EXHIBIT 75

OXFORD UNIVERSITY COMMONWEALTH LAW JOURNAL

VOLUME 5 NUMBER 1 SUMMER 2005

CONTENTS

FINALITY AND THE ENFORCEMENT OF FOREIGN JUDGMENTS UNDER THE COMMON LAW IN HONG KONG

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A Introduction

The enforcement of foreign judgments is an essential pillar of any system of the conflict of laws. The common law cases have long required that a foreign judgment must be 'final' to be enforceable. In the leading nineteenth century decision of the House of Lords in *Nouvion v Freeman*,[1] Lord Watson stated that a foreign judgment must be 'final and unalterable in the Court which pronounced it'.[2] Lord Watson's dictum has often been relied upon in later cases, including a number of recent decisions in Hong Kong in which judgments of the courts of Mainland People's Republic of China (PRC) were not enforced on the basis of a perceived lack of finality. Nevertheless, this paper argues that Lord Watson's dictum is not an appropriate test for finality. Drawing on case law from, in particular, Canada, Australia, and England, the paper seeks to explain the ratio in *Nouvion* and proposes a test for finality which is consistent with both theory and practice.

Hong Kong conflict of laws rules have always borne, both before and after the end of the colonial era,[3] a marked similarity to their English law equivalents. This 'English model' is noticeably present when it comes to the enforcement of foreign judgments.[4] Thus, as is also the case in many Commonwealth jurisdictions,[5] the Hong Kong courts may enforce foreign judgments by one of two routes: first, a foreign judgment may be enforced by reference to the common law; and, secondly, enforcement may occur under statutory rules, in particular the Foreign Judgments

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1 (1889) 15 App Cas 1 (HL).

2 *Nouvion* (n 1) 13 (Lord Watson). This case establishes that a judgment may be final even if it is under appeal abroad, although as a matter of practice the courts will normally stay execution until after the determination of the appeal.

3 On the resumption of sovereignty over Hong Kong by the People's Republic of China in 1997. See Y Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2nd edn Hong Kong University Press, Hong Kong 1999) ch 2. Of course, Hong Kong, as the Hong Kong Special Administrative Region of the People's Republic of China (or Hong Kong SAR), ceased to be a member of the Commonwealth as at 1 July 1997.

4 The exception is that Hong Kong never adopted those changes to English law (such as the most part of the Civil Jurisdiction and Judgments Act 1982 (UK), as amended) introduced specifically on account of membership of the EC. On English conflict of laws generally, see L Collins (ed), *Dicey and Morris on The Conflict of Laws* (13th edn Sweet and Maxwell, London 2000).

5 See generally K W Patchett, *Recognition of Commercial Judgments and Awards in the Commonwealth* (Butterworths, London 1984).

(Reciprocal Enforcement) Ordinance.[6] In practical terms, enforcement under the common law is more important than under the Foreign Judgments (Reciprocal Enforcement) Ordinance, for not only does the latter cover only some fifteen jurisdictions,[7] but also Hong Kong's major trading partners, including the United States, Japan and, in particular, Mainland PRC,[8] all come under the common law régime. The Hong Kong rules relating to the enforcement of foreign judgments under the common law will be immediately familiar to conflicts lawyers in any Commonwealth jurisdiction: the foreign judgment must be pronounced by a court of competent jurisdiction, be for a definite sum of money, and be final and conclusive.[9] It is not intended that this paper should offer a general review of the law on the enforcement of foreign judgments in Hong Kong, rather the specific question of what constitutes a 'final' judgment for enforcement purposes will be examined. For, in recent years, the Hong Kong courts have on several occasions refused to enforce judgments of Mainland PRC courts on the basis of a lack of finality. This issue is not only of obvious importance in the Hong Kong context but, having regard to the continuing development of the Mainland PRC's export-based economy,[10] will be of particular relevance in Commonwealth jurisdictions in the Asia-Pacific region and beyond.

When tackling the question of finality, the Hong Kong courts have, in general,[11] strictly applied the statement of Lord Watson in *Nouvion*,[12] namely that a foreign judgment is only considered final if it is 'final and unalterable in the Court which pronounced it'.[13] As a result, the Hong Kong courts have effectively held

[6] Chapter 319 (Laws of Hong Kong). The Ordinance is a virtual copy of the Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK).

[7] They are: Belgium, France, Germany, Italy, Austria, The Netherlands and Israel; as well as the following Commonwealth jurisdictions: Australia, Bermuda, Brunei, India, Malaysia, New Zealand, Singapore and Sri Lanka. Schedules 1 and 2 of the Foreign Judgment (Recriprocal Enforcement) Order, Ch 319A.

[8] At the time of writing there is no provision for the reciprocal enforcement of judgments between Hong Kong and Mainland PRC. See further n 96, below. The position is otherwise in respect of arbitral awards. See XC Zhang, 'The Agreement between Mainland China and the Hong Kong SAR on Mutual Enforcement of Arbitral Awards: Problems and Prospects' (1999) 29 Hong Kong LJ 463. Judgments of the courts in Taiwan can be enforced at common law notwithstanding the fact that Taiwan is not a recognised State, see *Chen Li Hung v Ting Lei Miao* (2000) 3 HKCFAR 9 (Court of Final Appeal (Hong Kong's highest court *post* 1997)).

[9] See generally *Dicey and Morris* (n 4) ch 14. See also P Nygh and M Davies *Conflict of Laws in Australia* (7th edn Butterworths, Australia 2002) ch 9; J-G Castel and J Walker *Canadian Conflict of Laws* (5th edn Butterworths, Toronto 2001) ch 14; P Diwan *Private International Law: English and Indian* (4th edn Deep and Deep Publications, New Delhi 1998) ch 25; R Hickling and A Wu *Conflict of Laws in Malaysia* (Butterworths, Kuala Lumpur 1995) ch 8.

[10] Especially after the accession of the PRC to the World Trade Organisation.

[11] Following the decision of Cheung J in *Chiyu Banking Corp Ltd v Chan Tin Kwun* [1996] 2 HKLR 395 (HC). The Hong Kong cases discussed in this paper can be found on the Hong Kong Legal Information Institute website <http://www.hklii.org>.

[12] *Nouvion* (n 1).

[13] ibid 13 (Lord Watson). *Nouvion* establishes that a judgment may be final even if it is under appeal abroad, although as a matter of practice the courts will normally stay execution until after the determination of the appeal.

that a judgment of a Mainland PRC court, even the highest court (the Supreme People's Court), can never be final. For there is always the possibility[14] under the Mainland PRC civil procedure system that, even after the regular appeal process has run its course through the courts, the Supreme People's Procuratorate may order that there be a retrial; and as a consequence, it is said by the Hong Kong judges, the judgment is not unalterable in the court which pronounced it. However, this commentator would submit that the Hong Kong courts have taken Lord Waston's words out of context and by so doing have applied the wrong test. Interestingly, the appropriateness, or rather inappropriateness, of Lord Watson's dictum as a test for finality was canvassed as long ago as 1938 by HE Read.[15] Moreover, an examination of modern case law from a number of Commonwealth jurisdictions[16] reveals that the better approach is that a foreign judgment may be final despite the fact that there is the possibility that the decision of the original court may be set aside and that the very same court may be required to re-visit the case.

B Mainland PRC Judgments and Hong Kong Case Law

Before considering the case law in any detail, it is necessary to give a brief overview of the procedure of 'trial supervision' under Mainland law.[17] A ruling by a Mainland court of first or, more commonly, second instance, will typically result in a judgment which is, to use a neutral expression, legally enforceable under PRC civil procedure law.[18] However, the procedure for trial supervision,[19] as opposed to the regular trial system,[20] allows for review by the People's Procuratorate of any legally effective decision made by a court. Article 185 of the Civil Procedure Law of the PRC 1991 specifies the following as the grounds on which the Procuratorate may intervene:

(1) The crucial evidence in the original judgment or ruling is found to be insufficient;
(2) The application of law in the original judgment or ruling is found to be erroneous;

[14] Although such possibility may, at times, be more theoretical than real.
[15] HE Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (Harvard University Press, Cambridge (MA) 1938) 85-6.
[16] In particular, *Schnabel v Lui* [2002] NSWSC 15 and *Lewis v Eliades* [2003] EWHC 368 (QB), [2003] 1 All ER (Comm) 850, discussed below.
[17] See generally N Liu, 'A Vulnerable Justice: Finality of Civil Judgments in China' 13 (1999) Columbia J of Asian Law 35. The general duties and responsibilities of the Procuratorate are outlined in A Chen, *An Introduction to the Legal System of the People's Republic of China* (3rd edn Butterworths, Hong Kong 2004) 159-63. The author also would like to thank Xian Chu Zhang and Peng Xu for their contributions to the author's comprehension of Mainland law.
[18] For a brief description of civil procedure law on the Mainland, see Chen (n 17) 217-22.
[19] Liu (n 17) 36, also uses the expressions 'the Supervision Procedure' or 'supervising system'.
[20] Liu (n 17) 45.

(3) The People's Court violates the legal procedure that may have prejudiced the passing of a correct judgment or ruling;
(4) The judge is found to have taken bribes, conducted malpractice out of personal considerations, and misused the law in rendering judgment during the trial of the case.

The breadth of these grounds scarcely requires comment. If the Procuratorate lodges a protest, the court must conduct a complete retrial[21] (needless to say, such a procedure is unknown to the common law, nor does it seem to have any direct equivalent in western civil law jurisdictions).[22] It must be stressed that this supervision procedure only comes into play after the civil courts have dealt with any appeals under the regular exercise of their jurisdiction. In other words, the fact that a party to civil litigation on the Mainland has lost before the trial courts, and then had all relevant appeals to higher courts dismissed, is not the end of the matter. Even judgments of the Supreme People's Court may be reviewed by the Supreme People's Procuratorate.[23] If the People's Procuratorate is of the view, or can be convinced, that the courts made procedural or substantive errors,[24] a retrial can be ordered. If a re-trial is ordered, the whole case is completely re-heard by the courts, so that, to put it colloquially, everything may go back to square one.[25]

The finality of Mainland judgments was first raised before the Hong Kong courts in *Chiyu Banking Corp Ltd v Chan Tin Kwun*.[26] The plaintiff brought an action in Hong Kong upon a judgment of the Fujian Intermediate People's Court delivered in January 1995. An appeal to the Fujian Higher People's Court was dismissed in July 1995. However, in October 1995, the defendant, a Hong Kong resident, asked the Fujian People's Procuratorate to investigate. In March 1996

[21] Civil Procedure Law art 186.

[22] The Chinese Procuratorate appears to have its origins in the Soviet legal system. See FJM Feldbrugge, GP Van Den Burg and WB Simons (eds), *Encyclopedia of Soviet Law* (2nd revised edn Martinus Nijhoff Publishers, Dordrecht 1985) 623.

[23] eg *Wuhan Zhong Shuo Hong Real Estate Co Ltd v Kwong Sang Hong International Ltd* [2000] HKCFI 708 (12 June 2000) (HC) and text to n 36 below. The Procuratorate includes the Supreme People's Procuratorate as well as regional Procuratorates.

[24] See Civil Procedure Law art 185, above, for the grounds on which a retrial may be ordered.

[25] This article concentrates on the impact of the supervisory jurisdiction of the People's Procuratorate, since the Hong Kong cases have largely focused on the possibility of a review by the People's Procuratorate. Nevertheless, it may be noted that the Civil Procedure Law also confers a supervisory jurisdiction on the courts themselves. See further *Tan Tay Cuan v Ng Chi Hung* [2001] HKCFI 102 (HC) text to n 40 below. For example, under art 178, a litigant who believes that a 'definite error' has been made in the proceedings, may petition the original court or a superior People's Court seeking a retrial. A 'definite error' includes a lack of sufficient evidence (art 179(2)), an erroneous application of the law (art 179(3)) or procedural errors (art 179(4)). Article 182 imposes a two year limit on applications by a litigant under art 178. This two year window means that Art 178 should present less severe problems in relation to enforcement proceedings in Hong Kong; since the process is not open-ended. In contrast, there is no time limit in relation to the Procuratorate's supervisory jurisdiction. See n 34, below.

[26] [1996] 2 HKLR 395 (HC). It will be up to the defendant to raise the question of finality.

the Fujian People's Procuratorate submitted a report to the Supreme People's Procuratorate requesting that the latter lodge a protest against the decision of the Fujian Intermediate People's Court. In the Hong Kong action, Cheung J held, relying *inter alia* upon *Nouvion*,[27] that the supervisory role of the Supreme People's Procuratorate, and in particular the possibility that in due course a protest might be lodged and a retrial ordered, meant that the judgment of the Fujian court was not final:

> Based on the material [on Mainland law] before me, the supervisory function of the Supreme People's Procuratorate and the protest system are not simply an appeal process. The Intermediate Court judgment is final in the sense that it is not appealable and it is enforceable in China, but it is not final and conclusive for the purpose of recognition and enforcement by the Hong Kong courts because in the words of Lord Watson [in *Nouvion v Freeman*], it 'is not final and unalterable in the court which pronounced it'. It is liable to be altered by the Intermediate Court on a retrial if the Supreme People's Procuratorate lodge a protest in accordance with the Civil Procedure Law. If upon protest being made, rare the circumstances may be, a Chinese court has to retry the case, then, clearly it retains the power to alter its own decision.[28]

On this basis, Cheung J stayed the Hong Kong action.[29]

The consequences of *Chiyu Banking* are immediately apparent. If the ruling of Cheung J is correct, it follows as a matter of inescapable logic that a judgment of the Mainland courts will be considered as lacking finality, in Hong Kong conflict of laws terms, whether: (i) the People's Procuratorate[30] has already lodged a protest against the original judgment, thereby requiring a retrial; (ii) the People's Procuratorate is actively considering whether or not to lodge a protest;[31] (iii) the defendant has submitted a request that the People's Procuratorate look into the case; or (iv) the defendant has not yet even submitted any request. Indeed, it should not be overlooked that the People's Procuratorate may intervene regardless of whether any party has made a complaint[32] and it may do so upon the broadest possible grounds.[33] The very fact that a defendant might ask the Procuratorate to intervene, or the Procuratorate might intervene of its own motion at any time it considers appropriate, means that the court which delivered the original judgment may subsequently have to revisit the matter should a retrial eventually be ordered by the Procuratorate.

[27] *Nouvion* (n 1).
[28] *Chiyu Banking* (n 26) 399.
[29] As to the appropriateness of a stay in such a situation, see further text to n 37 below.
[30] Whether the Supreme People's Procuratorate or subordinate (ie regional) People's Procuratorates, as appropriate.
[31] As in *Chiyu Banking* (n 26).
[32] That the Procuratorate may intervene of its own motion has been recognised in a number of the Hong Kong cases. See, for instance, *Lam Chit Man, t/a Yet Chong Electronic Co v Cheung Shun Lin*, Civil Appeal 1046 of 2001, 12 July 2002 (HKCA) (judgment, only in Chinese, available via the Hong Kong Judiciary website <http://www.judiciary.gov.hk/en/index/index.htm>).
[33] See Civil Procedure Law art 185, above.

Although on the facts in *Chiyu Banking* the Procuratorate had not yet decided whether the Fujian court would be required to conduct a retrial, the judgment of Cheung J does not explain what would happen (in Hong Kong) should the defendant fail in the attempt to have the Procuratorate order a retrial. It might initially appear that, should the Procuratorate refuse to intervene, the Fujian judgment would then have to be considered final. However, under Mainland law, there is no rule that only one resort to the Procuratorate is allowed.[34] For example, if in 2004 the People's Procuratorate decides not to lodge a protest, a protest may nevertheless be lodged in 2005 or 2006, or indeed at any later time. Moreover, where a retrial is ordered, the determination at the retrial is also subject to the supervisory jurisdiction of the People's Procuratorate: the process can, in theory, go on *ad infinitum*.[35]

Chiyu Banking was applied in *Wuhan Zhong Shuo Hong Real Estate Co Ltd v Kwong Sang Hong International Ltd*.[36] The plaintiff sought to enforce (in Hong Kong) a judgment of the PRC Supreme People's Court and was met with the argument, *inter alia*, that the judgment could not be considered final on account of the supervisory jurisdiction of the Supreme People's Procuratorate. On the facts the defendant had applied for review to the Supreme People's Procuratorate, which was considering the matter. Yeung J, applying *Chiyu Banking*, ordered that the enforcement proceedings in Hong Kong be stayed for 6 months, by which time it was hoped that the relevant procedures on the Mainland would have been concluded. His Lordship commented that the question of finality would have to be resolved at the trial, wherein the competing opinions of the parties' experts on Mainland law would be weighed, and noted:

> ... [I]f it is established that the judgment in question is not final and conclusive, the proper order to make is to dismiss the action and not just to stay the action. If it is the Defendant's contention that the judgment in question is not final and conclusive, perhaps it should have applied to have this issue dealt with in order to dismiss the Plaintiff's claim and not to stay the proceeding.[37]

This observation is particularly relevant for, as has already been noted, the fact that the Procuratorate has initially refused to act does not prevent either the defendant from immediately making a second request or, whether or not the defendant has made a request, the Procuratorate from changing its mind at a later date.[38] In other words, a six month stay of the Hong Kong proceedings might well

[34] In addition, there is no time limit for a defendant to petition the Procuratorate. See *Wuhan Zhong* (n 23) 5 (Yeung J). See also *Lam Chit Man* (n 32) [29].

[35] See Liu (n 17) 80.

[36] *Wuhan Zhong* (n 23).

[37] ibid 3.

[38] See text to n 35, above. Although one may speak of the losing party petitioning or applying to the Procuratorate, this does not involve a formal petition, or like document, as one would typically find in court proceedings. The fact that a losing party has petitioned does not require the Procuratorate to conduct a review, still less initiate the commencement of such a process.

lead nowhere: for even if the defendant fails to convince the Procuratorate to intervene, another application can immediately be made.[39]

Chiyu Banking was again applied in *Tan Tay Cuan v Ng Chi Hung*,[40] though on the facts of the latter case the Procuratorate was not involved. The plaintiff brought an action in Hong Kong on a judgment of the Fujian Higher People's Court and sought summary judgment. The defendant had not invoked the supervisory jurisdiction of the Procuratorate, but had asked the Supreme People's Court to order the Fujian Higher People's Court to conduct a retrial. The Supreme People's Court had instructed the Fujian Higher People's Court to consider the defendant's application. Expert evidence was produced showing that such a review procedure, conducted by in this instance the Supreme People's Court, was provided for under Articles 178 and 179 of the PRC Civil Procedure Law.[41] The consideration that there was a possibility that there might be a retrial in the Mainland court was sufficient for Waung J to refuse summary judgment and give unconditional leave to defend.[42] It may also be noted that *Chiyu Banking* has been referred to with apparent approval (but without any detailed analysis) on interlocutory appeals before the Court of Appeal of Hong Kong.[43]

C Nouvion v Freeman Explained

Despite the fact that *Chiyu Banking* has been followed in a number of cases, this commentator would respectfully suggest that Cheung J adopted too rigid an approach to the issue of finality. Although Lord Watson stated in *Nouvion* that a foreign judgment must be 'final and unalterable in the Court which pronounced it',[44] his Lordship was speaking in the context of a foreign judgment that was merely interim or provisional. *Nouvion* concerned an action brought on a 'remate' judgment given by the Spanish courts in an 'executive' action. Under Spanish law two types of legal proceedings were possible: 'executive' proceedings or 'plenary' proceedings. Executive proceedings were in effect summary in nature, whereas

[39] Provided a foreign judgment is *not* enforceable under Hong Kong law, an action may be commenced in Hong Kong on the original cause of action, rather than on the debt created by the foreign judgment, see s 5 of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance. However, merely staying enforcement proceedings does not resolve the question of finality one way or the other. In addition, even if one were considering bringing proceedings in Hong Kong based on the original cause of action, the lapse of time may be so extensive as to raise very real problems in relation to limitation periods. For example, in *Wuhan Zhong* (n 23) the plaintiff had commenced proceedings on the Mainland some five years prior to the date of the judgment of the Hong Kong court (and, obviously, the date of the breach which gave rise to the cause of action must have been a considerable time before that).

[40] [2001] HKCFI 102 (5 February 2001) (HC).

[41] For further details see n 25, above.

[42] *Tan Tay Cuan* (n 40) 3.

[43] See *Lam Chit Man* (n 32) and *Lam Chit Man v Lam Chi To* [2004] HKLRD 104 (HKCA) (judgment in Chinese only).

[44] *Nouvion* (n 1) 13.

plenary proceedings were what a common lawyer would regard as normal proceedings.[45] An executive action was restricted in its scope and, in particular, the defendant was only permitted to raise certain, limited defences. If the defendant lost the executive action, there was a right to bring plenary proceedings (before the same judge) at which every defence could be raised.[46] Lord Watson himself pointed out that for a foreign judgment to be enforceable it was essential that the foreign court had investigated and determined the matters in dispute between the parties, or at least that the defendant had the chance to put forward all its defences:

> All the authorities cited appear to me, when fairly read, to assume that the decree which was given effect to had been pronounced causâ cognitâ, and that it was unnecessary to inquire into the merits of the controversy between the litigants, either because these had already been investigated and decided by the foreign tribunal, or because the defendant had due opportunity of submitting for decision all the pleas which he desired to state in defence. In order to its receiving effect here, a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher court; but it must be final and unalterable in the court which pronounced it; and if appealable the English court will only enforce it, subject to conditions which will save the interests of those who have the right of appeal.[47]

The investigation of all the disputed issues between the parties, which was of course not the case in relation to the remate proceedings, was also stressed by the other Law Lords. For instance, Lord Herschell commented:

> The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that court be disputed, and can only be questioned in an appeal to a higher tribunal. In such a case it may well be said that giving credit to the courts of another country we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation. But where, as in the present case, the adjudication is consistent with the non-existence of the debt or obligation which it is sought to enforce, and it may thereafter be declared by the tribunal which pronounced it that there is no obligation and no debt, it appears to me that the very foundation upon which the courts of this country would proceed in enforcing a foreign judgment altogether fails.[48]

[45] Any plenary judgment rendered the remate judgment inoperative and required restoration of any money paid under the remate judgment.

[46] See *Lewis v Eliades* [2003] EWHC 368 (QB), [2003] 1 All ER (Comm) 850, para 51, discussed further text to n 64 below. See also *Biard Laboratories SA v Rosumi Ltd* [1999] HKCFI 150 (4 February 1999) (HC) where it was held that an 'ordonnance de référé' *delivered by a* French court was 'final and conclusive'.

[47] *Nouvion* (n 1) 13.

[48] *Nouvion* (n 1) 9–10. At 15, Lord Bramwell states: '... there is no ground for saying that all possible controversies between the parties have been decided'.

The Spanish remate judgment lacked finality not merely because the case might come back before the Spanish court for a second time, but rather on account of the consideration that another hearing (ie plenary proceedings) was readily foreseeable because the first hearing[49] had not canvassed all the disputed issues between the parties—the whole merits of the case had not been investigated. As Lindley LJ had put it in the Court of Appeal:

> ... [I]f a judgment leaves the rights of the parties uninvestigated and undetermined, and avowedly leaves those rights to be determined in some other proceeding, the judgment cannot be treated here as imposing an obligation which our tribunals ought to enforce.[50]

Thus, although the remate proceedings had resulted in a judgment (apparently in favour of the plaintiff), that judgment was given without deciding upon the merits of various defences that were available to the defendant. Those defences would not be ruled upon until the plenary proceedings, at which it might be decided—after considering all the facts—that the defendant had a perfectly valid defence and was thus not in fact liable. Hence Lord Herschell's comment that the remate judgment was consistent with the non-existence of the debt which the plaintiff was seeking to enforce in England. Quite simply, the comment of Lord Watson in *Nouvion* cannot be taken literally,[51] nor read as if it were a statutory provision.

In addition, even at the time of *Nouvion*, the English cases clearly established that a foreign judgment could be enforced in England despite the fact that there was a possibility that the foreign court might have to revisit its original decision. Modern case law, particularly concerning foreign judgments in default, has confirmed the following opinion of Erle CJ expressed as long ago as 1863 in *Vanquelin v Bouard*:

> ... [E]very judgment of a foreign court of competent jurisdiction is valid, and may be the foundation of an action in our Courts, though subject to the contingency, that, by adopting a certain course, the party against whom the judgment is obtained might cause it to be vacated or set aside. But, until that course has been pursued, the judgment remains in full force and capable of being sued upon.[52]

The apparent conflict between Lord Watson's dictum and *Vanquelin* was first recognised in *Boyle v Victoria Yukon Trading Co.*[53] In *Boyle* the Supreme Court of British Columbia enforced a default judgment of the Yukon Territorial Court, whilst accepting that the Yukon court had power to set aside, absolutely or on terms, its default judgment:

[49] eg the remate proceedings.

[50] (1887) 37 ChD 244 (CA) 255. In more recent times, Evans LJ has commented: 'The natural meaning of "final on the merits" is that there has been a final, as opposed to provisional, determination of the parties' substantive rights'. See *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847 (CA) 855.

[51] See also text to n 66 below.

[52] (1863) 15 CBNS 341, 367-368; 143 ER 817, 828.

[53] (1902) 9 BCR 213 (SC).

> It is true that under the system that prevails in the Yukon, as well as in our courts, as also in England, a default judgment may be set aside ... but so long as it stands it is a final and conclusive adjudication that a debt is due by the defendant if the claim is for debt ... .[54]

In his classic 1938 work, Dean Read endorsed the approach in *Boyle*,[55] opining that Lord Watson's words should not be taken at 'face value'.[56]

Unfortunately, neither *Vanquelin* nor *Boyle* was cited in *Chiyu Banking*.[57] Of course, the facts in *Chiyu Banking* did not concern a default judgment—the defendant had argued on the merits and had an appeal turned down—nevertheless this commentator would maintain that the Fujian judgment should have been regarded as final despite the fact that it was subject to the 'contingency' (as Erle CJ put it) that the defendant might, in due course, be able to have it set aside by invoking the supervisory jurisdiction of the Supreme People's Procuratorate. In practical terms, the Hong Kong court could have given judgment for the plaintiff,[58] but then stayed execution pending the decision by the Supreme People's Procuratorate whether or not to order a retrial.[59]

That *Vanquelin* and *Boyle* remain good law was recently confirmed by the New South Wales Supreme Court in *Schnabel v Lui*,[60] where it was accepted that a foreign default judgment could be regarded as final, at least until the court which made the original determination had set it aside.[61] A like conclusion was reached in Alberta in *Skaggs Companies Inc v Mega Technical Holdings Ltd.*[62] It is also particularly relevant to note that, when dealing with a US District Court default judgment, the Hong Kong court in *Nintendo of America Inc v Bung Enterprises Ltd*[63] applied *Vanquelin* and explained *Nouvion* by reference to the distinction between remate and plenary proceedings on the facts before the House of Lords. Unfortunately, *Chiyu Banking* was not referred to in *Nintendo of America Inc v Bung Enterprises Ltd.*

Schnabel was itself recently referred to with approval by the High Court in England, in a case which did not concern a foreign default judgment. In *Lewis v Eliades*,[64] an action was brought in England on a judgment of the US District

[54] (1902) 9 BCR 223 (Hunter CJ).
[55] Read (n 15) 85-6.
[56] ibid 85.
[57] Nor in any of the other Hong Kong cases involving recognition of Mainland judgments.
[58] Assuming that the defendant had no other grounds (eg fraud, breach of natural justice) to impeach the Mainland judgment.
[59] See also text to n 95, below.
[60] [2002] NSWSC 15.
[61] ibid [77] (Bergin J): 'A default judgment may be enforceable as a final and conclusive judgment even though it is liable to be set aside in the very court that rendered it. The approach that has been adopted is that until the steps are taken to set the judgment aside the judgment is enforceable as a final and conclusive judgment'.
[62] (2001) 103 ACWS (3d) 511. See also *Zaidenberg v Hamouth* (2003) 122 ACWS (3d) 52 (BCSC).
[63] [2000] 2 HKC 629 (HC) 633-4, it was stated that certain *dicta* in the English cases should be taken in context, particularly as 'the [foreign] court delivering the judgment had intended that the effect of its judgment was merely provisional'.
[64] [2003] EWHC 368 (QB), [2003] 1 All ER (Comm) 850. The decision of Nelson J was upheld on appeal but without discussion of the finality issue, see [2003] EWCA Civ 1758, [2004] 1 All ER 1196.

Court, Southern District of New York. The US court had found in favour of the claimant[65] on a number of grounds, one of which involved breach of the Racketeer Influenced and Corrupt Organisations Act (the 'RICO statute'), and awarded substantial damages. Although, as is well-known, under the RICO statute triple damages can be awarded, the US court had not initially awarded triple damages—all the damages awarded had been compensatory in nature. However, the claimant thereafter issued a motion in the US court requesting that the RICO damages be tripled. In the English proceedings the defendant, referring to Lord Watson's speech in *Nouvion*, asserted, *inter alia*, that the US court's judgment was not final, since the US court had yet to rule on the motion to alter the RICO damages: the judgment, it was argued, was not unalterable in the court which pronounced it. Nelson J held in favour of the claimant, commenting:

> At the centre of their Lordships' decision [in *Nouvion v Freeman*] was the fact that a 'remate' judgment was not a judgment where all defences could be raised and the merits had been fully considered. The whole case could be re-run before the plenary court which could decide that the debt, which was held to have existed in the remate proceedings, did not exist at all. It was not a case therefore where the merits had been considered or, as Lord Bramwell said, 'all the controversies between the parties had been decided'. The statement in the speech of Lord Watson that the decision must be 'final and unalterable in the court which pronounced it' has to be read in the light of the facts of the particular case and the speeches of his brethren. The words 'must be final and unalterable in the court which pronounced it' certainly cannot be taken in their literal sense, as if that was so the authorities which decide that a default judgment, which can be set aside in the court which pronounced it, may be a final and conclusive judgment, could not stand.[66]

His Lordship followed *Schnabel*, in that the US judgment was 'final unless subsequently altered'.[67] It is submitted that Cheung J in *Chiyu Banking*, when applying Lord Watson's words in a literal sense, fell into the trap identified by Nelson J.

D *Res Judicata* and The Role of The Foreign Law

The finality required of a foreign judgment has often been expressed in both the cases[68] and the literature[69] in terms of *res judicata*. This, however, does not mean that the foreign legal system must have a technical set of rules known as '*res judicata*' or which precisely tracks the content of the English common law doctrine of

[65] Lennox Lewis, the world heavyweight boxing champion.
[66] *Lewis* (n 64) [53].
[67] ibid [54].
[68] See text to n 72, below.
[69] See *Dicey and Morris* (n 4) 477 where it is stated: 'The test of finality is the treatment of the judgment by the foreign tribunal as a *res judicata*'.

res judicata. In the present context,[70] the terms 'final' and '*res judicata*' seek to identify the same characteristics in a foreign judgment; in other words, a foreign judgment cannot properly be considered *res judicata* unless it is final (and vice versa).[71] A foreign judgment is not a *res judicata* (or final) unless it conclusively establishes the obligation owed by the defendant. As Lord Herschell observed in *Nouvion v Freeman*:

> ... [i]t must be shewn that in the court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties. If it is not conclusive in the same Court which pronounced it ... then I do not think ... [it] can be regarded as finally and conclusively evidencing the debt ... .[72]

This comment has at times[73] been taken as suggesting that the finality of a foreign judgment is a matter for the foreign law to determine. In a negative sense, such an approach is clearly correct: for if, even under the foreign law, the judgment is not considered final—in the sense that it does not conclusively establish a debt—it can scarcely be maintained that the judgment is final for enforcement purposes under the common law.[74] However, the opposite situation requires a more careful analysis. The consideration, if it be the case, that the foreign experts agree that a particular judgment of their courts is in their eyes 'final', does not necessarily make that judgment final for the purposes of Hong Kong conflict of laws rules.[75] The Hong Kong court will naturally look to appropriate expert evidence[76] to illuminate the nature, effect and incidents[77] of the foreign judgment concerned in order to determine if the foreign judgment has conclusively established the debt between the parties. However, as with other enforcement issues at common law,[78] or under statute,[79] the Hong Kong court must apply Hong Kong conflicts rules, which is, of course, why it is crucial to determine whether Lord Watson's comment in *Nouvion* is indeed the correct test for finality.

Returning to Mainland judgments, there can at present be little doubt as to the main thrust of Mainland civil procedure law, in that it does provides extensive

70 Questions concerning *res judicata* may arise in relation to both the enforcement of a foreign judgment and the recognition of a foreign judgment giving rise to a cause of action or issue estoppel. The latter may be referred to as the 'preclusive effects' of a foreign judgment. See generally P Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (OUP, Oxford 2001) ch 1.

71 ibid 49-52.

72 *Nouvion* (n 1) 9.

73 eg *Korea Data Systems Co Ltd v Chiang Jay Tien* [2001] 3 HKC 239 (HC) 247.

74 See *Carl-Zeiss Stiftung v Rayner & Keeler (No 2)* [1967] 1 AC 853 (HL) 969-70 (Lord Wilberforce).

75 For instance, the result in *Nouvion* (n 1) would surely have been the same even if all the experts on Spanish law had maintained that the remate judgment was final as far as the law of Spain was concerned.

76 As introduced by the parties.

77 Not least, what avenues, if any, may be open to the parties or to governmental agencies or others after the delivery of the judgment and conclusion of any normal appeal process.

78 Such as, whether the foreign court was of competent jurisdiction. This is, of course, a matter for the court to decide according to Hong Kong conflicts rules.

avenues for the Procuratorate[80] to require a retrial even after the normal trial process[81] has been completed. Nevertheless, when it comes to the enforcement of a foreign judgment, the answer to the finality issue is, it is submitted, revealed by a proper analysis of the common law rules applicable in Hong Kong.

E Conclusion

In practical terms, it can scarcely be doubted that *Chiyu Banking* overly favours a defendant. Where the plaintiff brings an action in Hong Kong on a Mainland judgment, the defendant, without having any substantive complaint about the result in the Mainland court or the procedure adopted there,[82] can defeat an application for summary judgment[83] simply by raising the question of finality; any well-advised defendant will know that years of delay—if not indefinite delay—can be brought about by seeking to invoke the supervisory jurisdiction of the Procuratorate. In particular, as it appears that the supervisory jurisdiction can be invoked more than once, it is difficult to see, assuming *Chiyu Banking* is correct, how a Mainland judgment can ever be 'final'. Staying the Hong Kong proceedings for 6 months, or longer, does not solve the question of finality.[84] Although it might be argued by some that the current position under *Chiyu Banking*—in substance, a blanket denial of enforcement—is justifiable because of a lack of credibility on the part of Mainland courts, the indiscriminate nature of *Chiyu Banking* has little to recommend it. No one can deny that there will likely be cases where a defendant has genuine concerns about the way proceedings have been conducted in the Mainland courts, but the common law already has safeguards to deal with such situations.[85] Moreover, there is no reason to believe that the Hong Kong courts would enforce a Mainland judgment where there was evidence that the defendant had been denied a fair trial or otherwise unfairly prejudiced.[86] The *Chiyu Banking*

79 Pursuant to s 3(2) of the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319 Laws of Hong Kong) a judgment from a designated jurisdiction must be 'final and conclusive' in order to be registered in Hong Kong.

80 As well as the courts in certain circumstances, see *Tan Tay Cuan* (n 40).

81 Including any appeals.

82 Such as on the grounds of corruption, fraud, denial of natural justice, lack of proper notice or a denial of substantial justice. See *Adams v Cape Industries plc* [1990] Ch 433 (CA), applied in *Dinardo v Lark International Ltd* [1999] HKCFI 579 (2 June 1999) (HC).

83 When the action proceeds to trial the judgment will also not be 'final' in *Chiyu Banking* (n 26) terms since, even if the Procuratorate has dealt with and refused an application to protest the original judgment, the defendant can make another application.

84 If the defendant's application to the Procuratorate is refused within the period, a second application can apparently be made. See text to n 34, above.

85 See n 82, above.

86 In *Bayer Polymers Co Ltd v Industrial and Commercial Bank of China (Hong Kong Branch)* [2000] 1 HKC 805 (HC) the Hong Kong court, applying *Spiliada* [1987] AC 460 (HL), refused to stay Hong Kong proceedings in favour of the Mainland courts as the clearly more appropriate forum, because of evidence that the plaintiff would not receive substantial justice in the Mainland courts. Cf *Xinjiang Xingmei Oil Pipeline Co Ltd v China Petroleum & Chemical Group* [2005] 2 HKC 292 (HC).

approach, it is submitted, is not even an example of the right result but for the wrong reasons.

In addition, it would appear that the Hong Kong courts have themselves been inconsistent. For, on the one hand, it has been held, when dealing with a foreign default judgment, that a narrow approach[87] to *Nouvion* is applicable;[88] and the fact that the foreign defendant may potentially have the default judgment set aside, with the result that the case will proceed to trial, does not preclude finality. Yet, on the other hand, when faced with a Mainland judgment, the possibility that the Procuratorate may review the case and require the original court to conduct a re-trial—so that it cannot be said that the judgment is unalterable in the court which pronounced it—is fatal. Conflicting policies may likewise be noted. The willingness to enforce foreign default judgments is buttressed by the consideration that to do otherwise would favour the most hopeless defendants at the expense of the strongest plaintiffs.[89] Yet, under *Chiyu Banking*, in relation to Mainland judgments, the hopeless defendant can run a defence (and conduct an appeal) and still not be at risk of enforcement.

It is submitted that the common law authorities establish the following as the correct test for finality: (1) where the foreign court has fully inquired into the merits of the dispute—or the defendant's conduct has not permitted such investigation to proceed[90] and has delivered a judgment which, without more, establishes (under the foreign law) a debt between the parties, that judgment will be considered final,[91] even though there is a possibility that the judgment may later be reconsidered by the foreign court; and (2) the judgment will retain its finality[92] until such time as the procedures required under the foreign law[93] have reached the stage where the original judgment has been set aside.

Therefore, when dealing with an otherwise unimpeachable Mainland judgment, it would be fully consistent with the common law authorities to grant summary judgment in favour of the plaintiff but to stay execution against the defendant's assets in Hong Kong. So that, in an appropriate case, moneys might be held in court (or assets retained in the territory) until after the determination of any attempt by the defendant to invoke the supervisory jurisdiction of the Procuratorate.[94] The possibility of repeated, but groundless, applications to the

87 ie explaining the *dicta* in the speeches within the factual matrix before their Lordships.

88 See *Nintendo of America Inc* (n 63).

89 *Dicey and Morris* (n 4) 477.

90 eg where judgment in default of a defence has been granted by the foreign court.

91 For common law enforcement purposes.

92 Although there may in an appropriate case be a stay of execution, where, for example, the enforcement of the foreign judgment in the foreign country itself has been suspended pending the determination of relevant further proceedings. See also text to n 95, below.

93 This would include, for instance, in a common law setting, a successful application for leave to defend a default judgment, or, in relation to the Mainland PRC, an order by the Procuratorate for the original court to conduct a retrial.

94 Or of the higher courts. See *Tan Tay Cuan* (n 40).

Procuratorate by a defendant could easily be provided for by appropriate undertakings on the part of the defendant or plaintiff. For example, where a defendant has exhausted all regular court appeals and already unsuccessfully petitioned the Procuratorate, monies initially held in court in Hong Kong could at such stage be released to the plaintiff upon the giving of an undertaking (backed by third party security, if necessary) that if, for instance within the next three years, the Procuratorate were to order a retrial, the plaintiff would repay the moneys into court. Such an approach would, for all practical purposes,[95] ensure that a situation would not arise where a defendant was left without a remedy because the plaintiff had enforced the Mainland judgment (in Hong Kong) only for the judgment then to be sent back to the courts by the Procuratorate. The point being that, whilst there can be no absolute guarantee that, in theory, the Procuratorate will not at some distant time in the future order a retrial, there must be some effective way of putting the onus on the defendant and thereby encouraging reasonable settlements.

Of course, it goes without saying that the finality issue could, in the Hong Kong context, be resolved in a reciprocal enforcement agreement with the relevant Mainland authorities, wherein the expression 'legally enforceable' could, for example, be used rather than 'final'. However, progress towards a reciprocal enforcement agreement has been slow; and the latest (publicly available) proposal is limited to instances where the parties have entered into an exclusive choice of court agreement.[96] Accordingly, determining the correct test for finality under the common law is likely to remain a live issue for some considerable time to come, both in Hong Kong and elsewhere.

[95] The only exception might be where the plaintiff had committed fraud and this was only discovered years after the event. But such a situation might presently arise in relation to a foreign judgment from any country and, where there has been fraud, proceedings could be brought in Hong Kong against the fraudulent party.

[96] See [15] of the speech of the Secretary for Justice (the Hon. Ms. Elsie Leung) at the Opening of the Legal Year 2002 (14 January 2002) <http://www.doj.gov.hk/eng/archive/doc/sj140102e.doc> accessed 1 December 2004. At the date of writing (December 2004) no agreement was concluded. The Hong Kong/Mainland proposal is based on the (proposed) Hague Convention on Exclusive Choice of Court Agreements. A 'final and conclusive' requirement is not currently found in the proposed Hague Convention, which does however make provision for a 'review'. See draft art 9(4) <http://hcch.e-vision.nl/index_en.php?act=progress.listing&cat=4>.

EXHIBIT 76

[1996] A.C. 284 [1995] 3 W.L.R. 718 [1995] 3 All E.R. 929 [1995] 2 Lloyd's Rep. 417 [1995] C.L.C. 1090 (1995) 92(28) L.S.G. 28 (1995) 145 N.L.J. 1329 (1995) 139 S.J.L.B. 195 Times, August 11, 1995 [1996] A.C. 284 [1995] 3 W.L.R. 718 [1995] 3 All E.R. 929 [1995] 2 Lloyd's Rep. 417 [1995] C.L.C. 1090 (1995) 92(28) L.S.G. 28 (1995) 145 N.L.J. 1329 (1995) 139 S.J.L.B. 195 Times, August 11, 1995
(Cite as: [1996] A.C. 284)

[1995] 3 W.L.R. 718

*284 Mercedes Benz A.G. Appellant v Leiduck Respondent

Privy Council

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

1995 May 1, 2, 3; July 24

Injunction—Mareva injunction—Jurisdiction—Mareva injunction sought in aid of foreign proceedings having no connection with home territory—Defendant having assets within home territory—Whether service on defendant outside jurisdiction of writ claiming only Mareva relief permissible—R.S.C. (Hong Kong), Ord. 11, r. 1(1)(b)(m)

The first defendant, a German national, and a Monégasque company owned by him agreed to facilitate the sale in the Russian Federation of 10,000 vehicles manufactured by the plaintiff, a German corporation. The plaintiff advanced the company ***285** U.S.$20m. to finance the expenses of the operation on terms that it would be repaid with interest if the total price of the vehicles had not been remitted to the plaintiff by an agreed date. As security the company provided a promissory note for U.S.$20m. plus interest, and the first defendant added his personal guarantee by way of aval. The transaction did not proceed, the advance was not repaid and the note was dishonoured. The plaintiff commenced civil proceedings in Monaco against the first defendant in connection with the alleged misappropriation of the funds. On the plaintiff's application the court in Monaco attached the first defendant's assets in Monaco pending judgment but declined to extend the order to cover the first defendant's shares in the second defendant, a company registered in Hong Kong which the plaintiff alleged had received part of the misappropriated money. The plaintiff thereupon applied ex parte to the High Court of Hong Kong for a worldwide *Mareva* injunction restraining both defendants from dealing with any of their assets, including the first defendant's shares in the second defendant. The deputy judge granted the application on terms that the plaintiff issue a writ of summons against both defendants and gave leave for the first defendant to be served in Monaco, where he was in custody pending criminal investigations. The writ claimed against the first defendant moneys due under the aval, moneys had and received, damages for breach of fiduciary duty and an account; and against the second defendant restitution or repayment of moneys paid to it in breach of trust. The latter claim was later discontinued. The writ did not claim any injunctive relief.

On the first defendant's application to the High Court of Hong Kong to have the ex parte order discharged, on the ground that the court had no jurisdiction over him, the judge held that none of the claims set out in the writ fell within the court's power to permit service of proceedings out of the jurisdiction under Ord. 11, r. 1(1) of the Rules of the Supreme Court of Hong Kong,1 which corresponded to the English R.S.C., Ord. 11, r. 1(1). He accordingly quashed the leave to serve and set aside the accompanying *Mareva* injunction. The Court of Appeal of Hong Kong dismissed the plaintiff's appeal against the judge's order, holding that even had the writ claimed *Mareva* relief, the court's jurisdiction under R.S.C., Ord. 11, r. 1(1)(b) and (m) would not have permitted service on the first defendant in Monaco, since an injunction sought under rule 1(1)(b) 'ordering the defendant to do or refrain from doing anything within the jurisdiction' had to be part of a claim for substantive relief which could properly be tried in the courts of Hong Kong; and the provisions of rule 1(1)(m) permitting service of

[1996] A.C. 284 [1995] 3 W.L.R. 718 [1995] 3 All E.R. 929 [1995] 2 Lloyd's Rep. 417 [1995] C.L.C. 1090 (1995) 92(28) L.S.G. 28 (1995) 145 N.L.J. 1329 (1995) 139 S.J.L.B. 195 Times, August 11, 1995 [1996] A.C. 284 [1995] 3 W.L.R. 718 [1995] 3 All E.R. 929 [1995] 2 Lloyd's Rep. 417 [1995] C.L.C. 1090 (1995) 92(28) L.S.G. 28 (1995) 145 N.L.J. 1329 (1995) 139 S.J.L.B. 195 Times, August 11, 1995
(Cite as: [1996] A.C. 284)

a writ 'to enforce any judgment' could not be relied on before judgment had actually been obtained in Monaco.

On the plaintiff's appeal:-

dismissing the appeal (Lord Nicholls of Birkenhead dissenting), that the purpose of the statutory enlargement of the court's territorial jurisdiction by Ord. 11, r. 1(1) was to authorise the service on a person not otherwise compellable to appear before the local court of a document commencing an action designed to ascertain substantive rights and requiring him to***286** submit to the adjudication of that claim; that rule 1(1) did not therefore permit the service out of the jurisdiction of a writ claiming *Mareva* relief alone because a claim for such relief was not of that character; that rule 1(1)(b) was not to be construed literally without regard to the intent of the words used and was not intended to assert an extra-territorial jurisdiction based solely on the presence of assets within the territory; that a claim for *Mareva* relief did not fall within rule 1(1)(m) because it was not brought to enforce anything but merely to prepare the ground for a possible execution by different means in the future and there was, in any event, no judgment in existence to enforce; and that, accordingly, since the plaintiff had not made any claim for substantive relief which could properly be tried in Hong Kong, he could not compel the first defendant to appear before the Hong Kong court to contest the application for *Mareva* relief and there had been no power in the court to permit service of a writ claiming such relief (post, pp. 296C-D, 299A-D, 301E-302A, 304F).Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A. (The Siskina) [1979] A.C. 210, H.L.(E.) applied.X v. Y [1990] 1 Q.B. 220 not followed.Decision of the Court of Appeal of Hong Kong [1995] 1 H.K.C. 448 affirmed.

The following cases are referred to in the judgments:

- Beddow v. Beddow (1878) 9 Ch.D. 89
- Bekhor (A.J.) & Co. Ltd. v. Bilton [1981] Q.B. 923; [1981] 2 W.L.R. 601; [1981] 2 All E.R. 565, C.A.
- Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd. [1981] A.C. 909; [1981] 2 W.L.R. 141; [1981] 1 All E.R. 289, H.L.(E.)
- British Airways Board v. Laker Airways Ltd. [1985] A.C. 58; [1984] 3 W.L.R. 413; [1984] 3 All E.R. 39, H.L.(E.)
- Castanho v. Brown & Root (U.K.) Ltd. [1981] A.C. 557; [1980] 3 W.L.R. 991; [1981] 1 All E.R. 143, H.L.(E.)
- Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. [1993] A.C. 334; [1993] 2 W.L.R. 262; [1993] 1 All E.R. 664, H.L.(E.)
- Cretanor Maritime Co. Ltd. v. Irish Marine Management Ltd. [1978] 1 W.L.R. 966; [1978] 3 All E.R. 164, C.A.
- Derby & Co. Ltd. v. Weldon (Nos. 3 and 4) [1990] Ch. 65; [1989] 2 W.L.R. 412; [1989] 1 All E.R. 1002, C.A.
- G.A.F. Corporation v. Amchem Products Inc. [1975] 1 Lloyd's Rep. 601, Megarry J. and C.A.
- Haiti (Republic of) v. Duvalier [1990] 1 Q.B. 202; [1989] 2 W.L.R. 261; [1989] 1 All E.R. 456, C.A.
- Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A. [1981] Q.B. 65; [1980] 2 W.L.R. 488; [1980] 1 All E.R. 480
- Johnson v. Taylor Bros. & Co. Ltd. [1920] A.C. 144, H.L.(E.)

[1996] A.C. 284 [1995] 3 W.L.R. 718 [1995] 3 All E.R. 929 [1995] 2 Lloyd's Rep. 417 [1995] C.L.C. 1090 (1995) 92(28) L.S.G. 28 (1995) 145 N.L.J. 1329 (1995) 139 S.J.L.B. 195 Times, August 11, 1995 [1996] A.C. 284 [1995] 3 W.L.R. 718 [1995] 3 All E.R. 929 [1995] 2 Lloyd's Rep. 417 [1995] C.L.C. 1090 (1995) 92(28) L.S.G. 28 (1995) 145 N.L.J. 1329 (1995) 139 S.J.L.B. 195 Times, August 11, 1995
(Cite as: [1996] A.C. 284)

- Lister & Co. v. Stubbs (1890) 45 Ch.D. 1, C.A.
- Mareva Compania Naviera S.A. v. International Bulkcarriers S.A. [1975] 2 Lloyd's Rep. 509; [1980] 1 All E.R. 213n, C.A.
- North London Railway Co. v. Great Northern Railway Co. (1883) 11 Q.B.D. 30, C.A.
- Norwich Pharmacal Co. v. Customs and Excise Commissioners [1974] A.C. 133; [1973] 3 W.L.R. 164; [1973] 2 All E.R. 943, H.L.(E.)

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- Owens Bank Ltd. v. Bracco [1992] 2 A.C. 443; [1992] 2 W.L.R. 621; [1992] 2 All E.R. 193, H.L.(E.)
- P. v. Liverpool Daily Post and Echo Newspapers Plc. [1991] 2 A.C. 370; [1991] 2 W.L.R. 513; [1991] 1 All E.R. 622, H.L.(E.)
- Patterson v. B.T.R. Engineering (Australia) Ltd. (1989) 18 N.S.W.L.R. 319
- Rahman (Prince Abdul) bin Turki al Sudairy v. Abu-Taha [1980] 1 W.L.R. 1268; [1980] 3 All E.R. 409, C.A.
- Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Government of the Republic of Indonesia intervening) (Pertamina) [1978] Q.B. 644; [1977] 3 W.L.R. 518; [1977] 3 All E.R. 324, C.A.
- Rosler v. Hilbery [1925] Ch. 250, C.A.
- Schibsby v. Westenholz (1870) L.R. 6 Q.B. 155
- Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A. (The Siskina) [1979] A.C. 210; [1977] 3 W.L.R. 818; [1977] 3 All E.R. 803, H.L.(E.)
- South Carolina Insurance Co. v. Assurantie Maatschappij 'De Zeven Provincien' N.V. [1987] A.C. 24; [1986] 3 W.L.R. 398; [1986] 3 All E.R. 487, H.L.(E.)
- Veracruz Transportation Inc. v. V.C. Shipping Co. Inc. [1992] 1 Lloyd's Rep. 353, C.A.
- Waterhouse v. Reid [1938] 1 K.B. 743; [1938] 1 All E.R. 235, C.A.
- Williams v. Jones (1845) 13 M. &; W. 628
- X v. Y [1990] 1 Q.B. 220; [1989] 3 W.L.R. 910; [1989] 3 All E.R. 689
- Zucker v. Tyndall Holdings Plc. [1992] 1 W.L.R. 1127; [1993] 1 All E.R. 124, C.A.

The following additional cases were cited in argument:

- Coxton Pte. Ltd. v. Milne (unreported), 20 December 1985, New South Wales
- Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc. [1990] 1 Q.B. 391; [1989] 3 W.L.R. 563; [1989] 3 All E.R. 14, C.A.
- Nippon Yusen Kaisha v. Karageorgis [1975] 1 W.L.R. 1093; [1975] 3 All E.R. 282, C.A.
- Seaconsar Far East Ltd. v. Bank Markazi Jomhouri Islami Iran [1994] 1 A.C. 438; [1993] 3 W.L.R. 756; [1993] 4 All E.R. 456, H.L.(E.)
- Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460; [1986] 3 W.L.R. 972; [1986] 3 All E.R. 843, H.L.(E.)

APPEAL (No. 18 of 1995) by the plaintiff, **Mercedes Benz** A.G., from the order of the Supreme

[1996] A.C. 284 [1995] 3 W.L.R. 718 [1995] 3 All E.R. 929 [1995] 2 Lloyd's Rep. 417 [1995] C.L.C. 1090 (1995) 92(28) L.S.G. 28 (1995) 145 N.L.J. 1329 (1995) 139 S.J.L.B. 195 Times, August 11, 1995 [1996] A.C. 284 [1995] 3 W.L.R. 718 [1995] 3 All E.R. 929 [1995] 2 Lloyd's Rep. 417 [1995] C.L.C. 1090 (1995) 92(28) L.S.G. 28 (1995) 145 N.L.J. 1329 (1995) 139 S.J.L.B. 195 Times, August 11, 1995
(Cite as: [1996] A.C. 284)

Court of Hong Kong (Appellate Jurisdiction) (Nazareth V.P. and Litton J.A., Bokhary J.A. dissenting) upholding the judgment of Keith J. in the High Court of Hong Kong setting aside an ex parte order made by Deputy Judge Wilson on 29 April 1994 giving the plaintiff leave to serve proceedings on the first defendant, Herbert Heinz Horst Leiduck, in Monaco and granting a worldwide Mareva injunction against the first defendant and the second defendant, Intercontinental Resources Co. Ltd., a company incorporated in Hong Kong.

The facts are stated in the majority judgment of their Lordships.

Bernard Eder Q.C. and *Nigel Eaton* for the plaintiff. R.S.C. (Hong Kong), Ord. 11, r. 1(1)(b) permits the service of a writ out of the jurisdiction if in the action begun by the writ 'an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction . . .' The subparagraph does not require the injunction to be part of an actual substantive claim in the writ or otherwise linked to a***288** claim, and marries perfectly with section 21L of the Supreme Court Ordinance, which corresponds to section 37 of the Supreme Court Act 1981 and sets out in wide terms the court's power to grant Mareva injunctions.

In Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A. [1979] A.C. 210, 256, Lord Diplock said that the equivalent to rule 1(1)(b) could not encompass an interlocutory injunction standing alone, since the court had no jurisdiction to grant an interlocutory injunction in the absence of a cause of action. That must now be read subject to Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. [1993] A.C. 334, 362. There can now be said to be two requirements for the grant of an interlocutory injunction: (1) the injunction must be incidental to and dependent on the enforcement of a substantive right, which will not necessarily be a cause of action; (2) the defendant must be amenable to the jurisdiction of the court for the enforcement of the substantive right, i.e., must be subject to the jurisdiction of the court.

The plaintiff has a substantive right, namely, its claim against the first defendant as guarantor. The injunction is sought to preserve assets against which that right can be enforced once the Monaco court has given judgment. The first requirement is therefore met. As to the second, the prospective Monaco judgment will be enforceable in Hong Kong and the first defendant will be amenable to the jurisdiction for the purposes of such enforcement under Ord. 11, r. 1(1)(m). At the time of The Siskina decision sub-paragraph (m) was not in existence.

Where there is no prospect that the underlying right can ever be enforced within the jurisdiction, a Mareva injunction preserving assets within the jurisdiction can serve no useful purpose. The denial of jurisdiction in The Siskina must be seen in that context. That denial should not be taken to extend to circumstances where the underlying right will be enforceable once a judgment has been obtained in Monaco. [Reference was made to [1979] A.C. 210, 229A-B, 249H.] If The Siskina is not distinguishable, then it should not be followed. To deny the plaintiff a remedy by way of interlocutory Mareva injunction would cause serious inconvenience and injustice. The plaintiff's underlying substantive rights would be frustrated were the first defendant to be allowed to dissipate his assets, and the Monaco judgment would be rendered nugatory for want of means of enforcement.

Lord Diplock recognised that the principles which he set out in The Siskina were not immutable: see Castanho v. Brown & Root (U.K.) Ltd. [1981] A.C. 557, 569D, 573D-E and British Airways Board v. Laker Airways Ltd. [1985] A.C. 58, 81F. The correctness of the decision has been questioned: see South Carolina Insurance Co. v. Assurantie Maatschappij 'De Zeven Provincien' N.V. [1987] A.C. 24, 44E-G and Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. [1993] A.C. 334, 343D-E. At the time of the decision the Mareva jurisdiction was at an early stage of development. The restrictive approach then adopted is no longer ne-

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cessary. [Reference was made to Nippon Yusen Kaisha v. Karageorgis [1975] 1 W.L.R. 1093; Mareva Compania Naviera S.A. v. International Bulkcarriers S.A. [1975] 2 Lloyd's Rep. 509; Cretanor Maritime Co. Ltd. v. Irish Marine Management Ltd. [1978] 1 W.L.R. 966; Iraqi Ministry of***289** Defence v. Arcepey Shipping Co. S.A. [1981] Q.B. 65 ; A.J. Bekhor & Co. Ltd. v. Bilton [1981] Q.B. 923 and Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460.] However, the granting of a remedy to the plaintiff does not necessarily involve a complete abandonment of The Siskina or the acceptance of an open-ended jurisdiction to grant injunctions whenever just and convenient. Two modifications to the principle are necessary.

First, the requirement that the injunction must be incidental to and dependent on the enforcement of a substantive right should be accepted as including both prospective rights enforceable within the jurisdiction and pre-existing rights. That requirement has already been significantly altered by the statement of Lord Mustill, in Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. [1993] A.C. 334, 362, that an injunction may be granted on the basis of a substantive right falling short of a cause of action. Although Lord Diplock did not define 'pre-existing' in The Siskina, his words have been taken to refer to an accrued cause of action: see Veracruz Transportation Inc. v. V.C. Shipping Co. Inc. [1992] 1 Lloyd's Rep. 353 and Zucker v. Tyndall Holdings Plc. [1992] 1 W.L.R. 1127. But neither of the cases primarily relied upon by Lord Diplock stated that the right or cause of action had to be pre-existing: see North London Railway Co. v. Great Northern Railway Co. (1883) 11 Q.B.D. 30 and Rosler v. Hilbery [1925] Ch. 250. Further, a requirement for a pre-existing right is not obviously reconcilable with the jurisdiction to grant quia timet injunctions. The courts in Australia have recognised that a Mareva injunction may be granted in support of a prospective right or cause of action: see Coxton Pte. Ltd. v. Milne (unreported), 20 December 1985 and Patterson v. B.T.R. Engineering (Australia) Ltd. (1989) 18 N.S.W.L.R. 319.

Second, the requirement that the defendant must be subject to the court's jurisdiction should be broadened so that an injunction may be granted on the basis of a substantive right justiciable only in a foreign court if judgments of that court are enforceable within the jurisdiction. In Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. [1993] A.C. 334, it was held that the High Court might grant an injunction even though the merits would be determined in a foreign court or arbitration. That was a qualification of the spirit of The Siskina, although in the Channel Tunnel case the High Court had territorial jurisdiction over the defendants, who were English companies. The reasoning was that the international character of much contemporary litigation and the need to promote mutual assistance between the courts of the various jurisdictions which such litigation straddled require that the English court should be able to grant interlocutory relief where the substantive trial and the ultimate decision of the case might take place outside England: see [1993] A.C. 334, 341, *per* Lord Browne-Wilkinson. The legal systems of a number of states already allow interim relief to restrain dissipation of assets within the jurisdiction pending determination of a dispute before the courts of another state. In England, the High Court already has jurisdiction to grant interim relief where the substantive dispute is pending in another Brussels Convention state: section 25 of the Civil Jurisdiction and Judgments Act 1982. Where necessary, leave may be granted to serve a***290** writ seeking such relief outside the jurisdiction under R.S.C., Ord. 11, r. 1(1)(b): X v. Y [1990] 1 Q.B. 220.

Ord. 11, r. 1(1)(m) should be construed so as to encompass the prospective judgment which the plaintiff expects to obtain in Monaco. By section 19 of the Hong Kong Interpretation and General Clauses Ordinance, an Ordinance is to be given a liberal construction to ensure the attainment of the Ordinance according to its true intent. The purpose of this rule is to provide assistance in enforcement to plaintiffs with claims in foreign courts. That purpose will be frustrated if defendants are able to dis-

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sipate their assets while the foreign proceedings are still pending.

Jonathan Sumption Q.C. and *William Stone Q.C.* (of the Hong Kong Bar) for the first defendant. The fundamental question to be asked is whether the first defendant is subject to the jurisdiction of the Hong Kong court at all. The plaintiff is seeking to exercise a personal jurisdiction over the first defendant in circumstances where he is not within the jurisdiction and no substantive right has been asserted against him which the Hong Kong court would have jurisdiction to entertain. In such circumstances it cannot be said to be an injustice if the plaintiff cannot obtain a Mareva injunction, which, since it does not protect substantive rights, is no more than a procedural facility.

The court has no inherent jurisdiction to permit service of a writ out of the jurisdiction: Waterhouse v. Reid [1938] 1 K.B. 743, 747. Its power to do so is wholly statutory and depends, in all cases which are not governed by a special enactment, on the claim falling within one of the cases specified in the sub-paragraphs of R.S.C., Ord. 11, r. 1(1). The court must decide upon the application on the basis of what has been endorsed on the writ. [Reference was made to The Supreme Court Practice 1995, p. 85, para. 11/1/6 and Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc. [1990] 1 Q.B. 391, 436.] The ground on which service is permitted out of the jurisdiction is that there is an existing cause of action or, exceptionally, some other legal right falling within one of the sub-paragraphs. R.S.C., Ord. 11, r. 4(1)(a)(b) requires that the application must be supported by an affidavit stating the grounds on which it is made and that in the deponent's belief the plaintiff has a good cause of action. The purpose is to verify that not only the head of jurisdiction relied upon but also the cause of action invoked by the plaintiff falls within the particular head of jurisdiction: Seaconsar Far East Ltd. v. Bank Markazi Jomhouri Islami Iran [1994] 1 A.C. 438, 450. Thus rule 1(1)(m) should not be construed so as to authorise the service out of the jurisdiction of a writ founded on a claim which discloses no cause of action. No action may be brought to enforce a judgment unless there is a judgment to be enforced. Sub-paragraph (m) must therefore be taken to refer to an existing judgment.

The making of a Mareva injunction does not amount to the 'enforcement' of a judgment, even if there is one. It is an interlocutory order which attaches no assets and confers no security: see Cretanor Maritime Co. Ltd. v. Irish Marine Management Ltd. [1978] 1 W.L.R. 966, 974 and Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A. [1981] Q.B. 65, 71-72. The writ served on the first defendant did not include any claim to enforce a judgment. The affidavit in support of the application to***291** serve out did not suggest that there was any cause of action in respect of the enforcement of a judgment or that rule 1(1)(m) had any application. It said only that the sub-paragraph would apply if a judgment was subsequently obtained in Monaco. Accordingly, the claim cannot be said to have been 'brought to enforce any judgment' within the meaning of r. 1(1)(m).

As to rule 1(1)(b), the statement of principle in The Siskina [1979] A.C. 210, 256, that in order to come within what was the equivalent to rule 1(1)(b) the injunction sought in the action had to be in support of a right for the enforcement of which the defendant was amenable to the jurisdiction of the court, was founded upon unimpeachable analysis of the nature of injunctive relief and the principles underlying the jurisdiction to serve out. [Reference was made to North London Railway Co. v. Great Northern Railway Co., 11 Q.B.D. 30; Rosler v. Hilbery [1925] Ch. 250 and G.A.F. Corporation v. Amchem Products Inc. [1975] 1 Lloyd's Rep. 601.]

There are no good grounds for the plaintiff seeking to modify the principle in The Siskina. In any event, it was substantially re-affirmed in Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd. [1981] A.C. 909; British Airways Board v. Laker Airways Ltd. [1985] A.C. 58; South Carolina Insurance Co. v.

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Assurantie Maatschappij 'De Zeven Provincien' N.V. [1987] A.C. 24 and P. v. Liverpool Daily Post and Echo Newspapers Plc. [1991] 2 A.C. 370. The qualification formulated in Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. [1993] A.C. 334 relates to cases where the court has jurisdiction but declines to exercise it. It has no application to the present case. There is a significant difference of principle between a case in which, in relation to the particular dispute, the defendant is subject to the personal jurisdiction of the court and a case in which he is not.

It makes no difference to the decision in The Siskina that sub-paragraph (m) has now been added to R.S.C., Ord. 11, r. 1(1) and that the plaintiff expects to obtain a judgment in due course which will bring it within that sub-paragraph. If an injunction may be granted only in support of a legal or equitable right, the plaintiff cannot justify the application of sub-paragraph (m). The plaintiff's expectation that it will obtain judgment in Monaco is not a right. If and when the plaintiff obtains judgment in Monaco it will have rights under its judgment justiciable in Hong Kong. Until then, the only rights which the plaintiff has against the first defendant are the rights which it is seeking to enforce in the Monaco proceedings. Those rights are not subject to the jurisdiction of the Hong Hong courts.

It would be an act of judicial anarchy for the Board to advise Her Majesty to depart from the rules of law formulated in The Siskina. The House there reached its decision after all relevant issues, including the commercial implications, had been well canvassed. The effect of overruling The Siskina would be to introduce a new head of jurisdiction, founded simply on the location of a defendant's assets and irrespective of any connection between the dispute and the jurisdiction. The law in both England and Hong Kong has developed since 1977 on the basis that The Siskina is correct. It has been regularly applied without apparent difficulty by the lower courts and the principle has been left intact by the relevant***292** Rules Committees of both jurisdictions. If any modification were required, the Rules Committees would be the appropriate bodies to consider it. They could adapt the relevant rules prospectively, whereas any decision by the Board to overrule The Siskina would have retrospective effect.

Eder Q.C. in reply. A Mareva injunction is not just a procedural facility to maintain the status quo. Its fundamental purpose is to protect private rights, in particular, a plaintiff's right not to be deprived of the fruits of his judgment. There is no reason in principle why a Mareva injunction should not lie. The commercial reality should be recognised and support given to the proceedings about to take place in the courts of another jurisdiction. The Siskina should be re-considered.

Cur. adv. vult.

24 July. The majority judgment of their Lordships was delivered by LORD MUSTILL.

On 30 April 1994 the plaintiff company, **Mercedes-Benz** A.G. ('**Mercedes**'), commenced by writ an action in the Supreme Court of Hong Kong against two defendants, Mr. Herbert **Leiduck** and Intercontinental Resources Company Ltd. ('I.R.C.').**Mercedes** is a German corporation. The first defendant is the respondent to this appeal. He is a German citizen, and is the registered owner of almost the entire share capital of I.R.C., 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 I.R.C. The affidavit which led the application gave an account of a transaction between Mercedes, the first defendant and another of his companies, Intercontinental Resources S.A.M., ('I.R.S.A.M.') a corporation registered in Monaco. It was said that the first defendant and I.R.S.A.M., acting on his behalf, had agreed to promote the sale of 10,000 vehicles manufactured by Mercedes to a customer in the Russian Federation.

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To finance the heavy expenses of this operation Mercedes advanced to I.R.S.A.M. an amount of U.S. $20m., on terms that if the total price of the vehicles had not been remitted to Mercedes by 31 December 1993 the advance would be returned, together with interest. By way of security I.R.S.A.M. furnished a promissory note in favour of Mercedes for U.S. $20m. plus interest, and the first defendant 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 first defendant and I.R.S.A.M. had misappropriated the money, and in particular had applied part of it for the benefit of I.R.C. In consequence Mercedes had started civil proceedings in Monaco against the first defendant, but these would take some time to come to judgment. Meanwhile the first defendant 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***293** after expressing the apprehension of Mercedes that the first defendant was planning to transfer his shares in I.R.S.A.M., 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 worldwide injunction restraining the first defendant 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 R.S.C., Ord. 11, r. 1(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 R.S.C., Ord. 11, r. 1(1)(m) in an action to enforce such final order or it will be registrable under the bilateral 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 [the affidavit], 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 R.S.C., Ord. 11, r. 1(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 R.S.C., Ord. 11, r. 1(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 I.R.C. is registered there.

The deputy judge acceded to this application, gave leave to serve the writ on the first defendant in

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Monaco, and granted a Mareva injunction in the common form, limited so far as concerned the first defendant to assets not exceeding U.S. $19m. The writ, which was issued on the***294** following day and later served on the first 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. Hong Kong R.S.C., Ord. 11, r. 1 provides:

'(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. . . .'Rule 4(1) provides: '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; . . .' The Supreme Court Ordinance (cap. 4), section 21L provides:

'(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 subsection (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 Ord. 11, r. 1(1) correspond with the similarly lettered paragraphs of the Rules of the Supreme Court of England and Wales, except that sub-paragraph (p) reflects sub-paragraph (t) of the English rule. Sub-paragraph (m) is a recent addition. Paragraph (2) ***295** corresponds with part of the English paragraph (2), the omitted matter being concerned with the Civil Jurisdiction and Judgments Act 1982, and the underlying Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (O.J. 1972 No. L. 299, p. 32), which have no counterpart in Hong Kong. The parts of rule 4 quoted above are the same in both jurisdictions. Subsections (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 (36 & 37 Vict. c. 66). Subsection (3) of section 21L echoes section 37(3) of the Act of 1981, which was not present in the earlier legislation.

One further aspect of the statutory regime must be mentioned. In England the High Court has jurisdic-

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tion 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 I.R.C. to be abandoned. On 17 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 22 August 1994 Mercedes gave notice to discontinue the action against them. For the time being however the claim against the first defendant 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 24 June 1994 for some U.S. $17·6m., and obtained a charging order absolute on 2 August 1994 in relation to his shares in I.R.C.

At this point the first defendant 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. [1994] 3 H.K.C. 216. 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 Ord. 11, r. 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 first defendant 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 sub-paragraphs (b) and (m) of Ord. 11, r. 1(1). By a majority, Bokhary J.A. dissenting, the Court of Appeal of Hong Kong [1995] 1 H.K.C. 448 affirmed the order of Keith J. Mercedes now appeal to this Board.***296**

In the meantime, Mercedes have been pursuing their action against the first defendant 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 first defendant in Monaco, under Ord. 11, r. 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 first defendant 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 first defendant in the form which it then took should not have been granted, except perhaps on the ground alleged to fall within sub-paragraph (c) of rule 1(1); and this ground disappeared once the proceedings against I.R.C. 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.

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There is another striking feature of the appeal, to which their Lordships have already drawn attention. Ord. 11, r. 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 Ord. 11, r. 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 first defendant he would make arrangements for the immediate transfer of the I.R.C. 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***297** 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 (Owners of cargo lately laden on board) 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 statue, of bringing the person affected before the court. For present purposes the only relevant means are those empowered by Ord. 11, r. 1(1) read (in the case of proceedings begun by originating summons) together with Ord. 11, r. 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. Ord. 11, r. 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 first defendant 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 [1979] A.C. 210Mareva relief in support of foreign proceedings is permissible. Does the statutory enlargement of its territorial jurisdiction created by Ord. 11, r. 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***298** 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 first defendant's contentions on the first issue) Ord. 11, r. 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 inquiry should start. In their Lordships' opinion the question of territorial jurisdiction should be considered first, for if the first defendant 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 inquiry into the proper exercise of the injunctive powers of the court in such a situation could bot be pursued without considering the frontal attack by Mercedes on the statements of general principle by Lord Diplock in The Siskina [1979] A.C. 210, 256-257. These statements were adopted by the House of Lords in Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd. [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 Ltd. [1985] A.C. 58 and with further qualifications in South Carolina Insurance Co. v. Assurantie Maatschappij 'De Zeven Provincien' N.V. [1987] A.C. 24; and endorsed in P. v. Liverpool Daily Post and Echo Newspapers Plc. [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 Mercedes rely on two provisions of Ord. 11, r. 1(1): namely sub-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 ***299** about a final judgment for a Mareva injunc-

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tion; 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 subparagraph (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 subparagraph (m) was not intended to encompass such a case.

Their Lordships turn to Ord. 11, r. 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 inquire 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 Bros. & Co. Ltd [1920] A.C. 144, 153, *per* Viscount Haldante and G.A.F. Corporation v. Amchem Products Inc. [1975] 1 Lloyd's Rep. 601, 605, *per* Megarry J. and the cases there cited.

Ideally, to match an application for Mareva relief against the spirit of Ord. 11, r. 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 as 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, Gummow & Lehane, Equity Doctrines & Remedies, 3rd ed. (1992), pp. 607- 608, para. 2186, seems a rather unlikely event, at least in the courts of England and Hong Kong. The remedy is now 20 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***300** 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 Minyak Dan Gas Bumi Negara (Government of the Republic of Indonesia intervening) (Pertamina) [1978] Q.B. 644 ('the Pertamina case'), 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 & Co. 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 Rahaman bin Turki al Sudairy v. Abu-Taha [1980] 1 W.L.R. 1268 it has been commonplace 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 & Co. v. Stubbs, 45 Ch.D. 1 advanced in the Pertamina case [1978] Q.B. 644 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] 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 S.A. [1975] 2 Lloyd's Rep. 509, the appeal heard ex parte from which the remedy draws its popular name. Lord Denning M.R. 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 Act of 1981, 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.***301**

This rationalisation has never subsequently been advanced because it was overtaken by the different proposition, preferred in he Pertamina case [1978] Q.B. 644, that the statement of principle in the North London Railway case, 11 Q.B.D. 30 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 the Pertamina case [1978] Q.B. 644 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. Bilton [1981] Q.B. 923, 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 [1979] A.C. 210 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, 11 Q.B.D. 30 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 [1987] A.C. 24, 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

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whatever its precise status the Mareva injunction is a quite a different kind of injunction from any other. The inquiry must begin by recognising that it is sui generis, as was the injunction inhibiting foreign proceedings granted in the South Carolina case: see especially the speech of Lord Brandon of Oakwood, at p. 40. Thus, it is not enough simply to say that since a Mareva injunction is an injunction it automatically falls within Ord. 11, r. 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 sub-paragraph (b) and its predecessors were intended to assert.

Their Lordships are satisfied that it is not. In their opinion the purpose of Ord. 11, r. 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 Ord. 11, r. 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. ***302**

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 Ord. 11, r. 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 R.S.C., Ord. 11, r. 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, R.S.C., Ord. 11, r. 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 Re-

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public 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 Ord. 11, r. 1(2). It is unnecessary to decide whether this is so or not, although their Lordships cannot agree with Staughton L.J., at p. 211, 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 Ord. 11, r. 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***303** 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 [1978] Q.B. 644, in practice the Mareva injunction is a novelty. Lord Hailsham of St. Marylebone L.C. went so far in The Siskina [1979] A.C. 210, 260, as to assert 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 Ord. 11, r. 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 in 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 unjunction 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 Ord. 11, r. 1.

The next argument for Mercedes adopts the reasoning of Mr. Anthony Diamon Q.C. sitting as a deputy High Court judge 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 ***304** will lose much of its intended scope, and will fall short of the judicial co-operation envisaged by article 24 of the Convention of 1968. Section 25 does not itself create any mechanism for serving process in relation to such relief, and Ord. 11, r. 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 Ord. 11, r. 1(1), where subparagraph (b) provides an obvious solution. Whatever the word 'injunction' may formerly have comprised it mus 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 [1979] A.C. 210 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 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 Ord. 11, r. 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 not statute corresponding to section 25. Whatever may have happened in England and Wales, the Hong Kong Ord. 11, r. 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 ***305** R.S.C., Ord. 11,r. 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.

LORD NICHOLLS OF BIRKENHEAD.

I regret that I find myself constrained humbly to advise Her Majesty that this appeal should be allowed. The first 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 proceeding 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 so 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***306** 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 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 Marevainjunction 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***307** 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 Compania Naviera S.A. v. International Bulkcarriers S.A. [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***308** debt or damages. This is so, but only in the sense that the whole enforcement process can be so described. It should also 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 (U.K.) Ltd. [1981] A.C. 557, 573, South Carolina Insurance Co. v. Assurantie Maatschappij 'De Zeven Provincien' N.V. [1987] 1 A.C. 24, 44 and Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. [1993] A.C. 334, 340-341, 343. 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 [1987] A.C. 24, 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***309** 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 Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. [1993] A.C. 334 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 p. 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 p. 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 p. 362, observed that, put at its highest, the doctrine of The Siskina [1979] A.C. 210 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 observed [1993] A.C. 334, 363, 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.***310**

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 the first defendant 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.

[1996] A.C. 284 [1995] 3 W.L.R. 718 [1995] 3 All E.R. 929 [1995] 2 Lloyd's Rep. 417 [1995] C.L.C. 1090 (1995) 92(28) L.S.G. 28 (1995) 145 N.L.J. 1329 (1995) 139 S.J.L.B. 195 Times, August 11, 1995 [1996] A.C. 284 [1995] 3 W.L.R. 718 [1995] 3 All E.R. 929 [1995] 2 Lloyd's Rep. 417 [1995] C.L.C. 1090 (1995) 92(28) L.S.G. 28 (1995) 145 N.L.J. 1329 (1995) 139 S.J.L.B. 195 Times, August 11, 1995
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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; [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***311** 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 point-

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lessly negative attitude, lacking a sensible basis. That is not the law. On the contrary, the Channel Tunnel decision [1993] A.C. 334 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 [1979] A.C. 210, 256, Lord Diplock observed 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***312** 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 prerequisite 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. Inc. [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 (Australia) Ltd. (1989) 18 N.S.W.L.R. 319, 329, 330.

The second question: territorial jurisdiction

But the first defendant 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 the

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first defendant is abroad. When the judgment is forthcoming, **Mercedes-Benz** may obtain leave under R.S.C., Ord. 11, r. 1(1)(m) to serve on the first defendant 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's** application for a Mareva injunction if the originating process falls within one of the heads of Ord. 11, r. 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 Ord. 11, r. 1(1) relevant to this application is sub-paragraph (b). This gives rise to a short point of interpretation.

On the face of Ord. 11, r. 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***313** in Rosler v. Hilbery [1925] Ch. 250, 262, what is contemplated is an action where an injunction is part of the substantive relief. This interpretation of sub-paragraph (b) was confirmed in The Siskina [1979] A.C. 210.

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 Ord. 11, r. 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 sub-paragraph (b) of Ord. 11, r. 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 sub-paragraph (b). Sub-paragraph (b) exists as an independent head. It is intended to have some scope. As noted in The Siskna, 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 Marevainjunction 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 sub-paragraph (b), applying as this paragraph does to all forms of injunctions.

This reading of sub-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 Ord. 11, r. 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 sub-paragraph (b), is sensible and reasonable. Sub-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

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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 ***314** 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 [1993] A.C. 334. 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 first 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 Siskna [1979] A.C. 210, 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 Siskna, 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 [1993] A.C. 334. It was unsuccessful: see p. 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 the first defendant 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 Ord. 11, r. 1(1)(b).(C. T. B.)

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1. Rules of the Supreme Court of Hong Kong, Ord. 11, r. 1(1)(b)(c)(m) (psee post, p. 294B-D. see post, p. 294B-D.

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EXHIBIT 77

THE RULES OF THE HIGH COURT - ORDER 15

CAUSES OF ACTION, COUNTERCLAIMS AND PARTIES

(Past version on 30/06/1997).

Adaptation amendments retroactively made - see 25 of 1998 s. 2 1.
Joinder of
causes of action (O. 15, r. 1)

(1) Subject to rule 5(1), a plaintiff may in one action claim relief against
the same defendant in respect of more than one cause of action-

(a) if the plaintiff claims, and the defendant is alleged to be liable, in
the same capacity in respect of all the causes of action, or

(b) if the plaintiff claims or the defendant is alleged to be liable in
the capacity of executor or administrator of an estate in respect of
one or more of the causes of action and in his personal capacity but
with reference to the same estate in respect of all the others, or

(c) with the leave of the Court.

(2) An application for leave under this rule must be made ex parte by affidavit before the issue of the writ or originating summons, as the case may
be, and the affidavit must state the grounds of the application.

2. Counterclaim against plaintiff (O. 15, r. 2)

(1) Subject to rule 5(2), a defendant in any action who alleges that he has
any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that
matter; and where he does so he must add the counterclaim to his defence.

(2) Rule 1 shall apply in relation to a counterclaim as if the counterclaim
were a separate action and as if the person making the counterclaim were the
plaintiff and the person against whom it is made a defendant.

(3) A counterclaim may be proceeded with notwithstanding that judgment is
given for the plaintiff in the action or that the action is stayed, discontinued or dismissed.

(4) Where a defendant establishes a counterclaim against the claim of the plaintiff and there is a balance in favour of one of the parties, the Court may give judgment for the balance, so, however, that this provision shall not be taken as affecting the Court's discretion with respect to costs.

3. Counterclaim against additional parties (O. 15, r. 3)

(1) Where a defendant to an action who makes a counter-claim against the plaintiff alleges that any other person (whether or not a party to the action) is liable to him along with the plaintiff in respect of the subject-matter of the counterclaim, or claims against such other person any relief relating to or connected with the original subject-matter of the action, then, subject to rule 5(2), he may join that other person as a party against whom the counter-claim is made.

(2) Where a defendant joins a person as a party against whom he makes a counterclaim, he must add that person's name to the title of the action and serve on him a copy of the counterclaim and, in the, case of a person who is not already a party to the action, the defendant must issue the counterclaim out of the Registry and serve on the person concerned a sealed copy of the counterclaim together with a form of acknowledgment of service in Form No. 14 in Appendix A (with such modifications as the circumstances may require) and a copy of the writ or originating summons by which the action was begun and of all other pleadings served in the action; and a person on whom a copy of a counterclaim is served under this paragraph shall, if he is not already a party to the action, become a party to it as from the time of service with the same rights in respect of his defence to the counterclaim and otherwise as if he had been duly sued in the ordinary way by the party making the counterclaim.

(3) A defendant who is required by paragraph (2) to serve a copy of the counterclaim made by him on any person who before service is already a party to the action must do so within the period within which, by virtue of Order 18, rule 2, he must serve on the plaintiff the defence to which the counterclaim is added.

(4) The appropriate office for issuing and acknowledging service of a counterclaim against a person who is not already a party to the action is the Registry.

(5) Where by virtue of paragraph (2) a copy of a counterclaim is required to be served on a person who is not already a party to the action, the following provisions of these rules, namely, Order 6, rule 7(3) and (5), Order 10, Order 11, Orders 12 and 13 and Order 75, rule 4, shall, subject to the last foregoing paragraph, apply in relation to the counterclaim and the proceedings arising from it as if-

(a) the counterclaim were a writ and the proceedings arising from it in an action; and

(b) the party making the counterclaim were a plaintiff and the party against whom it is made a defendant in that action.

(5A) Where by virtue of paragraph (2) a copy of a counterclaim is required to be served on any person other than the plaintiff, who before service is already a party to the action, the provisions of Order 14, rule 5 shall apply in relation to the counterclaim and the proceedings arising therefrom, as if the party against whom the counterclaim is made were the plaintiff in the action. (L.N. 363 of 1990)

(6) A copy of a counterclaim required to be served on a person who is not already a party to the action must be indorsed with a notice, in Form No. 17 in Appendix A, addressed to that person. (L.N. 404 of 1991)

4. Joinder of parties (O. 15, r. 4)

(1) Subject to rule 5(1), two or more persons may be joined together in one action as plaintiffs or as defendants with the leave of the Court or where-

(a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions, and

(b) all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same

transaction or series of transactions.

(2) Where the plaintiff in any action claims any relief to which any other person is entitled jointly with him, all persons so entitled must, subject to the provisions of any written law and unless the Court gives leave to the contrary, be parties to the action and any of them who does not consent to being joined as a plaintiff must, subject to any order made by the Court on an application for leave under this paragraph, be made a defendant. This paragraph shall not apply to a probate action. (HK)(3) Where relief is claimed in an action against a defendant who is jointly liable with some other person and also severally liable, that other person need not be made a defendant to the action; but where persons are jointly, but not severally, liable under a contract and relief is claimed against some but not all of those persons in an action in respect of that contract, the Court may, on the application of any defendant to the action, by order stay proceedings in the action until the other persons so liable are added as defendants.

5. Court may order separate trials, etc. (O. 15, r. 5)

(1) If claims in respect of two or more causes of action are included by a plaintiff in the same action or by a defendant in a counterclaim, or if two or more plaintiffs or defendants are parties to the same action, and it appears to the Court that the joinder of causes of action or of parties, as the case may be, may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient.

(2) If it appears on the application of any party against whom a counterclaim is made that the subject-matter of the counterclaim ought for any reason to be disposed of by a separate action, the Court may order the counterclaim to be struck out or may order it to be tried separately or make such other order as may be expedient.

6. Misjoinder and nonjoinder of parties (O. 15, r. 6)

(1) No cause or matter shall be defeated by reason of the misjoinder or

nonjoinder of any party; and the Court may in any cause or matter determine
the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter. (L.N. 167 of
1994)

(2) Subject to the provision of this rule, at any stage of the proceedings in
any cause or matter the Court may on such terms as it thinks just and either
of its own motion or on application-

(a) order any person who has been improperly or unnecessarily made a party
or who has for any reason ceased to be a proper or necessary party, to
cease to be a party;

(b) order any of the following persons to be added as a party, namely-

(i) any person who ought to have been joined as a party or whose
presence before the Court is necessary to ensure that all
matters in dispute in the cause or matter may be effectually
and completely determined and adjudicated upon, or

(ii) any person between whom and any party to the cause or matter
there may exist a question or issue arising out of or relating
to or connected with any relief or remedy claimed in the cause
or matter which in the opinion of the Court it would be just
and convenient to determine as between him and that party as
well as between the parties to the cause or matter.

(3) An application by any person for an order under paragraph (2) adding him
as a party must, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute in the cause or
matter or, as the case may be, the question or issue to be determined as
between him and any party to the cause or matter.

(4) No person shall be added as a plaintiff without his consent signified in
writing or in such other manner as may be authorized.

(5) No person shall be added or substituted as a party after the expiry of

any relevant period of limitation unless either-

(a) the relevant period was current at the date when proceedings were commenced and it is necessary for the determination of the action that the new party should be added, or substituted; or

(b) the relevant period arises under the provisions of section 27 or 28 of the Limitation Ordinance (Cap 347) and the Court directs that those provisions should not apply to the action by or against the new party.

In this paragraph "any relevant period of limitation" (任何有關的時效期) means a time limit under the Limitation Ordinance (Cap 347).

(6) The addition or substitution of a new party shall be treated as necessary for the purposes of paragraph (5)(a) if, and only if, the Court is satisfied that-

(a) the new party is a necessary party to the action in that property is vested in him at law or in equity and the plaintiff's claim in respect of an equitable interest in that property is liable to be defeated unless the new party is joined, or

(b) the relevant cause of action is vested in the new party and the plaintiff jointly but not severally, or

(c) the new party is the Secretary for Justice and the proceedings should have been brought by relator proceedings in his name, or (L.N. 362 of 1997)

(d) the new party is a company in which the plaintiff is a shareholder and on whose behalf the plaintiff is suing to enforce a right vested in the company, or

(e) the new party is sued jointly with the defendant and is not also liable severally with him and failure to join the new party might render the claim unenforceable.

6A. Proceedings by and against estates (O. 15, r. 6A)

(1) Where any person against whom an action would have lain has died but the cause of action survives, the action may, if no grant of probate or administration has been made, be brought against the estate of the deceased.

(2) Without prejudice to the generality of paragraph (1), an action brought against "the personal representatives of A.B. deceased" shall be treated, for the purposes of that paragraph, as having been brought against his estate.

(3) An action purporting to have been commenced by or against a person shall be treated, if he was dead at its commencement and the cause of action survives, as having been commenced by his estate or against it in accordance with paragraph (1) as the case may be, whether or not a grant of probate or administration was made before its commencement. (L.N. 363 of 1990)

(4) In any such action as is referred to in paragraph (1) or (3)-

(a) the plaintiff shall, and the defendant, the personal representatives of the deceased or any person interested in the deceased's estate may, during the period of validity for service of the writ or originating summons, apply to the Court for an order appointing a person to represent the deceased's estate for the purpose of the proceedings or, if a grant of probate or administration has been made, for an order that the personal representative of the deceased be made a party to the proceedings, and in either case for an order that the proceedings be carried on against the person so appointed or, as the case may be, against the personal representative, as if he had been substituted for the estate; (L.N. 363 of 1990)

(b) the Court may, at any stage of the proceedings and on such terms as it thinks just and either of its own motion or on application, make any such order as is mentioned in sub-paragraph (a) and allow such amendments (if any) to be made and make such other order as the Court thinks necessary in order to ensure that all matters in dispute in the proceedings may be effectually and completely determined and adjudicated upon.

(5) Before making an order under paragraph (4) the Court may require notice to be given to any insurer of the deceased who has an interest in the proceedings and to such (if any) of the persons having an interest in the estate as it thinks fit.

(5A) Where an order is made under paragraph (4) at the instance of a plaintiff appointing the Official Solicitor to represent the deceased's estate, the appointment shall be limited to his accepting service of the writ or originating summons by which the action was begun unless, either on making such an order or on a subsequent application, the Court, with the consent of the Official Solicitor, directs that the appointment shall extend to taking further steps in the proceedings. (L.N. 363 of 1990; L.N. 375 of 1991)

(6) Where an order is made under paragraph (4), rules 7(4) and 8(3) and (4) shall apply as if the order had been made under rule 7 on the application of the plaintiff.

(7) Where no grant of probate or administration has been made, any judgment or order given or made in the proceedings shall bind the estate to the same extent as it would have been bound if a grant had been made and a personal representative of the deceased had been a party to the proceedings. (L.N. 363 of 1990)

7. Change of parties by reason of death, etc. (O. 15, r. 7)

(1) Where a party to an action dies or becomes bankrupt but the cause of action survives, the action shall not abate by reason of the death or bankruptcy.

(2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party. An application for an

order under this paragraph may be made ex parte.

(3) An order may be made under this rule for a person to be made a party to a cause or matter notwithstanding that he is already a party to it on the other side of the record, or on the same side but in a different capacity; but-

(a) if he is already a party on the other side, the order shall be treated as containing a direction that he shall cease to be a party on that other side, and

(b) if he is already a party on the same side but in another capacity, the order may contain a direction that he shall cease to be a party in that other capacity.

(4) The person on whose application an order is made under this rule must procure the order to be noted in the cause book, and after the order has been so noted that person must, unless the Court otherwise directs, serve the order on every other person who is a party to the cause or matter or who becomes or ceases to be a party by virtue of the order and serve with the order on any person who becomes a defendant a copy of the writ or originating summons by which the cause or matter was begun and of all other pleadings served in the proceedings and a form of acknowledgment of service in Form No. 14 or 15 in Appendix A, whichever is appropriate. (L.N. 404 of 1991)

(5) Any application to the Court by a person served with an order made ex parte under this rule for the discharge or variation of the order must be made within 14 days after the service of the order on that person.

8. Provisions consequential on making of order under rule 6 or 7 (O. 15, r. 8)

(1) Where an order is made under rule 6 the writ by which the action in question was begun must be amended accordingly and must be indorsed with-

(a) a reference to the order in pursuance of which the amendment is made, and

(b) the date on which the amendment is made; and the amendment must be made within such period as may be specified in the order or, if no period is so specified, within 14 days after the making of the order.

(2) Where by an order under rule 6 a person is to be made a defendant, the rules as to service of a writ of summons shall apply accordingly to service of the amended writ on him, but before serving the writ on him the person on whose application the order was made must procure the order to be noted in the cause book.

(2A) Together with the writ of summons served under paragraph (2) shall be served a copy of all other pleadings served in the action. (L.N. 404 of 1991)

(3) Where by an order under rule 6 or 7 a person is to be made a defendant, the rules as to acknowledgment of service shall apply accordingly to acknowledgment of service by him subject, in the case of a person to be made a defendant by an order under rule 7, to the modification that the time limited for acknowledging service shall begin with the date on which the order is served on him under rule 7(4) or, if the order is not required to be served on him, with the date on which the order is noted in the cause book.

(4) Where by an order under rule 6 or 7 a person is to be added as a party or is to be made a party in substitution for some other party, that person shall not become a party until-

(a) where the order is made under rule 6, the writ has been amended in relation to him under this rule and (if he is a defendant) has been served on him, or

(b) where the order is made under rule 7, the order has been served on him under rule 7(4) or, if the order is not required to be served on him, the order has been noted in the cause book; and where by virtue of the foregoing provision a person becomes a party in substitution for some other party, all things done in the course of the proceedings before

the making of the order shall have effect in relation to the new party as they had in relation to the old except that acknowledgment of service by the old party shall not dispense with acknowledgment of service by the new.

(5) The foregoing provisions of this rule shall apply in relation to an action begun by originating summons as they apply in relation to an action begun by writ.

9. Failure to proceed after death of party (O. 15, r. 9)

(1) If after the death of a plaintiff or defendant in any action the cause of action survives, but no order under rule 7 is made substituting as plaintiff any person in whom the cause of action vests or, as the case may be, the personal representatives of the deceased defendant, the defendant or, as the case may be, those representatives may apply to the Court for an order that unless the action is proceeded with within such time as may be specified in the order the action shall be struck out as against the plaintiff or defendant, as the case may be, who has died; but where it is the plaintiff who has died, the Court shall not make an order under this rule unless satisfied that due notice of the application has been given to the personal representatives (if any) of the deceased plaintiff and to any other interested persons who, in the opinion of the Court, should be notified.

(2) Where in any action a counterclaim is made by a defendant, this rule shall apply in relation to the counterclaim as if the counterclaim were a separate action and as if the defendant making the counterclaim were the plaintiff and the person against whom it is made a defendant.

10. Actions for possession of land (O. 15, r. 10)

(1) Without prejudice to rule 6, the Court may at any stage of the proceedings in an action for possession of land order any person not a party to the action who is in possession of the land (whether in actual possession or by a tenant) to be added as a defendant.

(2) An application by any person for an order under this rule may be made ex parte, supported by an affidavit showing that he is in possession of the land in question and if by a tenant, naming him. The affidavit shall specify the applicant's address for service and Order 12, rule 3(2), (3) and (4), shall apply as if the affidavit were an acknowledgment of service.

(3) A person added as a defendant by an order under this rule must serve on the plaintiff a copy of the order giving the added defendant's address for service specified in accordance with paragraph (2).

10A. (Repealed L.N. 127 of 1995)

11. Relator actions (O. 15, r. 11)

Before the name of any person is used in any action as relator, that person must give a written authorization so to use his name to his solicitor and the authorization must be filed in the Registry.

12. Representative proceedings (O. 15, r. 12)

(1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) At any stage of proceedings under this rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order under rule 6 adding that person as a defendant.

(3) A judgment or order given in proceedings under this rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.

(4) An application for the grant of leave under paragraph (3) must be made by summons which must be served personally on the person against whom it is sought to enforce the judgment or order.

(5) Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.

(6) The Court hearing an application for the grant of leave under paragraph (3) may order the question whether the judgment or order is enforceable against the person against whom the application is made to be tried and determined in any manner in which any issue or question in an action may be tried and determined.

13. Representation of interested persons who cannot be ascertained, etc. (O. 15, r. 13)

(1) In any proceedings concerning-

(a) the estate of a deceased person, or

(b) property subject to a trust, or

(c) the construction of a written instrument, including an Ordinance or any other written law, the Court, if satisfied that it is expedient so to do, and that one or more of the conditions specified in paragraph (2) are satisfied, may appoint one or more persons to represent any person (including an unborn person) or class who is or may be interested (whether presently or for any future, contingent or unascertained interest) in or affected by the proceedings.

(2) The conditions for the exercise of the power conferred by paragraph (1) are as follows-

(a) that the person, the class or some member of the class, cannot be ascertained or cannot readily be ascertained;

(b) that the person, class or some member of the class, though ascertained, cannot be found;

(c) that, though the person or the class and the members thereof can be ascertained and found, it appears to the Court expedient (regard being had to all the circumstances, including the amount at stake and the degree of difficulty of the point to be determined) to exercise the power for the purpose of saving expense.

(3) Where in any proceedings to which paragraph (1) applies, the Court exercises the power conferred by that paragraph, a judgment or order of the Court given or made when the person or persons appointed in exercise of that power are before the Court shall be binding on the person or class represented by the person or persons so appointed.

(4) Where, in any such proceedings, a compromise is proposed and some of the persons who are interested in, or who may be affected by, the compromise are not parties to the proceedings (including unborn or unascertained persons) but-

(a) there is some other person in the same interest before the Court who assents to the compromise or on whose behalf the Court sanctions the compromise, or

(b) the absent persons are represented by a person appointed under paragraph (1) who so assents, the Court, if satisfied that the compromise will be for the benefit of the absent persons and that it is expedient to exercise this power, may approve the compromise and order that it shall be binding on the absent persons, and they shall be bound accordingly except where the order has been obtained by fraud or non-disclosure of material facts.

13A. Notice of action to non-parties (O. 15, r. 13A)

(1) At any stage in an action to which this rule applies, the Court may, on the application of any party or of its own motion, direct that notice of the action be served on any person who is not a party thereto but who will or may be affected by any judgment given therein.

(2) An application under this rule may be made ex parte and shall be supported by an affidavit stating the grounds of the application.

(3) Every notice of an action under this rule shall be in Form No. 52 in Appendix A and the copy to be served shall be a sealed copy and accompanied by a copy of the originating summons or writ and of all other pleadings served in the action, and by a form of acknowledgment of service in Form No. 14 or 15 in Appendix A with such modifications as may be appropriate.

(4) A person may, within 14 days of service on him of a notice under this rule, acknowledge service of the writ or originating summons and shall thereupon become a party to the action, but in default of such acknowledgment and subject to paragraph (5) he shall be bound by any judgment given in the action as if he was a party thereto.

(5) If at any time after service of such notice on any person the writ or originating summons is amended so as substantially to alter the relief claimed, the Court may direct that the judgment shall not bind such person unless a further notice together with a copy of the amended writ or originating summons is issued and served upon him under this rule.

(6) This rule applies to any action relating to-

(a) the estate of a deceased person; or

(b) property subject to a trust.

(7) Order 6, rule 7(3) and (5) shall apply in relation to a notice of an action under this rule as if the notice were a writ and the person by whom the notice is issued were the plaintiff. (L.N. 404 of 1991)

14. Representation of beneficiaries by trustees, etc. (O. 15, r. 14)

(1) Any proceedings, including proceedings to enforce a security by foreclosure or otherwise, may be brought by or against trustees, executors or administrators in their capacity as such without joining any of the persons having a beneficial interest in the trust or estate, as the case may be; and any judgment or order given or made in those proceedings shall be binding on those persons unless the Court in the same or other proceedings otherwise orders on the ground that the trustees, executors or administrators, as the case may be, could not or did not in fact represent the interests of those persons in the first-mentioned proceedings.

(2) Paragraph (1) is without prejudice to the power of the Court to order any person having such an interest as aforesaid to be made a party to the proceedings or to make an order under rule 13.

15. Representation of deceased person interested in proceedings (O. 15, r. 15)

(1) Where in any proceedings it appears to the Court that a deceased person was interested in the matter in question in the proceedings and that he has no personal representative, the Court may, on the application of any party to the proceedings, proceed in the absence of a person representing the estate of the deceased person or may by order appoint a person to represent that estate for the purposes of the proceedings; and any such order, and any judgment or order subsequently given or made in the proceedings, shall bind the estate of the deceased person to the same extent as it would have been bound had a personal representative of that person been a party to the proceedings.

(2) Before making an order under this rule, the Court may require notice of the application for the order to be given to such (if any) of the persons having an interest in the estate as it thinks fit.

16. Declaratory judgment (O. 15, r. 16)

No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

17. Conduct of proceedings (O. 15, r. 17)

The Court may give the conduct of any action, inquiry or other proceedings to such person as it thinks fit. (Enacted 1988)

"any relevant period of limitation" (任何有關的時效期)