IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 34

Originating Summons No 807 of 2010
(Summons No 6343 of 2013) and
Originating Summons No 913 of 2010
(Summons No 6344 of 2013)

Between

(1) Astro Nusantara International BV
(2) Astro Nusantara Holdings BV
(3) Astro Multimedia Corporation NV
(4) Astro Multimedia NV
(5) Astro Overseas Limited (formerly known as AAAN (Bermuda) Limited)
(6) Astro All Asia Networks PLC
(7) Measat Broadcast Network Systems Sdn Bhd
(8) All Asia Multimedia Networks FZ-LLC

… *Plaintiffs*

And

(1) PT Ayunda Prima Mitra
(2) PT First Media TBK (formerly known as PT Broadband Multimedia TBK)
(3) PT Direct Vision

… *Defendants*

JUDGMENT

[Injunctions] — [Undertaking as to damages] — [Inquiry as to damages]

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v
PT Ayunda Prima Mitra and others and another matter

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High Court — Originating Summons No 807 of 2010 (Summons No 6343 of 2013) and Originating Summons No 913 of 2010 (Summons No 6344 of 2013)
Belinda Ang Saw Ean J
20 January 2014; 2 September 2014; 23 January 2015; 31 August 2015; 4 September 2015.

11 March 2016 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 The present applications, which are filed by the second defendant, PT First Media TBK (formerly known as PT Broadband Multimedia TBK) ("FM"), seek an inquiry as to damages in relation to the worldwide mareva injunctions that the plaintiffs obtained *ex parte* on 8 July 2011 ("the Mareva Orders"). The debate here concerns FM's entitlement to enforce the undertaking as to damages, which was given to the court by the plaintiffs upon their applications to obtain the Mareva Orders.

2 By their terms, the Mareva Orders would automatically lapse unless extension of the duration of the restraint was sought from the High Court. As

this was not done, the Mareva Orders lapsed on 31 October 2013, which was the day the Court of Appeal delivered its judgment in Civil Appeal No 150 of 2012 and Civil Appeal No 151 of 2012 ("the FM Appeals"). However, the undertaking as to damages given to the court is unaffected by these events. The issue of whether the court should in its discretion enforce the undertaking therefore remains to be determined. In this regard, the plaintiffs oppose FM's applications for an inquiry as to damages.

Background facts

3 I begin with the history which forms the background to the present applications.

The underlying dispute

4 The plaintiffs are Astro Nusantara International BV ("P1"), Astro Nusantara Holdings BV ("P2"), Astro Multimedia Corporation NV ("P3"), Astro Multimedia NV ("P4"), Astro Overseas Limited (formerly known as AAAN (Bermuda) Limited) ("P5"), Astro All Asia Networks PLC ("P6"), Measat Broadcast Network Systems Sdn Bhd ("P7") and All Asia Multimedia Networks FZ-LLC ("P8"). P1 to P5 and P7 to P8 are directly or indirectly owned by P6. The first and third defendants are PT Ayunda Prima Mitra ("D1") and PT Direct Vision ("D3").

5 The underlying dispute arose out of a failed joint venture between two groups of companies, the Astro group and the Lippo group, to provide direct-to-home multi-channel digital satellite pay television, radio and interactive multimedia services in Indonesia. The plaintiffs (collectively referred to as "Astro") are part of the Astro group, while FM, D1 and D3 are part of the Lippo group.

6 Central to the underlying dispute was a Subscription and Shareholders Agreement ("the SSA"). The SSA was subject to a number of conditions precedent, one of which was the conclusion of service agreements between an Astro entity and D3 ("the Service Agreements"). Notably, P6 to P8 were not parties to the SSA, but had, in the interim, provided supporting services and funding to D3. The Service Agreements were never concluded, and what followed was a dispute over the provision of the supporting services and funding.

The arbitration proceedings

7 The dispute was sent to arbitration pursuant to an arbitration clause in the SSA ("the Arbitration"). The Arbitration commenced on 6 October 2008 under the auspices of the Singapore International Arbitration Centre ("SIAC"). SIAC Rules 2007 applied to the Arbitration. An important preliminary issue before the arbitral tribunal ("the Tribunal") was the joinder of P6 to P8 as parties to the Arbitration. Factually, P6 to P8 were not parties to the SSA. The defendants objected to the joinder arguing that the Tribunal did not have jurisdiction to join P6 to P8 to the Arbitration. In an award issued on 7 May 2009 ("the 7 May 2009 Award"), the Tribunal found otherwise and exercised its powers to join P6 to P8 to the Arbitration. There was no application to the High Court under Article 16 of the UNCITRAL Model Law on International Commercial Arbitration on the 7 May 2009 Award. The Tribunal subsequently made four other awards in favour of Astro between 3 October 2009 and 3 August 2010 (together with the 7 May 2009 Award, collectively referred to as "the Five Awards").

Enforcement proceedings and the Mareva Orders

8 At no time did FM and the other defendants apply to set aside the Five Awards in Singapore. Prior to 2011, Astro had obtained leave to enforce the Five Awards in England, Malaysia and Hong Kong (see [90] below for details).

9 Astro subsequently applied *ex parte* for leave to enforce the Five Awards in the same manner as a judgment in Singapore. Accordingly, Originating Summons No 807 of 2010 ("OS 807/2010") and Originating Summons No 913 of 2010 ("OS 913/2010") were filed. Leave was granted on 5 August 2010 in OS 807/2010 (in relation to four awards) and on 3 September 2010 in OS 913/2010 (in relation to the remaining award) ("the Enforcement Orders"). As there was no challenge to the Enforcement Orders within the time stipulated therein, Astro entered judgments in the terms of the Five Awards against all three defendants on 24 March 2011 ("the 2011 Judgments").

10 On 8 July 2011, Astro obtained the Mareva Orders to aid the execution of the 2011 Judgments. The relevant applications were Summons No 2969 of 2011 in OS 913/2010 and Summons No 2970 of 2011 in OS 807/2010.

FM's challenges in Singapore

11 It is worth bearing in mind that D1 and D3 did not oppose the 2011 Judgments and the Mareva Orders. The sole challenge against the Enforcement Orders and the 2011 Judgments came from FM. The latter also sought to set aside or vary the Mareva Orders.

FM's applications to set aside or vary the Mareva Orders

12 On 19 July 2011, FM filed Summons No 3169 of 2011 ("SUM 3169/2011") in OS 913/2010 and Summons No 3170 of 2011 in OS 807/2010 ("SUM 3170/2011") to set aside or vary the Mareva Orders. I dismissed FM's applications on 16 August 2011. In the end, there was no appeal against the Mareva Orders. Procedurally, as required under Order 56 rule 3(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), FM would have to but did not apply for leave to appeal against my decision within seven days. On 22 September 2011, FM filed Summons No 4223 of 2011 in OS 807/2010 and Summons No 4230 of 2011 in OS 913/2010 for*, inter alia*, an extension of time to seek leave to appeal against my decision in SUM 3169/2011 and SUM 3170/2011. FM's applications were dismissed on 4 October 2011.

FM's applications to set aside the Enforcement Orders and the 2011 Judgments

13 On 3 May 2011, FM filed Summons No 1911 of 2011 in OS 807/2010 and Summons No 1912 of 2011 in OS 913/2010 to set aside the 2011 Judgments and for leave to apply to set aside the Enforcement Orders for improper service. On 22 August 2011, an Assistant Registrar set aside the 2011 Judgments and granted FM leave to apply to set aside the Enforcement Orders. Dissatisfied, Astro filed Registrar's Appeal No 278 of 2011 ("RA 278/2011") in OS 807/2010 and Registrar's Appeal No 279 of 2011 ("RA 279/2011") in OS 913/2010 to reverse the decision of the Assistant Registrar. On 12 September 2011, in seeking to resist the enforcement of the Five Awards on the ground that the Tribunal lacked jurisdiction to join P6 to P8 to the Arbitration, FM filed Summons No 4064 of 2011 ("SUM 4064/2011") in OS 913/2010 and Summons No 4065 of 2011 ("SUM 4065/2011") in OS 807/2010.

14 RA 278/2011, RA 279/2011, SUM 4064/2011 and SUM 4065/2011 were then listed for hearing before me. On 22 October 2012, I dismissed Astro's appeals in RA 278/2011 and RA 279/2011. I also dismissed FM's applications in SUM 4064/2011 and SUM 4065/2011. The grounds of my decision are reported in *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others* [2013] 1 SLR 636 ("the High Court decision").

15 FM filed the FM Appeals against my decision in SUM 4064/2011 and SUM 4065/2011. On 31 October 2013, the Court of Appeal allowed the FM Appeals in part, holding, essentially, that FM's obligations to P1 to P5 under the Five Awards were enforceable, whereas its obligations to P6 to P8 were not: *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 ("the Court of Appeal decision").

The present applications for an inquiry as to damages

16 On 9 December 2013, FM filed Summons No 6343 of 2013 in OS 807/2010 and Summons No 6344 of 2013 in OS 913/2010 to enforce Astro's undertaking as to damages. FM filed three affidavits in support of the applications. In return, Astro filed two affidavits to oppose the applications. Other affidavits filed in the earlier mareva proceedings were referred to.

17 Counsel for FM, Mr Edmund Kronenburg ("Mr Kronenburg"), made a straightforward case for an inquiry as to damages. Mr Kronenburg submits that FM's success in the FM Appeals meant that the Mareva Orders were "wrongly asked for", and that there is nothing to prevent this court from enforcing the undertaking as to damages since no "special circumstances"

exist in this case. In contending that the Mareva Orders were "wrongly asked for", Mr Kronenburg relies on the fact that the Court of Appeal disallowed P6 to P8 to enforce the Five Awards against FM and that FM was clearly the successful party as demonstrated by the fact that the Court of Appeal allowed enforcement of a much reduced sum of approximately US$700,000. The argument – that the plaintiffs must be regarded as having failed on the merits – develops with a comparison of the disparity between this reduced sum and the ceiling sum of approximately US$130m against FM in the Mareva Orders. As such, the Mareva Orders are to be regarded as having been "wrongly asked for". Mr Kronenburg made two other points. First, he accepts that FM has to show that there is an arguable case of loss. Here, he submits that so far as the evidence is concerned, FM has met the low threshold required to show that it has an arguable case for compensatory loss. Second, Mr Kronenburg submits that FM needs only to satisfy one ground, *viz*, that the Mareva Orders were "wrongly asked for", to carry the day. Put simply, FM was not basing the present applications on want of real risk of dissipation of assets, and therefore Mr Kronenburg made no submissions in this regard. At this juncture, I digress to note that various expressions (*viz*, "wrongly made", "wrongly granted" and "wrongly asked for") have been used in the cases to refer to what really is the same thing. However, I prefer the expression "wrongly asked for" used in *Canadian Pacific (Bermuda) Ltd v Nederkoorn Pte Ltd and another* [1999] 1 SLR(R) 628 ("*Canadian Pacific*") and I adopt the same in this judgment.

18 Counsel for Astro, Ms Lim Wei Lee ("Ms Lim") opposed the enforcement of the undertaking as to damages. She argues that the court should not be persuaded to order an inquiry as to damages consequent upon the outcome of the FM Appeals which ruled, amongst other things, that the Tribunal had no jurisdiction to join P6 to P8 as parties to the Arbitration. She

points to the importance of the distinction between the ordinary case of an interlocutory injunction, on the one hand, and mareva injunctions, on the other. Arising from this distinction, and given the purpose of the mareva jurisdiction, different principles may apply. Ms Lim's argument is that the Court of Appeal's determination of FM's substantive rights on the merits in the FM Appeals does not *ipso facto* entitle FM to compensation for loss arising from the operation of the Mareva Orders. FM's success on the merits does not without more affect the question whether or not the Mareva Orders were "wrongly asked for". Given that the purpose and true ground of the mareva injunction is to address the real risk of dissipation of assets (per LP Thean JA in *Heng Holdings SEA (Pte) Ltd v Tomongo Shipping Co Ltd* [1997] 2 SLR (R) 669 ("*Heng Holdings*") at [31]), the court, in determining whether or not to enforce the undertaking as to damages, still has to consider FM's conduct in the context of whether or not there was a real risk of dissipation of assets ("the risk of dissipation factor"). Ms Lim additionally relied on other factors like the absence of credible evidence of loss. She also highlighted other special features of the case on which the plaintiffs rely. Suffice to say that FM did not challenge the enforcement of the Five Awards in England, Malaysia and Hong Kong, and that Astro, acting in good faith, was, objectively speaking, not expecting FM to adopt an unknown and unexpected legal position in Singapore some two years after the Five Awards were issued and not set aside in Singapore.

19 As stated, Astro provided an undertaking as to damages to obtain the Mareva Orders. This undertaking was in the usual terms prescribed by the Supreme Court's Practice Directions. This prescribed form is substantially similar to that provided for by the Practice Directions of the UK Ministry of

Justice. It is therefore hardly surprising to find a preponderance of English authorities cited by the parties in the present applications.

20 Astro's undertaking as to damages read as follows:

> If the Court later finds that this order has caused loss to the Defendants, and decides that the Defendants should be compensated for that loss, the Plaintiffs shall comply with any order the Court may make.

21 The terms of the undertaking are expressed in general language. The court is given the discretion to make an order as to damages payable by the applicant of the injunction if it is of the opinion that the party restrained has sustained any loss by reason of the order. Peter Gibson LJ in *Cheltenham & Gloucester Building Society (formerly Portsmouth Building Society) v Ricketts* [1993] 1 WLR 1545 ("*Cheltenham & Gloucester*") said (at 1554-1555):

> The form of the undertaking indicates that the court has a discretion whether or not to enforce it at all and that discretion is not limited in any way.

Needless to say, the court's wide discretion must be exercised judicially.

22 Given the broad submissions canvassed by the parties that touched on how the court should approach the exercise of its discretion, and in light of the many authorities cited by the parties, a summary of the court's discretion and the breadth of this discretion in deciding whether to order an inquiry as to damages is a helpful starting point. This discretion, which is to be exercised judicially, is guided, in its exercise, by established equitable principles. This resonates with the general terms of the usual form of the undertaking.

The court's discretion

23 The often-cited proposition is that the court retains a discretion whether or not to enforce the undertaking as to damages. Yong Pung How CJ in *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 (*"Tribune Investment*"), in holding (at [54]) that the court has a discretion in deciding whether or not to enforce a plaintiff's undertaking as to damages, went on to state that the discretion is to be exercised by reference to all the circumstances of the case. However, this still leaves the question of what *principles* the exercise of this discretion should be based on.

24 English cases make clear that the discretion is to be exercised in accordance with equitable principles, taking into account the circumstances in which the injunction was obtained, the success or otherwise of the plaintiff on the merits at trial, the subsequent conduct of the defendant and all the other circumstances of the case (per Lloyd LJ in *Financiera Avenida S.A. v Basil Mutei Shiblaq,* The Times, 14 January 1991 ("*Financiera Avenida"*)). Potter LJ in *Yukong Line Ltd. v Rendsburg Investments Corporation and others* [2001] 2 Lloyd's Rep 113 ("*Yukong Line*") held (at [34]) that "[t]he order for an inquiry as to damages is discretionary, such discretion being exercised in accordance with *equitable principles*" [emphasis added]. This proposition stems from the fact that the entitlement of the party restrained to obtain, in appropriate circumstances, an award of damages pursuant to an undertaking as to damages is an equitable right (I.C.F. Spry, *The Principles of Equitable Remedies: Specific Performances, Injunctions, Rectifications and Equitable Damages* (Sweet & Maxwell, 9th Ed, 2014) ("*Spry*") at p 682). See also *Cheltenham & Gloucester* at 1551 per Neill LJ.

25 Lord Diplock in *F. Hoffmann-La Roche & Co. A.G. and others v Secretary of State for Trade and Industry* [1975] AC 295 ("*Hoffmann-La Roche"*) (at 361) spoke in terms of the court retaining a discretion not to enforce the undertaking as to damages in circumstances where it is inequitable to do so. The example given by Lord Diplock (at 361) is about the situation where the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so. It is worth noting here Neill LJ's observation in *Cheltenham & Gloucester* (at 1551) that the question whether or not the undertaking as to damages should be enforced is a separate question from the question whether an injunction order should be discharged or continued. Hence, the court exercises its discretion upon the basis of the facts known at the time it is to be exercised (*ie*, in deciding on the present applications). This leads me to a general principle articulated in *Abbey Forwarding Limited (in liquidation) v Her Majesty's Revenue & Customs* [2015] EWHC 225 (Ch) (at [87]):

> 4) Whether an order was "wrongly" made is judged retrospectively, with the benefit of hindsight. It is not a question whether the order was wrongly made in the light of the circumstances known to the court at that time.

26 Whilst the granting of equitable relief is discretionary, it is not arbitrary. The court will consider equitable doctrines in deciding whether to exercise its discretion to grant equitable relief. Spry has commented that the discretion is "exercised according to established equitable principles" (*Spry* at p 684). As Spry notes, there is no closed list as to what equitable principles may be taken into account and considered (*Spry* at p 685):

> Accordingly, exceptional circumstances must be found in order to render the award of damages pursuant to an undertaking unjust, and amongst matters that are here taken into account, apart from delay on the part of the defendant giving rise to laches, are the fact that damage or detriment that has been suffered by the defendant appears to be

> insignificant and any conduct on the part of the defendant, in relation to the injunction or the undertaking, that renders the award of damages inequitable. ***No inflexible rule can here be laid down****, and it is necessary to determine the justice of each case according to the particular circumstances in the light of established equitable considerations such as laches, acquiescence and unfairness.*
>
> [emphasis added in italics and bold italics]

27 It is also clear from the English cases cited by the parties that it would be inequitable to enforce the undertaking if there exist "special circumstances" (see *Graham v Campbell* (1877) 7 Ch D 490 ("*Graham v Campbell*") at 494). It is convenient, at this juncture, to amplify on what constitutes "special circumstances".

28 Nelson J in *Panos Eliades and others v Lennox Lewis* [2005] EWHC 2966 (QB) explains this phrase (at [42]):

> The phrase "special circumstances" used in *Graham v Campball* and repeated in *Bowling & Co (Insurance) Limited v Corsi Partners Limited* [1994] 2 Lloyd's R 567 means in my judgment no more than the test set out by Lord Diplock in *Hoffmann La-Roche*, namely whether the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to enforce that undertaking. I must therefore in considering the relevant circumstances assess the material now in front of me in order to be able to exercise my discretion.

29 In the same vein, Potter LJ in *Yukong Line* said (at [34]):

> Those special circumstances include the conduct of the injunctee at the time the injunction was obtained or later …

30 Mason J in *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249 ("*Air Express*") after noting that the defendant's loss has to be due to the grant of injunction went on to observe (at [10] of his judgment):

> The Supreme Court of Canada has held that the court will be entitled to refuse a reference as to damages where there are special circumstances, i.e. when the plaintiff is a public body and acts in the public interest to hold the situation until the rights are determined or when the defendant, having succeeded on technical grounds, has been guilty of misconduct …

31 Another example of "special circumstances" is delay. A delay in seeking an inquiry as to damages may result in the court declining to enforce the undertaking as to damages. It is a question of discretion in each case, on the particular facts of the case, whether any delay is such as to make the delay a material factor. It is for the court, in the exercise of its discretion, to decide on the facts whether the application to enforce the undertaking as to damages was taken out with reasonable despatch. I pause to mention that FM's applications were filed slightly over a month after the Court of Appeal decision. This period, in itself, is not a significant factor in the exercise of the court's discretion.

32 The "special circumstances" in the various cases referred to above are examples of the circumstances in which the court might exercise its discretion against ordering an inquiry. What is clear is that these examples are fact-specific, that there is always a discretion to refuse to enforce the undertaking, and that each case must be decided on its particular facts (per Einstein J in *Rail Corporation New South Wales v Leduva Pty Limited* [2007] NSWSC 571 at [11]).

33 The Singapore Court of Appeal has had occasion in *Tribune Investment* and in *Canadian Pacific* to adopt and follow the principles that I have set out.

Approach to exercise of the court's discretion

34 The undertaking as to damages is given to the court by the applicant for an injunction order and the undertaking is intended to provide a means of compensating the party restrained if it subsequently appears that the injunction order was "wrongly asked for". An application for an inquiry as to damages pursuant to an undertaking as to damages is a two-stage process. The court must first decide whether the undertaking should be enforced. The second stage is the court's consideration of the measure and quantum of damages. See *Financiera Avenida* and *Tribune Investment*.

35 FM's present applications concern the first stage – whether the undertaking should be enforced – and this first stage is to be considered in the context of the following matters: (a) whether the injunction order was "wrongly asked for"; and (b) whether "special circumstances" exist in the case. This follows from the Court of Appeal's holding in *Canadian Pacific* (at [50]) that:

> … [B]efore a defendant can recover damages based on the plaintiff's undertaking in damages, he must show: firstly, that the injunction was "wrongly asked for" and secondly, that it [*sic*] there was no "special circumstance".

36 Simply put, once it is established that the injunction order was "wrongly asked for" in light of the circumstances known to the court at the time of application for an inquiry as to damages, the court will ordinarily order an inquiry as to damages unless there exist "special circumstances". In addition, the applicant for an inquiry as to damages must also, at the time of the application, show an arguable case that it has suffered loss by reason of the injunction order. This is clear from the decision in *Tribune Investment* where the Court of Appeal considered the question whether the plaintiff had succeeded on the merits of his claim, but also, *inter alia*, whether or not the

defendant had adduced at least some evidence to show an arguable case that it had in fact sustained a loss falling with the terms of the plaintiff's undertaking.

37 The expression "injunction order" used in this judgment is intended to encompass both interlocutory injunctions and mareva injunctions. As will be explained later, different principles may apply depending on the nature of the injunction order. I will now briefly deal with the aforementioned three considerations in turn.

38 In the ordinary case of an interlocutory injunction, the question whether the interlocutory or interim injunction was rightly granted or not will generally be answered by whether a final injunction to the similar effect is granted at trial (*ie*, the substantive rights issue). I propose to leave aside any question of discharge or discontinuation of the interlocutory injunction before trial for, *inter alia*, misleading the court on the application or non-disclosure of material matters (*ie*, the procedural rights issue). This procedural rights issue does not arise in this case, and I say no more about it.

39 Zuckerman in *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, 3rd Ed, 2013) ("*Zuckerman*") at para 10.124 points out that in the case of an interlocutory injunction, the compensation is for harm to substantive rights caused as a result of restraint which turned out to have been unjustified. Normally, the dispute is over the subject matter of an interlocutory injunction and the trial determines the substantive right of the parties. If the party who is subject to the interlocutory injunction prevails at trial, he will have established his right to do what he was restrained from doing, namely, an activity which he ought to have been at liberty to pursue. Therefore, in considering whether to enforce the undertaking, the two factors to look at are: (a) whether the plaintiff has succeeded on the merits of his claim; and (b)

whether "special circumstances" exist to dissuade the court from ordering an inquiry as to damages.

40 However, in the case of a mareva injunction, the considerations are different. In such cases, the plaintiff notably makes no claim whatsoever to the assets covered by the mareva injunction. The nature and purpose of the mareva jurisdiction is based on different established principles. Zuckerman in A.A.S. Zuckerman, "The Undertaking in Damages – Substantive and Procedural Dimensions" (1994) 53 Cambridge Law Journal 546 ("the *Zuckerman* article") at 561 observed:

> The Mareva order gives rise to a somewhat different situation because it *does not anticipate the relief sought in the main action*. A Mareva order restrains a defendant from disposing of assets to which the plaintiff makes no claim. Since the relief obtained by a Mareva injunction does not correspond to the relief sought in the action, *the determination of the latter does not have a direct bearing on the position of the parties concerning the former*.
>
> [emphasis added]

41 Plainly, the compensation to the defendant is for loss arising from interfering with his substantive rights (*ie,* the freezing of his assets) and preventing him from using the same. More to the point, the fact that the defendant had prevailed on the substantive merits at the trial would not automatically lead to the conclusion that the mareva injunction was "wrongly asked for". The risk of dissipation factor in the context of the defendant's conduct at the time of the grant of the injunction and its continuance is a relevant factor in deciding whether to enforce the undertaking as to damages (*Zuckerman* at para 10.130 citing *Financial Services Authority v Sinoloa Gold plc and others (Barclays Bank plc intervening)* [2013] 2 AC 28 ("*FSA v Sinoloa*") at [18]).

42 Put simply, the court retains a discretion not to enforce the undertaking as to damages if the defendant's conduct makes it inequitable to do so. Thus, in cases involving mareva injunctions, the factors to consider in determining whether to enforce the undertaking are not only whether the plaintiff has succeeded on the substantive merits of his claim but also the risk of dissipation factor. As Steven Gee in *Commercial Injunctions* (Sweet & Maxwell, 5th Ed, 2004) ("*Gee*") (at para 11.021) puts it, if the plaintiff has succeeded in his claim and there was a real risk of dissipation of assets, then ordinarily the court will not enforce the undertaking.

43 The real risk of dissipation of assets was discussed by LP Thean JA in *Heng Holdings* at [31] as a factor in considering whether to enforce the undertaking as to damages. LP Thean JA drew attention to the nature and purpose of the mareva jurisdiction, which is to prevent the dissipation of assets to which the plaintiff makes no claim.

44 Recently, Lord Mance in *FSA v Sinoloa* said (at [18]):

> Under the standard forms of injunction currently in use for both ordinary interim injunctions and freezing injunctions, the enforcement of the undertaking is expressed to be in the court's discretion. There is little authority in this area. Neill LJ undertook a useful review of the general principles in *Cheltenham and Gloucester Building Society (formerly Portsmouth Building Society) v Ricketts* [1993] 1 WLR 1545, 1551-1552. The position regarding undertakings in favour of defendants has been more recently reviewed in *Commercial Injunctions*, by Steven Gee QC, 5th ed (2004 and First Supplement), paras 11.017-11.032, while the authorities on undertakings in favour of third parties are covered in paras 11.008-11.012. An inquiry into damages will ordinarily be ordered where a freezing injunction is shown to have been wrongly granted, even though the claimant was not at fault: para 11.023. But, depending on the circumstances, it may be appropriate for the court to await the final outcome of the trial before deciding whether to enforce: see the *Cheltenham and Gloucester* case, p 1552b. However, Professor Adrian Zuckerman has pointed out ("The Undertaking in Damages—

> Substantive and Procedural Dimensions" [1994] CLJ 546, 562) that *it does not follow from a defendant's success on liability that he did not in fact remove (or seek to remove) assets from the reach of the claimant, justifying an interim freezing order. The court retains a discretion not to enforce the undertaking if the defendant's conduct makes it inequitable to enforce*: *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 361e, per Lord Diplock. It seems likely that compensation is assessed on a similar basis to that upon which damages are awarded for breach of contract: the *Cheltenham and Gloucester* case [1993] 1 WLR 1545, 1552c-d, per Neill LJ.
>
> [emphasis added]

45 As I have alluded to earlier, Mr Kronenburg's arguments focus on the merits factor to adopt the position that FM's success at the FM Appeals meant that the Mareva Orders were "wrongly asked for". He decidedly left unchallenged in Ms Lim's favour the risk of dissipation factor.

46 At this juncture, I pause to note, parenthetically, that FM was only partially successful at the FM appeals. I do not have to deal with the parties' debate on what partial success actually means here as it will be evident later in the judgment that it is the risk of dissipation factor that comes to the forefront in this case.

47 I now come to the third consideration mentioned at [36] above. An inquiry as to damages should not be ordered unless there is at least some evidence to support an arguable case that the Mareva Orders have caused FM some loss for which compensation ought to be paid. Therefore, FM has to adduce credible evidence that it has suffered loss as a result of the making of the Mareva Orders. As Potter LJ in *Yukong Line* said (at [35]):

> So far as evidence of loss is concerned, upon an application for an inquiry, the applicant must ***adduce some credible evidence that he has suffered loss as the result of the making of the order***. The Court will not order an inquiry if it appears to be pointless to do so because the intended claim

> for damage is plainly unsustainable. That may be because it is clear that the order is no more than the factual context for loss which would have been suffered regardless of the granting of the order, or it may equally be clear that the damage is too remote. *However, at the stage of exercising its discretion whether to order an inquiry, the court does not ordinarily hear protracted argument on whether the suggested loss will be recoverable.* If the defendant *shows that he has suffered loss which was prima facie or arguably caused by the order*, then the evidential burden of any contention that the relevant loss would have been suffered regardless of the making of the order in practice passes to the defendant and an inquiry will be ordered…
>
> [emphasis added in italics and bold italics]

48 I will discuss in due course Mr Kronenburg's contention that the affidavit evidence satisfied the applicable threshold requirement in *Thai-Lao Lignite (Thailand) Co. Ltd and another v Government of The Lao People's Democratic Republic* [2013] 2 All ER (Comm) 883 ("*Thai-Lao*"). Suffice to say for now that in the context of the Mareva Orders, the purpose of the undertaking as to damages is to compensate for loss arising from the interference with FM's right to deal with or dispose of the assets frozen.

The issues

49 With the various principles outlined above in mind, and adopting the *Canadian Pacific* approach as posited by the Court of Appeal (see [35] above), I now turn to consider the two issues that arise in the present case:

(a) Whether the Mareva Orders were "wrongly asked for" ("Issue 1").

(b) Whether there were any "special circumstances" ("Issue 2").

50 As I have already mentioned, in the context of the Mareva Orders, the substantive rights issue is not about any claim to the frozen assets but rather to

the interference with FM's rights to the use and disposal of the frozen assets. The risk of dissipation factor is relevant to the present analysis. The risk of dissipation factor on the information now known forms part of the matrix for ascertaining whether there are "special circumstances" which would render it inequitable to enforce the undertaking as to damages. It is to these matters that I now turn.

Issue 1: Whether the Mareva Orders were "wrongly asked for"

51 Mr Kronenburg submits that Astro's failure at the FM Appeals meant that the Mareva Orders were, in effect, "wrongly asked for". As a starting point, Mr Kronenburg's submission is valid and appropriate for an interlocutory injunction wherein it has been said that the fact that the plaintiff fails at the final hearing is a sufficient demonstration that the material interlocutory injunction has been "wrongly asked for" and an inquiry as to damages should be ordered (see *Spry* at p 681). However, in the context of mareva injunctions, the plaintiff's success or failure at trial on the substantive merits of the case (in this case at the FM Appeals) does not *ipso facto* mean that an inquiry as to damages should be ordered. Issue 1 must be looked at in the round by considering the harm to FM from being prevented from dealing with its assets that were frozen, and the need to show an arguable case of loss.

Arguable case of loss in the context of Mareva Orders

52 Adopting a principled approach in determining whether a mareva injunction was "wrongly asked for", the court cannot rely solely on the defendant's success on the merits at trial. Rather, the court must confront the facts directly and ask whether the defendant has suffered loss as a result of the restraint over his assets frozen by the mareva injunction. The *Zuckerman* article explains (at 563):

> We have so far mentioned two principles affecting the exercise of the discretion in connection with Mareva injunctions. First, that *one of the purposes of the damages under the undertaking is to compensate the defendant for interference with his substantive rights (the freezing of his assets), if the latter wins on the merits.*
>
> [emphasis added]

53 In my view, this proposition must be correct. Looking at the wording of Astro's undertaking (which, it bears repeating, was given in the form prescribed by the Supreme Court's Practice Directions) one can find the strongest support for the proposition that Issue 1 is fundamentally directed at FM's loss by reason of the Mareva Orders:

> If the Court later finds that this order has *caused loss* to the Defendants, and decides that the Defendants should be *compensated for that loss*, the Plaintiffs shall comply with any order the Court may make.
>
> [emphasis added]

54 An inquiry as to damages should not be ordered unless there is at least some evidence to support an arguable case that the Mareva Orders have caused FM some loss for which compensation ought to be paid. I refer to [47] above where I have set out Potter LJ's speech in *Yukong Line* (at [35]) requiring the applicant to adduce some credible evidence that he has suffered loss as the result of the making of the injunction order.

55 FM relies on *Thai-Lao* (at [41]) to contend that Potter LJ's credible evidence guideline as described in his speech (at [35]) is "not a high threshold". With respect, Mr Kronenburg is wrong to equate "not a high threshold" with a "low threshold". Popplewell J in *Thai-Lao* went on to explain the requisite threshold, which is that the evidence of loss put forward for the application for an inquiry as to damages must have the degree of credibility and cogency to show that the inquiry is not an exercise in futility.

This description of the requisite evidence is no different from what is called for in our local cases. In *Tribune Investment*, the Court of Appeal held (at [55]) that a defendant applying for an inquiry as to damages must have "adduced at least *some evidence to show an arguable case* that they had in fact sustained a loss falling within the terms of the [plaintiffs'] undertaking" [emphasis added].

56 Ms Lim, in the course of her submissions, had highlighted that, in some cases, the courts have analysed the absence of credible evidence of loss arising from the injunctive relief as a "special circumstance" warranting a refusal to enforce the undertaking, and I was referred to some cases and a passage from *Gee* at para 11.021 in this regard.[1] I note, however, that most these authorities do not appear to actually have considered the absence of credible evidence of loss as an example of "special circumstances". The one authority that did do so, to some degree, was the case of *Lunn Poly Limited and another v Liverpool & Lancashire Properties Limited and another* [2006] EWCA Civ 430, where it was held (at [44]) that "[a]nother type of special case would be where the court is quite satisfied that no damages have been suffered". In this connection, I should also point out that Spry, in the passage from *Spry* at p 685, quoted at [26] above, has likewise listed "the fact that damage or detriment that has been suffered by the defendant appears to be insignificant" as an example of what he refers to as "exceptional circumstances". However, in my view, the question of whether damage has been suffered is more appropriately and logically dealt with under the issue of whether the applicant for an inquiry as to damages has shown an arguable case of loss. The applicant for an inquiry as to damages must adduce some credible evidence of loss. What must be emphasised, however, is that even if this

[1] Plaintiffs' Supplemental Skeletal Submissions dated 28 August 2015, para 34.

question were considered under the issue of whether there were "special circumstances", the burden of proving that there was some credible evidence of loss remains squarely on the applicant for an inquiry as to damages. This much is evident from the passage in *Canadian Pacific* at [50], which I have quoted at [35] above.

57 At this juncture, it would also be apposite for me to deal with two paragraphs from the Court of Appeal's judgment in *Tribune Investment* which may, at first blush, appear to be inconsistent with what has been discussed thus far. These paragraphs are at [54]–[55] of the Court of Appeal's judgment:

> 54 The court, in deciding whether or not to enforce a plaintiff's undertaking, has a discretion. The discretion is to be exercised by reference to all the circumstances of the case. In determining whether or not an order for inquiry should be granted, the court should first deal with the question whether or not the injunction was rightly granted. *The two factors which the court should consider when deciding whether to enforce the undertaking in damages by ordering an inquiry are firstly, whether or not the plaintiff has succeeded on the merits of his claim, and secondly, whether there was a real risk of dissipation of assets.* Where the discretion is being exercised after judgment, then the fact that the plaintiff has lost his claim militates strongly in favour of an order for inquiry: see Steven Gee, *Mareva Injunctions and Anton Piller Relief* (4th Ed, 1998) at pp 157–164.
>
> 55 The only pertinent questions to be asked in this case are thus *whether or not there was a real risk of dissipation of assets by the respondents at the relevant time, and whether or not the respondents had adduced at least some evidence to show an arguable case that they had in fact sustained a loss falling within the terms of the appellants' undertaking.* With respect to the question of risk of dissipation, we found that no such risk had been shown by the appellants to exist… As for the question whether or not the respondents had made out an arguable case of loss consequent on the Mareva, we found that they had. As a result of the injunction, the respondents lost the use of PD 177 for nearly three weeks. *Surely this must have caused some loss to them*, especially when it was undisputed at the trial that the respondents required the dock urgently for the purposes of SS' ship repair business in China.

> In the premises, we took the view that the order for inquiry should not be disturbed.
>
> [emphasis added]

58 I leave aside, for now, the risk of dissipation factor which is better dealt with under Issue 2, *viz*. whether there were any "special circumstances". What should be pointed out, however, is that the Court of Appeal had (at [54]) held that "whether or not the plaintiff has succeeded on the merits of his claim" is a factor to be considered when the court decides whether to enforce the plaintiff's undertaking in damages. As the plaintiff in that case had failed at trial, this point was summarily dealt with by the Court of Appeal. At first impression, the Court of Appeal's consideration of the plaintiff's success or failure at trial appears to be at odds with what I have discussed thus far. However, it is critical to observe that the Court of Appeal then went on (at [55]) to consider, in effect, *if the defendant had adduced some credible evidence of loss*. On the facts, this was found to have been done. In my judgment, this approach is entirely consistent with what has been discussed thus far. The plaintiff's success or failure at trial may be a preliminary question, but it is by no means conclusive. On the contrary, the fundamental concern is still with the defendant's loss arising from the mareva injunction preventing the use or disposal of the frozen assets.

59 Although FM argues in the present applications that it has suffered loss, it has *never* been FM's claim (directly or indirectly) that throughout the lifespan of the Mareva Orders, it was prevented from freely dealing with its assets outside Singapore.[2] Indeed, and in any event, such a claim would have been foreclosed to FM. The position FM took throughout was that the Mareva Orders were ineffective in Indonesia where all its assets are located. During

[2] Plaintiffs' Skeletal Submissions dated 2 September 2014, para 25.

the lifespan of the Mareva Orders, FM was able to carry on business as usual; and had found it unnecessary to give, and indeed did not give, any notice to Astro that it required the terms of the Mareva Orders to be varied to enable it to continue with its business or investments.

60 Moreover, FM took the position that the value of its shares in its subsidiary, PT Link Net, was much more than the sum of approximately US$130m that was injuncted against FM. FM's own evidence was that it had engaged two sets of external valuers, *viz.* Deloitte & Touche Financial Advisory Services Pte Ltd and Stone Forest Corporate Advisory Pte Ltd ("the external valuers") to provide independent estimates of the value of its shareholding in PT Link Net. This valuation was done twice, first in November 2011 and then again in June 2012. The reports of the external valuers ("the external valuers' reports") were submitted to show that FM's shareholding in PT Link Net exceeded the total sum restricted under the Mareva Orders, leaving FM "free to deal with its other assets".[3] The point taken by FM was that FM had no intention to dispose of and/or deal with its shares in PT Link Net.[4] For present purposes, it suffices to say these facts paint only one picture: FM never saw itself as being prevented, and was never indeed prevented, from freely dealing with its other assets. Even with the PT Link Net shares, and despite the Mareva Orders, an initial public offering ("IPO") of PT Link Net was planned for in or around the third quarter of 2013. However, this IPO did not go ahead in the end. I will return to this point later in this judgment.

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[3] Harianda Noerlan's 2nd Affidavit dated 21 January 2014, para 19.

[4] 3rd Joint Affidavit dated 17 November 2011, para 14.

61 Most of FM's assets were in Indonesia and it has been said in court on several occasions that FM was virtually "judgment-proof" there. The implication is that the Mareva Orders are ineffective in Indonesia.[5] FM has highlighted that the Supreme Court of Indonesia has ruled that the 7 May 2009 Award (on which the rest of the Awards are based) is unenforceable (because of non-registration) in Indonesia, which is "the very jurisdiction where FM's assets are".[6] FM has *reiterated* this point in the present applications, highlighting that the Supreme Court of Indonesia has now ruled that all Five Awards could not be registered and are thus unenforceable in Indonesia, and how this is "significant because [FM's] assets are practically all located in Indonesia".[7] FM's own declarations therefore make it patent and, indeed, blatant that it had never been prevented from freely dealing with its assets located in Indonesia.

62 FM's response to the Mareva Orders was consistent with its mentality that it was "judgment-proof" in Indonesia. Aside from FM's early attempt to set aside or vary the Mareva Orders, FM did not subsequently apply to court to vary the terms of the Mareva Orders, or seek Astro's permission for the use of its assets in the course of its business. This is notwithstanding the fact that both these options were available to FM under the terms of the Mareva Orders. This view is consistent with conduct indicative that the PT Link Net shares were the only assets subject to the Mareva Orders. FM, on the other hand, appeared to suggest that it did not seek to obtain court approval for its business transactions as this would result in further protracted, costly and very public litigation ensuing between Astro and FM, causing business partners to lose

[5] Plaintiffs' Skeletal Submissions dated 2 September 2014, para 26.

[6] 1st Joint Affidavit dated 29 July 2014, paras 17-18.

[7] Harianda Noerlan's 1st Affidavit dated 9 December 2013, para 14.

confidence in FM and the intended business transaction.[8] I find this argument to be disingenuous. As Ms Lim rightly pointed out, it is difficult to believe that FM would choose to avoid litigation costs rather than secure a genuine and serious business deal.[9]

63 In light of all the matters considered above, I find that there is no arguable case supported by credible evidence that FM was improperly prevented from doing something with its assets located in Indonesia that it was entitled to do. Specifically, this leads me to question the credibility and veracity of the specific losses that FM now claims.

FM's claimed losses

64 FM claimed losses under three heads, *viz*.:

(a) lost management time;

(b) lost business opportunities; and

(c) costs of mitigating damage.

Lost management time

65 With regard to lost management time, FM claims that management time was spent and wasted on:

(a) taking advice on and putting in place internal measures to ensure compliance with the Mareva Orders (e.g. that assets were not dealt with and that expenses were only in the ordinary course of business);

[8] Harianda Noerlan's 2nd Affidavit dated 21 January 2014, para 20.

[9] Plaintiffs' Skeletal Submissions dated 2 September 2014 , footnote 74.

(b) urgently coordinating and working with accountants to collate information for the disclosure of all its substantial assets;

(c) collating and sending to Astro, fortnightly, expenses in the "ordinary and proper course of business";

(d) taking advice on whether proposed business deals could be proceeded with; and

(e) correspondence with Astro on the latter's allegations that FM was in breach of the Mareva Orders.[10]

66 In *Aerospace Publishing Ltd and another v Thames Water Utilities Ltd* [2007] EWCA Civ 3, Wilson LJ undertook a comprehensive survey of the authorities dealing with claims for "staff costs", and concluded (at [86]) that they established the following propositions:

> (a) The fact and, if so, the extent of the diversion of staff time have to be properly established and, if in that regard evidence which it would have been reasonable for the claimant to adduce is not adduced, he is at risk of a finding that they have not been established.
>
> (b) The claimant also has to establish that the diversion caused significant disruption to its business.
>
> (c) Even though it may well be that strictly the claim should be cast in terms of a loss of revenue attributable to the diversion of staff time, nevertheless in the ordinary case, and unless the defendant can establish the contrary, it is reasonable for the court to infer from the disruption that, had their time not been thus diverted, staff would have applied it to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time.

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[10] Harianda Noerlan's 2nd Affidavit dated 21 January 2014, para 11; Harianda Noerlan's 3rd Affidavit dated 28 March 2014, paras 16-17.

67 I have summarised FM's evidence at [65] above. Arguably, there is some reference to a diversion of staff time but this was cursory. Even if one assumes, for the sake of argument, that the reference to a diversion of staff time satisfies proposition (a), FM has not succeeded in satisfying proposition (b). From the evidence, FM has not demonstrated how the time allegedly spent and wasted had caused a *disruption*, much less a *significant* disruption, to its business.

68 FM's claimed loss under this head is also untenable for another, perhaps more fundamental, reason. At [60] above, I referred to FM's evidence that had engaged the external valuers to provide independent estimates of the value of its shareholding in PT Link Net. The external valuers' reports had purportedly showed that FM's shareholding in PT Link Net exceeded the total sum restricted under the Mareva Orders against FM, allowing FM to freely deal with its other assets. Having taken this position, FM's compliance with the Mareva Orders should have required little effort, if at all. Presumably, FM would not even have been required to take any *active* steps; all it would have needed to do was to simply *refrain* from dealing with its shares in PT Link Net. FM's present portrayal that it had expended management time in complying with the Mareva Orders is therefore incongruous and must be explained in greater detail if it is to be believed.

Lost business opportunities

69 As regards lost business opportunities, FM claims that, from time to time, it encountered opportunities for greater business growth. As an example, FM related how Astro had applied for the Mareva Orders because of a business deal between FM and CVC Capital Partners Asia Pacific ("CVC").[11]

FM then noted how Astro had written to several of FM's business partners, advisers and banks to put them on notice of the Mareva Orders and to warn them that third parties may be implicated for assisting in or permitting a breach of the Mareva Orders. FM alleges that this has been severely damaging for its commercial reputation.[12] It was patently unclear to me where FM was headed with this narrative, which seemed little more than FM's bid to air its grievances. FM certainly did not appear to be suggesting that it had lost the deal with CVC as a result of the Mareva Orders, or that the third parties to whom Astro had written to had aborted deals with FM.

70 FM then contended that, as a result of the Mareva Orders, it has "been unable to proceed with some business deals, which would more likely than not have been profitable for [FM] and its shareholders".[13] As an example, FM highlighted its negotiations with KDDI Corporation ("KDDI"), a Japanese company, for the acquisition and operation of its WiMAX (Worldwide Interoperability for Microwave Access) business ("the KDDI deal"). FM's evidence is that negotiations had been underway in early to mid-2011. However, after the Mareva Orders were granted, KDDI was very concerned over the seriousness of the Mareva Orders and that it would be implicated for assisting in or permitting a breach of the Mareva Orders. KDDI eventually decided not to proceed with the transaction.[14] I note, parenthetically, that FM's evidence here is that the Mareva Orders had led to the loss of the KDDI deal as KDDI was concerned over the Mareva Orders; FM's evidence is *not* that

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[11] Harianda Noerlan's 2nd Affidavit dated 21 January 2014, para 13.

[12] Harianda Noerlan's 2nd Affidavit dated 21 January 2014, paras 14-15.

[13] Harianda Noerlan's 2nd Affidavit dated 21 January 2014, para 15.

[14] Harianda Noerlan's 2nd Affidavit dated 21 January 2014, para 16.

the Mareva Orders prevented FM from entering into this deal as a result of its assets being frozen.

71 I pause, at this juncture, to highlight the important distinction "between damages flowing from the *injunction* and damages flowing from the *litigation itself*" [emphasis added] (Aickin J's judgment in *Air Express* at [40]). Specifically, "[i]f it appears that no damage is proved occasioned by the injunction *as distinct from the detriment arising from the litigation*, the [defendant is] not entitled to an inquiry as to damages" [emphasis added] (*Newman Brothers, Limited v Allum S.O.S. Motors, Limited (in liquidation), and others (No. 2)* [1935] NZLR 17 at 18). Consequently, "if the loss would have been suffered because of the *bringing of the proceedings, regardless of the granting of the order*, then this is not covered by the undertaking" [emphasis added] (*Gee* at para 11.027).

72 Returning then to FM's claim, FM, in support of its contention, relied on three e-mail exchanges between itself and KDDI.[15] The e-mails have been redacted so as not to identify their senders and recipients. However, they appear to be:

(a) an e-mail from KDDI to FM dated 4 April 2012 ("the 4 April 2012 e-mail");

(b) an e-mail from FM to KDDI dated 10 April 2012; and

(c) an e-mail from KDDI to FM dated 23 April 2012 ("the 23 April 2012 e-mail").

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[15] Harianda Noerlan's 3rd Affidavit dated 28 March 2014, Tab HN-9.

73 I found these e-mails to be significant. Ironically, however, rather than assisting FM, these e-mails clearly evidenced the fact that the loss of the KDDI deal was a result of the *litigation* and *not* the Mareva Orders. For instance, the 4 April 2012 e-mail reads, *inter alia*, as follows:

> …
>
> Already taken too much time on litigation risks, and *so long as this Astro litigation hovers around*, we can't concentrate on the business issues which should require our whole attention. This is our fundamental concern.
>
> …
>
> I therefore strongly request you to *bring this Astro litigation to an end* with the settlement, as I hear you have mentioned that it might take place anytime soon. Once done, we don't worry about this and can fully focus on business.
>
> …
>
> [emphasis added]

74 The 23 April 2012 e-mail is perhaps of greater significance, as it appears that it was via this e-mail that KDDI had aborted its negotiations with FM. I set out the text of the e-mail in full:

> Dear [REDACTED],
>
> Awfully sorry for my belated reply to your email.
>
> As you can imagine, upon receiving your response, we had number of intensive discussions here, and after due consideration, concluded that we cannot follow your suggestions.
>
> We decided to stay in the position as not to take further action on this project *until your litigation is sorted out*.
>
> We understand the reason why you came up with the new structure, which however makes us all the more worried about the *unpredictable nature of your litigation status*.
>
> Whether the new structure can fully protect us is one thing, but what matters more to us is that *this litigation issue has nothing to do with our business and we shouldn't be involved in this in any fashion*. So we decided to stay away from that.

> Having said that, it is a big pity for us that we have to give it a miss. *Once your litigation is settled once and for all*, we are more than happy to come back to this project again and explore the opportunity to grow the business together.
>
> We sincerely hope that to happen in the very near future.
>
> Best and Warmest regards,
>
> [REDACTED]
>
> [emphasis added]

75 FM's evidence is that the litigation between Astro and FM had been ongoing and widely reported since 2008, and that it was only because of the Mareva Orders that investors became wary of further dealings with FM.[16] In saying this, FM *appears* to be arguing that, notwithstanding the plain and ordinary meaning of the above e-mails, the loss of the KDDI deal was a result of the Mareva Orders and not the litigation. If this was indeed what FM was asserting, I am unable to accept it. It is, of course, *possible* that the repeated use of the word "litigation" in the above e-mails may not have been meant literally. However, if this was FM's assertion, then it would have been incumbent on FM to demonstrate how and why the references to "litigation" in the e-mails have a different connotation and should be read as references to the Mareva Orders instead. This has not been done. Moreover, I am unable to see how or why this interpretation should be preferable to the plain and ordinary meaning of the e-mails.

76 I also note that the e-mails were exchanged in April 2012, some nine months after the grant of the Mareva Orders. To my mind, the fact that negotiations were still ongoing at this stage can only indicate that KDDI was not as concerned with the Mareva Orders as FM claims it to have been. This

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[16] Harianda Noerlan's 3rd Affidavit dated 28 March 2014, para 23.

reinforces my finding that the KDDI deal was ultimately aborted because of the ongoing litigation and not the Mareva Orders *per se*.

77 One further point must be made. It is to be recalled that FM's claim is with respect to the loss of "some business deals". However, the only example FM provided was the KDDI deal. No details whatsoever have been provided for the other deals. It can only mean that FM has not adduced evidence, let alone credible evidence, *vis-à-vis* the so-called other business deals that it had purportedly been unable to proceed with.

Costs of mitigating damage

78 I now move to FM's next claimed head of loss. FM claimed that it had to persuade its business partners to continue investments and business transactions with its related companies, resulting in FM itself being deprived of the opportunity to carry out these transactions. FM cited, as an example, a Japanese investor (who could not be named due to a confidentiality agreement) who was keen to invest in FM, but did not do so because of the Mareva Orders.[17]

79 For a start, I note that it is curious that FM had included this claim under the costs of mitigating damage. If anything, this should have been a claim for lost business opportunities. In any case, I consider that the lack of particularity to this alleged deal fails to satisfy even the alleged "low threshold" of credible evidence of loss. I also note that FM has once again referred to being deprived of the opportunity to carry out various transactions, but only cites one example. My reasoning set out at [77] applies equally here, and the only conclusion I can draw is that no evidence let alone *no* credible

[17] Harianda Noerlan's 2nd Affidavit dated 21 January 2014, para 18.

evidence has been adduced *vis-à-vis* these other transactions that FM had purportedly been deprived of.

80 FM then argues that in order to ensure compliance with the Mareva Orders and yet minimise its losses, it had engaged the external valuers to provide independent estimates of the value of its shareholding in PT Link Net. The external valuers' reports had purportedly showed that FM's shareholding in PT Link Net exceeded the maximum sum restricted under the Mareva Orders, allowing FM to freely deal with its other assets. FM claimed that it was able to avoid further substantial losses by its steps taken to engage the external valuers.[18]

81 I fail to see how this was a loss suffered by FM. I am also not convinced that FM's engaging of the external valuers was a step that FM had taken so as to mitigate its loss. If anything, FM had engaged the external valuers in order to self-servingly *justify* (whether rightly or wrongly) the position it had eventually taken, *viz*. that it was free to deal with its other assets.

82 In light of the foregoing, and despite the Court of Appeal decision, the Mareva Orders were therefore not "wrongly asked for".

Issue 2: Whether there were any "special circumstances"?

83 Having regard to my conclusion on Issue 1, which disposes of FM's applications for an inquiry as to damages, it is not strictly necessary to discuss Issue 2. However, even if a different conclusion on Issue 1 is reached, I would

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[18] Harianda Noerlan's 2nd Affidavit dated 21 January 2014, para 19.

nevertheless decline to enforce the undertaking as to damages because "special circumstances" exist here which justify such a course of action.

What are "special circumstances"?

84 I have earlier in this judgment touched on what constitutes "special circumstances". The phrase "special circumstances" used in *Graham v Campbell* obliges the court to take into account all the circumstances and information it now knows in order to determine whether it would be inequitable to enforce the undertaking. It also necessary to consider the conduct of both parties. The conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking may make it inequitable to enforce that undertaking. All material placed before the court is assessed in order for it to be able to exercise its discretion. In this regard, the "special circumstances" in reported cases are varied and depend on the facts of a particular case.

85 I have already referred to the passage from *Spry* (at p 685) which has helpfully listed some of the "special circumstances". This is set out at [26] above.

86 Peter Gibson LJ in *Cheltenham & Gloucester* said (at 1557):

> There are only a few reported decisions on what constitute special circumstances. ..... In *Modern Transport Co. Ltd. v. Duneric Steamship Co.* [1917] 1 K.B. 370, 380, Swinfen Eady L.J. said that inequitable conduct by the defendant constituted special circumstances such that no inquiry as to damages was to be granted even if the claim for an injunction could not be sustained at the trial; but that was a case where he held that the plaintiffs were justified in applying for an interlocutory injunction. In *Upper Canada College v. City of Toronto* (1917) 40 O.L.R. 483, the court in refusing to order an inquiry as to damages on an undertaking given on the grant of an interlocutory injunction discharged at the trial, had regard

> to a number of circumstances including the good faith of the plaintiffs and the fact that no costs were awarded against them when the action was dismissed. In *Attorney-General for Ontario v. Harry* (1982) 25 C.P.C. 67 a factor taken into account by the court in refusing to enforce an undertaking as to damages, notwithstanding the discharge at the trial of the interlocutory injunction, was the inequitable conduct of the defendants.

Inequitable conduct of the defendant

87 In *Hoffmann-La Roche*, Lord Diplock held (at 361):

> [The court] retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so…

88 In the present case, the aspect of FM's conduct that presents itself as a relevant factor in the exercise of discretion is the issue of risk of dissipation. I will now consider the parts of the evidence that are relevant to the risk of dissipation factor.

89 As stated earlier, the risk of dissipation factor was not challenged by FM (see [17] above), which preferred to rely on the "wrongly asked for" factor. I agree with Ms Lim that Astro's applications for the Mareva Orders were made in good faith. The merits of the underlying dispute over the SSA had already been adjudicated in favour of Astro. At the time when the applications for the Mareva Orders were made, the Five Awards had not been set aside and the Five Awards were unpaid for over two years. The Five Awards were therefore, for all intents and purposes, an unpaid debt. Plainly, the applications for the Mareva Orders had been made in favour of the plaintiffs and the Mareva Orders were taken out post-award to aid execution. The Mareva Orders were granted after the court was satisfied, on the evidence, that the plaintiffs had complied with the two pre-conditions in *Hitachi Leasing*

(Singapore) Pte Ltd v Vincent Ambrose and another [2001] 1 SLR (R) 762, namely, that there were grounds for believing that there was a real risk of dissipating or disposing of assets to deprive the creditor of satisfaction of the debt and that the post-award injunction was to act as an aid to execution (at [18]-[19]). In *Gidrxslme Shipping Co. Ltd. v Tantomar-Transportes Maritimos Lda.* [1995] 1 WLR 299, the court noted that a mareva injunction in aid of enforcement of an arbitral award could be granted before the award was converted into a judgment (at 310). A post-award mareva injunction could be made to aid enforcement of the English arbitral award on the ground of a real risk that the party against whom the award had been made may dispose of his assets to avoid execution of the award (at 304).

90 In the circumstances, this was not a case where Astro had any reason to seriously doubt that execution of this debt (by way of enforcement proceedings) would be waylaid. In this regard, I find it significant that Astro had obtained judgment in terms of the 7 May 2009 Award in England on 27 July 2009 and registration of the same in Malaysia on 30 July 2010. As regards all Five Awards, judgment in terms of the awards had been obtained in Hong Kong on 9 December 2010. All in all, this was not a case where FM could seek to "set off", so to speak, its own inequitable conduct with Astro's conduct. Indeed, Mr Kronenburg had, in the course of oral arguments, expressly stated that it was not his submission that there was a lack of bona fides on the part of Astro in obtaining the Mareva Orders.

91 The Mareva Orders were granted and continued because of the two pre-conditions identified in [89] above. That a real risk of dissipation existed on the facts was reinforced by how FM had maintained the position that it was "judgment-proof" in Indonesia which is "the very jurisdiction where FM's assets are".[19] Whilst FM has *reiterated* this point in the present applications,[20]

the risk of dissipation factor was not opposed by Mr Kronenburg, whose arguments focused on the merits factor only.

92 By FM's own evidence, its primary means of complying with the Mareva Orders was its retention of its shares in PT Link Net. Astro found out that FM was reported to have planned for an IPO of PT Link Net in or around the third quarter of 2013,[21] and in this regard, I was referred to a number of online articles published in September 2013 on the matter. Eventually, the IPO did not proceed. Nonetheless, the articles on the IPO were published *after* the High Court decision on 22 October 2012 but *before* the Court of Appeal decision on 31 October 2013. The fact of the matter is that there was some attempt to deal with the assets subject to the Mareva Orders. The attempt is consistent with conduct that has little or no regard for the Mareva Orders. Overall, the evidence points to risk of dissipation after the Mareva Orders were granted and before 31 October 2013.

93 My attention has also been drawn to the findings of the Hong Kong High Court in relation to garnishee proceedings commenced by Astro in Hong Kong in its bid to enforce the Five Awards. Astro had brought garnishee proceedings to attach a debt of US$44 million that was owed by FM's parent company, AcrossAsia Limited ("AAL"), to FM. In this regard, Ms Lim referred me to the Reasons for Decision of Deputy High Court Judge Lok dated 7 March 2013 ("Judge Lok's decision") and the Decision of Deputy High Court Judge Mayo dated 31 October 2013 ("Judge Mayo's decision"). Judge Lok found that there was "a legitimate concern that [FM] and AAL had

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[19] 1st Joint Affidavit dated 29 July 2014, paras 17-18

[20] Harianda Noerlan's 1st Affidavit dated 9 December 2013, para 14

[21] Plaintiffs' Skeletal Submissions dated 2 September 2014, para 40(b).

taken concerted action in Indonesia with a view to frustrate the garnishee proceedings in Hong Kong" (at [49] of Judge Lok's decision). In a similar vein, but in more definite terms, Judge Mayo held that "[i]t is very clear from hearings in the High Court in Hong Kong that FM and AAL have been acting in conjunction with each other in their mutual attempts to delay and frustrate the garnishee proceedings" (at [83] of Judge Mayo's decision). These observations were based on events that occurred both before *and after* the High Court decision on 22 October 2012. FM's response to the garnishee proceedings in Hong Kong is another factual demonstration that FM is prepared to frustrate proceedings if it considers it necessary or helpful to do so.

94 In the premises, my conclusion on Issue 2 is that there were "special circumstances" in this case.

Conclusion

95 For the reasons stated, FM's applications for an inquiry as to damages are dismissed with costs.

Belinda Ang Saw Ean
Judge

Lim Wei Lee, Chan Xiao Wei and Catherine Chan (WongPartnership LLP) for the plaintiffs;
Edmund Jerome Kronenburg, Lye Hui Xian and Alicia Xuang (Bradell Brothers LLP) for the second defendant.
