Republic of the Philippines v Maler Foundation and Others
[2008] SGCA 14

Case Number : CA 7/2007

Decision Date : 24 March 2008

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA

Counsel Name(s) : Harry Elias SC, Surenthiraj s/o Sauntharajah, Michael Palmer, Andy Lem and Sharmini Sharon Selvaratnam (Harry Elias Partnership) for the appellant; Chandra Mohan Rethnam, Jerome Robert and Ng Jin (Rajah & Tann) for the first to fifth respondents; Kenneth Michael Tan Wee Kheng SC, Soh Wei Chi and Cham Shan Jie Mark (Kenneth Tan Partnership) for the sixth respondent

Parties : Republic of the Philippines — Maler Foundation; Avertina Foundation; Palmy Foundation; Vibur Foundation; Aguamina Corporation; Plaintiffs in the estate of Ferdinand and E Marcos Human Rights Litigation in Case No. MDL840-R in the United States District of Hawaii

International Law – Sovereign immunity – Application by foreign State to stay interpleader proceedings pursuant to s 3 State Immunity Act (Cap 313, 1985 Rev Ed) – State claiming funds in hands of third party which was not agent or trustee of State – Whether doctrine of sovereign immunity applicable

International Law – Sovereign immunity – Application by foreign State to stay interpleader proceedings pursuant to s 3 State Immunity Act (Cap 313, 1985 Rev Ed) – Whether escrow agent of disputed funds acting as State's agent in proceedings – Whether State submitting to jurisdiction of Singapore courts through escrow agent

International Law – Sovereign immunity – Application by foreign State to stay interpleader proceedings pursuant to s 3 State Immunity Act (Cap 313, 1985 Rev Ed) – Whether prayer in stay application seeking release of disputed funds to State amounting to a step in proceedings – Whether State thereby deemed to have submitted to jurisdiction – Section 4(3)(b) State Immunity Act (Cap 313, 1985 Rev Ed)

International Law – Sovereign immunity – Application by foreign State to stay interpleader proceedings pursuant to s 3 State Immunity Act (Cap 313, 1985 Rev Ed) – Written submissions filed by escrow agent but not formally presented as oral arguments – Whether escrow agent making claim to disputed funds on State's behalf via written submissions

Words and Phrases – "Step in the proceedings" – Section 4(3)(b) State Immunity Act (Cap 313, 1985 Rev Ed)

24 March 2008 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 The Republic of the Philippines ("the Appellant") has appealed against the decision of Kan Ting Chiu J ("the Judge") dismissing its application in Summons No 3874 of 2006 ("the Stay Application") to stay the interpleader proceedings in Originating Summons No 134 of 2004 ("the Interpleader Summons") on the basis of state immunity (see *WestLB AG v Philippine National Bank* [2007] 1 SLR 967 ("the Judgment")).

Factual background

2 The interpleader proceedings concern competing claims to certain moneys ("the Funds") which are held in an escrow account in the name of Harry Elias Partnership ("HE&P"), the solicitors for Philippine National Bank ("PNB"), for the credit of the said proceedings. The Funds were originally held in escrow in PNB's account with WestLB AG, Singapore ("WLB") pending the determination of the ownership of or the title to the Funds by the courts of the Philippines, upon which event the escrow would automatically terminate. On 15 July 2003, the Supreme Court of the Philippines ordered that the Funds be forfeited to the Appellant on the ground that they were the ill-gotten gains of the former President of the Philippines, the late Ferdinand E Marcos, and Mrs Imelda R Marcos.

3 However, before WLB could release the Funds to PNB as the account holder, eight other claimants notified WLB of their claims to the Funds on various grounds. As a result, WLB took out the Interpleader Summons to interplead the conflicting claims of the nine claimants. PNB was named as the first defendant in the Interpleader Summons. Five foundations, *viz*, the Maler Foundation, the Avertina Foundation, the Palmy Foundation, the Vibur Foundation and the Aguamina Corporation (collectively referred to as "the Foundations"), which are the first to fifth respondents in this appeal, were named as the second to sixth defendants. The seventh defendant in the Interpleader Summons (the sixth respondent in this appeal) is collectively the plaintiffs in the *Estate of Ferdinand E Marcos Human Rights Litigation* in Case No. MDL840-R in the United States District of Hawaii ("the HR Claimants"), who had obtained damages from the Hawaiian district court on 3 February 1995. The eighth and the ninth defendants have withdrawn from the interpleader proceedings and are not parties to this appeal. Hereafter in this judgment, the Foundations and the HR Claimants will be referred to collectively as "the Respondents".

How and why the Funds came to be deposited in Singapore

4 The Funds (which at this time amounted to about US$25m inclusive of interest) were originally part of a larger pool of assets ("the Marcos assets") held in the Swiss bank accounts of the Foundations. They came under the jurisdiction of the Singapore courts in rather unusual circumstances. The journey began on 28 February 1986, two days after former President Ferdinand E Marcos and his family fled the Philippines, when the Appellant set up a commission called the "Presidential Commission on Good Government" ("PCGG") to recover "[all the] ill-gotten wealth accumulated by former President Ferdinand E. Marcos, his immediate family, relatives, subordinates and close associates, whether located in the Philippines or abroad"[note: 1] during his presidency. Some of the assets in question were the Marcos assets, which, as at 31 January 2002, amounted to more than US$658m with accrued interest.

5 The PCGG sought the assistance of the Swiss authorities to recover the Marcos assets from the Foundations. On 24 March 1986, the Swiss Federal Council issued an interim order freezing the Marcos assets pursuant to a Swiss federal law, *viz*, the International Mutual Assistance for Criminal Matters Act ("IMAC"), in anticipation of a formal request from the Appellant for assistance under the IMAC. Such assistance was formally sought on 7 April 1986. Pursuant to the procedures under the IMAC, the investigating magistrates in the Swiss cantons of Zurich, Fribourg and Geneva issued freezing orders against the Marcos assets between April 1986 and January 1990. These orders superseded the interim freezing order made earlier by the Swiss Federal Council.

6 The heirs of the late Ferdinand Marcos, Imelda Marcos and the Foundations challenged the validity of the cantonal freezing orders on the ground that the Appellant had not fulfilled the conditions required for the provision of assistance under the IMAC. On 21 December 1990, the Swiss Federal Court affirmed, with slight modifications, the freezing orders of the Fribourg and the Zurich

cantonal courts on the grounds that:

(a) it was satisfied that the Appellant would commence the necessary proceedings in the Philippines to determine the ownership of the Funds, as required by the IMAC; and

(b) such proceedings would not be time-barred.

However, the Swiss Federal Court, while agreeing with the cantonal courts that the remittance of the Marcos assets to the Appellant was in principle granted, ordered their remittance to be deferred:

> … until an executory decision of the Sandiganbayan [a special court established under the Constitution of the Philippines] or another Philippine Court legally competent in criminal matters concerning *their restitution to those entitled or their confiscation* is presented. If the [Appellant] intends to open a proceeding to this effect, it must do so within a maximum of one year from the present decision of the [Swiss] Federal Court, failing which the attachment of the assets shall be lifted on the request of the interested parties. [emphasis added]

In compliance with the decision of the Swiss Federal Court, the Geneva investigating magistrate modified his freezing order to conform to its terms.

7 On 14 August 1995, the PCGG and PNB entered into an escrow agreement ("the Escrow Agreement") under which PNB agreed to act as the PCGG's escrow agent in anticipation of the Swiss authorities agreeing to repatriate the Marcos assets to the Philippines on the Appellant's undertaking that the assets would be held in escrow until the resolution of the Appellant's actions against the estate of the late Ferdinand Marcos ("the Marcos Estate") and Imelda Marcos which were pending in the Sandiganbayan. As the Escrow Agreement is relevant to the status of PNB in the interpleader proceedings, we summarise its material provisions below:

(a) Under cl 2(vii), PNB, as the escrow agent, undertook "not to dispose of the [Marcos assets] other than in accordance with a final and enforceable judgment of the Sandiganbayan or any final and enforceable judgment of any competent court in the Philippines …".

(b) Under cl 5, the PCGG guaranteed that the funds held in escrow ("the Escrow Funds"), if invested with a Philippines bank or with some other entity, would not become the assets of such a bank or other entity with which the investment was made, but would instead continue to be held in escrow.

(c) Under cl 7, the PCGG and PNB agreed that the occurrence and fulfilment of condition (a) above ("the Escrow Condition") would have the effect of *terminating* the Escrow Agreement. The PCGG also agreed to "indemnify and hold … [PNB] free and harmless from any liability whatsoever arising from the faithful observance by … [PNB] of the above conditions". Further, if a suit or an action was filed against PNB in connection with or directly or indirectly related to the Escrow Funds, PNB was entitled to retain counsel to advise or defend it in the action, and all expenses incurred thereby could be deducted from the Escrow Funds.

(d) Under cl 9, PNB was entitled to charge to the Escrow Funds as "compensation" for its services "the usual fee charged by … [PNB] under similar arrangement[s]", and also to reimbursement of out-of-pocket expenses incurred in the performance of its functions as escrow agent.

8 On 10 December 1997, the Swiss Federal Supreme Court affirmed the order of the District

Attorney of Zurich that such of the Marcos assets as were held in the name of the Aguamina Corporation with the Swiss Bank Corporation and Credit Suisse in Zurich were to be released to the Appellant, subject to certain conditions. Following this ruling, the Marcos assets deposited in the names of the rest of the Foundations with other Swiss banks were also ordered to be released to the Appellant, subject to the following conditions:

(a) the assets in question were to be held in an escrow account in the name of a designated depositor;

(b) the assets could be invested in the money market or in securities provided the relevant debtor or company had a Standard & Poor's ("S&P") rating of at least "AA"; and

(c) the assets were to be held in escrow pending a final and binding decision by a competent court in the Philippines on their restitution or forfeiture (see [6] above).

PNB, with the consent of the Swiss authorities, was designated by the Appellant as the escrow agent, subject to the terms of the Escrow Agreement, in accordance with the requirements of the above Swiss court order.

9 Between April 1998 and July 1998, the Swiss authorities released the Marcos assets (then amounting to approximately US$567m) to PNB to hold as the escrow agent. On receipt of those assets, PNB deposited them in various banks in Singapore which had S&P ratings of at least "AA". One such bank was WLB.

10 Some years prior to the repatriation of the Marcos assets but after the Swiss Federal Court's order of 21 December 1990 (see [6] above), the Appellant had, on 17 December 1991, petitioned the Sandiganbayan for the forfeiture of the Marcos assets ("the forfeiture proceedings") on the ground that they were ill-gotten wealth under the law of the Philippines. The defendants in the forfeiture proceedings ("the FP Defendants") were the Marcos Estate and Imelda Marcos. On 18 October 1993, the FP Defendants filed their answers to the claim. Three years later, on 18 October 1996, the Appellant applied for summary judgment. The application was dismissed. Another application for summary judgment was filed on 10 March 2000 and, on 19 September 2000, the Sandiganbayan declared that the Marcos assets (then held by PNB as the escrow agent) were ill-gotten wealth and were to be forfeited to the Appellant. The FP Defendants filed an application for reconsideration and the Sandiganbayan reversed its decision on 31 January 2002. The Appellant appealed to the Supreme Court of the Philippines, which, on 15 July 2003, reversed the decision of the Sandiganbayan and ordered the Marcos assets (which included the Funds) to be forfeited to the Appellant ("the Forfeiture Order") (see [2] above). This decision was affirmed by the Full Bench of the Supreme Court on 18 November 2003 as it was satisfied that there was conclusive evidence that the Foundations were only the nominees for the late Ferdinand Marcos and/or Imelda Marcos and/or their children.

11 Following the making of the Forfeiture Order, PNB secured the repayment of the Marcos assets from the various banks in Singapore with which it had deposited the assets. In this connection, PNB instructed WLB to repay the approximately US$100m deposited with it (which was held in different deposit accounts with different maturity dates) to the Appellant as and when the deposits matured. The bulk of the assets deposited with WLB, amounting to about US$75m, were released to the Appellant on 25 August 2003. However, PNB was unable to obtain the release of the remaining sum (*ie*, the Funds) from WLB. As a result, PNB gave notice of termination of the remaining deposit accounts on 10 September 2003 for value on 11 September 2003. However, WLB could not return the Funds to PNB on 11 September 2003 as the HR Claimants had notified WLB of their claim against the Funds on 10 September 2003. Subsequently, the Foundations as well as the eighth and

the ninth defendants also notified WLB of their claims to the Funds.

12 On 22 January 2004, the Sandiganbayan issued a writ of execution for the transfer to the Appellant of those of the Marcos assets held by PNB and deposited with WLB. Effectively, this execution order affected only the Funds (then amounting to about US$22m), which remained unpaid by WLB. The legal effect of this execution order in relation to the status of the Funds or PNB as the escrow agent was not adverted to in the stay proceedings.

13 Two events which have a bearing on the issues in this appeal occurred a few days before the filing of the Interpleader Summons on 30 January 2004. On 27 January 2004, the PCGG passed resolution no 2004-Y-001 ("Resolution No 2004-Y-001") authorising PNB to retain "US$1-Million to cover the litigation and administrative costs to be incurred in the recovery and transfer to the Republic of the Philippines of the account in the bank in Singapore". Two days later, the PCGG passed resolution no 2004-Y-002 dated 29 January 2004, which increased the amount of US$1m to 5% of the amount recovered. These resolutions (collectively referred to as "the PCGG Resolutions") were passed in anticipation of litigation with respect to the Funds, which WLB had refused to pay to PNB.

The Interpleader Summons

14 On 24 March 2004, the court granted WLB's application in the Interpleader Summons without any objection from either PNB or the Appellant, which was fully aware of the application. The court also ordered the Funds to be transferred to an escrow account in the name of PNB's then solicitors, Drew & Napier LLC ("D&N"), "for the credit of these proceedings".[note: 2] However, the court did not remove PNB as the escrow agent (and this would be consistent with the principle of comity as PNB had been appointed as such by agreement between the Appellant and the Swiss authorities). As such, D&N (and later HE&P) presumably held the Funds as PNB's nominee, but subject to the control of the court for the credit of the interpleader proceedings. Subsequently, the court ordered the parties to the Interpleader Summons to file affidavits to set out their respective positions as to why they claimed to be entitled to the Funds. Only PNB and the HR Claimants filed affidavits setting out their respective claims and the background facts relating to the Appellant's claim to the Funds. The Foundations do not appear to have gone on affidavit as to their positive claims to the Funds.

Interlocutory applications: Forum non conveniensand other matters

15 Subsequently, the parties applied for and obtained various interlocutory orders from the court. One of them was Summons in Chambers No 4231 of 2005 ("SIC 4231/05"), filed on 18 August 2005 by PNB, seeking a stay of the interpleader proceedings on the ground of *forum non conveniens*. At the hearing of SIC 4231/05 on 21 October 2005, HE&P (which had, by then, replaced D&N as PNB's solicitors) made a further application that the court should also determine the validity of the adverse claims of the Respondents. The court declined to do so and proceeded to hear PNB's application that the interpleader proceedings should be stayed on the basis of *forum non conveniens.* The court dismissed the application after hearing extensive submissions from counsel. PNB did not appeal against the dismissal order.

16 On 7 November 2005, PNB filed Summons in Chambers No 5673 of 2005 ("SIC 5673/05") for the following orders:

1. Pursuant to Order 14 Rule 12 of the Rules of Court (2004 Ed), the following issues of law be determined: –

    i. Whether a finding recognising the 2nd to 6th Defendants' [*ie*, the Foundations']

claims and/or the 7th Defendants' [*ie*, the HR Claimants'] claims and/or the 8th and 9th Defendants' claims to … [the Funds] would be contrary to the Act of State doctrine and/or considerations of international comity;

ii. Whether a finding recognising the 2nd to 6th Defendants' claims and/or the 7th Defendants' claims and/or the 8th and 9th Defendants' claims to the Funds would be contrary to the sovereign immunity of the Republic of Philippines;

iii. Whether the claims of the 2nd to 6th Defendants and/or the 7th Defendants and/or the 8th and 9th Defendants are proprietary claims and therefore of a nature appropriate to be dealt with in this interpleader proceeding;

iv. Whether the claims of the 2nd to 6th Defendants and/or the 7th Defendants and/or the 8th and 9th Defendants are time-barred; and

v. Whether the Philippines Supreme Court Judgment of 15 July 2003 [*ie*, the Forfeiture Order] constitutes a judgment in rem in respect of the Funds.

2. Further or in the alternative, pursuant to Order 17 Rule 5 and/or Order 17 Rule 8 of the Rules of Court …, the claims of the 2nd to 9th Defendants in the [Interpleader] Summons be summarily determined on the grounds that: –

i. the Act of State doctrine and/or considerations of international comity applies; and/or

ii. the doctrine of sovereign immunity applies; and/or

iii. the 2nd to 6th Defendants and/or the 7th Defendants and/or the 8th and 9th Defendants do not have proprietary claims to the Funds; and/or

iv. the claims of the 2nd to 6th Defendants and/or the 7th Defendants and/or the 8th and 9th Defendants are time-barred; and/or

v. the Philippines Supreme Court Judgment of 15 July 2003 constitutes a judgment in rem in respect of the Funds; and/or

3. Costs of this application to be paid by the 2nd to 6th Defendants and/or the 7th Defendants and/or the 8th and 9th Defendants to the 1st Defendants; and

4. Such further or other ancillary directions that this Honourable Court deems fit or necessary to give.

17 On 8 February 2006, PNB, after discharging D&N as its solicitors, filed Summons No 552 of 2006 for an order that the Funds held in the escrow account in D&N's name be transferred to an escrow account in the name of HE&P, its new solicitors. The court granted the order on 22 February 2006.

18 On 28 February 2006, the HR Claimants filed Summons No 871 of 2006 ("SUM 871/06") for the following orders:

1. Pursuant to Order 14 Rule 12 and/or Order 17 Rule 5 and/or Order 17 Rule 8 of the Rules of Court (2004 Ed), the following issues to be determined together with [SIC 5673/05]: –

i. Whether [PNB] has any proprietary and beneficial claim to the Funds to entitle [PNB] to even be a party to this interpleader proceeding;

ii. Whether [PNB] has any locus standi/ standing and/or capacity to rely on the [Forfeiture Order];

iii. Whether the "Act of State" doctrine and/or considerations of international comity, if established, would render the entire proceedings non-justiciable even in respect of [PNB];

iv. Whether [PNB] has any locus standi/ standing and/or capacity to raise a defence of State Immunity when it is not a foreign state; [i]f so and in any event, whether it has waived such a defence of State Immunity, and/or whether an exception to State Immunity exists in any event[.]

2. Costs of this application to be paid by [PNB] to [the HR Claimants].

3. Such further or other ancillary directions that this Honourable Court deems fit or necessary to give.

19 On 8 March 2006, the Appellant filed Summons No 1048 of 2006 for an order that it be added as a defendant to the Interpleader Summons for the purpose of asserting its interest in the Funds and state immunity in respect of the same. The application was granted on 11 May 2006, and the Appellant was joined as the tenth defendant.

The Stay Application

20 On 22 August 2006, more than five months after intervening in the interpleader proceedings, the Appellant filed the Stay Application, the subject matter of this appeal, for the following orders:

1 That the claims of [PNB], [the Foundations] and [the HR Claimants] to … the Funds be stayed pursuant to section 3 of the State Immunity Act (Cap 313);

2 That the Funds be released to the [Appellant];

3 Costs; and

4 Such further or other ancillary directions that this Honourable Court deems fit or necessary to give.

21 In the court below, the Appellant claimed that it was entitled to stay the interpleader proceedings on the ground that it "own[ed] and/or [was] interested in the Funds and, as a sovereign nation, … [was] entitled to assert immunity in respect of the same".[note: 3] This claim of ownership of or interest in the Funds was founded on the premise that the Forfeiture Order had the effect of vesting the Funds in the Appellant. Before us, the Appellant nuanced its argument to state that the effect of the Forfeiture Order was that it "had possession and control of the Funds through PNB".[note: 4] In other words, the argument was that PNB held the Funds for the Appellant's account or on trust for the Appellant as the escrow had terminated due to the fulfilment of the Escrow Condition as a result of the Forfeiture Order.

22 The Appellant's argument before the Judge was disputed by the Respondents. They argued that the Appellant had neither a sufficient or recognisable interest in nor possession or control of the Funds to be entitled to assert immunity in litigation over their disposal on the following grounds:

(a) The Forfeiture Order was not enforceable against them under Singapore law as it was a judgment *in personam* and/or a penal judgment.

(b) The Forfeiture Order was not binding on them as they were not made parties to the forfeiture proceedings.

(c) The Appellant had submitted to the jurisdiction of the Singapore courts as:

(i) PNB had asserted the Appellant's claim to the Funds throughout the interpleader proceedings;

(ii) PNB had claimed a beneficial title to the Funds on the Appellant's behalf, which it could not have done except as the agent of the Appellant; and

(iii) prayer 2 of the Stay Application ("Prayer 2") was a step in the proceedings for the purposes of s 4(3)(*b*) of the State Immunity Act (Cap 313, 1985 Rev Ed) ("SIA"), and, thus, a submission to jurisdiction, as it requested the court to release the Funds to the Appellant.

In substance, the Respondents' argument before the Judge was that the Forfeiture Order did not fulfil the Escrow Condition as it was neither binding on nor enforceable against the Respondents, and therefore had not terminated the escrow.

23 The Appellant's response to these arguments was as follows:

(a) The Forfeiture Order was a judgment *in rem*.

(b) PNB did not assert the Appellant's rights to the Funds, but instead claimed the Funds in its own right as the original account holder (in that, as stated at [2] above, the Funds were originally held in PNB's account with WLB) and the escrow agent.

(c) PNB did not claim the beneficial interest in the Funds on behalf of the Appellant, and, in any case it was not authorised by the Appellant to make such a claim.

(d) The Appellant was not seeking to enforce the Forfeiture Order either directly or indirectly.

(e) Prayer 2 was not, nor was it intended to be, a step in the proceedings. Instead, it was a prayer for a consequential or an ancillary order that would facilitate the court in releasing the Funds to the Appellant should the court stay the interpleader proceedings on the basis of state immunity. The order sought in Prayer 2 was consequential in nature because, in the event of the proceedings being stayed, the court would have nothing more to do after staying the proceedings except to release the Funds to the Appellant in order to close the proceedings. (In the course of his argument in the court below, counsel withdrew Prayer 2 in order to avoid any further confusion as the Appellant took the view that prayer 4 of the Stay Application (see [20] above) was wide enough to cover the relief sought in Prayer 2.)

The Judge's findings and decision

24 The Judge held that it was not necessary for him to decide whether the Forfeiture Order had the effect of vesting the beneficial interest in the Funds in the Appellant. Instead, for the purpose of deciding whether the Appellant was entitled to stay the interpleader proceedings on the basis of state immunity, it was only necessary to determine whether the Appellant's claim to the Funds was "not merely illusory, nor founded on a title manifestly defective", applying the test laid down by the Privy Council (*per* Earl Jowitt at 89–90) in *Juan Ysmael & Company Incorporated v Government of the Republic of Indonesia* [1955] AC 72 ("*Juan Ysmael*"). For this reason, the Judge declined to consider the Respondents' arguments as to whether the Forfeiture Order was an *in personam* or *in rem* judgment, whether it was penal in nature and whether it was binding on or enforceable against the Respondents. He held that these were substantive issues which would have to be addressed at the substantive hearing of the Interpleader Summons should the interpleader proceedings proceed.

25 Applying the *Juan Ysmael* standard of proof, the Judge held that the Appellant's claim based on the Forfeiture Order was not illusory or manifestly defective and that the Appellant had established a sufficient standing to apply to stay the proceedings. However, he dismissed the Stay Application on the ground that the Appellant had, by its agent, PNB, and by its own conduct, submitted to the jurisdiction of the court (see the Judgment at [71]). It is not clear whether, by this decision, the Judge meant that *but for* the finding that the Appellant had submitted to the jurisdiction of the court, he would have stayed the interpleader proceedings. The Respondents have submitted on appeal that the Judge only decided that the Appellant had shown that it had a sufficient interest in the Funds to *apply* for a stay, but that does not mean that that interest is a sufficient basis for a stay to be *granted*. In the context of this case and having regard to our reasoning, we cannot see the difference between the two (*ie*, the interest which is sufficient to apply for a stay and the interest which is sufficient to warrant the grant of a stay) as it seems pointless for the court to divide the application of the doctrine of sovereign immunity in the context of stay applications in this way. Proof of an interest in property in the nature of a debt or chose in action which is sufficient to apply for a stay is, in our view, sufficient to stay the proceedings.

The issues and arguments on appeal

26 The issues and arguments presented by the parties in this appeal are substantially the same as those considered by the Judge. The main issues are as follows:

(a) whether the Appellant has a sufficient interest in the Funds to assert state immunity;

(b) whether PNB submitted to the court's jurisdiction as the agent of the Appellant;

(c) whether PNB claimed a beneficial interest in the Funds on behalf of the Appellant as the Appellant's agent, and, if it did, whether it was authorised to do so; and

(d) whether Prayer 2 was a step in the proceedings for the purposes of the SIA.

Issue (a) is one of law. It raises the question of whether sovereign immunity may be asserted by a state against intangible property in the nature of debts or choses in action (such as the Funds) which are in the possession or control of a third party, that is to say, a party which is not an agent or a trustee of the state. It also raises policy and practical considerations as to the ultimate disposal of such property where the third party is unwilling to release the property to the state on account of conflicting claims having been made against the property. In the present case, the situation is even more unusual in that the Funds are under the control of the court (see [14] above). Issues (b) and (c) are questions of fact, whilst issue (d) is one of law and fact.

27 Before we consider each of these issues, we propose to first describe the legal positions of the respective parties with regard to the Funds as this is important for a full appreciation of the legal issues. We will then discuss the principles of law on sovereign immunity in the context of stay applications and, in the light of the applicable principles, evaluate the rival arguments of the parties before concluding with our findings on these issues.

The parties' respective legal positions on the Funds

28 PNB has at all times been the escrow agent holding the Funds pending their restitution or forfeiture pursuant to the final and binding judgment of a competent Philippines court. The Appellant has always claimed that it is beneficially entitled to the Funds or that the Funds should be returned to it as they are the ill-gotten gains of the late Ferdinand Marcos and/or Imelda Marcos under the law of the Philippines. The Respondents assert that the Appellant appointed PNB as its agent to recover the Funds and that PNB so acted in the interpleader proceedings, but this is denied by the Appellant.

29 The legal relationship between PNB, as the depositor of the Funds and the original account holder, and WLB, as the depositee bank, was originally that of creditor and debtor. As such, PNB had the legal title to the Funds and was entitled to immediate repayment of the Funds as and when the deposits matured. PNB did demand repayment of the Funds from WLB, but was unable to obtain payment as WLB had by then received adverse claims from the Respondents.

30 The creditor-debtor relationship between PNB and WLB ceased after the Funds were transferred to an escrow account in the name of PNB's then solicitors (D&N) with another bank. Subsequently, the Funds were transferred to an escrow account in the name of PNB's current solicitors, HE&P. We have earlier stated that PNB remains the escrow agent of the Funds (see [14] above).

31 The Foundations were the original legal owners and holders of the various Swiss bank accounts in which the Marcos assets were initially held. They ceased to be such owners and account holders after the Marcos assets were transferred to the Philippines, pursuant to the order of the Swiss Federal Court made on 10 December 1997 (see [8] above), to be disposed of by the Philippines courts according to the laws of the Philippines. The Foundations are claiming ownership of the Funds in spite of the Forfeiture Order.

32 The HR Claimants are collectively a group of human rights victims who have obtained a Hawaiian judgment for damages against the Marcos Estate. They claim to be entitled to the Funds as these moneys form part of the assets of the Marcos Estate which they are entitled to look to for the purposes of enforcing the Hawaiian judgment.

Does the Appellant have a sufficient interest in the Funds to assert state immunity?

State immunity and stay of proceedings impleading a sovereign state's property

33 It is an established principle at common law that a foreign sovereign state is immune to the jurisdiction of our courts and may not be impleaded directly or indirectly in any action before our courts without its consent. The court will stay any such action if state immunity is invoked. These principles are now contained in s 3 of the SIA, which provides as follows:

> **General immunity from jurisdiction.**
>
> **3.**—(1) A State is immune from the jurisdiction of the courts of Singapore except as provided in

the following provisions of this Part [*ie*, Pt II of the SIA].

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

Sovereign or state immunity issues are not new to the courts of Singapore, but they are rare. The last occasion on which a sovereign asserted immunity to proceedings in a Singapore court occurred in the Privy Council case of *Sultan of Johore v Abubakar Tunku Aris Bendahar* [1952] AC 318 ("*Sultan of Johore*"), where it was held that the then Sultan of Johor had submitted to the jurisdiction of our courts. Although the court's jurisdiction to stay proceedings against a state on the basis of state immunity is set out in the SIA, the common law continues to apply to determine when a court will recognise sovereign immunity in any particular case. The present appeal raises specific issues on the scope of sovereign immunity which are novel in that they have not been directly decided by any common law court (although persuasive *dicta* are found in some of the decisions of the House of Lords discussed at [35]–[36] below).

34 The doctrine of state immunity is founded on the concept of the equality, independence and dignity of states and the principle that an equal has no authority over another equal: see the United States Supreme Court decision of *The Schooner Exchange v McFaddon* 11 US 116 (1812). In *Juan Ysmael* ([24] *supra*),Earl Jowitt said (at 86) that:

> The basis of the rule is that it is beneath the dignity of a foreign sovereign government to submit to the jurisdiction of an alien court, and that no government should be faced with the alternative of either submitting to such indignity or losing its property.

35 In *Compania Naviera Vascongado v Steamship Cristina* [1938] AC 485 ("*The Cristina*"), Lord Atkin stated the principle as follows (at 490):

> The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.
>
> The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property *which is his or of which he is in possession or control*. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both.
>
> [emphasis added]

It is implicit in the statements of both Earl Jowitt and Lord Atkin that the sovereign state must produce some evidence to show, and not merely assert, that it *has* an interest in or title to the property in question.

36 The following cases illustrate how the principles of sovereign immunity have been applied by the English courts:

(a) In *The Cristina*, the House of Lords stayed an action by the plaintiff, a Spanish company, against the defendant, the Spanish government, for the return of a ship registered in the plaintiff's name on the ground that the ship had been requisitioned by Spain for a public purpose and had been placed under the charge of a master appointed by Spain. The House of Lords held that as the ship was in the possession and control of Spain through the master, Spain was indirectly impleaded and the action must be stayed.

(b) In *United States of America and Republic of France v Dollfus Mieg et Cie SA and Bank of England* [1952] AC 582 ("*Dollfus Mieg*"), a French company ("Dollfus Mieg") sued the Bank of England ("BOE") for the return of 64 gold bars which the company claimed had been wrongfully seized from it by the Nazi government. The gold bars were subsequently recovered by the governments of the United States, France and the United Kingdom ("the three States"), which then delivered the gold bars to BOE to hold as a bailee. BOE sold 13 of the 64 gold bars ("the 13 gold bars") by mistake, but retained the remaining 51 gold bars ("the 51 gold bars"). Where Dollfus Mieg's claim for the 51 gold bars was concerned, it was held that the three States, as bailors, were entitled to immediate possession of those gold bars, which was as good as having legal possession thereof, and, accordingly, the three States were indirectly impleaded by Dollfus Mieg's claim. The House of Lords thus ordered the action in respect of the 51 gold bars to be stayed even though the three States were unable to obtain delivery of those gold bars without suing BOE (which was unwilling to return the gold bars to the three States because of Dollfus Mieg's claim) and thereby submitting to the jurisdiction of the English courts. (The action in respect of the 13 gold bars was, however, allowed to proceed on the ground that BOE, in selling those gold bars, had terminated the bailment.)

(c) In *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 ("*Rahimtoola*"), the Nizam of Hyderabad ("the Nizam") sued the High Commissioner of the State of Pakistan ("Rahimtoola") and an English bank ("Westminster Bank") to recover money which the Nizam claimed had been wrongfully transferred from his account with Westminster Bank to Rahimtoola. The House of Lords dismissed the action against Rahimtoola on the ground of sovereign immunity, holding that the money had been paid to Rahimtoola as the agent of Pakistan and not in his personal capacity. The action against Westminster Bank was also stayed on the ground that it impleaded Pakistan's title to the money in dispute and Pakistan's possession or control thereof through Rahimtoola. (In that case, Pakistan had both possession and control of the money through Rahimtoola.)

37 In all three cases mentioned in the preceding paragraph, the states in question were able to prove that the properties to which they claimed title were in the possession and/or control of their agents, or, in the case of *Dollfus Mieg*, in the possession of their bailees, against whom they were entitled to immediate possession. The issue that arises in the present appeal is whether a sovereign state which can show an *arguable* claim to an interest in property, but which does not have control or possession of that property through an agent or a trustee, is entitled to assert immunity to stay any proceedings in which an adverse claim is made against the property. The English judges are divided on this question, although they generally agree that the doctrine of sovereign immunity is not absolute under English law and that it should not be extended unnecessarily: see *The Cristina* at, *inter alia*, 494, 498, 515 and 521–522. For instance, the English Court of Appeal decided in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 that the commercial acts of a foreign state were not immune from the jurisdiction of the English courts. This principle is now enacted in s 5 of the SIA.

The standard of proof required to assert state immunity

38 In *Juan Ysmael* ([24] *supra*), the Privy Council (*per* Earl Jowitt) laid down the test on the

requisite degree of proof which a state has to satisfy in order to assert immunity ("the *Juan Ysmael* test"). At 87, Earl Jowitt said:

> Where the foreign sovereign State is directly impleaded the writ will be set aside, but where the foreign sovereign State is not a party to the proceedings, but claims that it is interested in the property to which the action relates and is therefore indirectly impleaded, a difficult question arises as to how far the foreign sovereign government must go in establishing its right to the interest claimed. Plainly if the foreign government is required as a condition of obtaining immunity to prove its title to the property in question the immunity ceases to be of any practical effect.

Earl Jowitt continued at 89–90 (see also [24] above):

> In their Lordships' opinion the view of Scrutton L.J. [in *The Jupiter* [1924] P 236] that a mere assertion of a claim by a foreign government to property [which is] the subject of an action compels the court to stay the action and decline jurisdiction is against the weight of authority, and cannot be supported in principle. In their Lordships' opinion *a foreign government claiming that its interest in property* will be affected by the judgment in an action to which it is not a party, is *not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective.* The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached. [emphasis added]

Should the Juan Ysmael test be applied in the present case?

39 In *Juan Ysmael* (at 84), counsel for the Republic of Indonesia submitted that:

> There does not appear to be one case in the books in which a sovereign has been required to prove his title, or in which after a decision had been taken as to title there would have been anything left to litigate.

This submission provided some degree of support to the test ultimately laid down by Earl Jowitt. Nevertheless, in our view, Earl Jowitt's statement of the law on the degree of proof required is unfortunate to the extent that he included the expression "not merely illusory" in his statement. Those words were not helpful in the context of *Juan Ysmael*, where the dispute concerned the ownership of a ship. The Privy Council held that the claim of the Republic of Indonesia as the owner of the ship was manifestly defective because the party which had purported to sell the ship to it had no authority to do so; nor was the ship in its (*ie*, the Republic of Indonesia's) possession through a master appointed by the Republic of Indonesia.

40 Earl Jowitt's test has not escaped criticism. In *Rahimtoola* ([36] *supra*), Lord Denning said that the test left many questions unanswered, such as the degree of proof that was needed to assert state immunity. In our view, the test is so vague outside the context of claims to title to tangible property that Earl Jowitt could not have intended it to apply to intangible property, such as debts or trust funds or moneys held in escrow. Its inadequacy in the present case is quite evident. Here, the Funds were held in escrow subject to the fulfilment of a specific condition (*ie*, the Escrow Condition). The Appellant claims ownership of the Funds on the ground that the Escrow Condition had been fulfilled in its favour, but this claim is contested by the Respondents. Moreover, the High Court has already allowed the adverse claims of PNB (the original account holder and the escrow agent) and the Respondents to be interpleaded. The Appellant did not intervene at that time to assert immunity

on the ground that it was indirectly impleaded by the claims of the Respondents, which it could have done. The application of the *Juan Ysmael* test to stay the interpleader proceedings without the court determining whether the Escrow Condition has been fulfilled would merely put the cart before the horse. It would simply leave the claim of the Appellant to the Funds undetermined and indeterminable so long as the Appellant refuses to submit to the jurisdiction of the Singapore courts to prove its claim conclusively. This would, in turn, leave the disposal of the Funds hanging in the air. These undesirable consequences must create a doubt as to whether, as a matter of legal policy, the *Juan Ysmael* test should be applied to a case like the present.

41 In our view, having regard to the circumstances in this case, the *Juan Ysmael* test should not be applied in the present case for the policy considerations we have outlined in the preceding paragraph. The Judge could and should have decided the threshold issue of whether the Forfeiture Order fulfilled the Escrow Condition as that question must be answered in the affirmative before the Appellant has a basis to stay the interpleader proceedings to begin with. This is a threshold issue and not an issue to be left to the interpleader proceedings proper. In our view, the Judge was in error in deciding that this was a substantive issue to be decided only in the substantive proceedings should the parties proceed further with the Interpleader Summons. The real consequence of the Judge's holding that the Appellant was entitled to assert state immunity without the question of whether the Forfeiture Order fulfilled the Escrow Condition being determined is that the issue would never be decided had the court not found that the Appellant had submitted to its jurisdiction as, in the absence of such a finding, the interpleader proceedings would simply have been stayed. The Respondents would have been completely shut out from proceeding with their claims to the Funds without really knowing whether, under Singapore law, the Forfeiture Order was binding on or enforceable against them, or had any legal effect on the status of PNB as the escrow agent – in other words, without knowing whether the Escrow Condition had been satisfied.

42 The critical issue in the Stay Application is whether the Appellant has a sufficient interest in the Funds to assert state immunity so as to stop the Respondents from interfering with its title to or its possession or control of the Funds. The Appellant certainly has an arguable claim by virtue of the Forfeiture Order. But, since the legal effect of the Forfeiture Order on the status of the escrow is challenged by the Respondents under Singapore law, the Appellant's claim remains only an arguable one until the dispute is decided by the court. The Appellant has argued that whether or not the Forfeiture Order is binding on the Respondents or enforceable with respect to the Funds is irrelevant as it is not enforcing that order. But, that argument is premised on PNB being in possession and/or control of the Funds for the account of or on trust for the Appellant on the basis that the Escrow Condition has been satisfied[note: 5] – which again brings us back to the threshold issue.

43 Having regard to the circumstances of this case, we are of the view that the *Juan Ysmael* test is not appropriate in the present case and that it should not be applied. Whether or not the Escrow Condition has been satisfied so as to enable the Appellant to claim that PNB is now holding the Funds for its account or on trust for it is a threshold issue, and not a substantive issue to be decided in the interpleader proceedings. Ironically, our conclusion that the question of whether the Forfeiture Order fulfilled the Escrow Condition is a threshold issue is supported by the Appellant's objective in including Prayer 2 in the Stay Application. The Appellant has explained that if the court were to accept its arguments and stay the interpleader proceedings, the court must release the Funds to the Appellant as a matter of course as there would be nothing left to litigate. In other words, the Appellant is effectively asserting immunity on the ground that it is entitled to the beneficial interest in or ownership of the Funds, with such entitlement resting on the basis that the Forfeiture Order fulfilled the Escrow Condition and not merely on the basis that the Appellant's claim to the Funds was not illusory.

44 In the light of our conclusions at [41]–[43] above, the next question is whether we should remit the case to the Judge to decide the threshold issue of whether the Appellant is the beneficial owner of the Funds under Singapore law. In connection with this question, it is necessary to recall that the Judge also decided that, on the evidence, the Appellant had submitted to the jurisdiction of the court through PNB as its agent as well as through its own action in including Prayer 2 as part of the Stay Application (see [25] above). In our view, upon which we will elaborate later, the evidence does not show that PNB was or acted as an agent of the Appellant in the interpleader proceedings, whether by making a claim to the beneficial interest in the Funds or otherwise. As for Prayer 2, it is not necessary for us to disagree with the Judge's finding that it constituted a step in the proceedings (and thus, a submission to the jurisdiction of the Singapore courts) as we are of the view that the Stay Application as a whole was a step in the proceedings, albeit made under the label of a stay application. As such, regardless of how the above threshold issue is decided, a stay of the interpleader proceedings would not be appropriate on the facts of this case.

45 However, we should add that our main ground for not remitting the threshold issue to the Judge for determination is that, in our view, the doctrine of state immunity should not be extended to a case like the present at all. There are two distinct features in this case that make it fall outside the established parameters of the doctrine. The first is that the property concerned, *ie*, the Funds, is in the nature of a debt or chose in action which is in the hands of a third party, *viz*, PNB as the escrow agent. The second is that the competing claims to the Funds have been interpleaded and the Funds are under the control of the court. Apropos these issues, the Respondents have argued that sovereign immunity is not applicable to property which is not in the possession and/or control of the sovereign state but in the hands of a third party against whom conflicting claims have been made, and that the Appellant does not have a recognisable interest in the Funds. Both issues overlap to the extent that they involve the same legal and policy considerations. In our view, there are merits in the Respondents' arguments on both issues, which we will now address.

(1) Does sovereign immunity apply to property in the hands of a third party?

46 We earlier stated (at [37] above) that the doctrine of sovereign immunity is not absolute. This is confirmed by the Privy Council in *Sultan of Johore* ([33] *supra*). We also referred (likewise at [37] above) to judicial statements that this doctrine should not be extended unnecessarily. With respect to the present case, no authority has been cited to us which shows that a sovereign state has previously been held to be entitled to assert immunity in proceedings involving property that is in the possession or control of a third party who is not an agent or a trustee of that state. The existing case law shows that in all the cases where the court ordered a stay of proceedings on an assertion of sovereign immunity, the sovereign state in question was in possession and/or control of the property which was the subject matter of the proceedings through an agent or a trustee. In *The Cristina* ([35] *supra*), Lord Maugham said at 516–517:

> There is, I think, neither principle nor any authority binding this House to support the view that the mere claim by a Government or an ambassador or by one of his servants would be sufficient to bar the jurisdiction of the Court, except in such cases as ships of war or other notoriously public vessels or other public property belonging to the State. ...
>
> The result so far, in my opinion, is that whilst in this country no action can be brought against a foreign Government or its accredited representative or persons who may be described as belonging to his suite, *still, if the foreign Government … wishes to recover property in the hands of some third party, an action must be brought in the usual way and there must therefore be a submission to the jurisdiction up to the judgment.* … If the foreign Government wishes to recover property in this country, I am of opinion that it must, subject to certain exceptions, prove its

case. If it is, rightly or wrongly, in possession of property in this country, no action can be brought against it by persons claiming title to or any interest in such property.

[emphasis added]

In a similar vein, in the English Court of Appeal decision of *Haile Selassie v Cable and Wireless, Limited* [1938] Ch 839 ("*Haile Selassie*"), Sir Wilfred Greene MR said at 844–845:

> The rule applies in the case both of actions in personam and of actions in rem. But it has never been extended to cover the case where the proceedings do not involve either bringing the foreign sovereign before the Court in his own person or in that of his agent or interfering with his proprietary or possessory rights in the event of judgment being obtained. Where it is either admitted or proved that property to which a claim is made either belongs to, or is in the possession of, a foreign sovereign, or his agent, the principle will apply. *But where property which is not proved or admitted to belong to, or to be in the possession of, a foreign sovereign or his agent is in the possession of a third party, and the plaintiff claims it from that third party, and the issue in the action is whether or not the property belongs to the plaintiff or to the foreign sovereign, the very question to be decided is one which requires to be answered in favour of the sovereign's title before it can be asserted that that title is being questioned. … It would be a strange result if a person claiming property in the hands of, or a debt alleged to be due by, a private individual in this country were to be deprived of his right to have his claim adjudicated upon by the Courts merely because a claim to the property, or the debt, had been put forward on behalf of a foreign sovereign.* [emphasis added]

47 In *Rahimtoola* ([36] *supra*), Viscount Simonds, who delivered the leading judgment, referred to *Haile Selassie* and approved the correctness of the law as stated therein by the English Court of Appeal, but he neither approved nor disapproved of the way the court had applied the principle. He said, at 394–396 of *Rahimtoola*:

> Much stress has been laid on the fact that [the government of Pakistan] has not asserted a beneficial interest in the fund [in dispute]. But why should it? It is not concerned to admit, assert or deny. It has the legal title, which cannot be displaced except by litigation which it is entitled to decline. It rests on the principle, the statement of which I take from the judgment of the Court of Appeal in *Haile Selassie v. Cable and Wireless Ltd.* just because the [Nizam] particularly relied on that case: "If property locally situate in this country is shown to belong to, or to be in the possession of, an independent foreign sovereign, or his agent, the courts cannot listen to a claim which seeks to interfere with his title to that property, or to deprive him of possession of it." It is true that in that case [*ie*, *Haile Selassie*] the court did not decline to adjudicate on the claim of a foreign sovereign State: it did so on the ground that, as there stated, "in the case of a debt such as that with which we are concerned there can be no question of possession or control and the title to it is the very thing which stands to be established or not to be established in these proceedings." Your Lordships are not concerned to consider whether the principle, which was there correctly stated, was also there correctly applied. In the present case its application does not appear to me to be in doubt. The property in dispute is situate in this country. I say that because it is, for many purposes, necessary to ascribe a situation to a chose in action which physically has none, and, for the purpose of this doctrine, no other situation can be ascribed to it than the place in which it can be sued for and enforced. A suit by a third party, the Nizam, is calculated and intended to interfere with the title of Rahimtoola and his principals, the Government of Pakistan, and with their possession or control of their property. It can only be maintained if the Government of Pakistan take a course which their sovereign dignity entitles them to reject and descend into the arena. I have used the words "possession or control"

because they are the words used in the statement of principle that I have adopted. It may be said that "possession" is not an apt word in connexion with a chose in action, but it seems to me that the two words, whether used together or separately, are apt to describe the relation in which an owner stands to the property which he owns.

48 On the other hand, Lord Reid said (see *Rahimtoola* at 402) that the italicised passage from Sir Greene MR's judgment in *Haile Selassie*, which we had referred to earlier (at [46] above), must be read in the light of the decisions in *Dollfus Mieg* ([36] *supra*) and *Juan Ysmael* ([24] *supra*). Lord Cohen merely said in *Rahimtoola* (at 409) that the case before him did not resemble *Haile Selassie*. But Lord Somervell of Harrow, in a very short speech in the same case (see *Rahimtoola* at 410), expressed his disagreement with Lord Maugham's statement in *The Cristina* (see [46] above), which was cited with approval by the English Court of Appeal in *Haile Selassie*, that in the type of cases Lord Maugham had referred to, the sovereign state must prove its title. Lord Somervell was of the view that all that the sovereign state had to do was to establish an "arguable" (*Rahimtoola* at 410) case to assert immunity. It should be noted, however, that Lord Somervell also expressed his agreement with Lord Reid's view (as stated at 404 of *Rahimtoola*) that the suit against Rahimtoola should be stayed as Rahimtoola had the legal title to and possession of the money in question on behalf of Pakistan and that, in order to succeed, the Nizam would have to displace the legal title and the right of the state of Pakistan to recover that money. As this would directly implead Pakistan, the Nizam's claim should not be allowed to proceed.

49 As for Lord Denning, he said in *Rahimtoola* at 415–416:

> It has sometimes been supposed that there is an absolute rule that a foreign Government cannot be impleaded in our courts in any circumstances, and, as a corollary, that it cannot be asked to come to our courts to litigate about its interest in property. That is supposed to be the result of Dicey's rule and Lord Atkin's two set propositions. But there are difficulties in it. To begin with, the rule about "not impleading a foreign Government" is by no means universal or absolute, as I will show. In the next place, the rule about "property" only applies, I think, to property which plainly or admittedly belongs to a foreign sovereign, or plainly or admittedly is in his possession or control. It is not appropriate in cases such as the present where the question "To whom does this debt belong?" "Whose property is it?" is the very question which has to be decided in the action. It cannot also be the question which has to be decided on a summons to stay. It is obvious that, if that is the question to be decided by the courts, it ought to be decided at the trial – or, at any rate, at *a* trial – after full discovery and examination of witnesses, instead of being done imperfectly at this preliminary stage with no discovery and on insufficient materials. Lord Maugham was of that opinion. He thought the foreign Government ought to *prove* its title. But if that is to be done, there is no point in a stay. You might as well have the trial anyway. [emphasis in original]

50 Lord Denning next proceeded to ask himself the question: What was the alternative? He referred to *Juan Ysmael*, where the Privy Council rejected Scrutton LJ's statement in *The Jupiter* [1924] P 236 that a bare assertion by a sovereign state of its title to or interest in disputed property was sufficient to invoke state immunity as that proposition, if adopted, would carry the doctrine of state immunity to the extreme. At the same time, Lord Denning expressed strong misgivings about the vagueness of the *Juan Ysmael* test. He questioned why the evidence adduced by the state as proof of its claim to the disputed property could not be displaced by the adverse claimants in the same proceedings and, if the adverse claimants did so, whether the sovereign state would still be entitled to a stay. These comments are particularly appropriate and relevant to the present case, where the Respondents have argued that they had displaced the Appellant's "not merely illusory" claim to the Funds by showing that the Forfeiture Order was not final and binding on them in a court in Singapore.

After surveying the imprecise state of English law on sovereign immunity, Lord Denning said at 417–418 of *Rahimtoola*:

> Such are the difficulties in the existing rules. I can see no satisfactory answer to them. They are so great that I think we should go back and look for the principles which lie behind the doctrine of sovereign immunity. Search as you will among the accepted sources of international law and you will search in vain for any set propositions. There is no agreed principle except this: that each State ought to have proper respect for the dignity and independence of other States. Beyond that principle there is no common ground. It is left to each State to apply the principle in its own way, and each has applied it differently. Some have adopted a rule of absolute immunity which, if carried to its logical extreme, is in danger of becoming an instrument of injustice. Others have adopted a rule of immunity for public acts but not for private acts, which has turned out to be a most elusive test. All admit exceptions. There is no uniform practice. There is no uniform rule. So there is no help there.
>
> Search now among the decisions of the English courts and you will not find them consistent. They seem to have different rules about "property" according to the subject-matter. On the one hand, there are the cases about ships and other specific chattels. In these cases the courts have tended to apply the rule of absolute immunity. This rule was formed in the days when no action lay against the sovereign in any circumstances. It was thought to offend the dignity of a sovereign and to impinge on his independence if his subjects were allowed to sue him in his own courts. Likewise if he were sued in the courts of another country. Proper respect for sovereign power therefore required that a sovereign should not be impleaded, directly or indirectly, in the courts of his own or any other country without his consent. These cases have received a check lately by the case of *Sultan of Johore* v. *Abubakar Tunku Aris Bendahar*, where the Privy Council rejected the notion that there was any absolute rule about "not impleading a foreign Government."
>
> On the other hand, there are the decisions about trust funds and other debts. These have a modern look about them. It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than by arbitrarily rejecting their jurisdiction. In all civilised countries there has been a progressive tendency towards making the sovereign liable to be sued in his own courts; notably in England by the Crown Proceedings Act, 1947. Foreign sovereigns should not be in any different position. There is no reason why we should grant to the departments or agencies of foreign Governments an immunity which we do not grant our own, provided always that the matter in dispute arises within the jurisdiction of our courts and is properly cognizable by them.

Beginning at 418 of *Rahimtoola*, Lord Denning analysed the decision of the House of Lords in *Dollfus Mieg* ([36] *supra*) to allow Dollfus Mieg to sue BOE for conversion of the 13 gold bars, and held that it was consistent with Chancery decisions regarding trust funds and debts in which the sovereign state had to submit to the jurisdiction of the English courts in order to claim such property. He said, at 419–421:

> The action by the Dollfus Mieg company was allowed to continue against the bank for conversion of the 13 bars. Yet it is obvious that the Sovereign Governments could also bring an action against the bank for conversion of the same 13 bars, and in that action the bank could not dispute the bailor's title. No system of jurisprudence could view with equanimity the prospect of the bank being made liable twice over for one and the same conversion. The bank would have a clear right to interplead by inviting the Sovereign Governments to come in and either to maintain

> or relinquish their claim, or else be barred … The rule about "not impleading a foreign Government" would not be applied so rigidly or so absolutely as to obstruct the justice of that course. ...
>
> … The court cannot allow the fund [*ie*, a trust fund in which a foreign government claims an interest] to lie stagnant for ever because one of the claimants is a foreign sovereign. In such a case, the court does not issue process to the foreign sovereign. It simply gives him notice of the proceedings ... If he, after being given an invitation, does not choose to come to our courts to make good his claim, the court will adjudicate as best as it can in his absence, and he will be bound by the decision. … Likewise with an English debt due in England to a creditor who comes to our courts to enforce it. If a foreign Government wishes to claim the debt, it ought, on being invited, to come to our courts to make good its claim. It cannot ask for the action to be stayed and do nothing more, because that would mean that the debt would remain unpaid for ever, which would be unjust to all others concerned. The creditor's action must therefore be allowed to continue, and in that action the claim of the foreign Government can be adjudicated upon in its absence …

51 Lord Denning accepted that the application of the doctrine of sovereign immunity should not be determined by the finer points of domestic law where there were two lines of inconsistent decisions (in *Rahimtoola*, the inconsistency alluded to by Lord Denning was that set out in the quotation at [50] above, *ie*, the inconsistency between English admiralty decisions, in which the doctrine of state immunity was applied strictly, and Chancery decisions, in which the doctrine was applied less rigidly), and found himself in a dilemma as to whether to disagree with the other law lords, who were in favour of staying the proceedings on the ground that Rahimtoola was holding the money in question for the government of Pakistan. He suggested that the answer lay in looking not at whether conflicting rights had to be decided, but at the nature of the conflict. On that basis, he held (at 423) that the transaction in *Rahimtoola* was in the nature of an inter-governmental transaction, and that that kind of dispute was best solved through inter-governmental negotiations in accordance with international law (citing *The Charkieh* (1873) LR 4 A & E 59).

52 In the present case, the facts are quite different from those in *Dollfus Mieg* and *Rahimtoola*. Both of these cases are distinguishable in that, in both cases, the sovereign states concerned had either possession or an immediate right to possession (which is equivalent to possession in law) of the property in question, the title to which was disputed. Here, the competing claims to the Funds by PNB, as the original account holder and the escrow agent, and by the Respondents have already been interpleaded. The Funds are not in the possession of an agent or a trustee of the Appellant, but in the hands of a third party, *viz*, HE&P, for the credit of the interpleader proceedings and under the control of the court. The essence of interpleader proceedings is that persons who have claims against property held by a third party must make their claims in the relevant proceedings. The court cannot release the disputed property to any claimant without the claimant submitting to the court's jurisdiction and proving its claim. In principle, there would be no reason why, in an appropriate case, a sovereign state may not intervene in interpleader proceedings to stay the proceedings. But, in the present case, if the Appellant claims that it has been indirectly impleaded as regards the Funds, it must be on the basis that the Funds have been vested in it by reason of the Forfeiture Order and that PNB is holding the Funds for its account or on trust for it. In fact, this is the very basis of the Appellant's case in these proceedings. As such, the Appellant should have instructed PNB to object or should itself have intervened to object to the Interpleader Summons and to ask for it to be dismissed. The failure of the Appellant to take those steps has not been explained, but it is, in our view, consistent with the position that either the Appellant or PNB did not then consider that the Funds had vested in the Appellant. The Appellant cannot now make such a claim without also accepting that it had, through PNB, submitted to the jurisdiction of the court in agreeing to be named as a defendant in the Interpleader Summons and in taking a large number of steps in the proceedings within the

meaning of s 4(3)(*b*) of the SIA, such as making interlocutory applications (including SIC 4231/05) and filing affidavits.

53 Having regard to the circumstances of this case, we are of the view that the doctrine of sovereign immunity should not be extended to a case involving debts or choses in action in the possession or control of a third party in respect of which the claimant state has yet to prove its ownership. We agree with Lord Maugham's statement in *The Cristina* at 516–517 (see [46] above) on this point, and distinguish Lord Somervell's contrary view (see [48] above) on the ground that PNB originally had the legal title to the Funds (and still retains it through HE&P) and is entitled to recover the Funds in the event that the Respondents fail to prove a better title to or interest in the Funds. In the circumstances, the Appellant cannot claim that it has been indirectly impleaded with respect to the Funds until and unless it proves that the Forfeiture Order has vested in it the title to the Funds under Singapore law; that, in turn, depends on whether the Forfeiture Order is binding on and enforceable against PNB and the Respondents under Singapore law. And, if the Appellant contends, as it has done (see [21] above), that it had possession and/or control of the Funds through PNB (*ie*, the Appellant alleges that PNB was holding the Funds for its benefit on the basis that the Escrow Condition had been satisfied), then the Appellant should have directed PNB to assert immunity, or the Appellant on its own should have asserted immunity in the Interpleader Summons and asked for it to be dismissed.

54 We would add that even on the test propounded by Lord Denning, *ie*, whether the transaction here is of an inter-governmental nature (see [51] above), we would answer "No" to the question of whether sovereign immunity could be asserted in the present case. The original transactions between the Swiss authorities and the Appellant were of an inter-governmental nature. However, the Swiss authorities did not release the Funds to the Appellant on the basis that the Appellant had title to the Funds. Instead, they released the Funds on the condition that the Funds should be held in escrow until a final and binding decision by the courts of the Philippines in the form of either a restitutionary or a forfeiture order. A restitutionary order in favour of the Appellant would imply that the Funds were previously owned by the Appellant, whereas a forfeiture order would simply signify that the Funds were the ill-gotten gains of the late Ferdinand Marcos and Imelda Marcos, but not necessarily gains derived from the Appellant itself. In the circumstances, it cannot be said that as between the Appellant and the Respondents, the dispute as to the ownership of the Funds was of an inter-governmental nature.

55 In the circumstances and for the reasons given above, we are satisfied that the Stay Application is ill-founded and should be dismissed. There is no reason to extend the doctrine of sovereign immunity to a case like the present where staying the proceedings would create more problems for every party, including the Appellant itself, than it solves.

(2) Does the Appellant have a recognisable interest in the Funds?

56 We turn now to the question of whether the Forfeiture Order confers on the Appellant a recognisable interest in the Funds insofar as that order is evidence that the Appellant's claim to the Funds is "not merely illusory". Should this be treated as a sufficient basis to stay the interpleader proceedings?

57 In our view, the answer to the above question is "No". In the present case, the Appellant was fully aware that its reliance on the Forfeiture Order's legal effect on the Funds under Singapore law as the basis of its claim to title to those moneys was contested by the Respondents. Until this disputed issue is settled, PNB would still hold the Funds as the escrow agent pending a ruling by our courts as to whether the Forfeiture Order satisfied the Escrow Condition. If the court were to stay

the interpleader proceedings on the basis that the Appellant's claim founded on the Forfeiture Order is "not merely illusory", the Respondents would, as we pointed out earlier (at [40]–[41]), be precluded from proceeding with their claims to the Funds without the Appellant having proved or having to prove its alleged ownership of those funds. In our view, there are overriding considerations of justice and policy to reject such an outcome.

58 The first consideration is that a stay of the interpleader proceedings in such circumstances would give rise to injustice to the Respondents (see, in this regard, Lord Denning's statement in *Rahimtoola* ([36] *supra*) at 419–421, which is reproduced at [50] above).

59 The second consideration is that if the Appellant decides not to proceed further to prove its claim, the Funds will remain in the possession of HE&P and under the control of the court indefinitely. There will be no finality to the proceedings (which is contrary to public policy) until and unless the Appellant decides to submit to the jurisdiction of the Singapore courts to prove its claim (see also [40] above). No one benefits from this stalemate, not even the Appellant as it will not be able to obtain the release of the Funds of which it claims, but declines to prove, ownership. This is not a result that any court will accept with equanimity, even taking into account the doctrine of state immunity. It is only just and in conformity with the public policy of Singapore that the Appellant should submit to the jurisdiction of our courts if it wishes to claim the Funds on the basis that it has a beneficial interest in them. As Lord Denning stated in *Rahimtoola* at 420–421 in the context of an English debt due in England to a creditor who sought to enforce that debt in the English courts:

> If a foreign Government wishes to claim the debt, it ought, on being invited, to come to our courts to make good its claim. It cannot ask for the action to be stayed and do nothing more, because that would mean that the debt would remain unpaid for ever [*sic*], which would be unjust to all concerned. The creditor's action must therefore be allowed to continue, and in that action, the claim of the foreign Government can be adjudicated upon in its absence: see *Haile Selassie* … by [Sir] Greene. If the English creditor succeeds and is paid, and the foreign Government should afterwards seek to make the debtor pay twice over, our courts would not permit it. Seeing that the foreign Government had refused to do the debtor the justice of coming in when given the chance, our courts would not permit it "to commit that injustice against him." Those were Lord Eldon's words in *Stevenson* v. *Anderson* [(1814) 2 V & B 407], a case of interpleader, which Lord Hatherley said [in *Larivière* v. *Morgan* (1871–72) LR 7 Ch App 550] had a great analogy. And if the foreign Government should seek to sue the debtor in any foreign court, I would assume, as Lord Hatherley did, "that the courts of all countries would recognize the decision of a court of competent jurisdiction in a country where the property was situated, and where the rights were properly to be tried."

In our view, the Stay Application should also have been dismissed on this ground.

60 Having regard to our findings, it would technically not be necessary for us to consider issues (b), (c) and (d) referred to at [26] above. However, as the Appellant has devoted its oral pleadings substantially to arguing that the Judge was wrong in his findings on these issues, we will address them in the interest of completeness.

Did PNB submit to the court's jurisdiction as the agent of the Appellant?

61 In the Judgment, the Judge accepted that PNB was the original account holder and also the escrow agent with respect to the Funds. However, he also found as a fact that PNB was and/or had acted as the Appellant's agent in the interpleader proceedings. This meant that PNB, as the first defendant in the Interpleader Summons, was both the original account holder and the escrow agent,

as well as the Appellant's agent in claiming the Funds. The Judge's reasons for concluding that PNB was the Appellant's agent and had acted as such were as follows:

(a) The Judge was of the view that "PNB's participation in the proceedings was at the behest of the [Appellant] pursuant to the authority conferred upon it by [the] PCGG" (see the Judgment at [23]) under Resolution No 2004-Y-001. This resolution authorised PNB to retain certain sums from the Funds "to cover the litigation and administrative costs to be incurred in the *recovery and transfer to the Republic of the Philippines* of the account in the bank in Singapore" [emphasis added by the Judge] (*ibid*).

(b) As such, contrary to the assertion at para 31 of the written submissions filed by PNB on 14 October 2004 for the Interpleader Summons ("WS 31") that *PNB* was "undoubtedly the legal-title holders [*sic*] to the [F]unds as well as *beneficially entitled to the same* as adjudicated by the Swiss courts and the Philippines Supreme Court and the Philippines Supreme Court En Banc" [emphasis added], the Judge found that "[w]hen PNB made a claim for the beneficial interest in the Funds, it *could only be doing that* on behalf of the [Appellant] pursuant to the resolution of the PCGG" [emphasis added] (see the Judgment at [24]).

(c) It followed (at [27]–[28] of the Judgment) that:

> [W]hen PNB submitted to the jurisdiction of this court and claimed a beneficial interest in the Funds, it was doing that as an agent of the [Appellant] acting under the authority vested in it by the PCGG [R]esolution[s].
>
> The [Appellant] has therefore, by its agent PNB, laid its claim before this court and has submitted to the jurisdiction of the court.

62 It is clear from these passages that the Judge construed the PCGG Resolutions as having the effect of appointing PNB as the Appellant's agent to recover the Funds and transfer them to the Appellant. The Appellant's contention is that the PCGG Resolutions were not intended to and did not appoint PNB as the Appellant's agent; nor did the Appellant (or the Escrow Agreement) authorise PNB to assert the Appellant's title to the Funds. The PCGG Resolutions were intended only to reimburse and remunerate PNB for expenses incurred and services rendered as escrow agent in recovering the Funds.

63 On the evidence before us, we agree with the submission of the Appellant. In our view, PNB was never appointed as an agent of the Appellant in connection with the Marcos assets for the following reasons:

(a) The PCGG itself is an agent of the Appellant. As such, it had no authority to appoint an agent (*ie*, PNB) for the Appellant without express authority from the latter: *delegatus non potest delegare*. There is no evidence that the PCGG was conferred such authority.

(b) The words of Resolution No 2004-Y-001 are not apt as words of appointment. When read in the context of the Escrow Agreement and of PNB's role as the escrow agent, it is clear that the resolution was intended to fix the amount of reimbursement and remuneration that PNB would be entitled to deduct from the Funds if and when it succeeded in recovering the Funds from WBL in a Singapore court. Clause 7 of the Escrow Agreement (see [7] above) stated that, *inter alia*, PNB was entitled to reimbursement from the Funds for expenses incurred in any litigation concerning the Funds. If the PCGG had intended to appoint PNB as the Appellant's agent via Resolution No 2004-Y-001, it would have done so expressly, and would not have left it to be

inferred from the words used in that resolution (read with cl 7 of the Escrow Agreement), which addressed a different subject matter, *viz*, the reimbursement and remuneration of PNB as the escrow agent.

(c) There was no reason for PNB to make a claim to the Funds on the Appellant's behalf when PNB itself was in a position to claim the Funds on its (PNB's) own behalf. As the original account holder and the legal owner of the Funds while they were held in accounts at WLB, PNB was in as good a position as the Appellant to recover the Funds from WLB. Any action taken by PNB to recover the Funds for itself would have been done *not on behalf of the Appellant* (which claimed a proprietary interest in the Funds by reason of the Forfeiture Order), but on its (PNB's) own behalf, albeit *for the benefit of the Appellant*.

(d) The appointment of PNB as the Appellant's agent to recover the Funds in the interpleader proceedings would be tantamount to a submission by the Appellant to the jurisdiction of the Singapore courts. There was no reason why, if the Appellant was prepared to submit to jurisdiction in that manner, it did not simply submit to jurisdiction in its own name.

64 A final consideration that undermines the Judge's finding that PNB was the agent of the Appellant in the interpleader proceedings is that if that finding were correct, it would not have been necessary for the Judge to rely on WS 31 as a basis for inferring that PNB was the agent of the Appellant (see the Judgment at [18], [19] and [24]). If this court were to agree with the Respondents that WS 31 itself constituted a sufficient act of submission to jurisdiction, then it would be open to the Respondents to argue that PNB, in its capacity as the Appellant's agent, had taken a large number of steps in the proceedings for the purposes of s 4(3)(*b*) of the SIA. These steps would include the filing of the written submissions of 14 October 2004 itself, the participation in all the interlocutory applications to which PNB was a party and *a fortiori*, crucially, the application in SIC 4231/05 (see [15] above) to stay the interpleader proceedings on the ground of *forum non conveniens*: see Nourse LJ in *Kuwait Airways Corporation v Iraqi Airways Company and Republic of Iraq* [1995] 1 Lloyd's Rep 25 ("*Kuwait Airways*") at 32. Yet, the Respondents have not considered these acts as steps in the proceedings by the Appellant for the purposes of s 4(3)(*b*) of the SIA. Accordingly, it is not open to the Respondents to selectively argue that WS 31 implied that PNB was acting as the agent of the Appellant when they had never taken the view that all the steps taken by PNB in the interpleader proceedings (which we have earlier described at [15]–[17] above) were done as the agent of the Appellant. For the same reason, it is also not open to the HR Claimants to argue that PNB, being only an escrow agent, could not have participated in the proceedings independent of the Appellant's claim.

65 Accordingly, for these reasons, we would disagree with the Judge's finding that the Appellant had appointed PNB as its agent to assert its (the Appellant's) interest in the Funds on its behalf. It follows that PNB had no authority to submit to the jurisdiction of our courts on behalf of the Appellant and, consequently, that the Appellant did not submit to jurisdiction through PNB.

Did PNB claim a beneficial interest in the Funds on behalf of the Appellant?

66 Having regard to the text of WS 31 itself, we have considerable doubts about whether the Judge was right to hold (at [24] of the Judgment) that when PNB claimed a beneficial interest in the Funds, it could only have been doing so on behalf of the Appellant. The relevant words in WS 31 are:

> They [PNB] are the account holders of the funds with the Plaintiffs [*ie*, WLB]. As such, they are entitled to require that the Plaintiffs release the monies to them. They are undoubtedly the legal-title holders [*sic*] to the funds as well as beneficially entitled to the same as adjudicated by the

Swiss Courts and the Philippines Supreme Court and the Philippines Supreme Court En Banc.

The words of claim "entitled to require" in the above passage are referable to PNB's claim that it had the legal title to the Funds as the original account holder. The rest of the passage does not, however, contain words of claim, but rather, words of description of the purported rights of the Philippines itself. In any event, we do not need to come to a conclusion on this point, which is inconsequential in view of our conclusion that PNB did not act as the Appellant's agent in the interpleader proceedings (see [63]–[65] above).

67 Besides, whatever the purport of WS 31 might be, we do not think that the mere filing of the written submissions by PNB on 14 October 2004 constituted making a claim in the interpleader proceedings. The reason is that these written submissions were not filed pursuant to any procedural rule or court order, and were never formally presented as oral arguments before the court. The written submissions were filed by D&N (PNB's former solicitors) in preparation for the hearing of the substantive issues in the Interpleader Summons. But, that hearing never got underway by reason of the filing of the Stay Application by the Appellant. Until these written submissions are pleaded orally or adopted formally as the arguments of PNB, they are not binding on PNB and may be abandoned, changed or withdrawn. In our view, the mere filing of written submissions voluntarily does not amount to making a claim. It would be straining the procedural rules to construe unread written submissions filed in such circumstances as effectively being equivalent in standing to pleadings.

Was Prayer 2 a step in the proceedings for the purposes of the SIA?

68 Before we deal with the facts pertinent to this issue, we should set out the law on what amounts to a step in the proceedings for the purposes of the SIA. Section 4(3)(*b*) of the SIA provides that a state is *deemed* to have submitted to the jurisdiction of the Singapore courts if (subject to ss 4(4) and 4(5), which are not relevant here) it has intervened or taken any step in the proceedings. The question of what is a "step in the proceedings" has been considered by the Singapore courts in the context of arbitration. The Judge referred to and applied the test laid down in *Chong Long Hak Kee Construction Trading Co v IEC Global Pte Ltd* [2003] 4 SLR 499, where Tay Yong Kwang J held at [14] that a step in the proceedings must reflect an "unequivocal, clear and consistent" intention to submit to the jurisdiction of the court. Tay J's decision is in line with English decisions on the same expression in similar English statutes.

69 The same issue (*viz*, what constitutes a step in the proceedings) in the context of state immunity was judicially considered in the context of the State Immunity Act 1978 (c 33) (UK) in *Kuwait Airways* ([64] *supra*). That case arose out of the invasion of Kuwait by Iraq in 1990, in the midst of which the Iraqi Airways Company ("IAC") flew ten civilian aircraft owned by the Kuwait Airways Corporation ("KAC") to Iraq on the instructions of an Iraqi minister. KAC subsequently issued a writ against IAC and the Republic of Iraq, claiming, *inter alia*, the delivery of the surviving aircraft and consequential damages. In its defence, IAC argued that it was immune from the jurisdiction of the English courts because its acts were done in the exercise of sovereign power. KAC in turn contended that if IAC were immune, the latter had lost its immunity by submitting to the jurisdiction of the English courts when it filed a summons seeking a declaration, on the basis of *forum non conveniens* (see [70] below), that the court had no jurisdiction over it. In rejecting KAC's contention, the court in *Kuwait Airways* stated the following principles (at 31–32):

(a) A defendant who does no more than claim immunity takes no step in the proceedings (*eg*, where a defendant serves a defence in which the only claim made is that of state immunity, even though the service of a defence would usually constitute a step in the proceedings).

(b) A step in the action must be unequivocal and must be done with the knowledge of the material consequences (adopting Lord Denning MR's formulation of a "step in the proceedings" in *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 at 361, an arbitration case).

70 The court in *Kuwait Airways* then went on to analyse the implications of IAC's assertion of immunity and its reliance on *forum non conveniens* as part of its argument, and said as follows (at 32):

> No doubt a defendant who seeks a stay on the ground of forum non conveniens will usually take a step in the proceedings. But it is not correct to say that IAC has sought a stay on that ground here. If regard is had to the summons of Aug. 2, 1991 and the affidavits in support, it is seen that the only material relief claimed is a declaration that the Court has no jurisdiction over IAC in respect of KAC's claim and that the claim is not justiciable in the Courts of England and Wales. The only reference to forum non conveniens is in the statement of the grounds of the application. Nowhere is the action sought to be stayed. *Reading the summons and the affidavits as a whole, I think it clear that "forum non conveniens" is advanced only as a ground for holding that there is no jurisdiction. No doubt what is actually being said, correctly as I think, is that a municipal Court has no jurisdiction to determine what is in reality a dispute of international law. In any event, it cannot possibly be maintained that IAC, by making such a case, is affirming the correctness of the proceedings or its willingness to go along with their determination by the English Courts. It is doing exactly the opposite.* [emphasis added]

The court accordingly concluded that IAC had not taken a step in the proceedings and therefore had not, nor was it deemed to have, submitted to the jurisdiction of the English courts. It should be noted that in *Kuwait Airways*, IAC did not apply to stay the proceedings on the ground of *forum non conveniens.* If IAC had done so, the court would have held that the former had taken a step in the proceedings.

71 The Appellant argued before both the Judge and this court that Prayer 2 was not, and was not intended to be, a step in the proceedings; rather, it was a prayer for relief which would naturally follow if the court were to stay the interpleader proceedings. In other words, it was purely a consequential and necessary order to a stay order.

72 Paragraph 11 of the skeletal arguments which the Appellant filed on 26 July 2007 for this appeal states as follows:

> It [*ie*, Prayer 2] is a necessary consequence that in the event that the Court finds in favour of the Appellant and grants a stay on the basis of the Appellant's immunity over the Funds, the Court must order the release of the Funds, which is held at its disposal. If the Court does not allow prayer 2 or 4 of the Stay Summons for the release of the Funds, the Funds will remain indefinitely with [HE&P]. There is a clear need for the relief sought in prayer 2 or 4.

The premise in this argument is that if the court stays the proceedings, it would be on the basis that the Appellant has proved its title to the Funds, and hence, the release of these funds to the Appellant would be a natural consequence of such a finding. In such a situation, there would be nothing left for the court to do but to release the Funds to the Appellant and bring finality to the proceedings; otherwise, as the Appellant has argued in the passage quoted above, the Funds would remain with HE&P indefinitely.

73 The Judge rejected these arguments and held (at [33] of the Judgment) that Prayer 2

amounted to a submission to the jurisdiction of the Singapore courts because a request to the court to release the Funds to the Appellant would require the court to:

> … consider the claims put forth by the [Appellant] and the other claimants, and be satisfied that the Funds should be released to the [Appellant] rather than to the other defendants. The court cannot do that without assuming jurisdiction over the dispute and the parties. The [Appellant], by asking the court to make that order, must necessarily be submitting to the jurisdiction of the court.

74 At [46] of the Judgment, the Judge also said, with reference to the argument that Prayer 2 was a consequential prayer ancillary to the determination of the Appellant's immunity:

> By endowing the prayer with the nature of a consequential, ancillary and necessary prayer, it is clear that the [Appellant] has intended that the prayer for the release of the Funds was to be proceeded with even if the claims of the ... Respondents were stayed. This was not a fallback step taken in the contingency that the proceedings are not stayed. Even assuming that it is correct for the [Appellant] to take the position that because the Funds are being held at the disposal of the court, the court must order their release, it does not mean that the court should order their release to the [Appellant]. If the [Appellant] does not submit to the jurisdiction, it should not want the court to make any order affecting it, save in connection to its assertion of state immunity, and it should not apply for an order that the Funds be released to it.

In the result, the Judge found that Prayer 2 was a step in the proceedings under s 4(3)(*b*) of the SIA, and that it remained so even after it had been withdrawn by the Appellant (see [23] above) for the reason that the step had already been taken.

75 In the present appeal, the Appellant contended that the Judge was wrong in holding Prayer 2 to be a step in the proceedings when its purpose in the Stay Application was to assert immunity. In its rebuttal submissions filed on 16 October 2006 for the Stay Application, the Appellant, after citing *Kuwait Airways* ([64] *supra*) and *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] SLR 168, submitted[note: 6] that Prayer 2:

> ... does not evidence a willingness by the [Appellant] to submit to the first kind of jurisdiction. … It is apparent that the application is made solely in the context of [the] application pertaining to State Immunity, and not to a determination of the merits[.]

76 The reference in the above quotation to "the first kind of jurisdiction" is a reference to the speech of Lord Fraser of Tullybelton in *Williams & Glyn's Bank Plc v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438, where his Lordship drew a distinction between two types of jurisdiction in stay applications, namely: (a) the jurisdiction to decide a case on its merits ("the first kind of jurisdiction"); and (b) the jurisdiction to decide whether the court has the first kind of jurisdiction ("the second kind of jurisdiction"). At 442–443, Lord Fraser said:

> It was further contended on behalf of the appellants that the respondents either had waived any objection to the jurisdiction because they had taken a step in the action by applying for a stay, or that they would waive any objection if they persisted with their application in priority to disputing the jurisdiction. My Lords, it would surely be quite unrealistic to say that the respondents had waived their objection to the jurisdiction by applying for a stay as an alternative in the very summons in which they applied for an order giving effect to their objection to the jurisdiction. That summons makes it abundantly clear that they are objecting, and the fact that they ask for a decision upon their objection to be postponed until the outcome of the Greek

> proceedings is known is not in any way inconsistent with maintaining their objection. I can see no reason in principle or common sense why the respondents should not be entitled to say: "We object to the jurisdiction of the English courts, but we ask for the proceedings necessary to decide that and the other issues to be stayed pending the decision of the proceedings in Greece."
>
> … By entertaining the application for a stay in this case, the court would be assuming (rightly) that it has jurisdiction to decide whether or not it has jurisdiction to deal with the merits, but would not be making any assumption about its jurisdiction to deal with the merits.

On the basis of this passage, counsel for the Appellant contended that the Stay Application was an application involving the second kind of jurisdiction only, and not the first kind of jurisdiction, and that the meaning of Prayer 2 should therefore be considered in that light.

77 As we noted at [73] above, the Judge declined to consider the meaning of Prayer 2 in that light and rejected these arguments. In the light of the Judge's reliance on the *Juan Ysmael* test to hold that the Appellant's claim to the Funds, not being illusory, was sufficient to stay the interpleader proceedings (see [25] above), it is understandable why the Judge had to construe Prayer 2 as invoking the court's jurisdiction to release the Funds to the Appellant. The Judge's logic in dismissing the Stay Application despite finding that the Appellant's claim to the Funds was not merely illusory required that some meaning or purpose be given to Prayer 2, and that could only be to require the court to adjudicate on the merits of the Appellant's claim and thereafter release the Funds to the Appellant.

78 The Appellant's contention before us was essentially that the Judge had misunderstood its argument on the purpose of Prayer 2. The Stay Application, so it was argued, was premised on the court finding that the Funds belonged to the Appellant by virtue of the Forfeiture Order, and not on the finding that the Appellant's claim to the Funds was not illusory. The Appellant, so counsel submitted, intended Prayer 2 to have a facilitative role, and not a destructive role.

79 In our view, the Appellant's approach or argument is founded on a fallacy and a misunderstanding of the nature of a stay application. Prayer 2 is not and cannot be a consequence of an order of court to stay the proceedings. It is the very antithesis of such an order. As the Judge observed, a stay is a stay, and its only consequence is the suspension of all pending claims in the proceedings in question. What is abundantly clear, as the Appellant has admitted, is that the Appellant wanted the Funds to be released to it under Prayer 2 (or, after the withdrawal of Prayer 2, under prayer 4 of the Stay Application).

80 The Appellant might have avoided the fatal effect which Prayer 2 had on the Stay Application if it had intended the prayer to operate only if the court found that it was the owner of the Funds, but not otherwise. Prayer 2 would then simply not have become operational in the event of the court ruling against the Appellant on the issue of ownership. The conditionality of Prayer 2 in such a scenario would have provided a credible explanation to what now appears to be inexplicable irrationality and self-destructiveness on the part of the Appellant in framing the Stay Application to include Prayer 2. The Judge might even have accepted the argument just posited (*ie*, that Prayer 2 was to operate only upon a ruling in favour of the Appellant *vis-à-vis* the issue of ownership of the Funds) and construed Prayer 2 in that light. However, since the Appellant denied that Prayer 2 was meant to have this conditional effect, the Judge was left with the construction that Prayer 2 meant what it said. In our view, Prayer 2 was always intended to invoke the jurisdiction of our courts to release the Funds to the Appellant *irrespective of why (ie, the grounds on which) the interpleader proceedings were to be stayed, so long as those proceedings were stayed.* On the Appellant's own

explanation, even if the Judge had decided to stay the interpleader proceedings on the basis that the Appellant had proved its title to the Funds, it would still have invoked Prayer 2 to request the court to release the Funds to it. Accordingly, we find as a fact that the Appellant had always intended to take a step in the proceedings.

81 The effect of treating Prayer 2 as independent of prayer 1 of the Stay Application may be considered from another perspective. When the Appellant filed the Stay Application, it was aware that the Funds were under the control of the court for the credit of the proceedings (*ie*, they would only be released to the claimant(s) found by the court to be entitled thereto). The problem which the Appellant had to overcome in order to achieve its ultimate objective of securing the release of the Funds was to find a way to procure such release without submitting to the jurisdiction of the Singapore courts. The Appellant considered that the solution lay in asserting state immunity in a stay application. In other words, the Stay Application was merely a pretext to persuade the court to release the Funds. From this perspective, and given the Appellant's ultimate objective, the Appellant had always intended the court to consider the merits of its claim to the Funds.

Summary of our findings

82 In summary, we find as follows:

(a) A sovereign state is not entitled to invoke the doctrine of state immunity in a case involving claims to debts or choses in action that are in the hands of a third party which is not an agent or a trustee of the state, and especially where, as in the present case, the disputed assets are held in escrow by the third party for the credit of the proceedings.

(b) On the facts of this appeal, the *Juan Ysmael* test is not sufficient as a test for determining whether or not the Appellant is entitled to assert immunity to the interpleader proceedings. This is because although the Appellant's claim to the Funds based on the Forfeiture Order is "not merely illusory", the legal effect of that order under Singapore law is disputed by the Respondents. If a stay were to be granted merely on the basis that the Appellant has satisfied the *Juan Ysmael* test, it would have the effect of leaving the threshold issue of whether the Forfeiture Order fulfilled the Escrow Condition undecided, and the Funds would remain in the control of the court indefinitely. This would be unjust to third party claimants (such as the Respondents) and is contrary to the public policy that there should be finality in court proceedings. (The Judge could have decided the above threshold issue, but he declined to do so and the Appellant has not appealed on this ground.)

(c) PNB did not act as the Appellant's agent in the interpleader proceedings, and therefore the Appellant could not have submitted to the jurisdiction of the court via PNB.

(d) Prayer 2, in seeking the release of the Funds to the Appellant, was a step in the proceedings for the purposes of s 4(3)(*b*) of the SIA, and therefore amounted to a submission to the jurisdiction of the court. In any event, the Stay Application, construed as a whole, had the effect of a submission to the jurisdiction of the court.

Conclusion

83 On the basis of the above findings, we dismiss the appeal. As the Appellant has succeeded on issues (b) and (c) as set out at [26] above but failed on issues (a) and (d), we order that it bear 50% of the costs of the Respondents in the appeal, with the usual consequential orders.

[note: 1]See section 1 of the Executive Order dated 28 February 1986.

[note: 2]See para 2 of the court order dated 24 March 2004.

[note: 3]See para 5 of the affidavit of the Philippines Ambassador to Singapore dated 8 March 2006.

[note: 4]See para 43 of the Appellant's skeletal arguments dated 26 July 2007.

[note: 5]See paras 43–44 of the Appellant's skeletal arguments dated 26 July 2007.

[note: 6]At para 19 of the Appellant's rebuttal submissions.