Beckkett Pte Ltd v Deutsche Bank AG and Another
[2005] SGHC 79

Case Number : Suit 326/2004, RA 72/2005

Decision Date : 22 April 2005

Tribunal/Court : High Court

Coram : Woo Bih Li J

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

Parties : Beckkett Pte Ltd — Deutsche Bank AG; PT Dianlia Setyamukti

Civil Procedure – Discovery of documents – Implied undertaking not to use documents disclosed for any ulterior purpose – Application for modification of or release from undertaking to allow use of documents in separate proceedings in Indonesia – Whether special circumstances warranting modification of undertaking – Whether prejudice caused to party giving discovery

22 April 2005

Woo Bih Li J:

Introduction

1 On or about 24 October 1997, the first defendant, Deutsche Bank AG ("DB"), advanced a loan of US$100m to PT Asminco Bara Utama ("Asminco"). The loan was secured by the following:

(a) the plaintiff's, *ie* Beckkett Pte Ltd's ("Beckkett") 74.2% shareholding in PT Swabara Mining & Energy ("SME"),

(b) SME's 99.9% shareholding in Asminco,

(c) Asminco's 40% shareholding in PT Adaro Indonesia ("Adaro") and PT Indonesia Bulk Terminal ("IBT").

The above shares have been referred to as "the pledged shares" and I shall use the same description. The loan was also secured by a corporate guarantee by Beckkett and SME. Beckkett, Asminco, SME, Adaro and IBT are part of a group of companies known as "the Swabara group". Adaro is reported as owning Indonesia's biggest coalmine.

2 On or about 21 November 2001, DB disposed of the pledged shares. It is not in dispute that at that time, an event of default had already arisen giving DB the right to dispose of the pledged shares.

3 Beckkett, however, said that the disposal of the pledged shares was without notice to it. It also said that the timing of the disposal coincided with the time when it was involved in a dispute with another group of shareholders in the Swabara group which it referred to as "the Management Group".

4 Beckkett said that despite requests from it in March 2002, DB refused to provide information to it on the identity of the purchaser of the pledged shares and the price at which the shares were sold, and that it was only in late April 2002, after its solicitors requested information from DB's solicitors that DB provided limited information on the price and the identity of the purchaser of the SME shares but no information on the other pledged shares. Consequently, Beckkett applied for

disclosure of documents in Originating Summons No 772 of 2002 ("the OS"). This was an application for pre-action discovery. An order was made by an assistant registrar on 2 August 2002 for such discovery. DB's appeal to a judge was dismissed on 15 November 2002. Subsequently, DB filed a list of documents and an affidavit verifying the list. Beckkett complained about the lack of full disclosure by DB under the order made in the OS but that is not relevant for present purposes.

5 Beckkett's position was that the sale of the pledged shares appeared to be at a gross undervalue. It believed that DB had breached its duties as mortgagee. It also believed that members of the Management Group had assisted the second defendant, PT Dianlia Setyamukti ("Setyamukti"), to purchase the pledged shares at an undervalue. Beckkett was unable to verify if Setyamukti was a *bona fide* purchaser, although Beckkett suspected it was not.

6 On or about 27 April 2004, Beckkett commenced the current proceedings in Suit No 326 of 2004 ("Suit 326"). DB gave discovery of various documents over a period of time. Again, Beckkett complained about the manner in which discovery was given but again, such a complaint is not relevant for present purposes.

7 Beckkett said that the documents disclosed by DB on 21 December 2004 and on 14 February 2005 confirmed its suspicion that DB and Setyamukti were involved in a conspiracy to harm or injure Beckkett when the pledged shares were sold by DB. Apparently, certain members of the Management Group had participated in the negotiations and/or assisted Setyamukti to purchase the pledged shares and the sale agreement and the exchange of e-mail revealed unusual terms and comments not usually found in an arms-length transaction. It is not necessary for me to elaborate on these allegations as they are not relevant for present purposes.

8 Suffice it for me to say that Setyamukti was added as a second defendant in Suit 326. Beckkett has obtained an order to serve the writ in Suit 326 outside of jurisdiction on Setyamukti in Indonesia but such service has not yet been effected. In Suit 326, Beckkett seeks an order for the sale of the pledged shares by DB to Sekyamukti to be set aside and for the equity of redemption in the pledged shares to be restored to their respective owners, or alternatively, damages.

9 I come now to the crux of the appeal before me. Beckkett said that in the light of the relief it sought to set aside the sale of the pledged shares and because there was news of an impending sale of the shares held by Setyamukti in Adaro, it wished to use the documents, disclosed by DB in the OS and in Suit 325, to seek an interim injunction in Indonesia to restrain the onward sale of the shares as that "would effectively render nugatory any relief that may be granted by the Singapore court" in Suit 326. On 10 March 2005, Beckkett applied for leave to use the documents enumerated in the schedule to the application. The documents listed in the schedule were in respect of all documents relating to the sale by DB of the pledged shares.

10 On 30 March 2005, an assistant registrar granted the leave sought with certain qualifications. The qualifications were:

(a) The documents to be used by Beckkett were limited to those exhibited in the seventh affidavit of Beckkett's director Ling Ping Sheun, Arthur, dated 10 March 2005 ("the documents in issue").

(b) Beckkett was not to proceed with its substantive action in Indonesia once the injunction was obtained, except with leave of the Singapore court.

(c) Beckkett was to apply for the Indonesian court record to be sealed when applying for

the injunction.

As regards the second qualification, it will presumably apply once the application for the injunction is made and decided upon, even if the application were not successful.

11 The assistant registrar, however, granted a stay of execution pending DB's appeal on DB's undertaking to file its notice of appeal by 4.00pm on 31 March 2005 and to seek a hearing thereof on an urgent basis. The appeal was heard by me on 6 April 2005. On 8 April 2005, I gave an oral judgment allowing DB's appeal and setting aside the order made below. I also ordered Beckkett to pay the costs of the appeal and of the hearing below to DB. Beckkett is appealing against my decision on an expedited basis. I now elaborate on the reasons for my decision.

The court's reasons

12 The background to Beckkett's application is the principle from *Riddick v Thames Board Mills Ltd* [1977] QB 881 which imposes an implied undertaking on a party to litigation not to use information disclosed to it in the course of the litigation for any ulterior purpose ("the *Riddick* principle"). There, Lord Denning MR said at 895 to 896:

> The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. …
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> … 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 anyone else – to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice. … In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purpose of the action in which they are disclosed. They are not to be made a ground for comments in the newspapers, nor for bringing a libel action, or for any other alien purpose. The principle was stated in a work of the highest authority 93 years ago by Bray J., *Bray on Discovery*, 1st ed. (1885), p. 238:
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> > A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit: … nor to use them or copies of them for any collateral object … If necessary an undertaking to that effect will be made a condition of granting an order: …
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> Since that time such an undertaking has always been implied, as Jenkins J. said in *Alterskye v Scott* [1948] 1 All E.R. 469, 471. A party who seeks discovery of documents gets it on condition that he will make use of them only for the purpose of that action, and no other purpose.

13 The above principle was not disputed. However, it was also not disputed that a party could be released from the implied undertaking ("the *Riddick* undertaking") if it demonstrated cogent and persuasive reasons for the release. The court would release or modify the implied undertaking in special circumstances and where the release or modification would not occasion injustice to the person giving discovery: *per* Lord Oliver of Aylmerton at 860 of *Crest Homes Plc v Marks* [1987] AC 829. The principle about releasing or modifying an undertaking in special circumstances and in the absence of injustice to the person giving discovery was cited with approval by Chan Sek

Keong J in *Reebok International Ltd v Royal Corp* [1992] 2 SLR 136.

14 Beckkett submitted that the intended use of the documents was not for a collateral or ulterior purpose, as the intended application for an injunction in Indonesia was to maintain the status quo pending the outcome of Suit 326. That application, it submitted, was ancillary to the proceedings in Suit 326.

15 Secondly, Beckkett submitted that there were cogent and persuasive reasons for its application. However, its reasons were the same as the basis for its application, that is, that if Setyamukti sold the pledged shares, any relief or judgment in Suit 326 would be nugatory.

16 Thirdly, Beckkett submitted that there would be no injustice to DB as Beckkett was prepared to seek a stay of the Indonesian proceedings after its application for injunctive relief was heard. It stressed that it was not seeking to pursue its main claims in Indonesia. Beckkett also stressed that it was not intending to use the documents to initiate or cause criminal proceedings to be initiated in Indonesia.

17 DB resisted Beckkett's application on various grounds. First, DB submitted that the documents in issue were more than what was necessary to support Beckkett's intended application for an injunction in Indonesia. DB raised the following chronology:

(a) On 26 January 2005, when Suit 326 was ongoing, Beckkett commenced a civil action in Indonesia against DB's Jakarta branch, Setyamukti and its nominees, Asminco, SME, Adaro and IBT. Beckkett had brought the Indonesian action in respect of the same facts and circumstances which form the basis of the dispute in Suit 326.

(b) On 7 February 2005, DB's Singapore solicitors put Beckkett's Singapore solicitors on notice of the *Riddick* undertaking. A letter was also sent to Sukanto Tanoto, who was believed to be the controlling mind and will of Beckkett.

(c) Beckkett filed a discontinuance of the Indonesian action on or around 14 February 2005.

(d) After the completion of discovery in Suit 326, Beckkett brought its application for leave to use documents obtained through discovery so as to seek an injunction against Setyamukti (as Beckkett's Singapore solicitors said they would do in their letter of 7 February 2005).

18 DB said that:

(a) In the action commenced by Beckkett in Indonesia in January 2005, Beckkett had applied for a provisional ruling to the effect that Setyamukti and its nominees be prohibited from transferring the pledged shares to any party. DB stressed that the provisional relief sought by Beckkett in the discontinued Indonesian action was the same as the injunction that Beckkett was now intending to apply for in the Indonesian courts.

(b) Despite the discontinuance of the Indonesian action, the documents submitted by Beckkett to the Indonesian court for the purposes of the provisional relief provided the best evidence that, in fact, Beckkett did not need the documents it then said it needed to apply for an injunction in Indonesia.

(c) In a letter dated 4 April 2005 by DB's Indonesian lawyer, he had identified the documents which were submitted to the Indonesian court in the discontinued action. The

identified documents did not include any of the documents which Beckkett was seeking to use.

(d) The fact that the documents in issue were actually not required by Beckkett then suggested that Beckkett had an agenda to use those documents for civil or criminal proceedings against DB in Indonesia.

19 Beckkett, however, explained that the initial Indonesian action was withdrawn on advice of its Singapore solicitors on the basis that there should not be two pending actions on the same cause of action. The intended application in Indonesia was only to seek injunctive relief and, as mentioned above, Beckkett would not be pursuing its main claim in Indonesia. Furthermore, Beckkett was entitled to use additional material to bolster its application for the injunction in Indonesia.

20 I was of the view that Beckkett was entitled to use whatever additional material was legitimately available to it to bolster its application for the injunction. The fact that it had previously sought similar provisional relief without the aid of the documents in issue did not mean that Beckkett should abandon the use of additional material if the same were legitimately available to it. Furthermore, I could not conclude that those documents were clearly irrelevant to an application for an injunction although DB had suggested that some might not be relevant.

21 DB's other argument was that it would suffer prejudice for the following reasons:

(a) Strong evidence had been adduced by DB to show that Beckkett would have to institute a civil claim against DB in the Indonesian courts before it could apply for an interim injunction, despite Beckkett's denial. This smacked of a lack of *bona fides* on the part of Beckkett.

(b) DB had grounds to believe that the documents, if released, would expose it to potential criminal proceedings in Indonesia.

(c) The Singapore court would lose exclusive control of the documents in issue once they were used in Indonesia. There was evidence that the documents in issue, once used in Indonesia, would become accessible to the public.

(d) The private interest of Beckkett in protecting its interest in the pledged shares could not outweigh the public interest in encouraging full disclosure which was the underlying rationale for the *Riddick* principle.

22 Although there was disagreement between the Indonesian lawyers of Beckkett and DB as to whether it was necessary to initiate a civil claim in Indonesia before seeking injunctive relief, I was of the view that even if Beckkett had to initiate a civil claim in Indonesia, this was immaterial because of the qualifications imposed by the assistant registrar which Beckkett was not contesting. If Beckkett did not comply with the qualifications, it would be subject to sanctions. True, it may well be that the real persons behind Beckkett were Indonesians and not the Singapore director of Beckkett who was signing affidavits on its behalf. However, the sanctions against Beckkett could be not only committal proceedings but the striking out of its claim in Suit 326. I did not think that Beckkett would want to take that risk. Furthermore, there was no evidence before me that it would not comply.

23 As for the argument that the Singapore court would lose exclusive control of the documents in issue once they were used in Indonesia, this would be the usual consequence should a Singapore court allow documents disclosed here to be used outside of its jurisdiction. Accordingly, this was not a strong argument against Beckkett's application if the intended use in Indonesia was ancillary to Suit 326 as appeared to be the case.

24 There was some common ground that any access to documents filed for use in Indonesian courts would be controlled by such courts. The debate, however, was the extent to which such control would be implemented even though Beckkett was to seek a sealing of the court record there. In my view, even if members of the public there were to obtain access to the documents in issue, that was not a strong argument against Beckkett's application since its intended use did appear ancillary to Suit 326. Such possible access is, again, not uncommon. What was important was that the documents in issue did not contain any trade secret or sensitive information that would affect DB's commercial interest beyond the present dispute, if the Indonesian public were to have access. True, the documents in issue contained confidential information of DB's dealings with Setyamukti and whoever was backing Setyamukti. They also contained confidential information on DB's own deliberations. However, in my view, those were not strong reasons to resist Beckkett's application.

25 As regards the argument that the private interest of Beckkett in protecting its interest in the pledged shares could not outweigh the public interest in encouraging full disclosure, this seemed at first blush to be a persuasive argument. Beckkett relied on *Sim Leng Chua v Manghardt* [1987] SLR 205 ("*Manghardt*"), where Chan Sek Keong JC (as he then was) said, at 213, [22]:

> The interest of the plaintiff in protecting his reputations is a private interest. There is no public interest in the pursuit of this action. No authority has been cited where a court has allowed a private interest to outweigh a public interest. In [*Halcon International Inc v The Shell Transport and Trading Co* [1979] RPC 97], Whitford J said:
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> > 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.

26 However, on reflection, I was of the view that this argument was not as persuasive as it had seemed. Many applications to seek a modification or release from an implied undertaking would be to advance the private interest of the applicant, unless it can be said that it is in the public interest that wrongdoers should not be allowed to get away with their wrongdoing. If the argument advocated by DB were valid, such applications would be doomed from the start. The reference to some overriding public interest by Whitford J should be considered in the light of subsequent cases where applications made to advance a private interest were allowed. Moreover, the reference by Chan JC to the absence of public interest must be seen in the context of the facts in *Manghardt*. In that case, the plaintiff had discovered certain defamatory remarks made by the defendant in the course of discovery of documents made in an earlier action between the plaintiff and another party. The plaintiff then sued the defendant for defamation. The defendant applied to strike out the action on the ground of abuse of process of the court. The application was dismissed by an assistant registrar but the defendant's appeal was allowed by Chan JC. The main ground of appeal was whether the *Riddick* principle was applicable. In that case, the documents disclosed were clearly being used for an ulterior purpose.

27 My main concern was DB's assertion that the use of the documents in Indonesia would expose it to potential criminal proceedings in Indonesia.

28 In *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1990] 3 All ER 283, Beldam LJ said, at 297 to 298:

Thus, in my judgment, it 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. I find support for this view in the judgments in the *Westinghouse Electric Corp* case and in *Rank Film Distributors Ltd v Video Information Centre* [1981] 2 All ER 76, [1982] AC 380. In the former case Lord Wilberforce accepted the proposition that the validation and connection of documents by sworn evidence with the RTZ companies would have a tendency to increase the risk of exposure to a penalty (see [1978] 1 All ER 434 at 445, [1978] AC 547 at 612). In the latter he said ([1981] 2 All ER 76 at 82, [1982] AC 380 at 443):

> Moreover, whatever direct use may or may not be made of information given, or material disclosed, under the compulsory process of the court, it must not be overlooked that, quite apart from that, its provision or disclosure may set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character. In the present case, this cannot be discounted as unlikely; it is not only a possible but probably the intended result. The party from whom disclosure is asked is entitled, on established law, to be protected from these consequences.

29 In *Lee Thin Tuan v Louis Vuitton* [1992] 2 SLR 273, Louis Vuitton claimed against Mr Lee for infringement of its trade marks. It obtained an order against him which, *inter alia*, required him to make and file an affidavit and serve a copy thereof on its solicitors within 14 days of the service on him of the order. The affidavit was to set out information concerning his receipt and supply of goods bearing trade marks infringing Louis Vuitton's trade marks. Mr Lee appealed against the whole of the order but his counsel argued only against the term of the order requiring him to give the above information. His counsel's argument was that compliance with the order might tend to incriminate him and expose him to criminal charges under various legislation. L P Thean J, delivering the judgment of the Court of Appeal, said at 277 to 278, [8]:

> With respect, we are unable to follow the majority decision in [*Busby v Thorn EMI Video Programmes Ltd* (1984) 2 IPR 304]. We cannot impose a condition that the information provided and documents produced should not be admissible in evidence against the appellant in any prosecution relating to the infringement of the respondents' trade marks. Neither can or should we require the respondents to give an undertaking to restrict the use of any of the information or documents. Firstly, the question of prosecution lies with the public prosecutor and not the respondents. Any undertaking given by or on their behalf restricting the use of any information or document in a criminal prosecution has but a limited effect; it binds only the respondents, and the public prosecutor is clearly not bound by such undertaking. Secondly, in the conduct of any prosecution, the public prosecutor cannot be constrained by such an order. Thirdly, the question of admissibility of evidence is governed by our Evidence Act (Cap 97, 1990 Ed) and other written law, and we need hardly say that our courts, when exercising their civil jurisdiction, have no power to order that certain information or documents ought not to be admitted in evidence in a criminal prosecution which is otherwise admissible under the Evidence Act or other written law.

30 At 279, Thean J noted that there was no suggestion that the risk of prosecution was flimsy or remote. Accordingly, the appeal was allowed and the term of the order in issue was expunged.

31 In *Guccio Gucci SpA v Sukhdav Singh* [1992] 1 SLR 553, the plaintiffs applied for summary judgment for various orders which included an order that the defendant disclose by affidavit information relating to past infringements of the plaintiffs' trade marks and an order for an affidavit setting out all information to be disclosed. The defendant resisted such orders and claimed the privilege against self-incrimination. Chan Sek Keong J said, at 557, [7]:

> Where the privilege is claimed and there is a basis for claiming it, 'it is the paramount duty of the court to uphold it' (per du Parcq LJ in [*Triplex Safety Glass Co, Ltd v Lancegaye Safety Glass (1934), Ltd* [1939] 2 All ER 613] at p 617). However, the judge must consider whether it is a bona fides claim. The mere assertion by a party that he may or will criminate himself is not sufficient.

32 Chan J also noted that on the facts before him, no one could say that the likelihood of prosecution was fanciful or remote. At 561, [21], he added:

> The operation of the privilege against self-incrimination is unavoidable in a case where, as here, the bases of civil liability are the same as those for criminal liability. The plaintiffs says that they are more interested in recovering damages from the defendant than in further prosecuting them or putting them in a position of being further prosecuted. Be that as it may, that is not a sufficient reason to deny the defendant his right o plead the privilege, which in the United States is regarded as 'one of the great landmarks in man's struggle to make himself civilized'. (Erwin N Grisworld, *The Fifth Amendment Today* (Cambridge, Mass, 1955), quoted by Frankfurter J in *Ullmann v US* [350 US 422 (1955)].) In my view, as the law stands, the privilege applies as much to pre-trial discovery as to post-judgment discovery.

33 In the circumstances, Chan J did not make those orders sought.

34 In the present case, a question also arose as to whether the privilege against self-incrimination would apply to foreign penal sanctions. Apparently, there was no local decision on the point. However, in *Brannigan v Davison* [1997] AC 238 ("*Brannigan*"), which was an appeal from the Court of Appeal of New Zealand to the Privy Council, the Privy Council decided that this common law privilege does not apply to foreign penal sanctions. Nevertheless, the Privy Council also said, at 251:

> If the unqualified application of the privilege to foreign law is unsatisfactory, so also is the opposite extreme. The opposite extreme is that the prospect of prosecution under a foreign law is neither here nor there. Since the privilege does not apply to prosecution under foreign law, the witness must always answer a relevant question in the domestic proceedings, regardless of the nature of the crime under the foreign law and regardless of the likely practical consequences for the witness under that law.
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> 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.

35 Therefore, even if the privilege against self-incrimination were not to apply to foreign penal sanctions, *Brannigan* suggests that such sanctions would still be a factor to be considered. In *Arab Monetary Fund v Hashim* [1989] 3 All ER 466, Morritt J said, at 474:

> In the case of offences under the criminal law of a foreign state, there is no privilege, but I see no reason why the possibility of self-incrimination or the incrimination of others should not be a factor to be taken into account in deciding whether and, if so, in what terms a disclosure order should be made.

36 Morritt J's view was referred to with approval by Evans-Lombe J in a subsequent case. Although the decision of Evans-Lombe J was reversed by the Court of Appeal in *Attorney-General for Gibraltar v May* [1999] 1 WLR 998, the Court of Appeal did not disapprove of that part of his judgment which cited Morritt J's view with approval.

37 I accepted that the risk of prosecution in a foreign country is a factor which the court should take into account in deciding whether to grant leave to use documents disclosed in proceedings in Singapore in that foreign country.

38 Beckkett submitted that DB did not specify which offence it would be guilty of and, indeed, DB was disavowing any wrongdoing. I was of the view that the disavowal did not preclude DB from raising the fear of prosecution in Indonesia. Indeed, as DB was disavowing any wrongdoing, I did not expect DB to specify what offence it was guilty of. To do so would, as it submitted, be suicidal. Likewise, I did not expect DB's Indonesian lawyer to specify what offence DB was guilty of.

39 On the other hand, Beckkett's Indonesian lawyer did not say that no offence had been committed by DB. At this point, I digress to say that I did consider whether any offence committed by DB would have been committed in Singapore only. However, neither side suggested this and, hence, I was not able to conclude that this was so.

40 The type and extent of the sanctions were also important. Such information was not before the assistant registrar. By the time of the hearing of the appeal before me, DB's Indonesian lawyer had stated, *inter alia*, that the criminal penalty for fraud is a maximum of four years of imprisonment and the criminal penalty for conspiracy ranged from a minimum of one year to a maximum of five years of imprisonment. However, in a case involving an individual who defrauded a state bank, the sentence was life imprisonment. The possible sanctions were therefore not light.

41 Although Beckkett disavowed any intention to use the documents in Indonesia to initiate or cause criminal proceedings to be initiated, DB submitted that the danger of prosecution was not fanciful or remote. In the past, Beckkett had lodged a complaint or caused an investigation by the Indonesian police to be initiated against DB's officers. Although the Indonesian police had terminated that investigation on the basis that the alleged crime purportedly committed was not a crime, I accepted DB's submission that there was nothing to stop the Indonesian police from re-opening their investigation, especially if they were to receive new information. Indeed, the possibility of the re-opening of police investigations in Indonesia was not denied by Beckkett.

42 Moreover, DB relied on two recent events for its fears of police investigations in Indonesia.

43 DB said that an officer of its branch in Indonesia had been threatened by Beckkett's Indonesian lawyer, one Lucas, that criminal proceedings would be started if the pledged shares were not returned to Beckkett. That officer declined to swear an affidavit to narrate the incident for fear of his own safety. On the other hand, Lucas denied uttering the threat although he did not deny meeting the officer.

44 Secondly, DB pointed out that in the *International Herald Tribune* issue of 1 April 2005, Beckkett's lawyer, one Oddo Cornelis Kaligis, was reported to have said "further legal action will be taken – a civil case in Central Jakarta District Court and a criminal case". Mr Kaligis denied having made this statement, thus suggesting that newspaper reports are not necessarily accurate. Be that as it may, Beckkett itself was relying on newspaper reports that refer to an intended sale by a different entity, New Hope Corporation ("New Hope"), of another block of shares in Adaro following the alleged lead of its Indonesian partners when they (the Indonesian partners) chose to sell. This was interpreted by Beckkett to mean that Setyamukti was trying to sell the pledged shares in Adaro or all the pledged shares which they had bought from DB. Beckkett submitted that it intended to buy the Adaro shares owned by New Hope based on its pre-emptive rights.

45 Taking into account the evidence and the fact that there was no question of restricting the

use by the Indonesian police of any of the documents in issue, I was of the view that the risk of prosecution in Indonesia in reliance on those documents was not fanciful or remote. I stress that nothing which I say is intended to discourage the Indonesian police from launching or re-opening their own investigations. I was concerned with the use of documents outside Singapore which have been disclosed pursuant to orders made by Singapore courts or Singapore rules of litigation.

46 I now come back to the reasons advocated by Beckkett for leave. As I have mentioned, Beckkett had submitted that the use of the documents in Indonesia for injunctive relief was ancillary to Suit 326. Beckkett also suggested that it was not even necessary for it to seek the court's leave to modify or release it from its implied undertaking but, as a matter of prudence, it had sought such leave. One of the cases which Beckkett relied on for the proposition that leave was not necessary was *Omar v Omar* [1995] 1 WLR 1428. In that case, the personal representatives of the deceased owner of bearer share warrants had issued a writ against his widow and his mistress to recover the warrants. On their undertaking not to use, without leave, information disclosed save for certain specified purposes, discovery was ordered against a bank of documents at its London branch. The plaintiffs subsequently applied for leave to use the documents disclosed in support, *inter alia*, of parallel actions abroad to aid inquiries as to the whereabouts of the share warrants and the identities of their present holders. At 1435 Jacob J said:

> It is accepted that the disclosed documents can be used in foreign proceedings aimed at following and tracing the money. For the same reasons I think they can also be used to establish ultimate liability in those foreign proceedings. This can be done without leave. True it is that Waller L.J. in the *Bankers Trust* case [1980] 1 W.L.R. 1274, 1283 referred to "this action" but that was in the context of the absence of any foreign proceedings. The whole purpose of permitting tracing discovery would be lost if the money could not be effectively followed once it was abroad.

47 However, I noted that Jacob J also said immediately thereafter that if he were wrong, then he would willingly grant leave.

48 The issue as to whether leave was necessary for use of disclosed documents in ancillary proceedings outside jurisdiction was not fully argued before me since Beckkett was, in any event, seeking leave to do so. Accordingly, it was not necessary for me to make a ruling thereon. However, as the matter is of some importance, I would say that my tentative view is that it is necessary to seek such leave. The party intending to use the documents outside jurisdiction should not be the one to decide for himself that the use is ancillary and hence an application for leave is unnecessary. Besides, as the implied undertaking is given to the court, it should be for the court to say whether the implied undertaking is to be released or modified. At present, I am also not in favour of the suggestion that an ancillary use would always result in the release or modification of the implied undertaking. The question of release or modification is at the court's discretion, as some of the cases which Beckkett relied on emphasise.

49 Beckkett relied on a number of cases but I need refer to only three.

50 In *Bayer AG v Winter (No 2)* [1986] FSR 357 ("*Bayer*"), the plaintiffs marketed an insecticide aerosol spray. They alleged that counterfeit products were being sold in the Middle East under a trade mark similar to their own. They obtained *ex parte* Anton Piller and Mareva orders. Subsequently, the plaintiffs received an affidavit of assets sworn by the first defendant on behalf of himself and the fourth defendant. The affidavit disclosed the existence of bank accounts in Austria. A document which the plaintiffs had obtained pursuant to the Anton Piller order appeared to identify an account maintained by the fourth defendant in Switzerland but which was not mentioned in the first

defendant's affidavit. The plaintiffs applied *ex parte* and in camera to use the Anton Piller information and documents in proposed proceedings in Switzerland and in Austria to attach funds held by certain defendants and to assert claims against Austrian parties identified by the Anton Piller documents. The plaintiffs were granted leave by Hoffmann J. The defendants applied to discharge the leave order and the plaintiffs further applied for an order that the first defendant sign letters requesting a Swiss bank to disclose to the plaintiffs' solicitor information concerning the operation of any account which the first or fourth defendants maintained with that bank. Both of those applications were also heard by Hoffmann J. As regards the application which was heard *ex parte* and in camera, Hoffmann J said, at 360:

> The use of the information to commence proceedings against existing defendants in Switzerland and Austria is also in my view justified on the ground that at least the initial object of such proceedings is the attachment of funds in those countries. In general it is desirable that the issues between the parties should not simultaneously be litigated in more than one jurisdiction. But a distinction must be made between the litigation of the substantive merits of the dispute and protective measures such as the *Mareva* injunction, attachment or *saisie conservatoire* which are designed to preserve assets out of which a successful plaintiff may obtain compensation. Orders of the latter kind cannot in the nature of things be made fully effectual except by the courts of the country where the assets actually are.

51 As regards the next two applications, Hoffmann J said at 363:

> The fact that this court may lose exclusive control over the documents once they come into the hands of the foreign court is therefore less significant than it would be if the documents contained sensitive information. …
>
> I do not think that it matters that the information obtained by the *Anton Piller* order could not have been obtained by discovery procedures in Austria or Switzerland.

He then noted that no criminal proceedings were contemplated. In the circumstances, Hoffmann J dismissed the defendants' application and granted the plaintiffs' further application.

52 Accordingly, in *Bayer*, the threat of criminal prosecution did not seem to have played a significant role in the arguments.

53 The second case was *Bank of Crete SA v Koskotas (No 2)* [1992] 1 WLR 919 ("*Bank of Crete*"). Beckkett relied on what Millett J said, at 924 to 925:

> Civil proceedings are not an end in themselves. In the present case the purpose of the English proceedings was to obtain the restoration of funds alleged to have been misappropriated from the bank. For that purpose it may be necessary to bring proceedings in many different jurisdictions. The use of material obtained in the course of English proceedings for the purpose of similar proceedings in other jurisdictions would not infringe the general principle, and accordingly I gave leave.

54 However, the facts in *Bank of Crete* were quite special. There, the plaintiff bank had commenced action against its former chief executive and others for misappropriation. An order was made by Morritt J against an English bank and several foreign banks with branches in London authorising disclosure of information and documents relating to certain account-holders for use solely in the action. Millett J then extended the order to permit use of the material for any civil proceeding, within or outside the court's jurisdiction, against any person relating to any matters disclosed

pursuant to the first order. Subsequently, the plaintiff bank sought leave to use the material disclosed by the head of a team of investigators appointed by the Bank of Greece to inquire into the affairs of the plaintiff bank, who was under a duty to produce audit reports to the provisional commissioner of the plaintiff bank, who in turn was under a duty to supply copies of the audit reports to the Governor of the Bank of Greece and to the examining magistrate appointed to investigate the criminal aspects of the fraud. It is important to bear in mind that the defendants and the banks who had made disclosure did not appear and were not represented. Even then, Millett J considered the matter to lie in his discretion. He noted that there were wide policy considerations and the absence of a claim to the privilege against self-incrimination. On the latter point, he said, at 925 to 926:

> I have considered what would be the position if this were an entirely domestic matter. It could not, I think, arisen in quite the same form in such a case for the account holders might have been entitled to refuse discovery by asserting the privilege against self-incrimination. On the other hand, that privilege would not have availed the account-holders if the banks were served with subpoenas duces tecum. Such considerations do not arise in the present case since by virtue of section 14(1) of the Civil Evidence Act 1968 the privilege does not extend to protection against the possibility of prosecution in a foreign jurisdiction.

He continued at 926:

> In my judgment, the correct approach to the present case is as follows. The purpose for which the material has been obtained is the recovery by the bank of misappropriated funds. Save in exceptional circumstances, it would not be right to authorise the bank voluntarily to make use of the material for any other purpose. There were special circumstances which led Ferris J to extend the order in order to prevent a miscarriage of justice. However, *voluntary* disclosure is one thing; disclosure under compulsion of law is another. By enabling the bank to obtain information which it needs for the successful prosecution of its civil remedies, the court should not place the bank in an impossible position in which it must either infringe its undertaking to this court or find itself in breach of its duties under Greek law. The fact that a party which seeks the assistance of the English court to obtain material for the purpose of an English action may find itself under a legally enforceable obligation in another jurisdiction to disclose the material for some other purpose is no doubt a factor to be taken into account by the court when considering whether to give such assistance, but unless the material is of only marginal relevance to the English action it ought not normally to preclude the court from assisting the applicant to obtain the material it needs for the successful prosecution of the action.
>
> Now that the bank is in possession of the material, it is the obligation of the bank to prepare audit reports. Such reports ought to be full and proper reports and not misleading or worthless reports. Precisely how its obligation is to be performed is a matter for the bank, but this court ought not to place any obstacle in the way of the proper performance by the bank of its obligations under Greek law. Once the report is completed, the provisional commissioner of the bank will be bound to notify the governor of the Bank of Greece that the audit report is complete. It would be wrong for this court to prevent the provisional commissioner from complying with his legal obligation under Greek law to convey that information to the Bank of Greece. Thereafter it will be a matter for the Bank of Greece to exercise whatever powers it has under Greek law to compel production of the audit reports. If the governor obtains them, it will be a matter for Greek law to determine what use if any the examining magistrate should make of them. Such questions involve considerations of public policy, but in my judgment they are questions of Greek public policy, and should be determined accordingly without the restraining hand of this court.

55 In my view, the facts in *Bank of Crete* were very different from those before me. As I have

mentioned, the privilege of self-incrimination was not argued and the court there was of the view that the plaintiff bank was under a legally enforceable obligation in the foreign jurisdiction to disclose material obtained in English proceedings.

56 The third case is *Omar v Omar*, which I have already mentioned above at [46]. There Jacob J also said at 1436 to 1437:

> In the present case the use of the discovered documents for a personal claim seems to me to be entirely a legitimate purpose – within the "broad purpose" of the original discovery. Such a claim is not in substance collateral at all: the object of the personal claim, as of the proprietary claim, is to see the estate put right. The facts giving rise to both claims are broadly the same. … I think there are compelling and cogent reasons why leave should be given.
>
> …
>
> *The Mareva relief leave*
>
> It became clear in argument that what was in dispute was use of the discovered documents not for tracing (which was conceded to be legitimate) but for relief in a personal claim. It was contended that the defendants (particularly Chiiko) may seek to dissipate or hide their assets pending trial and that the plaintiffs would or might, as a matter of urgency, need to seek relief against that in certain specified jurisdictions, as I have indicated above.
>
> For the same reasons as I think it appropriate to grant leave to use the documents in the English case, I think it appropriate to grant leave for corresponding foreign cases. I am aware that in foreign jurisdiction there may not be the same degree of judicial control over the use of such documents. In some other case that might matter but here I think not. I have been taken through the documents – they do not disclose anything which, apart from providing further evidence to bring the wife and mistress to book, is likely to be commercially sensitive.

57 Again, the intention there to use documents disclosed in England for proceedings outside of jurisdiction was in aid of Mareva relief elsewhere and the issue of self-incrimination did not appear to have played a role in the arguments.

58 Initially, I was concerned that if I were to allow DB's appeal, this might suggest that a plaintiff would not be able to use documents disclosed in Singapore pursuant to an Anton Piller order in aid of an application for a Mareva injunction in a foreign jurisdiction. The use of such documents is not uncommon and has been allowed, as demonstrated in *Bayer* ([50] *supra*) and *Omar v Omar*.

59 However, after further consideration, I was of the view that the facts before me were quite the opposite of those in the type of cases that require relief by way of a Mareva injunction and an Anton Piller order in Singapore and elsewhere. In such cases, the basis for seeking such relief is that the defendant may dispose of his assets to frustrate a judgment. In the case before me, there was no such allegation. There was no application for a Mareva injunction against DB. Indeed, it was not disputed that DB would be able to meet any monetary judgment that Beckkett might obtain against it in Suit 326.

60 This brought me to the next point. If the pledged shares in Adaro, or all the pledged shares, were sold by Setyamukti, it did not necessarily follow that Beckkett would not be able to set aside the sale between DB and Setyamukti and any subsequent sale by Setyamukti, since Beckkett had been giving notice of its claim to the intending purchasers and could give public notice of its claim.

However, even if that particular relief of setting aside were no longer available, Beckkett might still be awarded substantial damages in Suit 326. Significantly, Beckkett did not assert any special interest or value in the pledged shares beyond their monetary value. Accordingly, while Beckkett, in such circumstances, might not obtain the relief of setting aside, that was quite different from saying that any relief obtained by it in Suit 326 would effectively be rendered nugatory. In my view, the latter was an exaggeration.

61 Bearing in mind the risk of foreign penal sanctions and that substantial relief would still be available to Beckkett, even if the relief of setting aside were not, I was of the view that the scales weighed heavily in favour of allowing the appeal and I ruled accordingly.

62 I should mention that after I gave my oral judgment, Mr Chong, counsel for Beckkett, said that the crux of the reason for my decision was a point which counsel for DB had not raised. I should add that that was probably why that reason did not feature in the assistant registrar's reasons in granting leave. Mr Chong reiterated that pursuant to its pre-emptive rights, Beckkett was intending to buy the block of shares which New Hope was intending to sell. This block was 40% of the shareholding in Adaro as was the pledged shares in Adaro. With these two blocks of shares, Beckkett would be in control of Adaro which had a massive revenue stream. Mr Chong accepted that these allegations were not in the supporting affidavits of Beckkett for the application for leave but he said that that was because they were not in issue.

63 I was not persuaded to vary my decision or to allow further arguments based on this representation.

64 Firstly, while it is true that DB had not taken the point that substantial relief would in any event be available to Beckkett, even if the relief of setting aside were not available, it was for Beckkett to persuade the court to exercise its discretion in favour of its application. I reiterate that in *Bank of Crete*, there was no opposition to the application but still the applicant had to persuade the court to allow its application. After all, the implied undertaking is given to the court.

65 Secondly, when the primary affidavit in support of the application for leave was filed, Beckkett could not have been aware as to what points DB would have taken to resist its application. Yet, Beckkett was already contending, without basis, in my view, that the disposal of the pledged shares by Setyamukti would effectively render nugatory any relief that might be granted in Suit 326.

66 Thirdly, even if Beckkett could somehow show that it had the resources to buy New Hope's 40% stake, and that there would be some massive loss of revenue if it were not to gain control of Adaro, this would still be a question of damages which DB would be able to satisfy, provided liability and the extent of damages are eventually established.

67 It seemed to me that Mr Chong's representation about Beckkett's plan and alleged loss was reinforcing my view that damages would be an adequate remedy. Accordingly, I maintained my decision.

First defendant's appeal allowed.