Mareva injunctions, submission and forum non conveniens

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The law in Singapore on Mareva injunctions supporting foreign proceedings is on the move again. The High Court's recent decision in *Allenger v Pelletier* [2020] SGHC 279, issued barely a year after the Court of Appeal's decision in *Bi Xiaoqiong v China Medical Technologies* [2019] 2 SLR 595; [2019] SGCA 50 (see previous post here) qualifies the latter, confounding Singapore's position on this complex issue even further.

Pelletier sold shares to buyers in Florida while allegedly misrepresenting the company's value. The buyers obtained arbitral awards against him, then obtained a bankruptcy order against him in the Cayman Islands. By this time, however, Pelletier had initiated several transfers, allegedly to dissipate his assets to Singapore among other jurisdictions. The buyers then initiated proceedings to clawback the transfers in the Cayman courts, and obtained a worldwide Mareva injunction there with permission to enforce overseas. Subsequently, the buyers instituted proceedings in Singapore against Pelletier in Singapore based on two causes of action – s 107(1) of the Cayman Bankruptcy Law (the "Cayman law claim"), and s 73B of Singapore's Conveyancing and Law of Property Act (the "CLPA claim") – and applied for a Mareva injunction to freeze his Singapore assets.

Senior Judge Andrew Ang acknowledged that "the Mareva injunction remains, at its very core, ancillary to a main substantive cause of action." (*Allenger*, [125]). In doing so, he remained in step with *Bi Xiaoqiong*. Ang SJ eventually held that Mareva could be sustained based on the CLPA claim. However, he reasoned that the Cayman law claim could not; it is this latter point that is of relevance to us.

Ang SJ first held that the court had subject-matter jurisdiction over the Cayman law claim, because Singapore's courts have unlimited subject-matter jurisdiction over any claim based on statute or common law, whether local or foreign. The statute that defined the court's civil jurisdiction – Section 16(1) of the Supreme

Court of Judicature Act ("SCJA") – implicitly retained the position at common law, that the court possessed a generally "unlimited subject-matter jurisdiction", while expressly defining only the court's *in personam* jurisdiction over defendants ([45], [51]-[52]). The only limits on the court's subject-matter jurisdiction, then, were those well-established in the common law, such as the Mozambique rule and the rule against the justiciability of foreign penal, revenue and public law claims ([54]). This was a conception of international jurisdiction organised primarily around control and consent rather than sufficient connections between causes of action and the forum, although Ang SJ's recognition of the abovementioned common law exceptions suggests that a connection-based notion of jurisdiction may have a secondary role to play.

However, Ang SJ then held that the court could not issue a Mareva injunction against Pelletier, because, as all parties had accepted, Singapore was *forum non conveniens*. This is where the difficulty began, because the court's reasoning here was anything but clear. At times, Ang SJ suggested that Singapore being *forum non conveniens* precluded the *existence* of the court's jurisdiction over Pelletier; for instance, he dismissed the buyer's arguments for a Mareva injunction based on the Cayman law claim on grounds that "Singapore court would first have to have *in personam* jurisdiction over a defendant before it could even grant a Mareva injunction" ([145]). At other times, however, Ang SJ suggested that Singapore being *forum non conveniens* only prevented the court from "*exercising* its jurisdiction" over Pelletier ([123], emphasis added). The former suggestion, however, would have been misplaced: as Ang SJ himself noted ([114]), Pelletier had voluntarily submitted to proceedings, which gave the court *in personam* jurisdiction over him. That Ang SJ would otherwise have refused the buyers leave to serve Pelletier should also have been irrelevant: Section 16(1) of the SCJA, mirroring the position at common law, gives Singapore's courts "jurisdiction to hear and try any action in personam where (a) the defendant is served with a writ of summons or any other originating process … *or* (b) the defendant submits to the jurisdiction of the [court]" (emphasis added).

Ang SJ's objection, then, must have been the latter: if a court will not to exercise its jurisdiction over a defendant, it should not issue a Mareva injunction against him. This conclusion, however, is surprising. Ang SJ considered himself bound to reach that conclusion because of the Court of Appeal's holding in *Bi Xiaoqiong* that "the Singapore court cannot exercise any power to issue an injunction unless

it has jurisdiction over a defendant" (*Bi Xiaoqiong*, [119]). Yet, this hardly supports Ang SJ's reasoning, because *Bi Xiaoqiong* evidently concerned the *existence* of jurisdiction, not its exercise. There, the Court of Appeal simply adopted the majority's position in *Mercedes Benz v Leiduck* [1996] 1 AC 284 that a court need only possess *in personam* jurisdiction over a defendant to issue Mareva injunctions against him. It was irrelevant that the court would not exercise that jurisdiction thereafter; even if the court stayed proceedings, it retained a "residual jurisdiction" over them, which sufficed to support a Mareva injunction against the defendant (*Bi Xiaoqiong*, [108]). Indeed, in *Bi Xiaoqiong* itself the court did not exercise its jurisdiction: jurisdiction existed by virtue of the defendant's mere presence in Singapore, and the plaintiff itself applied to stay proceedings thereafter on grounds that Singapore was *forum non conveniens* (*Bi Xiaoqiong*, [16], [18])

Ang SJ's decision in *Allenger* thus rests on a novel proposition: that while a defendant's presence in Singapore can support a Mareva against him even when Singapore is *forum non conveniens*, his submission to proceedings in Singapore cannot unless Singapore is *forum conveniens*, though in both situations the court has *in personam* jurisdiction over him. Moreover, while Ang SJ's decision may potentially have been justified on grounds that the second requirement for the issuance of Mareva injunctions in *Bi Xiaoqiong* – of a reasonable accrued cause of action in Singapore – was not met, his reasoning in *Allenger*, in particular the distinction he drew between presence and submission cases, was directed solely at the first requirement of *in personam* jurisdiction. On principle, however, that distinction is hard to defend: in both scenarios, the court's jurisdiction over the defendant derives from some idea of consent or control, and not from some connection between the substantive cause of action and the forum. If like is to be treated alike, future courts may have to relook Ang SJ's reasoning on this point.

What was most surprising about *Allenger*, however, was the fact that Ang SJ himself seemed displeased at the conclusion he believed himself bound to reach. In *obiter*, he criticised *Bi Xiaoqiong* as allowing the "'exploitation' of the principle of territoriality by perpetrators of international frauds" (*Allenger*, [151]), and suggested that *Bi Xiaoqiong* should be overturned either by Parliament or the Court of Appeal ([154]). In the process, he cited Lord Nicholls' famous dissent in *Leiduck*, that Mareva injunctions should be conceptualised as supportive of the enforcement of judgments rather than ancillary to causes of action (*Leiduck*, 305).

The tenor of Ang SJ's statements thus suggests a preference that courts be allowed to issue free-standing Mareva injunctions against any defendant with "substantial assets in Singapore which the orders of the foreign court … cannot or will not reach" (*Allenger*, [151]). Whether the Court of Appeal will take up this suggestion, or even rectify the law after *Allenger*, is anyone's guess at this point. What seems clear, at least, is that Singapore's law on Mareva injunctions supporting foreign proceedings is far from settled.