IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 64

Suit No 535 of 2016 (Summonses Nos 637 of 2017, 1472 of 2017 and 644 of 2017)

Between

PT Gunung Madu Plantations

… Plaintiff

And

Muhammad Jimmy Goh Mashun

… Defendant

GROUNDS OF DECISION

[Civil Procedure] — [Mareva injunctions]

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Woo Bih Li J
18 May; 23 October 2017; 1, 9 February 2018

20 March 2018

Woo Bih Li J:

Introduction

1 The applications in this case raise the important question of whether a court has the jurisdiction to grant a Mareva Injunction ("MI") against a foreign defendant where a plaintiff's underlying cause of action has no connection with Singapore and the MI is really in aid of foreign court proceedings.

2 For the purpose of this Grounds of Decision and unless the context suggests otherwise:

(a) a reference to "court" is to the High Court of Singapore; and

(b) a reference to a "foreign defendant" is to a person who is not ordinarily resident in Singapore. Conversely, a "local defendant" is one who is ordinarily resident in Singapore.

3 I decided that a court has no jurisdiction to grant the MI sought in this case because, in the first place, the court does not have *in personam* jurisdiction over the foreign defendant. Without such a jurisdiction, a court will not have jurisdiction to grant an MI against a foreign defendant in aid of foreign court proceedings. I set out my reasons below.

Background

4 PT Gunung Madu Plantations ("the Plaintiff") is a Jakarta domiciled company. It owns and operates a sugar cane plantation in Lampung, Indonesia, and engages in other business activities relating to sugar. Muhammad Jimmy Goh Mashun ("the Defendant") is a citizen of the Republic of Indonesia and resides in Jakarta, Indonesia since 1977. He was employed by the Plaintiff on 1 June 1977. He became its General Manager in or around 1997 until the end of his employment on 15 February 2016. He was also its director from about June 2013 until 30 March 2016.

5 On 24 May 2016, the Plaintiff filed a Writ of Summons with a Statement of Claim in Singapore against the Defendant ("the Writ"). The Statement of Claim alleged that the Defendant had breached duties owed to the Plaintiff as its director and its employee in respect of various payments which the Defendant had wrongfully authorised the Plaintiff to make to others. The payments totalled almost 800 billion Indonesian Rupiah ("IDR") (about S$82.4

million based on an exchange rate of S$1=9,706.05 IDR mentioned in the statement of claim).

6 After the Singapore action was filed, the Plaintiff commenced action in Malaysia on 27 May 2016 against the Defendant and other individuals, and in Indonesia on 9 August 2016 against the Defendant. I was informed that the factual allegations against the Defendant in the Malaysia action overlapped with those in the Singapore action although some allegations in the Singapore action were not made in the Malaysia action. The factual allegations against the Defendant in the Singapore and Indonesia actions were the same.

7 In the meantime, the Plaintiff applied for leave to serve a sealed copy of the Writ on the Defendant in Indonesia. The court granted such leave on 30 June 2016 and the Defendant was granted 21 days to enter an appearance in the action after being served with the Writ.

8 Subsequently, another order was made on 15 August 2016 on the Plaintiff's application to allow a named Indonesian lawyer (of the Plaintiff) to serve the following documents on the Defendant in Indonesia:

(a) sealed copy of the Writ on the Defendant;

(b) the Order of Court of 30 June 2016 granting leave to effect service out of jurisdiction; and

(c) copies of the Bahasa Indonesia translation of these two documents.

9 On 8 November 2016, the Indonesian lawyer purported to serve these documents on the Defendant at her office in Indonesia. Although the Defendant had 21 days to enter an appearance in the court, he did not do so. He later alleged that he was not aware that formal service of the papers had been effected on him on 8 November 2016 as he had attended at the Indonesian lawyer's office in question that day for a Without Prejudice meeting and he had been handed these documents in the course of such a meeting. He thought the documents were for his information only. Indeed, he raised this as a ground to allege that there was in fact no valid service on him. I need not elaborate on the merits of this challenge for reasons which will become obvious later.

10 As the Plaintiff took the position that the Defendant had been validly served, the Plaintiff took steps to obtain a judgment in default from the court against the Defendant for his failure to enter an appearance in the court. On 6 December 2016, a judgment in default was issued by the court against the Defendant.

11 In January 2017, the Plaintiff applied for a garnishee order to show cause in respect of three bank accounts which the Defendant had with three banks in Singapore. Eventually three orders to show cause were made by the court in January 2017 in respect of each of those bank accounts ("the Garnishee Orders Nisi").

12 Notice of these Garnishee Orders Nisi was sent to the Defendant's residential address in Jakarta although he said he was staying outside Jakarta at that time. In any event, he came to learn of these Garnishee Orders Nisi. He then filed various applications in Singapore. The main application was Summons No

637 of 2017 (Amendment No 1) ("Amended Summons 637/2017"). It was initially filed on 10 February 2017. The court allowed the Defendant to amend the application on 7 March 2017 to include various reliefs. The main reliefs sought in Amended Summons 637/2017 were:

(a) an order to set aside the Writ and/or service thereof;

(b) orders to discharge an order dated 30 June 2016 granting the Plaintiff leave to serve the Writ out of jurisdiction on the Defendant and an order dated 15 August 2016 granting leave to a named Indonesian lawyer to effect personal service of the Writ on the Defendant;

(c) an order to set aside the judgment in default of an appearance;

(d) an order to discharge the Garnishee Orders Nisi; and

(e) a declaration that the court has no jurisdiction over the Defendant.

13 In response, the Plaintiff filed an application by way of Summons No 1472 of 2017 ("Summons 1472/2017") for an MI against the Defendant on 28 March 2017 in respect of the Defendant's assets in Singapore.

The issues

14 In summary, the main issues were:

(a) whether the court has *in personam* jurisdiction over the Defendant;

(b) whether the court has jurisdiction or power to grant an MI against the Defendant in aid of foreign court proceedings.

Whether the court has in personam jurisdiction over the Defendant

15 Sections 16(1) and (2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA 2007") states:

> 16.—(1) The High Court shall have jurisdiction to hear and try any action in personam where —
>
> (*a*) the defendant is served with a writ of summons or any other originating process
>
> (i) in Singapore in the manner prescribed by Rules of Court or Family Justice Rules; or
>
> (ii) outside Singapore in the circumstances authorised by and in the manner prescribed by Rules of Court or Family Justice Rules; or
>
> (*b*) the defendant submits to the jurisdiction of the High Court.
>
> (2) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as is vested in it by any other written law.

16 In the present case, the Defendant did not submit to the jurisdiction of the court. Hence, s 16(1)(*b*) SCJA 2007 was not applicable. Under s 16(1) SCJA 2007, the court's jurisdiction is founded on service of a writ of summons on a defendant. In the present case, since the Defendant was outside Singapore, s 16(1)(*a*)(ii) applied so that service was to be made in the circumstances authorised by the Rules of Court (Cap 322, R5, 2014 Rev Ed) ("ROC 2014"). As for s 16(2) SCJA 2007, I will come back to this provision later.

17 The relevant provision in ROC 2014 for service of originating processes out of Singapore is O 11 r 1. The Plaintiff had relied on O 11 r 1(*a*) which permits service out of Singapore if in the action:

> "(*a*) relief is sought against a person who is domiciled, ordinarily resident, carrying on business or has property in Singapore;"

18 When the Plaintiff applied for leave to serve the Writ on the Defendant in Indonesia, the supporting affidavit relied on the last limb of O 11 r 1(*a*), *ie*, that the Defendant has property in Singapore.

19 Interestingly, this last limb of O 11 r 1(*a*) appears to be derived from previous primary legislation. In the Supreme Court of Judicature Act (Cap 15, 1970 Rev Ed) ("SCJA 1970"), s 16(1) stated:

> 16.—(1) The High Court shall have jurisdiction to try civil proceedings where —
>
> (*a*) the cause of action arose in Singapore;
>
> (*b*) the defendant or one of several defendants resides or has his place of business or has property in Singapore;
>
> (*c*) the facts on which the proceedings are based exist or are alleged to have occurred in Singapore; or
>
> (*d*) any land the ownership of which is disputed is situated within Singapore:
>
> Provided that the High Court shall have no jurisdiction to try any civil proceeding which comes within the jurisdiction of the Shariah Court constituted under the Administration of Muslim Law Act.

20 Section 16(2) of the SCJA 1970 provided for jurisdiction with the written consent of the parties and s 16(3) referred to jurisdiction under any written law in force in Singapore.

21 As can be seen, service was not the basis for acquiring *in personam* jurisdiction over defendants under the SCJA 1970 (although service was the basis prior to the SCJA 1970). The mere existence of property of a defendant in Singapore was in itself sufficient under the SCJA 1970 to give the court jurisdiction over that defendant.

22 At that time, O 11 r 1(*c*) of the then Rules of the Supreme Court 1970 ("RSC 1970") permitted the court to grant leave to serve notice of a writ out of jurisdiction if the action sought relief "against a person domiciled or ordinarily resident or carrying on business within the jurisdiction". In 1973, *ie*, with effect from 27 January 1973, an amendment was made to include the words "or has property" in O 11 r 1(1)(*c*) so that the court could grant leave to serve notice of a writ out of jurisdiction where relief was sought against a person who has property within the jurisdiction even if he was neither domiciled or ordinarily resident in Singapore or carrying on business in Singapore. Thus, as at 27 January 1973, O 11 r 1(1)(*c*) of the RSC 1970 reads:

> 1.— (1) Where the writ does not contain any claim for damage, loss of life or personal injury arising out of —
>
> (i) a collision between ships; or
>
> (ii) the carrying out of or omission to carry out a manoeuvre in the case of one or more of two or more ships; or
>
> (iii) non-compliance on the part of one or more of two or more ships, with the collision regulations made in section 260 of the Merchant Shipping Ordinance,
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> service of a notice of a writ out of the jurisdiction is permissible with the leave of the Court in the following cases, that is to say —
>
> …

> (*c*) if in the action begun by the writ relief is sought against a person domiciled or ordinarily resident or carrying out business or has property within the jurisdiction;

23 In 1991, O 11 r 1 of the RSC 1970 was amended so that the various grounds on which leave to serve out of jurisdiction were deleted, see: The Rules of the Supreme Court (Amendment No. 3) Rules 1991 (S 532/91). The process was simplified so that there was only one provision permitting service of a writ out of jurisdiction with leave of the court. Thus, the amended O 11 r 1 read:

> 1. Service of a writ out of jurisdiction is permissible only with the leave of the Court.

24 In 1993, the SCJA 1970 was amended with effect from 1 July 1993: Supreme Court of Judicature (Amendment) Act 1993 (Act 16 of 1993). Section 16 of the SCJA 1970 was repealed. It was replaced by a new s 16. Under the new s 16(1), service was re-introduced as the basis for the acquisition of *in personam* jurisdiction by the court.

25 At the same time, O 11 of the Rules of the Supreme Court were amended: The Rules of the Supreme Court (Amendment No. 2) Rules 1993 (S 278/93). With effect from 1 July 1993, the simple provision in O 11 r 1 of the RSC 1970 was deleted. Instead specific grounds for which the court could grant leave to serve a writ out of jurisdiction were re-introduced. The ground about a defendant's domicile, residence, business or property in Singapore, which was previously specified under O 11 r 1(1)(*c*) of the RSC 1970, was then inserted under O 11 r 1(*a*).

26 Thereafter, the following amendments to s 16 of the Supreme Court of Judicature Act were made in 2014 (see: Family Justice Act 2014 (Act 27 of 2014)) but they are not material for present purposes:

(a) An amendment was made to s 16(1) to include reference to the Family Justice Rules;

(b) Section 16(2), which excluded proceedings under the jurisdiction of the Syariah Court, was deleted and the previous s 16(3) in 1993 referring to jurisdiction under any other written law became s 16(2).

27 Therefore, the amendments in 1993 which introduced service as the touchstone for founding jurisdiction remain in almost identical form today.

28 Under the present regime, the existence of a defendant's property in Singapore is no longer a ground for founding jurisdiction under primary legislation (the SCJA) but it remains a ground for permitting leave to serve a writ out of jurisdiction under secondary legislation (the ROC). However, an application for leave to serve a writ out of Singapore under the ROC 2014 must satisfy other requirements which I will come to.

29 The Plaintiff appeared to have satisfied O 11 r 1(*a*) of the ROC 2014 in that it did commence action in Singapore and the Defendant did have property in Singapore. However, there were also other requirements which the Plaintiff had to meet. In *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 ("*Siemens*"), the Court of Appeal at [2] mentioned three major considerations or requirements which a plaintiff must meet to obtain leave to serve a writ out

of Singapore. These three main requirements had been summarised by Prof Jeffrey Pinsler in *Singapore Court Practice 2009* (LexisNexis, 2009) at para 11/2/5 and are reiterated in the more recent *Singapore Court Practice 2017* (LexisNexis, 2017). They are:

(a) the claim must come within the scope of one or more of the paragraphs of O 11 r 1;

(b) the claim must have a sufficient degree of merit; and

(c) Singapore must be the *forum conveniens*.

These three main requirements were reiterated by the Court of Appeal in *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom Communications*") at [26].

30 The legal basis for the third requirement of *forum conveniens* ("the *forum conveniens* requirement") appears to be O 11 r 2(2) of the ROC 2014 which provides that no leave to serve out of jurisdiction will be granted unless it is "made sufficiently to appear to the Court that the case is a *proper one* for service out of Singapore" [emphasis added].

31 Unfortunately for the Plaintiff, this was where it faltered. Singapore had nothing to do with the alleged causes of action because the alleged misconduct occurred in Indonesia. The Plaintiff is an Indonesian company and the Defendant is an Indonesian citizen who is resident in Indonesia. Indeed, the Plaintiff did not attempt to argue that Singapore was the *forum conveniens* when compared with Indonesia. Neither did it argue that it would be deprived of substantial justice if it was not allowed to continue with the action in Singapore.

32 I pause here to mention that in *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR(R) 854 ("*Front Carriers*"), the High Court observed at [37], that under O 11 r 1(*a*) of the ROC 2014, "the presence of the defendant's assets in Singapore is in itself sufficient as a ground for service". This observation was mentioned by the Court of Appeal in *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 ("*Swift-Fortune*") at [92] and at [96(d)] without demur although the Court of Appeal also mentioned that it was not approving or disapproving of the decision in *Front Carriers* in respect of the court's jurisdiction to grant an MI in aid of foreign arbitrations under s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA").

33 It is not clear whether the observation in *Front Carriers* means that the requirement in O 11 r 1(*a*) of the ROC 2014 is the only requirement to be met in order to obtain an order for service out of jurisdiction under that provision or that it is the first of various requirements to be met. In any event, as already discussed, the satisfaction of any one of the grounds stated in O 11 r 1 of the ROC 2014 is just one of the three main requirements for leave to be granted for service out of jurisdiction. The third requirement is that Singapore must be the *forum conveniens* (see *Siemens* and *Zoom Communications*). I would also mention that in *Front Carriers*, the defendant did not challenge the court's *in personam* jurisdiction over it: at [40]. Instead, one of the main challenges in that case was that the court did not have power to grant an MI in aid of foreign arbitration.

34 I add that in the matter before me, the Plaintiff did not seek to argue that it could meet all the requirements for service out of jurisdiction once the requirement of *forum conveniens* was raised in argument by the Defendant.

35 For completeness, I would mention that the Plaintiff did not rely on O 11 r 1(*b*) of the ROC 2014 as a ground for leave to serve the Writ out of jurisdiction. Under that provision, leave may be granted to serve an originating process out of jurisdiction if in the action "an injunction is sought ordering a defendant to do or refrain from doing anything in Singapore". In *Siskina v Distos Compania Naviera SA* [1979] AC 210, the House of Lords decided that a similar provision under the English Rules of the Supreme Court (c 54), *ie*, O 11 r 1(1)(i), applied only if the injunction sought was part of the substantive relief of the plaintiff's cause of action against the defendant. This is because an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent on a pre-existing cause of action. That proposition in *The Siskina* was adopted by the Court of Appeal in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 ("*Karaha Bodas*") at: [42]-[43].

36 In the present case, the Writ did not include a claim for an MI. Even if it did, this would not have made any difference since in substance an MI is not an independent cause of action and not part of the substantive relief in the Plaintiff's causes of action.

37 In the light of *Karaha Bodas*, it was not surprising that the Plaintiff did not seek to rely on O 11 r 1(*b*) of the ROC 2014. In any event, that provision would not have made any difference as the Plaintiff would still not have been able to meet the common requirement (for all the grounds under O 11 r 1) that Singapore must be the *forum conveniens*.

38 In the circumstances, it became obvious that the orders for service of the Writ out of jurisdiction were wrongly made and should be discharged

whereupon all the steps taken pursuant to the orders would also have to be discharged or set aside. Hence the judgment in default and the Garnishee Orders Nisi would be set aside. This would mean that it was academic whether the Indonesian lawyer had in fact served the various documents on the Defendant.

39 For completeness, I mention that the Defendant also submitted that there were two instances of material non-disclosure by the Plaintiff in the supporting affidavits for the Plaintiff for orders for service out of jurisdiction:

(a) In the affidavit filed on 27 June 2016 in support of the application for an order to serve a sealed copy of the Writ on the Defendant in Indonesia, there was no disclosure that the Plaintiff had commenced the Malaysia action about one month earlier on 27 May 2016;

(b) In the affidavit filed on 2 August 2016 in support of the application for the Indonesian lawyer to serve various documents on the Defendant in Indonesia, there was no disclosure of the Plaintiff's intention to commence the Indonesia action soon thereafter. That action was filed on 9 August 2016.

40 Therefore, the Defendant submitted that the order made on 30 June 2016 (granting leave to serve a sealed copy of the Writ out of jurisdiction) and the order made on 15 August 2016 (which allowed the Indonesian lawyer to serve various documents on the Defendant in Indonesia) should be set aside for material non-disclosure. However, since the orders were wrongly made because the Plaintiff could not meet the requirement of *forum conveniens*, the submissions about material non-disclosure also became academic.

41 As the Plaintiff realised that it could not meet the requirements for service out of jurisdiction since it could not meet the *forum conveniens* requirement, it abandoned its reliance on s 16(1) SCJA 2007. Instead it relied on a different provision, *ie*, s 16(2) of the SCJA 2007 which I have set out above. Its argument was that s 4(10) of the CLA read with s 16(2) of the SCJA 2007 gave the court jurisdiction and power to grant an MI against a foreign defendant in aid of foreign court proceedings. This is because s 4(10) of the CLA constitutes "such other written law" for the purpose of s 16(2) of the SCJA 2007. Section 4(10) of the CLA states:

> (10) A Mandatory Order or an injunction may be granted or a receiver appointed by an interlocutory order of the court, either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which it appears to the court to be just or convenient that such order should be made.

42 However, the Plaintiff acknowledged that it had an uphill task under this new ground as there is case law holding that s 4(10) of the CLA confers a *power* to the court to grant an interlocutory injunction and not *jurisdiction* over a defendant, see: *Multi-Code Electronics Industries (M) Bhd and another v Toh Chun Toh Gordon and others* [2009] 1 SLR(R) 1000 ("*Multi-Code*") at [85], *Front Carriers* at [31]-[34], and *Swift-Fortune* at [64]-[65]. Nevertheless, the Plaintiff sought to persuade this court to adopt this new ground with the following arguments.

43 First, the Plaintiff submitted that in *Karaha Bodas* and in *Swift-Fortune* the Court of Appeal had left open the question whether a court has jurisdiction or power to grant an MI in aid of foreign court proceedings.

44 Secondly, the Plaintiff submitted that in *Multi-Code*, the High Court had ruled that where a stay of Singapore proceedings was granted, the court has a residual jurisdiction and power to grant an MI in aid of foreign court proceedings.

45 I was of the view that the Plaintiff had mis-read the judgment of the High Court in *Multi-Code*. First, the relevant defendants in that case were either Singapore citizens resident in Singapore or a company incorporated in Singapore Second, they were also duly served with a writ issued by the Singapore court: *Multi-Code* at [57] and [98]. The *in personam* jurisdiction of the court there over these defendants was not in doubt. The question of s 4(10) CLA arose in the context of a stay of the Singapore proceedings and not a challenge to the court's jurisdiction over the defendants as such. Specifically, the question was whether the court could grant an MI in aid of foreign court proceedings under s 4(10) CLA if the Singapore proceedings were stayed. The court held that it could but this was because *in personam* jurisdiction was not in issue. Indeed, the High Court specified at [85] that certain jurisdictional pre-requisites had to be met, namely, (a) the court must have clear *in personam* jurisdiction over the defendants and (b) the "stayed" action had not been struck out either because there was a reasonable accrued cause of action under Singapore law or because the other reasons under O 18 r 19 of the ROC did not apply.

46 Therefore, *Multi-Code* did not support the Plaintiff's new ground. On the contrary, it reinforced the point that the court must first have *in personam* jurisdiction against the Defendant before considering s 4(10) CLA. Indeed, the High Court at [99] stated that it had the pre-existing "jurisdiction to grant the

Mareva injunction against these defendants who were subject to the *in personam* jurisdiction of the court."

47 The Plaintiff also relied on [99] of *Multi-Code* to submit that so long as it had an accrued cause of action in Singapore, the court had a "limited jurisdiction and power" to grant an MI under s 4(10) CLA[1]. In my view, the Plaintiff had also misconstrued [99] of *Multi-Code*, which states:

> If indeed there was no valid or reasonable accrued cause of action in Singapore or if the Singapore court had no jurisdiction whatsoever to hear and try the action, it would be open to the defendants to apply to strike out the claim in the Singapore action or to set aside the writ. If the defendants were successful, then obviously the Mareva injunction would have to be discharged, there being no remaining suit against them in Singapore. As it stood before me, there was a *prima facie* cause of action in Singapore to support the issue of the writ. …

48 The court there was merely explaining that if there was no valid or accrued cause of action *or* if there was no jurisdiction, the defendant could apply to strike out the action. If the action was struck out, then the MI already granted in that case would be discharged. In other words, an action could be struck out on either ground. The Plaintiff misconstrued that passage to mean that the action could be maintained on either ground, *ie*, if there is jurisdiction or if there is a valid or accrued cause of action.

49 It seemed to me that the Plaintiff had conflated two questions similar to those mentioned by Lord Mustill in *Mercedes-Benz AG v Leiduck* [1996] 1 AC 284 ("*Mercedes-Benz*") at 297-298. The first question was whether the court has *in personam* jurisdiction over the Defendant. The second question is

[1] Plaintiff's Supplemental Written Submissions, paras 28–31.

concerned with a different kind of jurisdiction, or more accurately, a power (as Lord Mustill put it) namely, whether the Court has a power to grant an MI to restrain the Defendant from disposing of his assets in Singapore pending the conclusion of foreign court proceedings. Therefore, it is only if the court has *in personam* jurisdiction over the Defendant (*ie*, if the first question is answered positively), that the second question arises. It is in the context of the second question that s 4(10) CLA becomes relevant and it was the second question that the Court of Appeal in *Swift-Fortune* has so far left open.

50 The Plaintiff was attempting to telescope s 4(10) of the CLA into s 16(2) of the SCJA 2007. But s 4(10) CLA does not found *in personam* jurisdiction over any defendant. It only confers a *power* on the court once *in personam* jurisdiction is founded against the defendant. Those two concepts must be kept distinct. As Chan Sek Keong J (as he then was) observed in *Muhd Munir v Noor Hidah* [1990] 2 SLR(R) 348 at [19]:

> The jurisdiction of a court is its authority, however derived, to hear and determine a dispute that is brought before it. The powers of the court constitute its capacity to give effect to its determination by making or granting the orders or relief sought by the successful party to the dispute.

51 There was a suggestion by the Plaintiff that assuming that it cannot effect service of the Writ on the Defendant in the present circumstances, there was a possibility that it might do so in the future if, for example, the Defendant were to come to Singapore. I would add that another possibility was that the primary and/or secondary legislation in Singapore may be amended in future so that either service is no longer a means to acquiring jurisdiction or *forum conveniens* is no longer a requirement for service out of jurisdiction. In any case, I was of the view that the court has to make its decision based on the present

state of the law and present circumstances and not on such possibilities in the future.

Whether the court has jurisdiction or power to grant an MI against the Defendant in aid of foreign court proceedings

52 In *Multi-Code*, the High Court at [89] expressed the view that s 4(10) CLA confers a general power on the court to grant Mareva relief in aid of foreign court proceedings if the court has *in personam* jurisdiction over the defendant.

53 In the present case, the court does not have *in personam* jurisdiction over the Defendant. Therefore the issue as to whether the court has power to grant an MI against the Defendant in aid of foreign court proceedings became academic.

54 On that issue, much has been said about the decision of the majority and the minority in *Mercedes-Benz*. I accept the concerns expressed by Lord Nicholls of Birkenhead in that case but that is a matter that has to be left to a higher court or to the legislature.

55 In Australia, the courts are prepared to grant relief by way of a freezing order against a defendant who is outside of their territorial jurisdiction in aid of foreign proceedings on the basis of the courts' inherent jurisdiction, see: James J Spigelman AC, "Freezing Orders in International Commercial Litigation" (2010) 22 SAcLJ 490 at 497-501. There, the freezing order is not regarded as a species of injunction.

56 In the United Kingdom, primary and secondary legislation have been passed to address the situation, see: Civil Jurisdiction and Judgments Act 1982 (c 27) (UK), s 25, Civil Jurisdiction and Judgment Act 1982 (Interim Relief) Order 1997 (SI 1977/302) (UK).

57 In Singapore, the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") was amended to include a new s 12A with effect from 1 January 2010, see: International Arbitration (Amendment) Act 2009 (Act 26 of 2009). Section 12A(2) gives the court power to grant various reliefs including an interim injunction in aid of a foreign arbitration. While the terms of s 12A(2) do not expressly state that the power applies even if the defendant is a foreign defendant, that is the apparent assumption in view of the background leading to the amendment.

58 However, it is unclear how s 12A(3) will apply. Under s 12A(3), the court may refuse to make an order under s 12A(2) if, in the opinion of the court, the fact that the place of arbitration is outside Singapore makes it "inappropriate" to make such an order. In any event, s 12A only applies to foreign arbitrations, *ie*, where the seat of the arbitration is not Singapore. It does not apply to foreign court proceedings.

59 In the circumstances, I granted the Defendant the main reliefs he sought in Amended Summons 637/2017 and I dismissed the Plaintiff's application for an MI in Summons 1472/2017 with consequential orders.

Observations

60 Applications for an MI are often made on an urgent *ex parte* basis and before service of the originating process on a defendant. The result is that a judge hearing such an application may focus primarily on:

(a) whether there is a good arguable cause of action against the defendant;

(b) the existence of assets of the defendant in Singapore; and

(c) whether there is a genuine or real risk that the defendant will remove his assets out of the jurisdiction in order to frustrate a judgment obtained against him.

61 Even where an application for service of process out of jurisdiction is included with an application for an MI, the requirement of *forum conveniens* may be overlooked as it is not expressly stated in the ROC 2014. While O 11 r 2(2) does state that no leave is to be granted unless the case is a proper one for service out of jurisdiction, its terms do not expressly state that Singapore must be the *forum conveniens*. The requirement of *forum conveniens* was pronounced by the courts, as mentioned above.

62 The risk of a judge overlooking the requirement of *forum conveniens* for an application for leave to serve out of jurisdiction is greater when the application for an MI is not combined with an application for service out of jurisdiction as the latter may be heard separately by a Registrar.

63 This case therefore highlights the importance of a judge hearing an application for an MI against a foreign defendant to bear in mind the *forum conveniens* requirement for an application for leave to serve an originating process out of jurisdiction on a foreign defendant, whether or not the application for such an MI is combined with an application for leave to serve out of jurisdiction. If the Plaintiff is unlikely to satisfy the requirement of *forum conveniens* and leave to serve out of jurisdiction is unlikely to be granted, then an MI should not be granted even on an *ex parte* basis.

64 However, if an order has been made *ex parte* for leave to serve out of jurisdiction, it remains open to a foreign defendant to subsequently challenge that order and even the writ itself on the ground that Singapore is not in fact the *forum conveniens* and there is no *in personam* jurisdiction over the foreign defendant.

65 This brings me to one other point of interest. Since service is necessary in order to found *in personam* jurisdiction under s 16(1) SCJA 2007, one has to bear in mind that even for local defendants, it is quite often the case that an application for an MI is made on an urgent *ex parte* basis before the originating process is served on the defendant. If the MI is granted, it will have been granted before service of the writ. Technically, an argument might be raised that the court's jurisdiction over the defendant has not been founded yet. This raised an interesting point for discussion between the parties and the court, *ie*, whether the court then has jurisdiction to grant an MI even against a local defendant before the writ is served on him. On the facts before me, it was not necessary for me to reach a definite conclusion on the point, especially in the absence of further arguments.

66 However, I would be inclined to the view that the court does have such a jurisdiction. One possible explanation is that the MI is granted on the assumption that it is likely that the plaintiff will eventually effect service of the writ on the defendant whether the service is personal or by way of substituted service. Indeed, O 29 r 1(3) of the ROC 2014 and para 42A of the Supreme Court Practice Directions anticipates that an injunction may be granted before service and even before issuance of an originating process in cases of urgency. Our courts have also in fact been granting MIs on an urgent *ex parte* basis from time to time before service of the writ. To hold that the court does not have jurisdiction to do so would mean that an MI can only be granted after service is effected. This, in turn, will practically nullify the effectiveness of an MI in many cases. Likewise in the context of a foreign defendant, the court has jurisdiction to grant an MI on the assumption that it is likely that the plaintiff will eventually obtain leave to serve out of jurisdiction and is likely to eventually effect service. However, this assumption must be weighed against the known facts. If the facts do not support that assumption, then the court must decline to grant the MI.

67 I would also add that when courts express the view that there is jurisdiction "as of right" against a local defendant, this does not mean that the presence of the defendant in Singapore is in itself the means of founding jurisdiction. The expression "as of right" only means that there is no legal impediment to service since leave of court is not required to effect service on a local defendant.

68 On a separate note, one may have to take extra care as to whether and when to use the expression "territorial jurisdiction" when the court's *in personam* jurisdiction is discussed. That expression may give the impression

that *in personam* jurisdiction is founded solely on the presence of a defendant in Singapore. As I have discussed above, in Singapore, such jurisdiction is founded on service.

Woo Bih Li
Judge

Jason Chan, Daniel Ling, Tan Kai Liang and Evangeline Oh (Allen & Gledhill LLP) for the plaintiff;
Andrea Tan and David Marc Lee (PK Wong and Associates) for the defendant.