Front Carriers Ltd v Atlantic & Orient Shipping Corp
[2006] SGHC 127

Case Number : OS 1104/2005, SIC 5286/2005

Decision Date : 19 July 2006

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Anna Quah and Chong Shiao Hann (Ang & Partners) for the plaintiff; Yap Yin Soon (Allen & Gledhill) for the defendant

Parties : Front Carriers Ltd — Atlantic & Orient Shipping Corp

Civil Procedure – Mareva injunctions – High Court establishing personal jurisdiction through service over party to arbitration in foreign jurisdiction – Whether High Court having power under International Arbitration Act to order Mareva injunction against such party in support of such foreign arbitration – Whether High Court having general power under Civil Law Act to grant Mareva relief in support of such foreign arbitration – Whether preconditions for grant of Mareva relief existing – Section 4(10) Civil Law Act (Cap 43, 1999 Rev Ed), s 12(7) International Arbitration Act (Cap 143A, 2002 Rev Ed), Art 9 UNCITRAL Model Law on International Commercial Arbitration

19 July 2006 *Judgment reserved.*

Belinda Ang Saw Ean J:

1 This is an application by the defendant, Atlantic & Orient Shipping Corporation ("A&O"), to set aside a Mareva injunction obtained *ex parte* on 26 August 2005 by the plaintiff, Front Carriers Limited ("FCL"). The Mareva relief was applied for as a pre-award injunction in support of arbitration commenced in London. FCL is a company incorporated in Monrovia, Liberia, and has a registered office in Norway. A&O is a company incorporated in the island of Nevis, West Indies. An important question of jurisdiction which arises in this application concerns the power of the court to grant an interim injunction in aid of foreign arbitration proceedings under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA").

2 In brief outline, the course of events is as follows. FCL through its London brokers, Simpson, Spence & Young Ltd ("SSY"), negotiated the charter of a Panamax newbuilding to be named *Double Happiness* with one Lee Heng Juan ("Juan Lee"). All e-mails from Juan Lee to SSY were from Juan Lee's e-mail address at juan@anoshipintl.com. All e-mails were also copied to team@anopshipintl.com. At no time during the negotiations did A&O question Juan Lee's authority to correspond with SSY and to negotiate the fixture on its behalf. FCL's position is that the e-mail exchanges between SSY and Juan Lee resulted in a time charter being concluded on 7 March 2005 at the hire rate of US$31,500 a day. Some four months later, Juan Lee e-mailed SSY on 14 July 2005 declaring that he did not have authority to fix the charter. It later transpired that Juan Lee had left the employment of Atlantic & Orient Shipping Pte Ltd ("A&O Singapore") either in January 2005 or on 7 February 2005. According to FCL, a Singapore company, Amstec Shipping Pte Ltd ("Amstec"), came forward on 11 August 2005 to deny the existence of a binding charter between A&O and FCL. FCL was informed of Juan Lee's departure from A&O Singapore and hence the disclaimer of any liability on the part of Amstec and Juan Lee as agent. That denial was apparently not made on behalf of A&O, but was a conclusion which Juan Lee (who had joined Amstec as executive director) reached from his review of the events as he saw them. FCL heard nothing directly from A&O despite the various attempts on several occasions by FCL and its representatives to communicate with A&O.

3 It was against this background that FCL simultaneously applied on 22 August 2005 for Mareva relief against A&O in Singapore and commenced arbitration against A&O in London for breach of the time charter. In Singapore, the application for Mareva relief was made by originating summons, being an application for relief under ss 12(7) and 12(1)(*g*), 12(1)(*h*) and 12(1)(*i*) of the IAA. By the originating summons, FCL claimed an order restraining A&O from removing from Singapore any of its assets up to a specified value or in any way disposing of, dealing with or diminishing the value of any assets within Singapore. On 26 August 2005, Andrew Phang Boon Leong JC (as he then was) granted the Mareva relief sought by way of *ex parte* Summons in Chambers No 4269 of 2005 in respect of A&O's assets in Singapore. Leave was also granted to serve the originating summons and the Mareva order of 26 August 2005 out of jurisdiction.

4 M/s Allen & Gledhill entered an appearance on A&O's behalf on 28 September 2005. A&O has denied the existence of a binding charterparty on the ground that the party with whom A&O intended to contract with was "Front Carriers Inc" and not FCL. Therefore, FCL has no *locus standi* to file the originating summons. Subsequently, it turned out that there was no such entity known as "Front Carriers Inc" of Bermuda, which is confirmation that there could have never been a concluded charter. I should mention that it was only after A&O had filed its application to set aside the Mareva injunction that A&O conceded that Juan Lee was its representative.

5 A&O seeks to have the Mareva injunction set aside on two main grounds. First, it argues that the High Court has no jurisdiction to grant the Mareva order in support of London arbitration. Second, it contends that FCL has not met the requirements for the grant of a Mareva order. Specifically, there is insufficient or no evidence of a risk of dissipation of assets. An associated consideration is FCL's duty in an *ex parte* application to make full and frank disclosure of material facts. FCL has been criticised for breaching this duty in several ways.

Jurisdictional bases to grant Mareva relief

6 Counsel for FCL, Ms Anna Quah, contends that on a true construction of s 12(7) of the IAA read with Arts 1(2) and 9 of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"), the High Court has the power to grant Mareva relief in aid of international arbitration held overseas ("foreign arbitration"). Counsel maintains that the IAA is not limited in its application to only international arbitration held in Singapore ("Singapore arbitration") for there are exceptions to Art 1(2) of the Model Law, which provides that the Model Law shall *prima facie* apply in Singapore only where this country is the place of arbitration. Article 9 is one of the exceptions and, read together with s 12(7) of the IAA, gives the High Court the power to grant Mareva relief even though the substantive dispute is referred to foreign arbitration. Ms Quah also raised s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) as an additional or alternative source of the Mareva jurisdiction.

7 Counsel for A&O, Mr Yap Yin Soon, maintains that there is no legal basis for the grant of *Mareva* relief by the High Court to support the London arbitration even though the foreign defendant, A&O, has assets within the jurisdiction. He relies on *Swift-Fortune Ltd v Magnifica Marine SA* [2006] 2 SLR 323 ("*Swift-Fortune*"). In that case, Judith Prakash J held that the High Court has no power to make interim orders to assist foreign arbitration except in the limited situations covered by ss 6(3) and 7(1) of the IAA. Mr Yap cited *Siskina v Distos Compania Naviera SA* [1979] AC 210 ("*The Siskina*") for the proposition that the High Court has no jurisdiction to grant interlocutory relief when the substantive proceedings take place abroad as there would be no cause of action before the High Court to support the ancillary relief. In arguments redolent of the reasoning subsequently found in *Swift-Fortune*, Mr Yap argues that there is nothing in Singapore's domestic law that confers jurisdiction on the High Court to grant free-standing Mareva relief in aid of foreign arbitration. Article 9 of Model Law does not give the High Court such jurisdiction. Instead, it is merely a statement of

principle to the effect that the existence of an international arbitration agreement is not incompatible with a request to "a court" for interim measures of protection and the court's grant of such measures. As for s 12(7) of the IAA, it is a specific statutory provision which confers power on the High Court to grant interim relief where the substantive proceedings are before an arbitral tribunal in Singapore, *ie*, where the international arbitration in question takes the form of Singapore arbitration.

8 The principal question in this application is whether the High Court has power to make a free-standing Mareva order against a party over whom the High Court has established personal jurisdiction through service (which was the case here as there was no challenge to the order for leave to serve the originating summons and the Mareva order of 26 August 2005 out of jurisdiction) but in circumstances where the substantive dispute between the parties has been or has to be referred to arbitration abroad. Numerous arguments were made and various authorities from other jurisdictions and legal theses were produced by both sides. I did not find it necessary to resolve all the arguments canvassed since the issue ultimately concerns a construction of the pertinent statutory provisions.

Statutory powers

International Arbitration Act

9 The IAA adopted the Model Law as part of Singapore's domestic law. Section 3(1) of the IAA provides that the Model Law, with the exception of Chp VIII, has the force of law in Singapore. The relevant provisions of s 12 of the IAA read as follows:

> (1) Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for —
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> …
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> (*g*) securing the amount in dispute;
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> (*h*) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
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> (*i*) an interim injunction or any other interim measure.
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> …
>
> (6) All orders or directions made or given by an arbitral tribunal in the course of an arbitration shall, by leave of the High Court or a Judge thereof, be enforceable in the same manner as if they were orders made by a court and, where leave is so given, judgment may be entered in terms of the order or direction.
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> (7) The High Court or a Judge thereof shall have, for the purpose of and in relation to an arbitration to which this Part applies, the same power of making orders in respect of any of the matters set out in subsection (1) as it has for the purpose of and in relation to an action or matter in the court.

10 The relevant Articles of the Model Law read:

> *Article 1. Scope of application*

…

(2) The provisions of this Law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.

…

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

…

(*c*) "court" means a body or organ of the judicial system of a State;

…

Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

Section 2(2) provides that unless otherwise stated, a word or expression used in both Pt II of the IAA and the Model Law will be ascribed the same meaning which it has in Pt II even though a particular meaning is given to it by the Model Law. Section 3(2) of the IAA defines "State" in the Model Law to mean "Singapore and any country other than Singapore" and "this State" to mean Singapore, specifically.

11 The brief facts of *Swift-Fortune* ([7] *supra*) are as follows. By a memorandum of agreement dated 31 August 2004 ("the MOA"), Magnifica Marine SA ("the seller") agreed to sell the vessel *Capaz Duckling* to Swift-Fortune Ltd ("the buyer"). English law was the proper law of the MOA and all disputes under the MOA were to be determined by arbitration in London. The original delivery date of the vessel for completion of the sale was 6 December 2004. However, the delivery date was extended beyond 6 December 2004 several times at the request of the seller. All extensions were agreed to without prejudice to the buyer's right to claim compensation under cl 14 of the MOA. Clause 14 of the MOA provided for the payment of compensation to the buyer if the failure to deliver on or before 6 December 2004 was due to the proven negligence of the seller. In November 2004, an explosion occurred on board and the vessel sustained some damage. This resulted in negotiations for a reduction of the purchase price to take into account the damage sustained by the vessel as well as the loss sustained by the buyer due to the delays in delivery. A settlement was reached on the explosion damage but not on the delay claim. Consequently, the purchase price was reduced by US$200,000. After the vessel arrived at a Chinese port on 17 February 2005, the parties agreed to a further extension of the delivery date to 9 March 2005. Later on, the closing meeting was scheduled for 8 March 2005. The parties proceeded on the basis of a closing on 8 March 2005 until the evening of 7 March 2005, when the buyer's solicitors requested the seller's solicitors to postpone delivery of the vessel back to 9 March 2005 because of some delay in the remittance of the balance of the purchase price to the account of M/s Clyde & Co in Singapore. The seller agreed to this postponement.

12 As the buyer was concerned that the net proceeds in the region of US$2.9m would be

remitted out of Singapore after completion, leaving it with no security for its claims for damages, the buyer on 8 March 2005 commenced proceedings to restrain the seller from disposing of or dealing with moneys held by Den Norske Bank and in the client account of Clyde & Co, Singapore. No substantive claim was brought in Singapore as the parties had agreed to refer the substantive dispute to arbitration in London in accordance with the terms of the MOA. Nevertheless, a free-standing Mareva injunction was granted. The seller applied to set aside the Mareva injunction on 7 April 2005. The main issue before Prakash J was whether the High Court had the power to issue a Mareva injunction over the Singapore assets of a foreigner in support of arbitration in London.

13 Prakash J held that under the IAA, the High Court's power to grant an interim injunction is limited to ss 6(3) and 7(1). Prakash J reasoned that the wording used in s 12(7) is similar to that used in s 27(1) of the Arbitration Act 1950 (c 27) (UK), which had long been interpreted in England as not giving the courts power to make orders in respect of foreign arbitration. She was of the view that Parliament's intention in introducing the IAA was to promote Singapore as an international arbitration centre. Parliament did not appear to have considered the possible extraterritorial ramifications of the proposed legislation during the debate on the Bill, and there was no mention of curial support in aid of foreign arbitration. Section 12 and all its subsections except sub-s (7) deal with the powers of an arbitral tribunal in a Singapore arbitration. As courts do not have any inherent powers to make orders to aid any proceedings except those that take place before them, specific jurisdiction has to be given to the courts to enable them to make orders to assist foreign court proceedings. Likewise, since free-standing Mareva relief in aid of foreign arbitration has an extraterritorial reach, there should be specific jurisdictional bases for the courts to assist, by way of interim measures of protection, foreign arbitration. The courts' jurisdiction in this respect should not simply be implied from the use of the words "an arbitration to which this Part applies" in s 12(7) of the IAA or from the fact that Art 9 of the Model Law itself envisages that courts may make such orders.

14 With the greatest of respect, I differ from the learned judge on her construction of s 12(7) of the IAA. In my view, the High Court has power under the IAA to assist, by way of interim orders, international arbitration both in Singapore and abroad. I will now explain and state the reasons for the conclusion I have reached.

15 Section 12(1) spells out in detail the interim measures of protection which an arbitral tribunal may make. These measures are essentially remedies aimed at assisting in the just and proper conduct of arbitration, or in the preservation of property which is the subject matter of the arbitration. Under s 12(6), orders of such an arbitral tribunal are given coercive effect with the High Court's leave. In my view, s 12(7) of the IAA gives effect to Art 9 of the Model Law in the same way that O 69A rr 3(1)(c) and 4(1) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) give effect procedurally to Art 9. I disagree with Mr Yap's reading of Art 9 (see [7] above) which to me seems too narrow.

16 What is the purpose of Art 9? Whilst the Model Law expressly provides for the power of an arbitral tribunal in Singapore to order interim measures of protection in Art 17, Art 9 preserves the right of the parties to have recourse to a "court" for interim protection. The "court" in Art 9 includes the High Court in Singapore (see Art 2(*c*) of the Model Law and s 3(2) of the IAA). More importantly, whilst the existence of an arbitration agreement means that the parties have chosen to exclude the jurisdiction of any court as to the merits of the substantive dispute, Art 9 expressly preserves the court's jurisdiction to grant interim measures in support of arbitration proceedings, whether commenced or anticipated, and irrespective of the seat of arbitration (see [21] below). This is borne out by the *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (a report of the Secretary-General of the United Nations) (UN Doc A/CN.9/264 dated 25 March 1985), at para 1 of the commentary on Art 9 which states that Art 9:

> … *makes it clear that the "negative" effect of an arbitration agreement, which is to exclude court jurisdiction, does not operate with regard to such interim measures.* The main reason is that the availability of such measures is not contrary to the intentions of parties agreeing to submit a dispute to arbitration and that the measures themselves are conducive to making the arbitration efficient and to securing its expected results. [emphasis added]

17 As such, Art 9 is in effect the lawful basis on which a "court" may order interim measures applying its own domestic law. In this regard, two considerations exist. First, the "court" must have *in personam* jurisdiction over the party against whom interim protection is sought (see O 69A r 4(1) of the Rules of Court discussed in [29]–[31] and [38]–[41] below). Second, the range of interim measures which the "court" is empowered to grant is delineated by s 12(7) of the IAA. It bears remembering that Art 9 has the force of law in Singapore. There is thus legal recognition of the principle that since the substantive dispute will not be before the "court" (for the parties have excluded the jurisdiction of any court as to the substantive dispute), the interim order is ancillary to the final order sought via arbitration. Put another way, the court's jurisdiction to grant interim measures is not co-extensive with its jurisdiction to adjudicate on the merits. To this end, it is understandable why O 11 r 1 of the Rules of Court does not apply to an application for interim relief sought under s 12(7) of the IAA. My view as stated earlier is that s 12(7) of the IAA gives effect to Art 9 of the Model Law in the same way that O 69A rr 3(1)(*c*) and 4(1) of the Rules of Court give effect procedurally to Art 9.

18 The purpose and effect of s 12(7) of the IAA is to enable the High Court to make for the purpose of and in relation to foreign arbitration those orders (like those under ss 12(1)(*g*), 12(1)(*h*) and 12(1)(*i*)) which it could have made if the matter referred to arbitration had been tried as a High Court action. In my view, the language of s 12(7) *endorses* the interim measures jurisdiction in Art 9 as explained in [17] above; any interim order made under s 12(7) will be ancillary to the final order sought elsewhere in arbitration. Effectively, the interim order is "a free-standing item of ancillary relief" (*per* Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 ("*Channel Tunnel*")). Article 9 expressly allows for this. Moreover, the words "for the purpose of and in relation to an arbitration" in s 12(7) encompass a reference to arbitration that has either already begun or is anticipated. In other words, the High Court has power under s 12(7) to grant Mareva relief for the purpose of and in relation to arbitration regardless of whether or not the arbitration has actually commenced. I note, by way of analogy, that O 29 r 1(1) read with O 29 r 1(3) of the Rules of Court empowers the High Court to grant interim injunctions for the purpose of and in relation to an action or matter in the High Court even before the relevant originating process has been issued and, in such cases, to impose such other terms as it thinks fit: see O 29 r 1(3)(*a*).

19 I turn now to consider s 12(7) of the IAA in detail. I begin with the phraseology "an arbitration to which this Part [Pt II] applies" in the first line of s 12(7). It is necessary to determine the scope of this expression in order to resolve Mr Yap's argument, following the decision in *Swift-Fortune* ([7] *supra*), that s 12(7) of the IAA is restricted to only Singapore arbitration. The "arbitration" which s 12(7) refers to is an "international arbitration" within the meaning of s 5. Where the place of arbitration is Singapore, such international arbitration is governed by Pt II of the IAA which includes the Model Law (s 3(1) of the IAA). It is clear from Art 1(2) of the Model Law that the scope of curial support under the Model Law is principally in respect of arbitrations where Singapore is the place of arbitration *except* in the four specific instances prescribed by Arts 8, 9, 35 and 36. In those four instances (*ie*, Arts 8, 9, 35 and 36), there can be court intervention even though the seat of arbitration is abroad. This reading of Art 1(2) is supported by the Court of Appeal's decision in *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 393 at [21] to the effect that the Singapore courts can only intervene in arbitral proceedings taking place abroad in the limited instances set out in Arts 8, 9, 35 and 36. As an aside, I should point out that Arts 35 and 36 do not have the force of law

in Singapore by virtue of s 3(1) of the IAA (see [9] above). In lieu of these provisions, which concern the recognition and enforcement of foreign arbitral awards, Parliament has enacted Pt III of the IAA. I note too that s 6 of the IAA (stay of legal proceedings in respect of any matter which is the subject of an international arbitration agreement) in effect replaces Art 8(1). In contrast, both Arts 8(2) and 9 have not been amended or excluded by the IAA and have the force of law in Singapore as they stand. As I see it, Art 9 should have been excluded if curial support for foreign arbitration was not intended by Parliament when it enacted the IAA.

20 The framework of the IAA, including Arts 1(2) and 9 of the Model Law, recognises that parties to an international arbitration may require curial support by way of interim measures from the High Court even though the seat of arbitration is outside Singapore. The nature of the assistance which the High Court may grant is restricted to applications for interim measures of the types listed in s 12(1) as s 12(7) stipulates. In any case, it has been held that Mareva relief is an example of an interim measure of protection under Art 9: see *Katran Shipping Co Ltd v Kenven Transportation Ltd* [1992] 1 HKC 538.

21 As stated, Art 9 has the force of law in Singapore and is the basis on which the High Court may order interim measures applying its own domestic law (see [17] above). Under the first part of this Article, a request for interim protection is not incompatible with an arbitration agreement (as defined in s 5 of the IAA) and the request can be made to a "court" in a country which is different from the country where the seat of arbitration is: see Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 2nd Ed, 2005) at para 2-095. Moreover, a "court" in a Model Law country (*ie*, the High Court in Singapore) is expressly permitted by the second part of Art 9 to render assistance to the arbitral proceedings by granting interim relief irrespective of the place of arbitration chosen by the parties: see Aron Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law and Taxation Publishers, 1990) at p 51 para 1. Mr Yap, citing Barnett J's *dictum* in *Interbulk (Hong Kong) Ltd v Safe Rich Industries Ltd* [1992] 2 HKLR 185 at 190 on Art 9, contends that only a court in the country which is the seat of arbitration can grant interim relief in aid of the arbitral proceedings. The relevant part of Barnett J's judgment is as follows:

> It seems to me, therefore, to be at least open to argument that, given the permission if not an invitation expressed in Article 9, a court of a state which has adopted the Model Law might be more ready to assist a party to an international arbitration agreement, notwithstanding that the arbitration has its seat elsewhere. Where the parties to, or the subject matter of such an agreement are in the state where the assistance of the court is sought, that court might be prepared to hold that it retains a discretion to grant protection.
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> For my, part, I incline to the view that it is only the courts of the state in which the arbitration has its seat that recourse may be had other than for purposes such as staying proceedings or enforcing an award.

Barnett J looked upon Art 9 as the basis of the court's assumption of jurisdiction to assist by way of interim orders. It must be remembered that court-ordered interim measures are in the court's discretion. In my view, what Barnett J meant was that since the court is likely to exercise its discretion in favour of those parties with some connection to the courts of the State which is the seat of arbitration, it is the courts of that State which parties may turn to for interim relief. Contrary to Mr Yap's view, Barnett J was not saying that only the courts of the State which is the seat of arbitration have the power to grant interim relief in aid of arbitration.

22 With these comments on Arts 1(2) and 9 in mind, I take the view that the phrase "an

arbitration to which this Part applies" in s 12(7) is wide enough to cover international arbitration both in Singapore and abroad, but with the qualification that the curial support for arbitral proceedings abroad is confined to court-ordered interim measures. There is nothing in s 5(2) of the IAA which limits the definition of "international arbitration" to arbitrations which take place only in Singapore. There is also O 69A r 4(1) of the Rules of Court which will be discussed in due course (see [29] to [30] below).

23 The above holding, that the High Court's jurisdiction to assist (by way of interim protection or otherwise) both foreign arbitration and Singapore arbitration is established by specific statutory authority in s 12(7) of the IAA, was shared by Lai Kew Chai J in *Econ Corporation International Limited v Ballast-Nedam International BV* [2003] 2 SLR 15. Lai J held at [13] that the High Court had power to grant interim injunctions under s 12(1)(*g*) read with s 12(6) of the International Arbitration Act (Cap 143A, 1995 Rev Ed) ("the 1995 IAA"), now ss 12(1)(*i*) and 12(7) of the IAA, pending arbitration in India. Lai J also referred to Art 9 of the Model Law and s 16(2) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) on the jurisdiction of the High Court. In his view, the "other written law" under s 16(2) referred to the 1995 IAA. I should mention that it did not appear from Lai J's judgment that there was much adversarial debate on the High Court's jurisdiction to grant free-standing interim injunctions under the 1995 IAA, unlike the position in *Swift-Fortune* ([7] *supra*) and now in this application; but the jurisdictional bases must have been clear enough to Lai J for him to make so affirmative a pronouncement of the High Court's power.

24 Again, I respectfully differ from the learned judge in *Swift-Fortune* on her conclusion that the High Court's power to grant Mareva relief in support of foreign arbitration is limited to ss 6(3) and 7(1) of the IAA (see [13] above). If the action is to be stayed under s 6, the High Court can combine a mandatory stay with an interlocutory injunction. But does the ruling in *Swift-Fortune* mean that the High Court has no power to grant Mareva relief when its assistance for interim relief is sought in cases where the parties have observed their agreement to arbitrate abroad? That cannot be right. It is illogical, given the purpose of Art 9 (see [16] and [17] above), that the High Court should be powerless to entertain a request for interim relief in that situation.

25 Similarly, Chan Seng Onn JC (as he then was) said this in *Coop International Pte Ltd v Ebel SA* [1998] 3 SLR 670 at [135] when explaining why Arts 8 and 9 of the Model Law remain applicable to foreign arbitration:

> Articles 8 and 9 serve to preserve the bargain of the parties to an international arbitration agreement by ensuring that the court will not deal with the dispute itself but refer the matter to arbitration and that the court will have powers to afford the parties interim protection before or during the arbitral proceedings, for example, to order interim injunctions, preservation, interim custody or sale of any of the disputed properties.

26 In the same vein are the equally apposite observations of Lord Mustill in *Channel Tunnel* ([18] *supra*) at 366 on why the court's powers to grant interim relief are not affected when proceedings are stayed for arbitration. The reasons are grounded on the following:

> Common sense, because it cannot be right that by starting the action the plaintiff automatically forfeits any right to ancillary relief to which he would otherwise be entitled. Logic, because the purpose of the stay is to remove from the court the task of deciding the substantive dispute, so that it can be entrusted to the chosen tribunal. … But neither the arbitration agreement nor [the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards] contemplate that by transferring to the arbitrators the substance of the dispute, the court also divests itself of the right to use the sanctions of the municipal law, which are not available to the

arbitrators, in order to ensure that the arbitration is carried forward to the best advantage.

27 Lord Mustill's observations accord with the intent and effect of Art 9 of the Model Law. His Lordship had earlier commented at 365:

> The purpose of interim measures of protection, by contrast, is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration.
>
> … I prefer the view that when properly used such measures serve to reinforce the agreed method, not to bypass it.

28 I now turn to s 7(1) of the IAA. The High Court may on ordering a stay of proceedings also order the property arrested in *in rem* proceedings to be retained as security for the satisfaction of any award made on the arbitration (s 7(1)(*a*)) or, under s 7(1)(*b*), order that alternative security be provided for the satisfaction of any such award. Section 7(1) reflects the general distinction between the choice of forum for determination of the merits of a dispute on the one hand and the right to security in respect of maritime claims under the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) on the other hand. Prior to the enactment of the IAA, the High Court's power to retain or order alternative security when the parties had agreed to arbitration was limited to what became known as the *Rena K* principle. In *The Rena K* [1979] QB 377, Brandon J (as he then was) held that the English court had a discretion, when it granted a mandatory stay of *in rem* proceedings on the basis that the parties had agreed to submit the dispute to arbitration outside England, to also order that the ship under arrest be retained or that alternative security be provided in circumstances where the shipowner was shown to be unlikely to be able to satisfy the arbitration award so that a stay order would not be final. In that event, the claimant would be entitled to have the stay of the *in rem* action removed and to proceed to a judgment *in rem* on its cause of action. The claimant was not confronted by the doctrine of merger as a judgment *in rem* is of a different character from a judgment *in personam*. Hence, there was no merger of an arbitral award based on a cause of action *in personam* with an arbitral award based on a cause of action *in rem:* see *The Rena K* at 405. Section 7 effectively does away with the *Rena K* test.

29 I am in agreement with the decision in *Swift-Fortune* ([7] *supra*) on the procedural point, which is that where an application is made for interlocutory orders under s 12(7), service of the relevant cause papers outside jurisdiction is governed by O 69A r 4 and not O 11 r 1 of the Rules of Court. Order 69A r 4 reads as follows:

> (1) Service out of the jurisdiction of the notice of an originating motion or the originating summons or of any order made on such motion or summons under this Order is permissible with leave of the Court whether or not the arbitration was held or the award was made within the jurisdiction.
>
> (2) An application for the grant of leave under this Rule must be supported by an affidavit stating the ground on which the application is made and showing in what place or country the person to be served is, or probably may be found; and no such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Rule.
>
> (3) Order 11, Rules 3, 4 and 6 shall apply in relation to any such summons, notice or order

as is referred to in paragraph (1) as they apply in relation to a writ.

30 In *Swift-Fortune,* Prakash J observed at [51] that the phrase "whether or not the arbitration was held or the award was made within the jurisdiction" is limited to completed arbitration whether in Singapore or abroad, as those words have to be read in the context of O 69A r 3(1)(*e*) (application for leave to enforce a foreign award under s 29 of the IAA) and O 69A r 3(1)(*d*) (application for leave to enforce awards under s 18 or 19 of the IAA). I doubt, with respect to the learned judge, the correctness of her interpretation of the phrase. This is because it is O 69A r 6 (and not r 4(1)) that applies to any *ex parte* application under O 69A rr 3(1)(*d*) and 3(1)(*e*) and no leave of court (unlike under O 69A r 4(1)) is required under O 69A r 6(3) to serve the order for leave out of jurisdiction. I read the phrase "whether or not the arbitration was held or the award was made within the jurisdiction" to include foreign arbitration, whether commenced or anticipated. The phrase "within the jurisdiction" is applicable to all the scenarios identified in r 4(1). The ambit of this phrase fortifies my view that the High Court has power to grant Mareva relief in aid of foreign arbitration. Interestingly, the interface between s 12(7), Art 9 and O 69A r 3(1)(*c*) is evident. The word "request" in Art 9 is curiously used in O 69A r 3(1)(*c*) where:

> Every application or *request* to the Court ... for interlocutory orders or directions under section 12(7) of the Act shall be made to a Judge in Chambers or the Registrar. [emphasis added]

31 Finally, a defendant to an interlocutory injunction must be amenable to the jurisdiction of the court. In the case of a foreign defendant, a claimant for an interlocutory injunction of the Mareva type has to found territorial jurisdiction against that defendant before the court can exercise its powers. Service is the usual basis on which this court can have jurisdiction over a defendant not resident here. I will be discussing this issue under the heading "Territorial or personal jurisdiction".

Section 4(10) of the Civil Law Act

32 Apart from s 12(7) of the IAA, is there a general power conferred on the court by s 4(10) of the Civil Law Act to grant Mareva relief in support of foreign arbitration? In my judgment, the answer is in the affirmative, applying s 4(10) with Art 9 of the Model Law. This general power in s 4(10) was not argued in *Swift-Fortune*. The House of Lords in *Channel Tunnel* ([18] *supra*) held that the court retained in principle its power under s 37(1) of the Supreme Court Act 1981 (c 54) (UK) ("the UK SCA") even though the substantive dispute was referred to arbitration (see [44] to [47] below). Mr Yap maintains that there is no such power and that the House of Lords' pronouncement of the English court's jurisdiction under s 37(1) of the UK SCA in *Channel Tunnel* should not be followed as s 37(1) is worded differently from s 4(10) of the Civil Law Act. I am unable to accept his arguments. The wording of s 4(10) of the Civil Law Act and s 37(1) of the UK SCA is materially similar. Section 37(1) of the UK SCA states:

> The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases where it appears to the court to be just and convenient to do so.

Likewise, s 4(10) of the Civil Law Act reads:

> 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.

33 The power of the High Court to grant Mareva relief is derived from s 4(10) of the Civil Law

Act (see *Art Trend Ltd v Blue Dolphin* (*Pte) Ltd* [1982–1983] SLR 362 at 366, [27]). Wide though the power in s 4(10) is, it is subject to both jurisdictional and other limits, for in the exercise of that power, the High Court still has to have regard to the principles which it will ordinarily follow in considering whether to grant or to refuse an injunction of the type sought by FCL. The High Court's power is also restricted to the making of orders which the court regards as "just or convenient" to make in exercise of its jurisdiction. Lai J said in *Art Trend Ltd v Blue Dolphin (Pte) Ltd* at 366–367, [29]:

> What is 'just and convenient' in any case to a court in exercising its discretion is not possible to, an obviously should not, be encapsulated into a set of rigid principles. Each case must turn on the merits of its facts. But applicants for a Mareva injunction have been required to observe five guidelines: *The 'Genie'* [1979] 2 Lloyd's Rep 184 at p 189 per Denning MR.

Territorial or personal jurisdiction

Order 11 and Order 69A of the Rules of Court

34 This topic concerns firstly, the question of the jurisdiction of the High Court to grant permission to serve the originating summons out of the jurisdiction and secondly, whether this jurisdiction should be exercised in all the circumstances of the case. Mareva relief is generally available whether or not the defendant is resident in Singapore. However, a claimant for Mareva relief has to found territorial jurisdiction against a foreign defendant to the injunction before the court can exercise its powers under s 4(10) of the Civil Law Act, failing which the court lacks personal jurisdiction to make such an order because the defendant is resident out of the jurisdiction. This point was emphasised by both Lord Mustill and Lord Browne-Wilkinson in *Channel Tunnel* ([18] *supra*) in relation to the English courts' powers under s 37(1) of the UK SCA. Personal jurisdiction over a defendant resident outside Singapore depends on service (as to which see s 16(1) of the Supreme Court of Judicature Act). Ordinarily, to establish personal jurisdiction in the case of a foreign defendant, the consideration is whether O 11 of the Rules of Court applies.

35 *The Siskina* ([7] *supra*) is an O 11 case. The reason why the English court in *The Siskina* had no jurisdiction was because the plaintiff was not able to invoke any of the grounds set out in O 11 r 1(1) of the then English Rules of Supreme Court ("the English RSC") to obtain leave to serve notice of the writ outside England on the non-resident defendant. Leave for service out of jurisdiction under O 11 r 1(1)(*i*) of the English RSC, namely where "an injunction [was] sought ordering the defendant to do or refrain from doing anything within the jurisdiction", was not possible because under English law at that time, the mere presence of the defendant's insurance proceeds in England was insufficient to give the English court personal jurisdiction over the defendant. Lord Diplock said in *The Siskina* at 256 that a right to an interlocutory injunction could not stand on its own:

> It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.

36 Similarly, *Mercedes Benz AG v Leiduck* [1996] AC 284 was decided on the issue of the court's territorial jurisdiction over a foreigner outside the jurisdiction under O 11 r 1(1)(*b*) of the Hong Kong Rules of the Supreme Court, a provision that was *in pari materia* with O 11 r 1(1)(*i*) of the English RSC and our O 11 r 1(*b*). The majority of the Privy Council in that case left it open whether there could be a free-standing application for Mareva relief against a foreign defendant. The Privy Council

decided the particular application before it against the plaintiff on the ground that there was no provision under the Hong Kong Rules of the Supreme Court permitting service out of the jurisdiction. In that case, the appellant, Mercedes Benz AG, sought to recover US$20m which it had lent to International Resources SAM ("IRSAM"), a Monaco company owned by a German, Leiduck, who had guaranteed IRSAM's repayment of this sum. After both the borrower and the guarantor defaulted on their obligations, the appellant began proceedings in Monaco to recover the money. As Leiduck had assets in International Resources Company Ltd ("IRC"), a Hong Kong company, the appellant sought Mareva relief in Hong Kong against both Leiduck and IRC. IRC was dropped as a defendant and the Hong Kong proceedings were only against Leiduck, who was a foreign defendant resident outside the jurisdiction. The Hong Kong Court of Appeal upheld the lower's court discharge of the Mareva order against Leiduck. The appellant then appealed to the Privy Council.

37 The O 11 problem in *The Siskina* and *Mercedes Benz AG v Leiduck* does not arise here because the position in Singapore is different. Specifically, there is O 11 r 1(*a*) of our Rules of Court which allows for service out of jurisdiction on a defendant having property in Singapore, *ie*, the presence of the defendant's assets in Singapore is in itself sufficient as a ground for service. However, the underlying principle in *The Siskina* that the court must have jurisdiction over the substantive claim in the action is still a valid consideration. I will deal with this in due course under the heading "Underlying substantive right or cause of action".

38 Significantly and on a separate note, where an application for interim relief is made under s 12(7) of the IAA, O 11 r 1 does not apply. Instead, O 69A of the Rules of Court is the relevant provision on service for the specific types of applications listed in O 69A r 3(1)(*c*). As stated, I agree with the judge in *Swift-Fortune* ([7] *supra*) at [24] and [25] that for proceedings commenced under the IAA, the application for leave to serve out of jurisdiction is governed by O 69A r 4 and the plaintiff need not bring himself within O 11 r 1. The burden is on the plaintiff to satisfy the court that the case is a proper one for service out: see O 69A r 4(2). However, in my view, the "proper case" envisaged by O 69A r 4(2) is referable to those matters listed in O 69A r 3(1)(*c*). In other words, the focus is on the merits of the ancillary matters made pursuant to s 12(7) of the IAA as opposed to the merits of the substantive claim, which by agreement has been referred to arbitration. As stated above at [17], an application or request for Mareva relief in Singapore is ancillary to and in support of foreign arbitration. Section 12(1)(*h*) which encapsulates the very purpose of a Mareva injunction supports this view. Likewise ss 12(1)(*g*) and 12(1)(*i*) provide for interim measures which are merely ancillary to the substantive cause of dispute which has been or is to be referred to arbitration. This view is compatible with the language of s 12(7) and the purpose and effect of Art 9 of the Model Law.

39 Order 69A r 4(2) states that no leave shall be granted unless "it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction". As the phraseology of r 4(2) is similar to O 11 r 2, Prakash J in *Swift-Fortune* was persuaded to follow the test prescribed in O 11 r 2. Woo Bih Li JC (as he then was) in *PT Garuda Indonesia v Birgen Air* [2001] SGHC 262 said that the applicant must show for the purposes of O 69A r 4(2) that there were merits in the case and that Singapore was a *forum conveniens*. In my view, in the context of international arbitration to which s 12(7) of the IAA applies, the notion of "merits of the case" must be referable to the claims for the interim relief under s 12(7). The court must be satisfied that there is (a) *prima facie* evidence of those facts which form the basis of the application for interlocutory relief and (b) a reasonably arguable basis for any question of law involved. Of relevance to the issue of *forum conveniens* is the additional factor that the forum and place of arbitration are member countries of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the New York Convention"). An overall aspect of a "proper case" relates to the requisite nexus between the arbitral forum and the subject matter of the ancillary matter in dispute and the extent of the territorial reach of the relief to be ordered in terms of enforcement of the

potential award.

40 In the present case, A&O accepted service of the originating summons and Mareva order, and there was no issue of A&O not having been properly served or of this case not being a proper one for service out of jurisdiction. As such, the High Court's personal jurisdiction over A&O has been established. The upshot of this is that A&O has made itself amenable to the Singapore court's jurisdiction. As such, the court has jurisdiction to grant an injunction over A&O in precisely the same way as against a person within the jurisdiction.

41 In any event, I would have regarded this case as a proper one for service out of jurisdiction for these reasons. I disagree with Mr Yap's contention that there are no connecting factors with Singapore merely because the substantive claim has been referred to arbitration. FCL's claim is connected to Singapore. There is a nexus between the cause of action and the forum in that A&O's representative, Juan Lee, was negotiating the charter from Singapore. Since the negotiations were conducted on behalf of A&O by its representative in Singapore, the alleged contract was arguably made through an agent in Singapore on behalf of an overseas principal. The plaintiff's claim for breach of charter is one that is plainly recognisable by the Singapore courts. There is also evidence of a bank account held by A&O within the jurisdiction, so there are assets against which an interim injunction could bite. An added factor is that the arbitration is to be held in England, which is a party to the New York Convention.

Underlying substantive right or cause of action

42 The underlying principle in *The Siskina* ([7] *supra*) is the jurisdiction of the court over the substantive claim. There has also to be in existence an accrued cause of action before a plaintiff can obtain a Mareva injunction. Hence, no interlocutory injunction is granted prior to the accrual of an anticipated cause of action. The debate which is tied to foreign arbitration proceedings is this: To what extent should a grant of a Mareva injunction depend on whether the Singapore court is itself being asked to decide some "substantive" claim against the defendant to the order, so much so that the underlying principle in *The Siskina* is not met when the substantive dispute between the parties has been or has to be referred to arbitration abroad? The issue which arises for discussion in this application is Mr Yap's point that even if FCL can show that it has an arguable case that its legal or equitable right has been infringed, no Mareva injunction can be granted because there is no substantive cause of action before the Singapore courts, the substantive dispute having been referred to arbitration.

43 The above point was *not* considered and addressed in *The Siskina*. It was, however, before the House of Lords in *Channel Tunnel* ([18] *supra*) and its decision is persuasive authority on this point. Applying the decision in *Channel Tunnel*, what is required is that there is a justiciable right between the parties that is recognised by the court in Singapore. Significantly, Art 9 of the Model Law addresses this very point and expressly preserves the court's interim measures jurisdiction as explained in [16] and [17] above.

44 The House of Lords in *Channel Tunnel* dealt with the issue of whether, by reason of *The Siskina*, an English court no longer had power to make an order under s 37(1) of the UK SCA in circumstances where the action was stayed for arbitration abroad. Their Lordships held that even in such circumstances, an English court retained in principle its power under s 37(1). In *Channel Tunnel*, litigation arose out of the contract to build the Channel Tunnel. Disputes were to be resolved by an arbitral tribunal sitting in Brussels. A dispute arose and the builders (the defendants) threatened to stop work. The claimant employers sought an interlocutory injunction (under s 37(1)) to restrain the builders from stopping work while the underlying dispute was referred to Brussels for arbitration. The

House of Lords held that the court had jurisdiction to grant such an interlocutory injunction, although it upheld the Court of Appeal's exercise of its discretion not to grant an injunction (see [1992] QB 656). It was argued in the House of Lords that because the underlying dispute between the parties had by contract to be referred to foreign arbitration, based on the authority of *The Siskina*, the English court did not have jurisdiction to grant an interlocutory injunction. Both the speeches of Lord Brown-Wilkinson and Lord Mustill considered this question and, in so doing, analysed the effect of Lord Diplock's judgment in *The Siskina*.

45 Their Lordships rejected the submission that an interlocutory injunction must be ancillary to a claim for substantive relief to be granted in England by an order of the English court. Lord Browne-Wilkinson, with whose remarks Lord Keith of Kinkel and Lord Goff of Chieveley expressed agreement, concluded at 342 that Lord Diplock's speech indicated that "the relevant question is whether the English court has power to grant the substantive relief not whether it will in fact do so". He went on to hold at 343 that *The Siskina* did not impose an additional requirement that the interlocutory injunction must be ancillary to a claim for substantive relief that would actually be granted in England, whether by an order of the English court or by some other foreign court or arbitral tribunal. He said at 343:

> Even applying the test laid down by the *Siskina* the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by the English court or by some other court or arbitral body.

46 His Lordship had earlier observed at 341:

> If correct, that submission [quoted in [45] above] would have the effect of severely curtailing the powers of the English courts to act in aid, not only of foreign arbitrations, but also of foreign courts. Given the international character of much contemporary litigation and the need to promote mutual assistance between the courts of the various jurisdictions which such litigation straddles, it would be a serious matter if the English courts were unable to grant interlocutory relief in cases where the substantive trial and the ultimate decision of the case might ultimately take place in a court outside England.

47 Lord Mustill in *Channel Tunnel* at 362 observed that, put at its highest, the doctrine in *The Siskina* simply entailed that an interlocutory injunction was "always incidental to and [dependent] on the enforcement of a substantive right", which must itself be "subject to the jurisdiction of the English court", before the English court should exercise its power to grant interim relief. Several points may be gathered from Lord Mustill's speech. The injunction has always to be incidental to and dependent on the claim to enforce a substantive right. That substantive right has to be one that the English court will recognise. *But the claim itself need not be brought before the English court especially where the parties have agreed to arbitration to resolve their disputes.* In other words, all that the claimant must establish is that the factual situation on which he relies on to support his claim must be capable of sustaining his proceedings against the defendant and, in this respect, there is a close connection with the substantive law relating to what is recognised as a legally valid cause of action. I should add here that O 11 r 2(1)(*a*) of the Rules of Court is also to be read in this context.

48 The other point that emerged from *Channel Tunnel* is that Lord Brown-Wilkinson and Lord Mustill accepted that the defendant to the injunction must be amenable to the territorial jurisdiction of the English court. It is clear from *Channel Tunnel* that an interim injunction under s 37(1) of the UK SCA can only be made against a party against whom residual jurisdiction exists by

reason of a cause of action entitling the claimant to bring himself under a sub-rule of O 11 r 1 other than O 11 r 1(1)(*i*) where "an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction".

49 Lord Mustill considered various hypothetical examples of arbitration proceedings in which the English court would have jurisdiction over the cause of action giving rise to the dispute between the parties. He emphasised that if the arbitration was to be outside England, then problems of founding territorial jurisdiction over the parties in respect of the underlying cause of action might preclude the grant of an injunction. But if the territorial jurisdiction question could be resolved, then the English court would have jurisdiction over the underlying dispute and, hence, could grant an interlocutory injunction even though the seat of arbitration was a foreign country. Lord Mustill explained this at 363 as follows:

> Let us now make a further change, and postulate an arbitration agreement which calls for arbitration abroad. This may indeed have an indirect effect on the availability of injunctive relief. Very often it happens that where there is an arbitration agreement between foreign parties the English court has jurisdiction only because the agreement stipulates that the arbitration shall be held in London, thereby justifying the inference of English law as the substantive proper law of the contract, and hence giving the court jurisdiction over the cause of action under Ord. 11, r. 1(1)(*d*)(iii). If the seat of arbitration is abroad this source of jurisdiction is cut off, and the inhibitions created by the *Siskina* authorities will preclude the grant of an injunction. *Nevertheless, if the facts are such that the court has jurisdiction in some way other than the one just described I can see no reason why the additional foreign element should make any difference to the residual jurisdiction of the court over the dispute, and hence to the existence of the power to grant an injunction in support.* [emphasis added].

I have already commented on this topic in [37] above.

5 0 *The Lady Muriel* [1995] 2 HKC 320 illustrates the principle that once personal jurisdiction is established, the court has jurisdiction to grant interim relief based on its domestic law. In that case, the Hong Kong appellate court said that the Hong Kong court in principle had inherent jurisdiction to grant the application sought. The decision also recognises that Art 1(2) coupled with Art 9 of the Model Law allows the Hong Kong court to entertain the application even though the arbitration is outside Hong Kong as the application is in the nature of an order for an interim measure of protection envisaged in Art 9. Following the reasoning in *Channel Tunnel*, the appellate court agreed that it was not a necessary condition for the grant of an interim measure of protection that the measure must be ancillary to a final order to be granted by the Hong Kong court. In *The Lady Muriel*, the question was whether the Hong Kong court had jurisdiction to order a survey to be conducted on a vessel in the territorial waters when that conservatory measure related to arbitral proceedings in London, and where the contract in question was governed by English law. The appellate court held that it did in principle have inherent jurisdiction to order inspection of the vessel so as to preserve evidence in support of London arbitration. The vessel was within its territorial jurisdiction, and the evidence was important in the context of the arbitration proceedings. On the facts, however, the appellate court was not minded to grant the order without the prior approval of the arbitrators. Besides, the charterers were unable to show that they would suffer serious and irreparable damage if no order were made.

51 The decision of the Court of Appeal in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR 112 ("*Karaha Bodas*"), which appears to refute *Channel Tunnel* and *The Lady Muriel*, is distinguishable. In *Karaha Bodas*, the court was not asked to grant a Mareva injunction to support a pending arbitration in Hong Kong. Karaha Bodas had obtained an award against the Indonesian state-

owned oil company, Pertamina. The proceedings in Singapore arose after it was discovered during enforcement of the award in Hong Kong that Pertamina Trading Limited ("Petral"), a Hong Kong company and a debtor of Pertamina, had transferred money it owed to Pertamina to Pertamina Energy Services Pte Ltd ("PES"), a Singapore company and a wholly-owned subsidiary of Petral. Petral was a 99% subsidiary of Pertamina. Karaha Bodas sought an interim injunction against Petral and PES to restrain them from disposing their respective assets in Singapore. Both Petral and PES applied to set aside the originating summons and its service and also to discharge the Mareva injunction against each of them. On the question of whether the court had jurisdiction to grant a Mareva injunction, the Court of Appeal held that Karaha Bodas as a creditor of Pertamina had no *locus standi* to sue Pertamina's Hong Kong debtor, Petral, and thus there was no recognisable claim at all to support an injunction against Petral. In the case of PES, there was no existing cause of action against it.

52 In the present case, A&O withdrew its application to set aside the originating summons on the grounds that FCL has no *locus standi* to sue. Hence, on the persuasive authority of *Channel Tunnel,* the court has power to grant an interim injunction since there is a recognisable justiciable right between the parties, even though that right is to be determined not by the court but by the foreign arbitral tribunal. If the High Court grants an interlocutory injunction under s 4(10) of Civil Law Act, it is not playing any part in the decision of the dispute but is simply making the resolution of the dispute more effective. As Lord Mustill in *Channel Tunnel* puts it, the interim order is "a free-standing item of ancillary relief" (at 365). In any case, Art 9 of the Model Law envisages the grant of free-standing interim measures in support of foreign arbitration.

53 The next consideration is whether the court should exercise its discretion. Would the grant of the interim injunction in the words of s 4(10) of the Civil Law Act be "just or convenient"? The court should be prepared to act only when there is a serious need such that "the balance of advantage plainly favours the grant of relief" (*per* Lord Mustill in *Channel Tunnel* at 367). This is a matter for the discretion of the court, having regard to the particular circumstances of the case. The exercise of discretion still has to be based on principles which the court would ordinarily follow in considering whether to grant or refuse an injunction of the type sought by FCL.

The preconditions for grant of Mareva relief

54 In my judgment, the High Court has the power to grant a Mareva injunction in this case. The grant of a Mareva injunction involves both enquiring whether the preconditions for the grant of a Mareva injunction are met and whether as a matter of discretion the instant case is an appropriate one in which to actually grant Mareva relief, and if so, in what terms. Having withdrawn the *locus standi* point, there is no challenge to FCL's contention that it has a good arguable case (which has been referred to arbitration) for the grant of a Mareva injunction. The main grounds relied upon by Mr Yap to oppose Mareva relief are the absence of any risk of dissipation of the assets within the jurisdiction and non-disclosure of material facts.

55 In principle, there is no reason why the jurisdiction should not be exercised in support of the arbitration in London provided that there are grounds for believing that there is a real risk A&O may dispose of its assets to avoid execution of the award. FCL has to satisfy the court with "solid evidence" that there would be a "real risk" of dissipation: see *Choy Chee Keen Collin v Public Utilities Board* [1997] 1 SLR 604. FCL raised a few concerns which, it says, taken together demonstrate convincingly that there is a real risk that any award in its favour will not be satisfied. They are: (a) the elusiveness of A&O as to its position after 7 March 2005; (b) that A&O is not a company of good standing; (c) the placing of a warning list on A&O Singapore; and (d) A&O's tendency to "walk away" from contracts.

56 As regards the elusive behaviour of A&O, FCL complained that A&O was silent in the face of FCL's correspondence, and that was what precipitated the application for Mareva relief. FCL had written on several occasions to A&O asking that it confirm that it would take delivery of the vessel from the builder's yard as stipulated by the charter. A&O did not respond. Months after the fixture was concluded, Juan Lee wrote on 14 July 2005 to advise SSY that he was mistaken as to his authority to "conclude this business and/or to sign on behalf of A&O". On 11 August 2005, Amstec alleged that there was no contract in place. There was also an unsigned fax purportedly from A&O Singapore dated 24 August 2005 which was produced at the hearing by Mr Yap in an affidavit which he affirmed on behalf of A&O. FCL claimed not to have received this unsigned fax which stated that A&O had not contracted with FCL. Nothing was heard from A&O itself.

57 Whilst A&O's silence in the face of FCL's correspondence was, to say the least, disconcerting, I agree with Mr Yap that its silence cannot pass off as solid evidence of risk of dissipation of assets. It is necessary to also look at A&O's conduct after the *ex parte* order of 26 August 2005 was served. As required by the *ex parte* order, A&O wrote to FCL's lawyers on 13 September 2005 to confirm its account with UFJ Bank in Singapore and to state that its account had a nil balance. A&O also informed FCL that its bank account with the Royal Bank of Scotland had been closed on 25 June 2004 and that there were no other assets belonging to A&O in Singapore. A&O has not ignored these proceedings or the arbitration commenced in London. It is challenging the substantive dispute in London and is actively pursuing this application to set aside the *ex parte* order.

58 Ms Quah points out that A&O is incorporated in the island of Nevis and little is known of its corporate structure, directors and shareholders or trading history. There is no evidence that A&O is in any way a substantial company or carries on business in Nevis. No accounts or financial statements have been produced by A&O. Affidavits filed on behalf of A&O in this application were sworn or affirmed by its Singapore lawyers and its external auditor, Mr Donald Patrick Coughlin. No directors of A&O filed any affidavits on behalf of the company. Further, at the time the *ex parte* order was granted, A&O was reported to be of unsound standing as no Certificate of Good Standing has been issued. In addition, a "warning listing" was placed against A&O Singapore in 2004 on the Baltic Exchange to warn members of the Baltic Exchange contemplating business with A&O Singapore. The warning was to the effect that A&O Singapore had defaulted on an arbitration award in favour of a Greek shipowner. The latter had conducted some investigations in Singapore and found that A&O Singapore and A&O had the same directors, one of whom was a Murray Wilgus. According to industry sources, Murray Wilgus had a habit of "walking away" from his contracts and closing down his companies. Finally, FCL's English lawyers had advised that under English law, there was no reciprocal right to enforce a London arbitral award in Nevis.

59 In response, Mr Yap says that no sinister interpretation should be placed on the fact of A&O having been incorporated in a country where the laws on corporate and financial reporting are not stringent. FCL itself is a Liberian company. FCL was prepared to enter into a contract with A&O with its eyes open and without the benefit of background information on A&O. A prerequisite to the fixture was the provision of background information on A&O but that prerequisite was dropped on or about 4 March 2005. In any case, A&O had been in business since 1989. SSY had negotiated 43 charters with A&O and other members of the A&O group since 2002, which included eight charters in 2004. The "warning listing" could not have concerned A&O Singapore as it was not involved in any arbitration with any Greek shipowner. If anything, the "warning listing" had nothing to do with A&O which is a different entity. Mr Yap rightly maintains that nothing turns on the absence of a Certificate of Good Standing on A&O's part in August 2005. The simple explanation is that Caribbean Trust and Management Services Ltd, the service provider appointed by A&O, had overlooked the matter of payment of the renewal fee for the Certificate even though A&O had already given it the renewal fee in March 2005. Although there was late payment of the renewal fee, A&O was not struck off and

remained a legal and existing entity. As for Murray Wilgus's habit of "walking away" from contracts and closing down his companies, Mr Yap contends that the allegations are unsubstantiated as no credible evidence has been adduced.

60 This is not a case where a defendant is accused of participation in nefarious activities or where a defendant's financial affairs are so structured (for instance, as a single ship-owning company which then loses its single major asset, or as a company whose funds are concealed in or switched between entities with anonymous officers and shareholders) that the court can readily see that a Mareva injunction can be of assistance to a plaintiff. In this case, FCL would have known that the "assets" of a chartering company like A&O lay in the benefit of its contracts with potential shippers throughout the duration of the two-year charter. FCL must have been comfortable enough to want to charter its expensive new vessel to A&O. On the overall evidence before me, there is in my view insufficient grounds for believing that there is a real risk that a potential award will not be satisfied. FCL has not satisfied the threshold test laid down in *Choy Chee Keen Collin v Public Utilities Board* ([55] *supra*).

61 Having ruled that FCL has not established that there is a real risk of dissipation of the assets within the jurisdiction, it is not necessary to deal with Mr Yap's point on material non-disclosure. Suffice it to say that this complaint of material non-disclosure was in the main very much related to the *locus standi* issue (and hence the underlying merits) which was abandoned in the course of the hearing, so much so that A&O's allegation of want of proper disclosure would have failed. In any event, I disagree that the criticisms levelled at the conduct of FCL can be categorised as material non-disclosure.

62 Furthermore, even if I had ruled in favour of FCL on the issue of risk of dissipation, there is a separate and independent reason why this court as a matter of discretion should discharge the injunction. After the Mareva order was served on A&O on 7 September 2005, two sums of money, namely US$4,565.33 and US$21,730.21, were paid into A&O's bank account with UFJ Bank, Singapore. The total amount caught by the Mareva order is US$26,295.54. Separately, FCL managed subsequently to obtain a Mareva injunction against A&O in Canada in respect of the same claim made in the London arbitration. The amount caught by that injunction is C$200,000. A&O was unsuccessful in its challenge against the injunction in the Canadian courts. A ruling in FCL's favour was handed down on 11 January 2006. To this end, any serious need for assistance by way of a Mareva order against A&O's assets in Singapore has diminished or evaporated in the face of the Canadian order. Any potential award in FCL's favour is likely to be enforced in Canada, which is a New York Convention country. The situation now no longer favours the continuation of *Mareva* relief in Singapore.

Result

63 I thus order that the Mareva order of 26 August 2005 be set aside. It is set aside not because of the court's lack of jurisdiction but because of the lack of merits on FCL's part. I will hear parties on costs and, in particular, on whether this is an appropriate case to order that costs be costs in the arbitration.