying the principles applicable solely to the setting aside of consent judgments in non-admiralty civil actions and confusing the standing of Inter Maritime as intervener in these proceedings. ***In so far as Inter Maritime were concerned, these proceedings were and still are an admiralty action in rem*** but in so far as the defendants are concerned, by reason of their appearance and albeit by their consent a judgment has been entered against them for which they, Perkapalan Emas, are also personally liable. (original emphasis in italics, emphasis added in bold italics)

The foregoing passage serves to underscore my view that s 6 of the IAA can have no application to the present situation because vis-à-vis the intervener the Action was an admiralty action *in rem*. The intervener, as a party to the action *in rem* only, was not a party to any arbitration agreement with the plaintiff and could not therefore be forced to litigate in another forum.

Whether the plaintiff had to seek leave under s 299 of the Companies Act and the effect that has on its application to stay under s 6 of the IAA

27 Having decided not to grant the stay on the basis of the reasons given in the above section, there was no need for me to go further to decide the issues relating to s 299 of the Companies Act. Perhaps, however, I should state my views.

28 The main argument mounted against the grant of the stay under this head was that the arbitration agreement was null and void because the plaintiff did not seek the court's leave pursuant to s 299 of the Companies Act to commence foreign arbitration proceedings against the defendant.

29 The simple answer to that argument was that even if the arbitration proceedings commenced in London were null and void because leave was required but not obtained from the Singapore courts, the arbitration agreement itself was still valid. Parties could nonetheless still seek a stay of court proceedings under s 6 of the IAA unless there was some reason why they could not thereafter apply to the court for leave to arbitrate and start arbitration proceedings afresh. After all, the threshold requirements in s 6(1) of the IAA require the existence of an arbitration agreement and not the existence of the arbitration per se. Nothing in the provision prevents parties from seeking a stay as a preliminary measure prior to the commencement of the arbitration itself.

30 In any case, I would, most likely, have held that no leave was required under s 299 of the Companies Act to commence foreign arbitrations.

31 Section 299(2) provides:

> After the commencement of the winding up no *action or proceeding* shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes. [emphasis added]

VK Rajah JC noted in *Korea Asset Management Corp v Daewoo Singapore Pte Ltd (in liquidation)* [2004] 1 SLR(R) 671 at [43]:

> The words "action or proceeding" in s 299(2) and its sister provisions are not defined in the Act. There is however a body of English and Australian case law that appears to suggest the words ought to be broadly interpreted to embrace all manner of civil proceedings, including the prosecution of a counterclaim or the execution of a judgment. This is consistent … with the *raison d'etre* of the provisions.

Earlier in his grounds of decision (at [36]), he explained that the reason for s 299 and other similar provisions:

> …is to prevent the company from being further burdened by expenses incurred in defending unnecessary litigation. The main focus of a company and its liquidators once winding up has commenced should be to prevent the fragmentation of its assets and to ensure that the interests of its creditors are protected to the fullest extent. In other words, returns to legitimate creditors should be maximised; the process of collecting assets and returning them to legitimate creditors

should be attended to with all practicable speed. Unnecessary costs should not be incurred; liquidators should act in the collective interests of all legitimate stakeholders and not with a view to enhancing their own self-interests or fees.

32 Even though the words "action or proceeding" ought to be read widely, they are not without limits. For example, it is well established that foreign proceedings are not affected by s 299. The reason is that the courts of one country have no jurisdiction over the affairs of another country. Sir George Jessel M.R. held in *Re International Pulp and Paper Co* (1876) 3 Ch D 594 at 599:

> …if any creditor in Turkey, Russia, or any other purely foreign country, were to bring an action, although it would be desirable in the interests of the person concerned in the litigation to make that creditor come in with the rest, yet the Court cannot restrain the action for want of power - not from want of will or want of provisions in the Act of Parliament, but simply that the Act of Parliament cannot give this Court jurisdiction over Turkey or over Russia…. Therefore, as to a purely foreign country, it is of no use asking for an order, because the order cannot be enforced.

This was echoed in *Re Oriental Inland Steam Co* (1874) LR 9 Ch App 557 at 560:

> Parliament never legislates respecting strictly foreign Courts. Nor is it usually considered to be legislating respecting Colonial Courts or Indian Courts, unless they are expressly mentioned.

The same sentiment was expressed again in *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196 where it was held that provisions of the UK Companies Act 1929 had no application to actions or proceedings in foreign courts.

33 The issue before me was not whether s 299 applied to foreign court proceedings, but whether it applied to international arbitrations.

34 In interpreting the substantive equivalent of s 299 in the Companies Act 1948, Lord Simon opined in *Herbert Berry Associates Ltd v Inland Revenue Commissioners* [1977] 1 WLR 1437 at 1446:

> The Companies Act is a statute dealing with technical matters, and one would expect the words therein to be used in their primary sense as terms of legal art. The primary sense of "action" as a term of legal art is the invocation of the jurisdiction of a court by writ; "proceeding" the invocation of the jurisdiction of a court by process other than writ.

On the basis of this reasoning, it would appear that one does not need to obtain leave before proceeding in arbitration against a company in a creditors' voluntary winding up. However, it ought to be noted that Lord Simon's observations were only *obiter dicta* and there is a line of authority to the contrary.

35 In *Re Taylor (A Bankrupt)* [2007] 2 WLR 148 at [56], in the context of the UK Insolvency Act 1986, Kershaw QC, sitting in the High Court, opined:

> If Parliament says that proceedings may only be started if leave is obtained from a particular court the jurisdiction of any other court *or of an arbitrator* is thereby controlled. The leave is not merely permission to the would-be litigant; it is a condition precedent to the jurisdiction of the court in which proceedings are then to be started or of an arbitrator.
>
> [emphasis added]

This position was echoed in Australia, where the words "action or other legal proceeding" and "action or other civil proceeding" have been interpreted to include arbitration (see *Re Vassal Pty Ltd (receivers and managers appointed) (in liquidation)* (1984) 2 ACLC 53, *Mowbray College v Exhib Design & Construction Pty Ltd (in liquidation)* (1987) 5 ACLC 478 ("*Mowbray College*"), *Doran Constructions Pty Limited (in liquidation) v Beresfield Aluminuim Pty Limited* [2002] NSWCA 95). In *Mowbray College*, Nathan J opined at 479:

> The essence of the words "civil proceedings" given the legal matrix in which they occur encompasses all processes of disputation involving a company, in an adversarial role with other legal persons, whereby its financial affairs may be affected.

36 In my view, the word "proceeding" should be interpreted to encompass the process of arbitration, which in this day and age is a well-established means of dispute resolution. To exclude arbitrations from the ambit of s 299 would be to create a gaping exception to the process of preserving the assets of an insolvent company from dissipation. Yet, just as foreign court proceedings are excluded from the ambit of s 299, I would take the tentative view that foreign arbitrations are also probably not caught by the provision. This is because the local court has no power to control or direct the conduct of foreign arbitrations. It may have the power to refuse to uphold a judgment awarded by an arbitrator or to restrain a party from participating in the arbitration via an anti-suit injunction but that is an entirely separate matter from the power to control the arbitration itself. As such, if I had had to decide the matter, I would likely have held that the plaintiff was not required to seek leave, and arguments along this line could not assist the defendant and intervener. Nonetheless, as already mentioned above, my decision did not turn on this point and I do not express a concluded view on this issue.