Privy Council Appeal No. 18 of 1995

Mercedes-Benz AG *Appellant*

v.

Herbert Heinz Horst Leiduck *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 24th July 1995

Present at the hearing:-

Lord Goff of Chieveley
Lord Mustill
Lord Slynn of Hadley
Lord Nicholls of Birkenhead
Lord Hoffmann

*[Majority Judgment delivered by **Lord Mustill**]*

On 30th April 1994 Mercedes-Benz AG ("Mercedes") commenced by writ an action in the Supreme Court of Hong Kong against two defendants, Mr. H. Leiduck and Intercontinental Resources Company Limited ("ICR"). Mercedes is a German corporation. Mr. Leiduck is the respondent to this appeal. He is a German citizen, and is the registered owner of almost the entire share capital of ICR, a company incorporated in Hong Kong. On the previous day Mercedes had obtained on an ex parte application an order granting leave to serve a *Mareva* injunction restraining both defendants from dealing with any of their assets within or without the jurisdiction, including in particular the shares in ICR. The affidavit which led the application gave an account of a transaction between Mercedes, Mr. Leiduck and another of his companies, Intercontinental Resources S.A.M., ("IRSAM") a corporation registered in Monaco. It was said that Mr. Leiduck and IRSAM, acting on his behalf, had agreed to promote the sale of 10,000 vehicles manufactured by Mercedes to a customer in the Russian Federation. To finance the heavy expenses of this operation Mercedes advanced to IRSAM

an amount of US$20m, on terms that if the total price of the vehicles had not been remitted to Mercedes by 31st December 1993 the advance would be returned, together with interest. By way of security IRSAM furnished a promissory note in favour of Mercedes for US20m plus interest, and the respondent added his personal guarantee, by way of an "aval" endorsed on the note. According to the affidavit the transaction did not proceed, the advance was not repaid and the note was dishonoured. The respondent and IRSAM had misappropriated the money, and in particular had applied part of it for the benefit of ICR. In consequence Mercedes had started civil proceedings in Monaco against the respondent, but these would take some time to come to judgment. Meanwhile Mr. Leiduck was in custody in Monaco, whilst criminal investigations were being carried out.

It is unnecessary to go into further details, and indeed undesirable, since it seems probable that the accuracy of the deponent's assertions will never be tested in the courts of Hong Kong. It is sufficient to say that after expressing the apprehension of Mercedes that the respondent was planning to transfer his shares in IRSAM, together with other assets, from Hong Kong to avoid any judgment that might be obtained against him, the deponent set out the grounds for contending that the court should grant leave to serve the intended writ out of the jurisdiction, and also grant a world-wide injunction to restrain the respondent from disposing of his assets pending trial of their claims against him. Such an order is informally but conveniently referred to as a *Mareva* injunction. It is instructive to quote the grounds on which the deponent relied:-

> " I believe that the plaintiff has a good arguable case that the case is a proper one for service on the first defendant out of the jurisdiction under RSC Order 11 r1(1)(b). The plaintiff has a good cause of action recognised under Hong Kong law. The final order in that cause of action is likely to be made in the courts of Monaco. If, as I believe to be likely, the final order is made in the plaintiff's favour, the Hong Kong court will have jurisdiction over the first defendant under RSC Order 11 r1(1)(m) in an action to enforce such final order or it will be registrable under the bi-lateral arrangements for the reciprocal enforcement of judgments between Hong Kong and France. However, that may be rendered nugatory if the plaintiff cannot obtain interlocutory relief.
>
> Further, the plaintiff claims against the second defendant, a Hong Kong company, as constructive trustee and for disclosure. For the reasons set out in paragraphs 13 to 16 above, I believe that there is a real issue between the plaintiff and the second defendant which the plaintiff may reasonably

ask the Court to try. The second defendant has not been served in advance of the first defendant because that would put the first defendant on notice of this application. However, I undertake to arrange service of these proceedings at the company's registered office in Hong Kong before service on any other party. Subject to prior service on the second defendant, I believe that the plaintiff has a good arguable case that the first defendant is a necessary or proper party to those proceedings within RSC O.11 r1(1)(c) in that, had he been present within the jurisdiction, both he and the second defendant would clearly have both been defendants to the same proceedings.

Further, the plaintiff claims against the first defendant for money had and received and as constructive trustee, and the first defendant's alleged liability arises out of acts committed with the connivance of the second defendant, a company incorporated in Hong Kong. In these circumstances, I believe that the plaintiff has a good arguable case that the case is a proper one for service out of the jurisdiction under RSC O 11 r1(1)(t)."

It was not suggested in the affidavit, and is not suggested now, that the transaction had any connection with Hong Kong, apart from the fact that ICR is registered there.

The learned deputy judge acceded to this application, gave leave to serve the writ on the respondent in Monaco, and granted a *Mareva* injunction in the common form, limited so far as concerned the respondent to assets not exceeding US$19m. The writ, which was issued on the following day and later served on the defendant in Monaco, claimed sums of money due under the aval, and as moneys had and received; damages for breach of fiduciary duty; and an account. There was no claim for an injunction, either final or interlocutory.

It is convenient to interrupt the narrative so that the most material of the statutory provisions can be set out:-

"Rules of the Supreme Court

Order 11, Rule 1

(1) Provided that the writ is not a writ to which paragraph (2) of this rule applies, service of a writ out of the jurisdiction is permissible with the leave of the court if in the action begun by the writ -

...

(b) an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);

(c) the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto;

...

(m) the claim is brought to enforce any judgment or arbitral award;

...

(p) the claim is brought for money had and received or for an account or other relief against the defendant as constructive trustee, and the defendant's alleged liability arises out of acts committed, whether by him or otherwise, within the jurisdiction.

(2) Service of a writ out of the jurisdiction is permissible without the leave of the Court provided that each claim made by the writ is -

(b) a claim which by virtue of any written law the High Court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction.

...

4.(1) An application for the grant of leave under rule 1(1) must be supported by an affidavit stating -

(a) the grounds on which the application is made;

(b) that in the deponent's belief the plaintiff has a good cause of action;

..."

"Supreme Court Ordinance (Cap. 4)

21L (1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the High Court to be just or convenient to do so.

(2) Any such order may be made either unconditionally or on such terms and conditions as the Court thinks just.

(3) The power of the High Court under sub-section (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled or resident or present within that jurisdiction."

Sub-paragraphs (b), (c), (m) and (p) of the Hong Kong Order 11 Rule 1(1) correspond with the similarly lettered paragraphs of the Rules of the Supreme Court of England and Wales, except that paragraph (p) reflects paragraph (t) of the English rule. Paragraph (m) is a recent addition. Sub-rule (2) corresponds with part of the English sub-rule (2), the omitted matter being concerned with the Civil Jurisdiction and Judgments Act, 1982, and the underlying Convention, which have no counterpart in Hong Kong. The parts of Rule 4 quoted above are the same in both jurisdictions. Sub-sections (1) and (2) of section 21L of the Supreme Court Ordinance are founded on the corresponding provisions of section 37 of the Supreme Court Act, 1981 of England and Wales (United Kingdom). These are derived from section 45 of the Supreme Court of Judicature (Consolidation) Act 1925, and ultimately from section 25 of the Supreme Court of Judicature Act 1873. Sub-section 21L(3) echoes section 37(3), which was not present in the earlier legislation.

One further aspect of the statutory regime must be mentioned. In England the High Court has jurisdiction to grant interim relief under section 25 of the Civil Jurisdiction and Judgments Act, 1982, in support of substantive proceedings pending before the courts of another state, party to the Brussels or Lugano Conventions on Jurisdiction and the Enforcement of Judgments. No equivalent statutory jurisdiction exists in Hong Kong.

Returning to the present case, the proceedings against the two defendants took a very different course. It seems that it did not take long for the action against ICR to be abandoned. On 17th May all the interim orders against these defendants were set aside by consent, with costs to be paid by Mercedes on an indemnity basis, and on 22nd August 1994 the appellants gave notice to discontinue the action against them. For the time being however the claim against the respondent went ahead. Pursuant to the leave granted by the deputy judge, the writ was served on him in Monaco. No notice of intention to defend was given. Mercedes signed judgment against him on 24th June 1994 for some US$17.6m, and obtained a charging order absolute on 2nd August 1994 in relation to his shares in ICR.

At this point the respondent began to take part in the proceedings, and on the same day that the charging order was made he initiated applications to have all the orders against him set aside. The applications were heard by Keith J. In a careful judgment he discharged the order of the deputy judge which had granted leave to serve the writ out of the jurisdiction, holding that none of the claims contained in it fell within Order 11, Rule 1(1). The judgment and charging order fell away, and the *Mareva* injunction was also set aside. Mercedes appealed to the Court of Appeal of Hong Kong. They no longer sought to uphold the grounds on which they had persuaded the deputy judge that the substantive claims were a proper subject for service out of the jurisdiction, but contended first that by failing to file an affidavit of merits and allowing judgment to go by default the respondent had lost his right to dispute the jurisdiction of the court over the substantive claims, and second, that the court had jurisdiction to grant the *Mareva* injunction by virtue of paragraphs (b) and (m) of Order 11, Rule 1(1). By a majority, Bokhary J.A. dissenting, the Court of Appeal affirmed the order of Keith J. Mercedes now appeal to this Board.

In the meantime, Mercedes have been pursuing their action against the respondent in Monaco which is said to be close to a conclusion; so close indeed that during the last day of the argument counsel for Mercedes informed the Board that a judgment in their favour was anticipated within a very few hours. If such a judgment was forthcoming it was the intention of Mercedes to start a fresh action based upon it, and to seek leave to serve the writ on the respondent in Monaco, under Order 11, Rule 1(1)(m).

Their Lordships now turn to the issues arising on the appeal. It is a striking feature that there has been no attempt by Mercedes since the judgment of Keith J. to contend that any of the relief claimed against the respondent in the writ fell within Order 11. This was inevitable. The deputy judge was faced with a complex affidavit, and did not have the benefit of adversarial argument, but once the matter was explored it became obvious that leave to serve the writ on the respondent in the form which it then took should not have been granted, except perhaps on the ground alleged to fall within paragraph (c) of Rule 1(1); and this ground disappeared once the proceedings against ICR were abandoned. Since Mercedes cannot have improved their position by starting incompetent proceedings, the present appeal should in their Lordships' opinion be approached on the footing that no writ claiming substantive relief has ever been issued, and that the part of the order which required Mercedes to issue an inter partes summons (which must have contemplated a summons in an action begun by writ) was empty of content. Their Lordships are not aware whether such a

summons was ever in fact issued, but if it was it must have been procedurally meaningless.

There is another striking feature of the appeal, to which their Lordships have already drawn attention. Order 11, Rule 1 is concerned with the service of documents which assert a claim or seek a remedy. Yet in the writ actually issued there was no claim for an injunction, whether *Mareva* or of any other species. Thus, although much of the argument of the present appeal was devoted to the question whether it would be possible to serve a document indorsed with a claim for a *Mareva* injunction under Order 11, Rule 1, in reality no leave to effect the service of such a document was ever sought, and no such document was ever served. This is not surprising, for as Mercedes themselves explained to the deputy judge in their affidavit they were applying ex parte without notice because they feared that if word reached the respondent he would make arrangements for the immediate transfer of the ICR shares. On the face of it, this feature would seem to furnish a short answer to the appeal. As the extract from the affidavit quoted above plainly shows the *Mareva* injunction was sought and obtained as ancillary relief in the proposed substantive action. If Mercedes had abstained from inducing the court to assert a non-existent jurisdiction over the substantive claims, and had pursued their *Mareva* application as a free-standing claim for relief the affidavit, and much more importantly the writ, would have looked entirely different. The argument on the appeal therefore seems to be concerned with whether the Board should uphold the validity of an order for service which has never in fact been made.

This is not a technicality. The court has no power to make orders against persons outside its territorial jurisdiction unless authorised by statute; there is no inherent extra-territorial jurisdiction, *Waterhouse v. Reid* [1938] 1 K.B. 743, 747 per Greer L.J. Thus, even if Mercedes are right in their contention that notwithstanding the statements of principle in *Siskina (Cargo Owners) v. Distos Compania Naviera S.A.* [1979] A.C. 210 a *Mareva* injunction can properly be granted in support of proceedings in a foreign court, the order cannot simply be made in the air; there must be some means, authorised by statute, of bringing the person affected before the court. For present purposes the only relevant means are those empowered by Order 11, Rule 1(1) read (in the case of proceedings begun by originating summons) together with Order 11, Rule 9. These means are to serve upon the person overseas a document which initiates proceedings and requires the person served to appear and answer them. Order 11, Rule 1 does not authorise the service on such a person of an order; it is concerned with documents claiming relief, not granting it, although once the extra-territorial

jurisdiction has been validly asserted through the medium of Order 11 service of orders subsequently made in the proceedings will often be a matter of course. In the present case no document of the kind embraced in Order 11, namely a writ or originating summons, claiming an injunction, ever existed or was the subject of an application for leave or the grant of leave under that Order. Thus, now that it is recognised that the respondent should not have been brought before the court to answer the substantive claims, he has not been brought before the court by any valid means, even if Mercedes are right on all the questions of law brought forward in argument. It is true that if their contentions are correct, and that if they had set about the matter in an entirely different way, the position would have been different. But given that the present case combines two jurisdictions, the extra-territorial jurisdiction under Order 11 and the *Mareva* jurisdiction, both of which should be exercised with great circumspection, it is far from obvious that Mercedes should now be allowed to advance a case so fundamentally different from the one which they successfully presented to the deputy judge. This being said, the matter has been thoroughly argued in cogent and economical submissions to which the Board is much indebted, and since the issues are important their Lordships think it appropriate to engage them.

It is important at the outset to distinguish two questions. The first is concerned with territorial jurisdiction. The foreigner is outside the jurisdiction. The claim against him has no connection with the home territory. No action against him in respect of that claim is brought, or properly could be brought, before the local court. But he has assets within the territory. Assume for this purpose that *Mareva* proceedings could have been commenced by writ or other originating process, and assume also that such relief could properly be given: i.e., that notwithstanding *The Siskina* *Mareva* relief in support of foreign proceedings is permissible. Does the statutory enlargement of its territorial jurisdiction created by Order 11, rule 1(1) entitle the court to permit the service of a writ or other originating process claiming such relief on the foreigner out of the jurisdiction, thus compelling him to choose between suffering a judgment in default or appearing before a court which has no other jurisdiction over him to argue that his assets should not be detained?

The second question is concerned with a different kind of jurisdiction; or, more accurately, a power. Assume for this purpose that the foreign defendant is someone who can be brought before the English court to answer a claim for a *Mareva* injunction, either because he is present here or because (contrary to the respondent's contentions on the first issue) Order 11, Rule 1(1)(b) is wide enough to cover all kinds of injunction. Assume also

that the matters in dispute have no connection with the English court, and that the plaintiff neither can, nor as in the present case intends to, bring them before that court. Does the court have power to restrain the free disposition of the defendant's assets in England and Wales, to await the conclusion of proceedings brought against that person in a foreign jurisdiction?

On the argument of the appeal counsel disagreed about where the enquiry should start. In their Lordships' opinion the question of territorial jurisdiction should be considered first, for if the respondent cannot properly be brought before the court the second question will not arise. Indeed it seems that it can only arise in the situation, perhaps rather uncommon, where the local court has territorial jurisdiction over the foreigner through his physical presence, but the plaintiff chooses not to invoke it to pursue the substance of his claim and has recourse to the local court only to seek a *Mareva* injunction over assets within the territory. An enquiry into the proper exercise of the injunctive powers of the court in such a situation could not be pursued without considering the frontal attack by the appellant on the statements of general principle by Lord Diplock in *The Siskina, supra*, at pages 256-7. These statements were adopted by the House of Lords in *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation* [1981] A.C. 909, albeit with a difference of opinion about how they should be applied to the particular case; restated with an added qualification in *British Airways Board v. Laker Airways* [1985] A.C. 58 and with further qualifications in *South Carolina Insurance Co. v. Assurantie Maatschappij 'De Zeven Provincien'* [1987] A.C. 24; and endorsed in *Pickering v. Liverpool Post* [1991] 2 A.C. 370. In their Lordships' opinion it would not be permissible for this Board to contemplate a further modification of the principles enunciated by the House of Lords in these authorities, still less a complete departure from them, unless a decision on their correctness or otherwise was indispensable to the determination of the present appeal.

Their Lordships will therefore take the question of territorial jurisdiction first. It will be recalled that the appellants rely on two provisions of Order 11, Rule 1(1): namely paragraphs (b) and (m). The latter need not be considered at length. Their Lordships are far from convinced that it is permissible to issue an originating process claiming only *Mareva* relief, even against a defendant present within the jurisdiction, rather than to proceed by summons or motion in an existing action or one which the applicant undertakes to commence as a condition of obtaining an order. For if the defendant fails to appear to the writ the plaintiff is entitled to judgment in default for the relief claimed, and there is something strange about a final judgment for a

Mareva injunction; a remedy which, as is well established, embodies no adjudication by the court on the rights of the parties and takes effect only until such an adjudication has taken place in other proceedings. Leaving this aside however there are two unanswerable objections to a jurisdiction asserted under paragraph (m). The first is that the claim would not be "brought to enforce" a judgment. Unlike a suit founded on the cause of action created by a judgment the *Mareva* injunction does not enforce anything, but merely prepares the ground for a possible execution by different means in the future. Secondly, and more simply, in a case such as the present the injunction does not enforce a "judgment", but is intended to hold the position until a judgment comes into existence. At the time when the injunction is sought and granted there is no judgment. All that the plaintiff can do is to assert his hope that a favourable judgment will at some time in the future be obtained in an action which at the time when the application is made may not even have commenced. It is quite plain that paragraph (m) was not intended to encompass such a case.

Their Lordships turn to Order 11, Rule 1(1)(b). At its simplest, the argument for Mercedes is that this paragraph expressly posits an injunction ordering the defendant to do or refrain from doing anything within the jurisdiction; that this is exactly what a *Mareva* injunction does do; and that there is no need to enquire further. In their Lordships' opinion this is not the right approach. It is not enough simply to read the words of the Rule and see whether, taken literally, they are wide enough to cover the case. Regard must be paid to their intent, their spirit: see, for example, *Johnson v. Taylor* [1920] A.C. 144 per Viscount Haldane at page 153, *G.A.F. Corporation v. Amchem Products Inc.* [1975] 1 Lloyds Rep. 601, per Megarry J. at page 605 and the cases there cited.

Ideally, to match an application for *Mareva* relief against the spirit of Order 11, Rule 1, the first step would be to ascertain, not only what a *Mareva* injunction does, but also how, juristically speaking, it does it. This should be straightforward, but is not. After only a few years the development of a settled rationale was truncated by the enactment of section 37(3) of the Supreme Court Act 1981. This did not, as is sometime said, turn the common law *Mareva* injunction into a statutory remedy, but it assumed that the remedy existed, and tacitly endorsed its validity. An all-out challenge to the entire concept, such as may be found in Meagher, Gummer & Lehane, Equity Doctrines and Remedies, 3rd Edn. (1992) paragraph 2186, seems a rather unlikely event, at least in the courts of England and Hong Kong. The remedy is now twenty years old and the problems, of which there is no lack, are of a practical kind; how to frame an order which, on the one hand, protects the claimant against the manipulations of a defendant who

may prove to be unscrupulous, without strangling the working capital of a defendant at the instance of a claimant who may prove to be unscrupulous; how to form the necessary judgment at a time when every fact is hotly controverted; how to choose ancillary orders which are effective without being oppressive. These problems did not arise in the early days of the injunction, where the remedy was given only in the clearest of cases, but they have been increasing ever since. Amidst all the burdensome practicalities theory has been left behind. The only rationalisations which can be found in the cases are as follows. First, that although *Mareva* relief takes the shape of an injunction it is really a kind of attachment. In the first of the appeals argued inter partes *Rasu Maritima S.A. v. Perusahaan Pertambangan etc. ("Pertamina")* [1978] Q.B. 644 Lord Denning M.R. called up in support certain local customs prevailing in the City of London and elsewhere in the early eighteenth century, and subsequently received into certain American jurisdictions, under the name of "foreign attachment". The long established line of authority, of which *Lister v. Stubbs* (1890) 45 Ch.D. 1 is the best-known example, to the effect that the attachment before judgment is not permissible under English law was distinguished on the ground that it applied only to defendants who were out of the jurisdiction but had assets here. This explanation cannot, their Lordships believe, be sustained in the light of the subsequent practical development of the regime. Ever since *Prince Abdul Rahman bin Turki al Sudairy v. Abu-Taha* [1980] 1 W.L.R. 1268 it has been common place to grant *Mareva* injunctions against persons resident within the jurisdiction; and presumably this enlargement could not have been sanctioned if the ground for distinguishing *Lister v. Stubbs* advanced in the *Pertamina* case was seen to be acceptable. Moreover, it is now quite clear that *Mareva* relief takes effect in personam alone; it is not an attachment; it gives the claimant no proprietary rights in the assets seized, and no advantage over other creditors of the defendant. *Cretanor Maritime Co. Ltd. v. Irish Marine Management Ltd.* [1978] 1 W.L.R. 966; *Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A.* [1981] 1 Q.B. 65, 72; *Derby & Co. Ltd. v. Weldon (Nos. 3 and 4)* [1990] Ch. 65; and *A.J. Bekhor & Co. Ltd. v. Bilton* [1981] Q.B. 923. The courts administering the remedy always distinguish sharply between tracing and other remedies available where the plaintiff asserts that the assets in question belong to him and that the dealings with them should be enjoined in order to protect his proprietary rights, and *Mareva* injunctions granted where the plaintiff does not claim any interest in the assets and seeks an inhibition of dealings with them simply in order to keep them available for a possible future execution to satisfy an unconnected claim.

The second rationalisation was advanced in the earlier case of *Mareva Compania Naviera S.A. v. International Bulkcarriers* [1975] 2 Lloyds Rep. 509, the appeal heard ex parte from which the remedy draws its popular name. The Master of the Rolls accepted a narrow view of the power to grant injunctive relief, founded on the statement by Cotton L.J. in *North London Railway Co. v. Great Northern Railway Co.* (1883) 11 Q.B.D. 30, to the effect that notwithstanding its apparent width section 25(8) of the Judicature Act 1873, the predecessor of the present section 37 of the 1981 Act, did not confer an unlimited jurisdiction to grant an injunction regardless of the existence of a legal or equitable right which the injunction was designed to protect. He went on to hold, however, that even this restricted jurisdiction could found injunctive relief, since the plaintiff had a right to be paid the debt owing to him, even before he had established his right by getting judgment for it, in the action which was already afoot in England.

This rationalisation has never subsequently been advanced because it was overtaken by the different proposition, preferred in the *Pertamina* case, that the statement of principle in the *North London Railway* case was wrong, and that the much wider understanding of the statutory power to grant an injunction enunciated by Sir George Jessel M.R. in *Beddow v. Beddow* (1878) 9 Ch.D. 89, 93 was correct. Since *Pertamina* contained the first endorsement and explanation, in a case argued inter partes, of the new jurisdiction it is natural that subsequently, for example in *A.J. Bekhor & Co. v. Bilton supra*, the court accepted that the source of the power is to be found in section 37 of the Supreme Court Act 1981 and its predecessor.

There is, however, a problem with this explanation, for not only in *The Siskina* but also in the subsequent decisions of the House of Lords cited above, it was laid down that the statement of Cotton L.J. in the *North London Railway* case was right and that the wider interpretation of the statutory power is not. On the face of it this would appear to negative the only surviving basis for the jurisdiction, unless the *Mareva* injunction is, like the relief granted in the *South Carolina Insurance* case, a special exception to the general law.

Further than this it is at present impossible to go, at least so far as concerns the law of England and Hong Kong. The most that can be said is that whatever its precise status the *Mareva* injunction is a quite a different kind of injunction from any other. The enquiry must begin by recognising that it is sui generis, as was the injunction inhibiting foreign proceedings granted in the *South Carolina* case, *supra*: see especially the speech of Lord Brandon of Oakwood, at page 40. Thus, it is not enough simply to say that since a *Mareva* injunction is an injunction it automatically falls

within Order 11, Rule 1(1)(b), and that the special feature that it is not concerned with any rights justiciable within the home territory is merely one of the factors to be taken into account in the exercise of the discretion to grant leave. Rather, it must be asked whether an extra-territorial jurisdiction grounded only on the presence of assets within the territory is one which paragraph (b) and its predecessors were intended to assert.

Their Lordships are satisfied that it is not. In their opinion the purpose of Order 11, Rule 1 is to authorise the service on a person who would not otherwise be compellable to appear before the English court of a document requiring him to submit to the adjudication by the court of a claim advanced in an action or matter commenced by that document. Such a claim will be for relief founded on a right asserted by the plaintiff in the action or matter, and enforced through the medium of a judgment given by the court in that action or matter. The document at the same time defines the relief claimed, institutes the proceedings in which it is claimed, and when properly served compels the defendant to enter upon the proceedings or suffer judgment and execution in default. Absent a claim based on a legal right which the defendant can be called upon to answer, of a kind falling within Order 11, Rule 1(1), the court has no right to authorise the service of the document on the foreigner, or to invest it with any power to compel him to take part in proceedings against his will.

Thus, at the centre of the powers conferred by Order 11 is a proposed action or matter which will decide upon and give effect to rights. An application for *Mareva* relief is not of this character. When ruled upon it decides no rights, and calls into existence no process by which the rights will be decided. The decision will take place in the framework of a distinct procedure, the outcome and course of which will be quite unaffected by whether or not *Mareva* relief has been granted. Again, if the application succeeds the relief granted bears no resemblance to an orthodox interlocutory injunction, which in a provisional and temporary way does seek to enforce rights, or to the kind of interim procedural measure which aims to make more effective the conduct of the action or matter in which the substantive rights of the plaintiff are ascertained. Nor does the *Mareva* injunction enforce the plaintiff's rights even when a judgment has ascertained that they exist, for it merely ensures that once the mechanisms of enforcement are set in motion, there is something physically available upon which they can work.

This opinion, that Order 11 is confined to originating documents which set in motion proceedings designed to ascertain substantive rights, is borne out by its language. Thus, the

opening words of Rule 1(1) define the extra-territorial jurisdiction by reference to the relief claimed in "the action begun by the writ". Looking at Order 11, Rule 1(1) in the round, it seems to their Lordships plain that this expression refers to a claim for substantive relief which will be the subject of adjudication in the action initiated by the writ, and not to proceedings which are merely peripheral; and, what is more, peripheral to an action in a foreign court concerning issues which could not be brought before the English court under Order 11. It is true that Rule 9 makes Order 11 applicable to the service of an originating summons, but the imprint of Rule 1(1) does in their Lordships' view remain on the entire scheme of extra-territorial jurisdiction, and relates it to proceedings for substantial and not incidental relief.

Again, Order 11, Rule 4 requires the affidavit leading the application to state the belief of the deponent that the plaintiff has "a good cause of action". It may be that, as the Court of Appeal held in *Republic of Haiti v. Duvalier* [1990] 1 Q.B. 202, this expression is capable of referring to claims for the interim relief now empowered under section 25, where it appears in the special context of Order 11, Rule 1(2). It is unnecessary to decide whether this is so or not, although their Lordships cannot agree with Staughton L.J. (at page 221) that it is merely a matter of semantics. However this may be, in their Lordships' opinion the requirement in Rule 4 read in the context of the jurisdiction created by Order 11, Rule 1 can only mean a substantive right enforceable by proceedings in the English court. In one sense, it might be said that a valid claim for the infringement of a substantive right is a cause of action even if no action lies in the English court to enforce it; but this obviously cannot be what is contemplated by Order 11. In the present situation the only other candidate for the cause of action to whose existence the deponent must speak is the possession of an arguable case for the discretionary grant of a *Mareva* injunction. Even on the most generous approach to the language (an approach which so far as Order 11 is concerned has often been discouraged) this bears no resemblance to the ordinary understanding of this expression, and no resemblance to the kind of claim which is to be pursued "in the action begun by the writ" with which alone Order 11 is concerned.

Furthermore, it is impossible to overlook that, whatever the distant origins called up in the *Pertamina* case, in practice the *Mareva* injunction is a novelty. Lord Hailsham went so far in the *Siskina* as to assert, at page 260, that until three years previously he would have regarded the plaintiffs' claim as wholly unarguable. If the argument for Mercedes is correct, it must follow either that throughout the life of Order 11 the extra-territorial jurisdiction of the English court has extended to a sui generis form of relief which

nobody knew to exist, or that the jurisdiction will suddenly gain an extra dimension at the moment (if it arrives) when a *Mareva* injunction in aid of foreign proceedings is recognised as a permissible exercise of the power to grant an injunction. Neither alternative is convincing.

Next, their Lordships must deal with certain arguments which favour a wide interpretation of Order 11, Rule 1(1)(b). First, an analogy is drawn with a quia timet injunction. Their Lordships cannot accept this. It is true that such an injunction is designed to ensure that an infringement of rights constituting a present cause of action in the strict sense will never come into existence. But the action or other originating process in which the application for an injunction is embodied founds upon an assertion of substantive rights whose validity is a prerequisite of the proper grant of relief. The remedy is knitted together with the rights and the threatened infringement of them. With a *Mareva* injunction the right to the injunction and the ultimate right to damages or whatever else is claimed in the action are wholly disconnected. The threatened infringement of the plaintiff's rights which a quia timet injunction forestalls is a wrongful act, although not one which constitutes an immediate cause of action for substantive relief. By contrast, the threatened dispersal of assets is not a wrongful act even against the background of a pending suit in England, for subject to any special rules relating to insolvency, a person can do what he likes with his own; and the more so, where no action is being, or could be, brought in England to make good the claim. Thus, even if the language of Rule 4 can be stretched far enough to accommodate an originating process consisting of a claim solely for a quia timet injunction in cases where the events and the proceedings have no other connection with England than that the infringement if uninhibited will take place in England (a matter on which their Lordships express no opinion), this does not lead to the conclusion that *Mareva* relief falls within the intent of Order 11, Rule 1 RSC.

The next argument for Mercedes adopts the reasoning of Mr. Anthony Diamond Q.C. in *X. v. Y.* [1990] 1 Q.B. 220. It runs as follows. Many of those who take part in foreign proceedings are not subject to the territorial jurisdiction of the English court, and are not domiciled in a Convention territory. Unless there is some way to bring such a person before the English court to answer a claim for interim relief under section 25 of the Act of 1982 that section will lose much of its intended scope, and will fall short of the judicial co-operation envisaged by Article 24 of the Convention. Section 25 does not itself create any mechanism for serving process in relation to such relief, and Order 11, Rule 1(2)(a) does not authorise service on a person domiciled outside

a Convention territory, even if *Republic of Haiti v. Duvalier* [1990] 1 Q.B. 202 is rightly decided as regards persons within such a territory. Nor is provision made elsewhere in the Rules of the Supreme Court. The jurisdiction must therefore be sought in Order 11, Rule 1(1), where paragraph (b) provides an obvious solution. Whatever the word "injunction" may formerly have comprised it must now be read as extending to the kind of interim relief governed by section 25, which includes *Mareva* relief. And since it must have a consistent meaning, the same is the case for proceedings outside Convention territories. *The Siskina* does not stand in the way, since it has been reversed by section 25.

Their Lordships do not accept this argument. Whatever else may be said about the current standing of *The Siskina*, it has not so far been reversed by anything, as shown by the decisions of the House of Lords which their Lordships have cited, still less as a by-product of the 1982 legislation. Either the reasoning of the decision is sound or it is not, and the subsequent enactment of a power applicable in certain limited areas for which special jurisdictional provision is made can have no bearing on the generality of situations to which the statute does not apply. Their Lordships are unable to understand how the conferring of powers to be exercised, by way of exception to the general rule, in support of litigation within convention countries could have any effect on the meaning of Order 11, Rule 1(1) of the English Rules of the Supreme Court, which governs the service of proceedings worldwide. And when one turns to Hong Kong the proposition becomes quite unsustainable, for Hong Kong is not a party to the convention, and has no statute corresponding to section 25. Whatever may have happened in England and Wales, the Hong Kong Order 11, Rule 1 retains the shape and purpose which it has always had.

For these reasons their Lordships consider that the court would have had no power to order the service of a form of process limited to a claim for *Mareva* relief even if leave to effect such service had been sought. This conclusion is sufficient to dispose of the appeal. The second question therefore does not arise for decision and their Lordships prefer to express no conclusion upon it. They do however think it proper to make this observation. It may well be that in some future case where there is undoubted personal jurisdiction over the defendant but no substantive proceedings are brought against him in the court, be it in Hong Kong or England, possessing such jurisdiction, an attempt will be made to obtain *Mareva* relief in support of a claim pursued in a foreign court. If the considerations fully explored in the dissenting judgment of Lord Nicholls of Birkenhead were then to prevail a situation would exist in which the availability of relief otherwise considered permissible and expedient would depend upon

the susceptibility of the defendant to personal service. Their Lordships believe that it would merit the close attention of the rule-making body to consider whether, by an enlargement of Order 11 Rule 1(1), a result could be achieved which for the reasons already stated is not open on the present form of the Rule.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant will pay the costs of the appeal to this Board.

Dissenting judgment delivered by
Lord Nicholls of Birkenhead

I regret that I find myself constrained humbly to advise Her Majesty that this appeal should be allowed. The defendant's argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong court cannot reach him. That cannot be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable.

In order to explain why that is not the law it is necessary to separate clearly the two questions which arise on this appeal. Both are questions of law. The first is whether the Hong Kong court ever has jurisdiction, in the sense of legal power, to grant a *Mareva* injunction in aid of a judgment being sought in a foreign court. If the Hong Kong court has such jurisdiction, the second question is whether a plaintiff in such a case may serve proceedings claiming a *Mareva* injunction on a defendant outside the jurisdiction, in the territorial sense, of the Hong Kong court. Failure to distinguish between these two meanings of jurisdiction is a fruitful source of confusion.

The second question cannot be attempted until the first has been given a full answer. The answer given to the first question, and the implications inherent in that answer, provide the basis essential to any consideration of the second question.

The first question: subject-matter jurisdiction

Take two people, both living in Hong Kong. One of them defaults under a contract they have made. The contract contains a clause that all disputes shall be determined exclusively by the courts of a foreign country. The defaulting party insists on the dispute being heard in that country. So the innocent party commences proceedings in the foreign court, claiming damages

for breach of contract. The plaintiff then discovers that the defaulting party is planning to remove his assets from Hong Kong in order to thwart enforcement in Hong Kong of the judgment the plaintiff is having to seek abroad. Has the Hong Kong court jurisdiction to grant a *Mareva* injunction to prevent him from doing so? There is no problem about service, because the defendant is resident in Hong Kong.

Justice and convenience suggest that the answer to the question is yes. The defendant is in Hong Kong, and the judgment will be sought to be enforced in Hong Kong through the courts of Hong Kong against assets which are in Hong Kong. So long as the foreign judgment when obtained will be recognised and enforceable in Hong Kong, the Hong Kong court should be as able to exercise its wide powers to grant an injunction in such a case as in a case where the judgment is being sought from the Hong Kong court itself. The need for such an injunction is particularly compelling when the foreign court has no power to grant interim relief in respect of assets outside its territorial jurisdiction. Unless the Hong Kong court can grant interim relief in respect of the Hong Kong assets, the defendant can cock a snook at the legal process of both countries.

It is necessary to dig a little deeper than this. The starting point is to note that the court's power to grant a *Mareva* injunction is now firmly established. Whatever views some may have of the legitimacy of its origin, the jurisdiction exists. The jurisdiction has received legislative recognition: in section 37(3) of the Supreme Court Act 1981 in England, and in section 21L(3) of the Supreme Court Ordinance (cap 4) in Hong Kong. The present case concerns the ambit, not the existence, of the jurisdiction. In order to identify the proper ambit of the jurisdiction, it is necessary to embark on the difficult task of seeking to elucidate the underlying rationale.

Ordinarily a plaintiff seeks a *Mareva* injunction in the same proceedings as those in which he is seeking his judgment. This should not be permitted to obscure the fact that *Mareva* relief differs from other interim relief in an important respect. Like other injunctions, a *Mareva* injunction operates in personam. It does not create a proprietary interest in the affected property, even where it relates to a specifically identified asset. And like other interim relief, a *Mareva* injunction is concerned to provide protection pending a future stage in the judicial process. But unlike other interlocutory relief, *Mareva* relief is not connected with the subject matter of the cause of action in issue in the proceedings. A *Mareva* injunction does not prevent a defendant from doing something which if done by him would be a wrong attracting a remedy. An unsecured creditor, or a claimant for

damages, has no legal or equitable interest in any of the assets of the defendant, nor will the judgment itself give him such an interest. The judgment will comprise an order of the court that the defendant pay the plaintiff an amount of money.

This feature has to be kept in mind. Although normally granted in the proceedings in which the judgment is being sought, *Mareva* relief is not granted in aid of the cause of action asserted in the proceedings, at any rate in any ordinary sense. It is not so much relief appurtenant to a money claim as relief appurtenant to a prospective money judgment. It is relief granted to facilitate the process of execution or enforcement which will arise when, but only when, the judgment for payment of an amount of money has been obtained. The court is looking ahead to that stage, and taking steps designed to ensure that the defendant cannot defeat the purpose of the judgment by thwarting in advance the efficacy of the process by which the court will enforce compliance. He is not to be permitted to steal a march on the court's own enforcement process. If a prospective judgment debtor can look and plan ahead, so can the court. He is not at liberty deliberately to take steps to prevent enforcement. This is so, irrespective of the nature of the underlying cause of action. *Mareva* relief is granted in aid of the underlying cause of action only in the sense that the whole enforcement process can be said to be in aid of that cause of action.

Once it is borne in mind that a *Mareva* injunction is a protective measure in respect of a prospective enforcement process, then it can be seen there is a strong case for *Mareva* relief from the Hong Kong court being as much available in respect of an anticipated foreign judgment which would be recognised and enforceable in Hong Kong as it is in respect of an anticipated judgment of the Hong Kong court itself. Courts of many countries recognise and enforce judgments regularly obtained in other countries. The English court has done so for centuries. Courts are not so insular that they enforce only judgments obtained in proceedings conducted by themselves. If the Hong Kong court will make its enforcement process available in respect of a foreign judgment, then in principle that must surely encompass *Mareva* relief as well. In other words, as a form of interim relief given by the Hong Kong court to further the object of its enforcement process, *Mareva* relief should be available in all cases where the Hong Kong court will make its enforcement process available, whether the judgment being enforced is that of the Hong Kong court, or of a foreign court or, for that matter, is an arbitration award.

A further point, to be noted here in passing, is that the plaintiff's underlying cause of action is essentially irrelevant when considering the court's jurisdiction to grant *Mareva* relief. Since *Mareva* relief is part of the court's armoury relating to the enforcement process what matters, so far as the existence of jurisdiction is concerned, is the anticipated money judgment and whether it will be enforceable by the Hong Kong court. In general, and with some well known exceptions, the cause of action which led to the judgment is irrelevant when a judgment creditor is seeking to enforce a foreign judgment. It must surely be likewise with a *Mareva* injunction. When a court is asked to grant a *Mareva* injunction, and a question arises about its jurisdiction to make the order, the answer is not to be found by looking for the cause of action on which the plaintiff is relying to obtain judgment. So far as jurisdiction is concerned, that would be to look in the wrong direction. Since *Mareva* relief is designed to prevent a defendant from frustrating enforcement of a judgment when obtained, the plaintiff's underlying cause of action entitling him to his judgment is not an apposite consideration, any more than it is when a judgment creditor applies to the court to enforce the judgment after it has been obtained.

Of course, the matter stands very differently when the court is considering the exercise of the jurisdiction and whether in its discretion to grant or refuse relief. Among the matters the court is then concerned to consider are the plaintiff's prospects of obtaining judgment and the likely amount of the judgment. For that purpose the court will be concerned to identify the plaintiff's underlying cause of action.

The "*Siskina*" and the later authorities

This approach is not so heterodox as might appear at first sight. The basis on which *Mareva* injunctions were first granted was a simple exercise of the English High Court's statutory power to grant an injunction in all cases in which it appears to the court to be just or convenient to do so: see *Mareva International Carriers SA v. International Bulkcarriers SA* [1975] 2 Lloyd's Rep. 509. The problem now being addressed was not present there; the proceedings in which judgment was being sought were before the English court. In the *Siskina* [1979] A.C. 210, 253, Lord Diplock analysed a *Mareva* injunction in terms of a classical interlocutory injunction, describing it as ancillary to a substantive pecuniary claim for debt or damages. This is so, but only in the sense that the whole enforcement process can be so described. It should be noted that in the *Siskina* the two questions I have identified were not considered and addressed separately. And when the *Siskina* was decided *Mareva* injunctions were very much in their infancy. Since then the scope of *Mareva* relief has broadened: orders are made after judgment has been obtained as well as before; discovery

may be ordered to render the *Mareva* injunction effective; and worldwide orders are now made, whereby the court assists a plaintiff to enforce the judgment in other countries. These developments, in a jurisdiction which even now is still in a state of development, make it easier than formerly to see the *Mareva* jurisdiction in its wider, international context.

I am fortified in this approach by observations subsequently made in the House of Lords. Lord Diplock's categorisation of the circumstances in which alone an interlocutory injunction may be granted by the English court has been queried by, among others, Lord Keith of Kinkel, Lord Scarman, Lord Mackay of Clashfern, Lord Goff of Chieveley and Lord Browne-Wilkinson, in *Castanho v. Brown & Root (UK) Ltd.* [1981] A.C. 557, 573, *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" NV* [1987] 1 A.C. 24, 44, and *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.* [1993] A.C. 334, 340, 341, and 344. These are highly persuasive voices that the jurisdiction to grant an injunction, unfettered by statute, should not be rigidly confined to exclusive categories by judicial decision. The court may grant an injunction against a party properly before it where this is required to avoid injustice, just as the statute provides and just as the Court of Chancery did before 1875. The court habitually grants injunctions in respect of certain types of conduct. But that does not mean that the situations in which injunctions may be granted are now set in stone for all time. The grant of *Mareva* injunctions itself gives the lie to this. As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yester-year.

These post-*Siskina* judicial observations on the court's jurisdiction to grant injunctions do not of themselves assist in identifying, in any specific form, the rationale of the *Mareva* jurisdiction. What they do is to relieve the unusual *Mareva* jurisdiction of the need to be squeezed inside the circumstances in which alone interim injunctive relief has normally been granted in the past.

This accords with the approach adopted by Lord Brandon of Oakbrook in the *South Carolina* case (at page 40). He suggested that before its statutory recognition the power of the court to grant *Mareva* injunctions may have been an exception to the judicially-established limitations on the situations in which the court had power to grant injunctions.

Interim relief and the Channel Tunnel case

The recent authorities go further than this. Thus far I have concentrated on noting the way in which *Mareva* relief stands apart from ordinary interlocutory relief. But even in respect of interim relief connected with the subject matter of the parties' underlying dispute, the law has moved on since the *Siskina* decision. Even in such instances, when granting interim injunctive relief the English court does not now regard itself as rigidly confined to cases where the action will proceed to trial before the English court. In the *Channel Tunnel* case the plaintiffs sought an interlocutory injunction restraining the defendants from suspending work. One of the submissions was 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. The House of Lords rejected that submission. Lord Browne-Wilkinson commented (at 341):-

> "If correct, that submission 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."

He concluded (at page 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."

Lord Mustill, at page 362, observed that, put at its highest, the doctrine of the *Siskina* is that an interlocutory injunction is "always incidental to and dependant 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.

In this context, and this is important, "a cause of action recognised by English law", or a substantive right "subject to the jurisdiction of the English court", was held to include a cause of action which would be enforceable in England save for the defendant insisting on his contractual right to have the matter tried elsewhere. Lord Mustill at page 363 observed that in such a case the existence of a pending suit in England is an irrelevance.

On this basis, therefore, the Hong Kong court would have jurisdiction to grant interlocutory relief in my example of the two Hong Kong residents who enter into a contract with an exclusive foreign jurisdiction clause. Save for the defendant insisting on his contractual right to have the dispute tried abroad, the dispute could have been tried in Hong Kong. If that is so for ordinary interlocutory relief, so much the more for *Mareva* relief in respect of a prospective foreign judgment which will be enforceable in Hong Kong.

Accordingly the answer to the first question is yes. The boundary line of the *Mareva* jurisdiction is to be drawn so as to include prospective foreign judgments which will be recognised and enforceable in the Hong Kong courts. If Mr. Leiduck had been a Hong Kong resident, the Hong Kong court would have had jurisdiction to grant the *Mareva* injunction sought. A writ, claiming *Mareva* relief and nothing further, could have been issued and served on him in Hong Kong. This latter conclusion is of importance when considering the second question.

Causes of action and prospective rights

Given that *Mareva* relief is of an interim character, it may seem strange that there can be proceedings claiming this relief and nothing more. What is clear is that in the case of an anticipated foreign judgment, where the judgment is being sought in other proceedings, nothing further can be claimed in the *Mareva* proceedings. When the foreign judgment is obtained, the common law regards the defendant as under an obligation to pay, which the English court will enforce: see the classic expositions of Parke B in *Williams v. Jones* (1845) 13 M. & W. 628, 633, and Blackburn J. in *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155, 159, affirmed by Lord Bridge of Harwich in *Owens Bank Ltd. v. Bracco* [1992] 2 A.C. 443, 484. But, in the nature of things, until the judgment is forthcoming the plaintiff cannot seek to enforce it. Until then he has only a prospective right of enforcement, to which the *Mareva* relief is ancillary.

The substantive relief sought by a writ or other originating process needs to be founded on a cause of action. So the question which arises, and which must be faced squarely, is whether a writ seeking only a *Mareva* injunction in respect of an anticipated foreign judgment falls foul of this requirement.

To a large extent any discussion of this question is doomed to be circular. A cause of action is no more than a lawyers' label for a type of facts which will attract a remedy from the court. If the court will give a remedy, ex hypothesi there is a cause of action. However, the discussion still has usefulness because it causes one to look at the matter from a different angle.

Two preliminary points are to be noted. First, practising lawyers tend to think in terms of the established categories of causes of action, such as those in contract or tort or trust or arising under statute. They do not always appreciate that the range of causes of action already extends very widely, into areas where identification of the underlying "right" may be elusive. For instance, a writ may properly be issued containing nothing materially more than a claim for an injunction to restrain a defendant from continuing proceedings abroad on the ground that this would be unconscionable: see *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58, 81, 95 and [1984] Q.B. 142, 147. In such a case, the underlying right, if sought to be identified, can only be defined along the lines that a party has a right not to be sued abroad when that would be unconscionable. This formulation exemplifies the circular nature of the discussion. Second, originating process is not always concerned with the determination of an underlying dispute between the parties. For instance, a plaintiff may bring an action for discovery against a person, in respect of whom he has otherwise no cause of action, in aid of other proceedings not yet commenced: see *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] A.C. 133. In such a case the only relief sought is of an interim character in the sense that it is in aid of other proceedings.

A right to obtain an interlocutory injunction in aid of the substantive relief sought in an action is not normally regarded as a cause of action. This is because ordinarily proceedings bring a substantive dispute before the court. Attention is therefore focused on the cause of action involved in the substantive dispute the court is being asked to resolve. The claim to interim protective relief is ancillary to the underlying cause of action, and in that respect it has no independent existence of its own.

That is the normal position. But where the substantive dispute is being tried by a foreign court, the matter stands differently. It is difficult to see any reason in principle why, in this type of case, where the defendant is within the territorial jurisdiction of the court, the court should decline to give such interim relief as might have been given had the court been determining the substantive dispute. It would be odd if the court should adopt the attitude of drawing back and declining to give any relief, whatever the circumstances, unless the court were seized of the whole dispute. That would be a pointlessly negative attitude, lacking a sensible basis. That is not the law. On the contrary, the *Channel Tunnel* decision has shown the way ahead. As appears from the observations in that decision referred to above, a writ may be issued claiming only interim relief ancillary to a final order being sought from some other court or arbitral body. So be it. If the consequence is that in such a case, where the court is seized only

of a claim for interim relief, that claim must bear the burden of being labelled a cause of action if intervention by the court is to be justified, let that be so. The law continues to adapt and develop.

Likewise, with *Mareva* relief in aid of a prospective foreign judgment. As already noted, *Mareva* relief differs from normal interim relief in that it protects a right of enforcement which does not yet exist. However, on the point now under consideration, this difference is immaterial. It is the interim nature of the relief which is under consideration, and on this the prospective nature of the right protected by a *Mareva* injunction is irrelevant.

Nevertheless there is a point here which must be touched upon further. In the *Siskina* Lord Diplock observed at page 256 that the right to obtain an interlocutory injunction is dependent upon there being a pre-existing cause of action. This is inconsistent with the analysis of the *Mareva* injunction as ancillary to a prospective right of enforcement. On this I must diffidently part company from this highly distinguished expositor of the common law. In the first place, there is in principle no inherent difficulty in an injunction, interim or final, being granted at a time when the defendant has currently done no wrong. One of the most useful features of injunctions is that they can be anticipatory. The common law courts gave remedies for wrongs which had been committed. So did the Court of Chancery. But the Chancery Court also granted injunctions to prevent anticipated wrongs from being committed. Quia timet injunctions are the classic instance of this. The *Norwich Pharmacal* bill of discovery is another example of the Chancery Court giving in personam relief where the plaintiff had no existing cause of action against the defendant. It is only a short step from this to the court granting an injunction as a protective measure in respect of a right (of enforcement) which has not yet come into existence.

In the second place, the *Siskina* analysis, tying *Mareva* relief closely to the underlying cause of action, gives rise to an unfortunate difficulty of its own. This must call into question the soundness of the *Siskina* approach. When hearing an application for *Mareva* relief, the court is concerned to consider the plaintiff's prospects of obtaining the judgment whose efficacy he is seeking to protect. Given that on any analysis *Mareva* injunctions are anticipatory, there is no obvious reason why it should be an essential pre-requisite in all cases that the underlying cause of action must have accrued. Depending on the facts, a plaintiff may be as much in need of *Mareva* protection before the precise moment at which his underlying cause of

action strictly accrues as afterwards. Where the underlying cause of action has not accrued the court should be particularly cautious in granting relief. But this factor goes to discretion, not to jurisdiction. It follows that I doubt the correctness of later decisions, such as *Veracruz Transportation Inc. v. V.C. Shipping Co.* [1992] 1 Lloyd's Rep. 353 and *Zucker v. Tyndall Holdings Plc* [1992] 1 W.L.R. 1127, in so far they are based on the proposition that *Mareva* relief can only be granted after the underlying cause of action has arisen. On this I prefer the approach adopted in Australia: see, for instance, the decision of the New South Wales Court of Appeal in *Patterson v. B.T.R. Engineering (Aust) Ltd.* (1989) 18 N.S.W.L.R. 319, 329, 330.

The second question: territorial jurisdiction

But Mr. Leiduck does not live in Hong Kong. He is in Monaco. This fact gives rise to no problem over subject-matter jurisdiction in respect of the application for *Mareva* relief. There will be no difficulty over the enforceability of the Monaco judgment in Hong Kong in due course even though Mr. Leiduck is abroad. When the judgment is forthcoming, Mercedes-Benz may obtain leave under Order 11 rule 1(1)(m) to serve on Mr. Leiduck outside Hong Kong an application to enforce the Monaco judgment.

But what about service of the *Mareva* proceedings? The Hong Kong court can only entertain Mercedes-Benz' application for a *Mareva* injunction if the originating process falls within one of the heads of Order 11 rule 1 under which leave may be given for service of a writ outside the territorial jurisdiction of the Hong Kong court. The only head in Order 11 rule 1(1) relevant to this application is paragraph (b). This gives rise to a short point of interpretation.

On the face of Order 11 rule 1(1)(b), all that is required is that in the action an injunction is sought concerning acts or omissions of the defendant within the territorial jurisdiction of the court. Having regard to the context, however, it cannot have been intended that where substantive relief is being sought from the court at the trial, a claim to an interlocutory injunction meanwhile would bring within the grasp of the court proceedings otherwise beyond its reach. As Sargant L.J. observed in *Rosler v. Hilbery* [1925] 1 Ch. 250, 262, what is contemplated is an action where an injunction is part of the substantive relief. This interpretation of paragraph (b) was confirmed in the *Siskina*.

None of this touches *Mareva* relief as sought in the present action. In answer to the first question I have already concluded that a writ claiming *Mareva* relief and nothing more could have been issued and served on Mr. Leiduck in Hong Kong. A claim for

a *Mareva* injunction may stand alone in an action, on its own feet, as a form of relief granted in anticipation of and to protect enforcement of a judgment yet to be obtained in other proceedings. In such an action *Mareva* relief is not interim relief in the sense relevant for Order 11 rule 1(1)(b) purposes. In that action the *Mareva* relief is not granted pending the trial of that action. It is granted pending judgment in other proceedings. At the trial of the *Mareva* action, if it ever took place, the only relief sought would be the *Mareva* injunction. That is the substantive relief sought. Obtaining that relief is the sole purpose of the action.

This undermines the basis on which the conclusion was reached in the *Siskina* that paragraph (b) of Order 11 rule 1(1) is inapplicable to *Mareva* injunctions. That basis disappears if the answer I have given to the first question is correct. A claim for an injunction which can stand on its own feet as the entirety of the relief claimed ought, in principle, to be within paragraph (b). Paragraph (b) exists as an independent head. It is intended to have some scope. As noted in the *Siskina*, it is apt to apply to quia timet injunctions, and injunctions to protect or enforce equitable rights and duties not arising from contract or outside the ambit of the law of tort. It is equally apt to apply to a *Mareva* injunction which comprises the sole relief sought in the action, albeit sought in aid of other proceedings. A *Mareva* injunction is a novel form of injunction, but this affords no reason for excluding it from paragraph (b), applying as this paragraph does to all forms of injunctions.

This reading of paragraph (b) gives rise to no difficulty in the ordinary case where a plaintiff seeks judgment and a *Mareva* injunction meanwhile in the same proceedings against a non-resident defendant. On an application for leave under Order 11 rule 1, the claim for *Mareva* relief would follow the same fate as the main claims. If leave were refused in respect of the latter, there would be no prospective judgment calling for *Mareva* protection.

The end result, that a *Mareva* injunction in aid of a prospective judgment being sought from another court is an injunction within the meaning of paragraph (b), is sensible and reasonable. Paragraph (b) applies only to acts or omissions within the territorial jurisdiction of the Hong Kong court, so it would embrace only *Mareva* injunctions confined in this way. There is nothing exorbitant about the Hong Kong court granting *Mareva* relief limited in this fashion, given the prerequisite that the anticipated judgment must be one which will be recognised and enforceable in Hong Kong. The alternative result would be deeply regrettable in its unfortunate impact on efforts being made

by courts to prevent the legal process being defeated by the ease and speed with which money and other assets can now be moved from country to country. The law would be left sadly lagging behind the needs of the international community.

For completeness I add that the position under Order 11 would appear to be the same in respect of interim relief of the character discussed in the *Channel Tunnel* case. Interim injunctive relief of this character is in aid of other proceedings. It is in the other proceedings that the substantive issue between the parties will be determined. The court which grants the interim relief is doing no more than regulate meanwhile the defendant's acts or omissions within its territorial jurisdiction. However, that is not a point which directly arises on this appeal.

The defendant contended that it would be an act of judicial anarchy for your Lordships' Board to decline to follow the decision of the House of Lords in the *Siskina*, with the law of Hong Kong then differing from the law of England, although the former is based on the latter. This submission is not impressive. If this appeal were allowed, the inevitable result would be that an appropriate case would soon reach the House of Lords and harmony would be restored. The law took a wrong turning in the *Siskina*, and the sooner it returns to the proper path the better.

For the same reason I am not attracted by the argument that this matter should be left to be dealt with by the Rules Committees in Hong Kong and England. A similar type of argument was raised in the *Channel Tunnel* case. It was unsuccessful: see [1993] A.C. 363, 364. So it should be in this case.

The endorsement on the writ

There remains the point that, even now, the writ is not endorsed with a claim for a *Mareva* injunction. This defect can readily be cured by amendment of the writ. An amendment would not take Mr. Leiduck by surprise, or unfairly prejudice him. The amendment would do no more than include on the writ a claim for relief which, from the very first, was sought by way of summons, in reliance on Order 11 rule 1 (1)(b).