Beckkett Pte Ltd v Deutsche Bank AG
[2005] SGCA 34

Case Number : CA 34/2005

Decision Date : 12 July 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tay Yong Kwang J

Counsel Name(s) : Steven Chong SC, Ronald Choo and Sim Kwan Kiat (Rajah and Tann) for the appellant; K Shanmugam SC, Stanley Lai and William Ong (Allen and Gledhill) for the respondent

Parties : Beckkett Pte Ltd — Deutsche Bank AG

Civil Procedure – Discovery of documents – Implied undertaking not to use discovered documents for collateral or improper purpose – Discovering party seeking to use discovered documents to obtain injunction in foreign jurisdiction – Whether discovering party should be released from implied undertaking – Whether court can take into account risk that party giving discovery may face criminal prosecution in foreign jurisdiction

Civil Procedure – Discovery of documents – Implied undertaking not to use discovered documents for collateral or improper purpose – Whether overriding public interest required before discovering party can be released from implied undertaking

Credit and Security – Mortgage of personal property – Stocks and shares – Mortgagor alleging breach of mortgagee's duties – Mortgagor giving notice of interest in shares – Whether risk that shares may be sold to bona fide purchaser without notice existing

12 July 2005

Chao Hick Tin JA (delivering the judgment of the court):

1 This was an appeal against the decision of Woo Bih Li J, who allowed the appeal of the respondent, Deutsche Bank ("DB"), against the decision of the assistant registrar permitting the appellant, Beckkett Pte Ltd ("Beckkett"), to use certain documents disclosed by DB in proceedings in Singapore for the purposes of obtaining an injunction against a third party in Indonesia (see [2005] SGHC 79). We heard the appeal on 25 April 2005 and dismissed it for the reasons that follow.

The background

2 At all material times, Beckkett, PT Swabara Mining & Energy ("SME"), PT Asminco Bara Utama ("Asminco"), PT Adaro Indonesia ("Adaro") and PT Indonesia Bulk Terminal ("IBT") were part of a group of companies known as the Swabara group. In October 1997, DB granted a loan of US$100m to Asminco, which loan was secured by Beckkett's 74.2% shareholding in SME, SME's 99.9% shareholding in Asminco and Asminco's 40% shareholding in Adaro and in IBT. These securities are hereinafter referred to as "the pledged shares".

3 It was not in dispute that by November 2001, Asminco was in default, giving rise to a right in DB to dispose of the pledged shares. Indeed, Asminco was in default for the entire preceding three-year period before the pledged shares were sold. Neither Beckkett nor Asminco rectified the default in spite of repeated requests by DB. On 21 November 2001, DB, in exercise of its rights as lender, disposed of the pledged shares.

4 Beckkett alleged that DB did not give it notice of DB's intention to dispose of the pledged shares. In any case, on learning of the sale, Beckkett asked for particulars of the sale, including the

identity of the purchaser and the price. Eventually, DB gave information only in relation to the sale of the pledged SME shares. Not being satisfied with that limited disclosure, Beckkett took out pre-action discovery by way of Originating Summons No 772 of 2002 ("OS 772"), whereupon DB was ordered to disclose documents relating to the sale of the other pledged shares. It emerged that the pledged shares were sold to PT Dianlia Setyamukti ("DSM").

5 Following from the discovery, Beckkett instituted the present action, Suit No 326 of 2004 ("Suit 326"), claiming for damages on the ground that the pledged shares were sold at a gross undervalue.

6 Pursuant to the discovered documents, Beckkett came to the conclusion that the sale of the pledged shares to DSM was not a genuine arms' length deal. Accordingly, Beckkett added DSM as the second defendant to the action. In the Amended Statement of Claim in Suit 326, Beckkett sought to set aside the sale of the pledged shares to DSM, or alternatively, for damages. However, even up to the date of the hearing of the appeal before us, service of the writ on DSM in Indonesia had yet to be effected.

7 In the meantime, Beckkett received information that DSM intended to sell the shares in Adaro which it had bought from DB. Beckkett claimed that the special value of the Adaro shares lay in the fact that Adaro operated a major Indonesian coal mine and that the loss of that interest could not be adequately compensated by monetary payment. Beckkett asserted that unless DSM was restrained from further selling the pledged shares to other parties, the relief eventually obtained in Suit 326 would be rendered nugatory. Thus, Beckkett made the present application to court to obtain leave to enable it to use the discovered documents (obtained in OS 772 and Suit 326) to apply for an injunction in Indonesia to restrain DSM, or its nominees, from disposing of the pledged shares, in particular the shares in Adaro. Of course, except in relation to the pledged SME shares, Beckkett's interest in the other pledged shares are indirect.

8 On 30 March 2005, the assistant registrar, while granting the application, limited the documents which Beckkett was to be allowed to use in Indonesia. The assistant registrar also restricted Beckkett from proceeding further in Indonesia after obtaining the injunction. In addition, Beckkett was required to obtain an order from the Indonesian court to seal the record there so that the documents would not be accessible to the public.

9 Woo J reversed the decision of the assistant registrar and refused to grant leave to Beckkett to use the documents in Indonesia. In deciding that leave should not be granted to Beckkett, Woo J's main concern was that, in all the circumstances, the disclosure of the documents in Indonesia could render DB liable to criminal prosecution in that jurisdiction. A subsidiary reason was that even though the pledged shares were to be sold by DSM or its nominees to third parties, it did not necessarily follow that the setting aside of the sales of the pledged shares would not be possible, bearing in mind that every effort had been made by Beckkett to give notice of its interest in them to potential buyers. In any event, even if setting aside was not possible, Beckkett would be entitled to substantial damages. Beckkett had not asserted any special interest or value in the pledged shares beyond their monetary value. Beckkett had not challenged DB's ability to meet whatever damages which the court might award in favour of Beckkett in Suit 326. Thus, Woo J thought that it was not correct for Beckkett to claim that Suit 326 would be rendered nugatory unless leave was granted to permit Beckkett to obtain an injunction in Indonesia to restrain DSM and its nominees from disposing of the pledged shares.

Appeal

10 Before us, Beckkett emphasised the fact that the circumstances surrounding the sale of the pledged shares to DSM were unusual and highly suspicious, as no prior valuation was obtained by DB. Beckkett asserted that some of the discovered documents indicated that there was a conspiracy between DB and DSM and that the sale was not really an arms' length transaction.

11 Reference was also made by Beckkett to reports in the media that another substantial shareholder in Adaro, New Hope Corporation ("New Hope"), an Australian company which also owned about 40% of the shares in Adaro, was planning to sell its shares in Adaro "following the lead of its Indonesia partners". Beckkett asserted that the "Indonesian partners" would include DSM. According to the reports, New Hope was to hold a general meeting on 21 April 2005 to vote on the proposed sale. In the meantime, to protect its interest in the Adaro shares, Beckkett had also made every effort to notify all potential purchasers of its interests in those shares.

12 Beckkett contended that, given that DSM and its nominees were Indonesian companies and the pledged shares were shares of those companies, it was vitally important for Beckkett to obtain an injunction in Indonesia to preserve its rights as direct or indirect chargor or mortgagor of the pledged shares. The injunction proposed to be obtained in Indonesia was ancillary to, or in furtherance of, the action in Singapore. The documents on which leave was given by the assistant registrar would greatly assist Beckkett in obtaining an injunction in Indonesia. Beckkett reiterated that there was never any intention on its part to litigate the substantive dispute there. Proceedings in Indonesia would be stayed once the injunction was obtained.

13 Reliance was placed by Beckkett on the case of *Omar v Omar* [1995] 1 WLR 1428, where the court allowed the plaintiff the use of discovered documents for the purpose of seeking an injunction against third parties in another jurisdiction.

The *Riddick* principle

14 The principle established in *Riddick v Thames Board Mills Ltd* [1977] QB 881 ("the *Riddick* principle") is that where a party to litigation has been ordered to give discovery, the discovering party may not use the discovered documents, and the information obtained therefrom, for a purpose other than pursuing the action in respect of which discovery is obtained. Public interest requires that in relation to an action, there should be full and complete disclosure in the interest of justice. On the other hand, it cannot be denied that discovery on compulsion is an intrusion of privacy. The *Riddick* principle seeks to strike a balance between these two interests. Lord Denning MR enunciated the rationale and scope of the undertaking as follows (at 896):

> The memorandum was obtained by compulsion. Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party – or anybody else – to use the documents for any ulterior or alien purpose.

15 The implied undertaking of not using the documents for other purposes is also an obligation owed to the court and not just to the party who was compelled to make discovery and it is an obligation which only the court can modify: see *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 1 WLR 756 at 764–765.

16 However, the *Riddick* principle is not absolute. Where there are exceptional circumstances, and no injustice will be caused to the party giving discovery, the court will release the party obtaining discovery from the implied undertaking. In *Crest Homes Plc v Marks* [1987] AC 829 ("*Crest Homes*"),

Lord Oliver of Alymerton, in delivering the judgment of the House of Lords, said at 860:

> I do not, for my part, think that it would be helpful to review these authorities for they are no more than examples and they illustrate no general principle beyond this, that the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery.

This case held that the party seeking release from the implied undertaking must demonstrate cogent and persuasive reasons why that party should be released from its undertaking. That party must also show that the party giving discovery would not suffer any prejudice if the first party were to be released from its implied undertaking.

17 In *Crest Homes*, documents seized pursuant to an Anton Piller order in an action for copyright infringement were permitted to be used in separate contempt proceedings between the same parties. The contempt proceedings arose out of the alleged breach of undertaking by the defendants in relation to a previous order of court. The House of Lords held that there were exceptional circumstances because, firstly, the disclosure of the documents was necessary to the determination of the contempt proceedings which concerned public policy. Secondly, both the main action and the contempt proceedings concerned the same subject matter and the same parties and, therefore, were substantially one set of proceedings. Thirdly, no prejudice would be done to the defendants if the documents were made available in the contempt proceedings.

18 Thus, a discovering party should only be released from its implied undertaking on the discovered documents in special or exceptional circumstances which warrant overriding the public interest in encouraging full disclosure in proceedings here. There was a suggestion in *Halcon International Inc v The Shell Transport and Trading Co* [1979] RPC 97 at 122 ("*Halcon*") that the mere furtherance of some private interest, even when the private interest arose directly out of or was brought to light as a result of the discovery, might not be sufficient. In *Halcon*, the plaintiff sought leave to use documents, which were obtained in an English patent action, in a related proceeding in the Netherlands. Whitford J refused the application because if the documents (which themselves were not confidential) were released, the defendant would have to release other confidential documents to explain these disclosed documents and under Dutch law, all documents disclosed in court would then be available to the public without restriction. The decision of Whitford J was upheld on appeal on the narrower ground that there was no parallel procedure for discovery in the Netherlands and the documents, once disclosed in the Netherlands, would be available to the world at large. What is significant to note is that Whitford J, after reviewing the authorities, said (at 109–110):

> However, these authorities to my mind, lead to this conclusion, that the use of a document disclosed in a proceeding in some other context, or even in another proceeding between the same parties in the same jurisdiction, is an abuse of process unless there are very strong grounds for making an exception to the general rule. It does, I think, emerge that some overriding public interest might be a good example, but not the mere furtherance of some private interest even where that private interest arises directly out of or is brought to light as a result of the discovery made.

We should add that on appeal, Megaw LJ referred to this passage of Whitford J without approving or disapproving it.

19 However, in the later case of *Sybron Corporation v Barclays Bank Plc* [1985] Ch 299 ("*Sybron Corp*"), Scott J did not think that Whitford J's suggestion, that the furtherance of a private interest

could not justify the grant of leave to use discovered documents for the purpose of other proceedings and that some overriding public interest would normally be required, should be applied generally and in all cases. Scott J noted that in most cases, leave was sought in furtherance of a private interest, as in *Sybron Corp* itself. We agree with Scott J that Whitford J's proposition might be a bit too stringent. It seems to us that, generally, before leave to be released from the implied undertaking is given, two conditions must be satisfied. First, cogent and persuasive reasons must be furnished for the request. Second, it must not give rise to any injustice or prejudice to the party who had given discovery.

20 Beckkett acknowledged that it bore the burden of showing that there were exceptional circumstances to justify a variation of the implied undertaking. However, Beckkett's contention was that where the discovered documents were intended to be used in ancillary proceedings or in furtherance of the Singapore proceedings, such a use would be sufficient to amount to exceptional circumstances warranting the variation of the implied undertaking, unless it could be shown that the disclosure of the documents in a foreign jurisdiction would cause prejudice. In general, we agree with this proposition.

Preliminary issues

21 In the appeal before us, two preliminary points were raised by DB. The first was that there was no evidence of an imminent sale by DSM of the pledged shares. The evidence which Beckkett relied on related to an intended sale by another major shareholder of Adaro, New Hope, which owned 40% of Adaro. On the contrary, there was evidence to show that DSM was contemplating purchasing the 40% share which New Hope held in Adaro. This necessitated Beckkett to alter course by referring to its "right of first refusal", as can be seen from the affidavit of Arthur Ling ("Ling"), a director of Beckkett, filed on 10 April 2005 where, at para 13, he stated:

> The Plaintiff's [Beckkett's] solicitors in Australia have also been instructed to look into the possibility of obtaining an injunction to restrain the sale of the Adaro shares by New Hope. Although this block of shares is not the subject of the Suit Action, the Plaintiff (through its shareholding in SME and Asminco) should rightfully be given the "right of first refusal" to purchase the shares of New Hope in Adaro. The right of first refusal requires New Hope to offer to sell its shareholding in Adaro to the other existing shareholders of Adaro before it can sell the shares to third parties. Hence, the Plaintiff, through its subsidiaries would have had the opportunity to purchase New [H]ope's stake in Adaro if not for [DB and DSM's] wrongful acts and conspiracy that have deprived the Plaintiff of its shares in its subsidiaries.

22 The second preliminary point raised by DB was that Beckkett would not require the discovered documents to obtain an injunction in Indonesia against DSM. DB based its argument on the fact that in January 2005, Beckkett instituted an action in Indonesia ("the January 2005 action"), parallel to that of Suit 326, against DB (Jakarta branch), DSM, Asminco, SME, Adaro and IBT, seeking a provisional ruling that DSM and its nominees be prohibited from transferring the pledged shares to any third party. That ruling was similar to what Beckkett now sought to obtain against DSM. On 7 February 2005, DB's solicitors reminded Beckkett's solicitors of the *Riddick* principle, and on 14 February 2005, Beckkett discontinued the January 2005 action. DB submitted that the fact that Beckkett could institute the January 2005 action indicated that Beckkett had enough documents to obtain the provisional relief in Indonesia without the need for the discovered documents. Beckkett asserted that it wanted to be able to produce the discovered documents in Indonesia only because it was the "best available evidence" to support the application for an injunction in Indonesia. DSM submitted that that would not be the correct basis for this court to exercise its discretion in granting leave.

23 For the purposes of the present appeal, and for the reasons which follow, it was not necessary for us to rule on these two preliminary points to dispose of the present appeal.

Risk of prosecution

24 Like the judge below, we were of the view that the risk of prosecution in Indonesia, if leave for the use of the documents were given, was a major concern. It must be borne in mind that there was a previous criminal complaint lodged by Beckkett against an officer of DB, Mr Wolfgang Topp. Even though the investigation relating to that complaint had been terminated in September 2002, and had not resulted in the prosecution of any officer of DB or of DB itself, there was nothing to preclude the Indonesian authorities from re-opening the investigation upon the disclosure of the discovered documents.

25 It was true that the leave granted by the assistant registrar was a limited one and was subject to the sealing of the documents by the Indonesian courts. The legal experts of the parties were not *ad idem* as to the question whether the Indonesian courts would agree to seal up the court's file on Beckkett's application. Moreover, we seriously doubted that the Indonesian courts, as a matter of their public policy, would refuse to release the disclosed documents to the police or prosecuting authorities if the latter should apply for them in relation to their investigations into a possible offence. It seemed to us hardly conceivable that the undertaking given by Beckkett to the courts in Singapore could override the national interest of Indonesia of detecting a crime and prosecuting those responsible for it. The Indonesian prosecuting authorities could not be bound by the undertaking given by Beckkett to the Singapore courts: see *Attorney-General for Gibraltar v May* [1999] 1 WLR 998 at 1007. While Beckkett did not dispute that the Indonesian authorities could re-open the case, it said that there was no evidence that the authorities there would in fact do so. But this would be to impose an impossible burden on DB. Ordinarily, no law enforcement agency of a country would prematurely show its hands to any outside party or individual.

26 Beckkett also said that DB did not show how the documents set out in the seventh affidavit of Ling would incriminate DB and for what offence. More importantly, Beckkett pointed out that DB had denied that it was involved in any wrongdoing, much less a criminal offence. Beckkett thus submitted that the allegation of a risk of criminal prosecution in Indonesia was vague and unsubstantiated and was wholly unreal.

27 However, it seemed to us that Beckkett was saying one thing to the courts here and its Indonesian lawyers were uttering something different to the media there. Even after the ruling by the assistant registrar, one of Beckkett's Indonesian lawyers, Mr Kaligis, was reported in the 1 April 2005 issue of the *International Herald Tribune* to have said that a civil case as well as a criminal case would be taken up in Indonesia against DB.

28 On 6 April 2005, DB's Indonesian firm of lawyers, M/s Amir Syamsuddin & Partners, wrote to advise DB that:

> We have heard that Beckkett has now approached [the Indonesian police] to seek to reopen investigations on the ground that they have new evidence. We will endeavour to find out more and keep you informed of any further developments.

29 On the 11 April 2005 issue of the Indonesian publication *Prospektif*, another of Beckkett's Indonesian lawyers, Mr Lucas, again threatened to institute criminal proceedings if the shares in question were not returned to Beckkett. Mr Lucas was reported to have said that Beckkett would report the case to the police if DB did not return the shares. It should be noted that this report was

carried three days after Woo J made his ruling. Excerpts of the interview were set out in the affidavit of Mr Low Soon Heng, the Deputy General Counsel of DB, filed on 18 April 2005 as follows:

> Lucas SH, the attorney representing Beckett [*sic*] Pte Ltd, has requested (indirectly) that the 40% shares owned by Beckett at PT Adaro be immediately returned to his client. The South Jakarta High Court has approved his request of annulling the 16 decisions of the South Jakarta District Court that allowed Deutsche Bank to sell the secured shares of PT Asminco Bara Utama of PT Dianlia Setya Mukti owned by Edwin Soeryadjaya. If the parties involved fail to comply, says Lucas, they will be reported to the authorities for conducting criminal acts. …
>
> **Has there been authorization from Beckett to report the crime?**
>
> We will immediately report it. (However), we are still waiting. If they act in good faith to return (our shares) then we will not report them. But if they do not return [them], we will report the case to the police.

30 In another turn of events, on 30 March 2005, Beckkett commenced a fresh civil action in Indonesia against DB, Asminco, SME, Adaro and IBT. However, on 8 April 2005, Beckkett applied to discontinue that action, which application was pending at the time of the hearing of the present appeal before us. It was of interest to note that Beckkett commenced this new action even though it had stated that it could obtain an injunction in Indonesia by merely filing a claim for a declaratory judgment.

Principle against self-incrimination

31 The principle against self-incrimination is part of the law of this land. In *Lee Thin Tuan v Louis Vuitton* [1992] 2 SLR 273, this court reiterated the principle against self-incrimination and modified the terms of an order of court requiring the appellant to provide information and documents concerning the receipt and supply of goods bearing the trade marks belonging to the respondent, as complying with that part of the order would "tend to incriminate him and expose him to a criminal charge or charges under the Trade Marks Act (Cap 322) and the Consumer Protection (Trade Descriptions And Safety Requirements) Act (Cap 53)" (at 275, [4]). Another case which applied this principle is *Guccio Gucci SpA v Sukhdav Singh* [1992] 1 SLR 553.

32 In order to plead the privilege of self-incrimination, there "must be grounds to apprehend danger to the [defendant], and those grounds must be reasonable, rather than fanciful": *per* Staughton LJ in *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310 at 324. In the same case, Beldam LJ put the point as follows (at 332):

> [I]t is sufficient to support a claim to privilege against self-incrimination that the answers sought might lead to a line of inquiry which would or might form a significant step in the chain of evidence required for a prosecution.

33 Admittedly, there is a question mark as to whether the privilege against self-incrimination extends to criminal proceedings in a foreign jurisdiction. In *Brannigan v Davison* [1997] AC 238, a case on appeal from New Zealand, the Privy Council reviewed the cases on the subject from various common law countries, including the United States. Lord Nicholls of Birkenhead, delivering the judgment of the Board, alluded to the difficulties of granting the privilege against self-incrimination on account of prosecution under a foreign jurisdiction, as follows (at 249):

> It is the unqualified nature of the right, so valuable as a protection for the witness, which gives

rise to the problem when a foreign law element is present. If the privilege were applicable when the risk of prosecution is under the law of another country, the privilege would have the effect of according primacy to foreign law in all cases. Another country's decision on what conduct does or does not attract criminal or penal sanctions would rebound on the domestic court. The foreign law would override the domestic court's ability to conduct its proceedings in accordance with its own procedures and law. If an answer would tend to expose the witness to a real risk of prosecution under a foreign law then, whatever the nature of the activity proscribed by the foreign law, the witness would have an absolute right to refuse to answer the question, however important that answer might be for the purposes of the domestic court's proceedings.

34 However, the Board recognised that an absolute no-privilege rule *vis-à-vis* foreign prosecution could be harsh. Without offering a firm view on it, Lord Nicholls observed (at 251):

> This would be a harsh attitude. It would be a reproach to any legal system. One would expect that a trial judge would have a measure of discretion. It will be recalled that paragraph 11 of the Report of the Law Reform Committee envisaged that the judge would exercise a discretion. Thus a further question arises: where the self-incrimination privilege does not apply because the feared prosecution is under foreign law, does the domestic court, under its inherent power to conduct its process in a fair and reasonable manner, nevertheless have a discretion to excuse a witness from giving self-incriminating evidence?

35 As far as the position in the United Kingdom is concerned, by virtue of s 14 of the Civil Evidence Act 1968 (c 64), the privilege against self-incrimination only applies to criminal offences in the United Kingdom. Notwithstanding this, Morritt J in *Arab Monetary Fund v Hashim* [1989] 1 WLR 565 ("*Hashim*") held that if disclosure of a document could give rise to self-incrimination in relation to the criminal law of a foreign state, that was a factor which the court could take into account. Such an approach was also adopted by the Court of Appeal in *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 ("*Cuoghi*"). Beckkett conceded as much that this was a factor which the court could take into account.

36 It seems to us that there must be a residual discretion in the court to take into account the possibility of foreign prosecution to determine whether to grant leave to a party seeking a release from the implied undertaking. We see merits in the flexible approach adopted in *Hashim* and *Cuoghi*.

37 In this regard, the conduct of Beckkett, as well as its Indonesian lawyers, left us in considerable doubt as to what Beckkett's real intentions were. Why did Beckkett commence a second civil action in Indonesia and then seek to withdraw it when Beckkett stated that it could obtain an injunction based on a declaratory claim? The media reports as to what its Indonesian lawyers said not only did not help matters, but raised doubts as to the *bona fides* of Beckkett. It seemed to us that Beckkett's Indonesian lawyers were seeking the return of the pledged shares by exerting pressure in the media. It was significant to us that there was no subsequent correction or retraction of the reports by Beckkett. While the 2002 investigation had ended with no criminal action being filed against either DB or its officers, we were, in the circumstances, not in the least confident that a fresh complaint might not be made based on the disclosed documents.

38 The legal expert of DB, Mr Rahmat Bastian, had also stated that under Indonesian law, the police could reopen the investigation at any time and that there was no restriction of access by the police to court files. Thus, DB's apprehension of criminal proceedings was real and *bona fide* and could not be alleged to be fanciful or remote. In the affidavit filed by Mr Low Soon Heng on behalf of DB on 5 April 2005, he stated that:

> [DB] is under a real apprehension that the release of these documents to [Beckkett] for use in Indonesia would tend to expose [DB] to criminal proceedings in Indonesia.

39 The present case is different from that in *Hung Ka Ho v A-1 Office System Pte Ltd* [1992] 2 SLR 379, where the defendant's application to discharge an *ex parte* Anton Piller order was refused, as no affidavit was filed setting out the basis on which the defendant sought to rely on the privilege against self-incrimination. There, the claim to privilege was made by the defendant's counsel only in submissions without substantiation and was thus not accepted by the court.

40 The case of *Omar v Omar* ([13] *supra*) is different. Besides being a tracing action, no criminal wrongdoing was alleged. So there was no question of any prejudice arising.

41 We noted that DB had categorically stated that the sale of the pledged shares to DSM was aboveboard and was proper. DB had disavowed any wrongdoing. The fact that DB honestly (for present purposes, we assumed that this was the position) felt that it did not do anything wrong or commit any offence, did not mean that criminal investigations might not be re-commenced against it or its officers or that criminal proceedings could not be formally brought against them. That would be a decision for the Indonesian police or prosecuting authorities to make. It would be wholly unfair to expect DB to show how each of the documents would, in fact, incriminate it. As the judge below rightly pointed out, the disavowal of wrongdoing did not mean that DB could not reasonably entertain fears that it could be subjected to prosecution in Indonesia. The following pronouncement by Lord Denning MR in *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547 at 574 is germane:

> It is for the judge to say whether there is reasonable ground or not. Reasonable ground may appear from the circumstances of the case or from matters put forward by the witness himself. He should not be compelled to go into detail – because that may involve his disclosing the very matter to which he takes objection. But if it appears to the judge that, by being compelled to answer, a witness may be furnishing evidence against himself – which could be used against *him* in criminal proceedings or in proceedings for a penalty – then his objection should be upheld.

42 In the result, we felt that if leave was granted to Beckkett to be released from its implied undertaking, there would be a real risk that DB might have to face criminal investigation or prosecution in Indonesia. There would be prejudice to DB. For this reason alone, leave should not be given to allow Beckkett to use the disclosed documents to obtain an injunction in Indonesia. We now turn to deal briefly with two other points raised in arguments.

Are damages an adequate remedy?

43 Beckkett argued that it was not asking for a Mareva injunction but an injunction to preserve the subject matter of the claim in Suit 326. There was, therefore, no requirement that Beckkett show that damages would be an inadequate remedy. The pledged Adaro shares, amounting to 40% of the total shares in Adaro, constituted a substantial block of shares in a private company which operated the largest coal mine in Indonesia. Beckkett thus averred that damages would not be an adequate remedy for shares of such a nature, relying on Spry, *The Principles of Equitable Remedies* (Law Book Company, 6th Ed, 2001) at p 64. In this regard, Beckkett emphasised the fact that its claim in Suit 326 was for breach of mortgagee's duties and for conspiracy, and one of the reliefs claimed was to have the sale of the pledged shares set aside. There was no reason why Beckkett should, at this stage, be confined to the remedy of damages alone.

44 The trial judge stated that Beckkett did not assert any special interest or value in the

pledged shares beyond their monetary worth. However, Beckkett placed special emphasis on the shares of Adaro. First, Adaro was a private company. Second, the block of pledged Adaro shares constituted 40% of the shares in Adaro. It was thus a substantial shareholding. Third, Adaro runs the biggest coal mine in Indonesia. Fourth, it would not be easy to acquire such a block of shares in Adaro. It is true that Beckkett's original claim was in damages, *ie*, that the sale of the shares to DSM was at an undervalue. However, it amended the Statement of Claim after further discovery, and asked for the sale of the pledged shares to DSM to be set aside on the ground of conspiracy. On the authority of *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349, a Privy Council decision on appeal from Hong Kong, and *Latec Investments Limited v Hotel Terrigal Pty Limited* (1965) 113 CLR 265 ("*Latec Investments*"), a decision of the Australian High Court, one of the remedies which Beckkett could be entitled to, and for which it has prayed, is to have the sale by DB to DSM of the pledged shares, including the Adaro shares, set aside and have the equity of redemption restored to it. Therefore, *prima facie*, damages would not be an adequate remedy for the loss of the equity of redemption.

***Bona fide* purchaser without notice**

45 However, the injunction which Beckkett seeks in Indonesia is not in relation to the sale of the pledged shares by DB to DSM, but to restrain DSM from further selling the shares to other purchasers. Beckkett wished to prevent the situation of a purchaser for value without notice from arising.

46 It is settled law that a *bona fide* purchaser of the pledged shares from DSM, without notice of the defect in DSM's title to them, would be protected and such a transaction could not be set aside: see *Latec Investments Ltd* ([44] *supra*). Beckkett said that it was to prevent such a *bona fide* purchaser without notice from coming into the picture that it was essential that an injunction be obtained in Indonesia to restrain DSM from disposing of the pledged shares to any other party.

47 However, any potential purchaser of DSM's 40% share in Adaro would not be any small-time uninformed individual. In terms of value, the deal would involve a colossal sum, running into hundreds of millions of dollars. On Beckkett's own evidence, it had written to all potentially interested parties, including some big corporate names, to put them on notice that any purchase of those shares in Adaro could be affected by Beckkett's prior rights and interest in those shares.

48 In addition, notices were also inserted by Beckkett in the major Indonesian newspapers warning the public of its interest in the pledged shares. A purchaser of the Adaro shares with notice of Beckkett's interest to them would not, *vis-à-vis* Beckkett, possess any better title to those shares than DSM, and that transaction may be set aside: see *Clough v The London and North Western Railway Company* [1871] LR 7 Exch 26. An investor of such a magnitude would invariably have conducted due diligence before completing the purchase. It was unimaginable that such an investor could, after due diligence, be ignorant of the dispute between Beckkett and DB as to those shares. And if such an investor was willing to complete the transaction in the face of such knowledge, then it must have been that it had made its calculations and was prepared to take the risk or that it had been given an adequate assurance.

49 Thus the concern that a *bona fide* purchaser without notice might come into the picture would, in our view, be remote.