Her Majesty's Revenue & Customs *v* Hashu Dhalomal Shahdadpuri and another [2011] SGHC 22

Case Number	: Suit No 355 of 2010 (Summons Nos 2437, 2554 and 2559 of 2009)
Decision Date	: 25 January 2011
Tribunal/Court	: High Court
Coram	: Andrew Ang J
Counsel Name(s)	: Andre Maniam SC, Lim Wei Lee and Sim Hui Shan (WongPartnership LLP) for the plaintiff; Surenthiraraj s/o Sauthararajah, James Lin Zhurong and Sunil Nair (Harry Elias Partnership) for the first defendant; Chopra Sarbjit Singh (Lim & Lim) for the second defendant.
Parties	: Her Majesty's Revenue & Customs — Hashu Dhalomal Shahdadpuri and another

Conflict of Laws – Characterisation – Revenue rule – Law applicable to the characterisation process – Enforcement of foreign revenue law

Civil Procedure – Pleadings – Striking out pursuant to O 18 r 19 and inherent jurisdiction of the court – Application of the plain and obvious threshold

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 220 of 2010 was allowed by the Court of Appeal on 27 May 2011. See [2011] SGCA 30.]

25 January 2011

Andrew Ang J:

Introduction

1 The plaintiff obtained a worldwide Mareva injunction against the defendants in England. Thereafter, the plaintiff commenced simultaneous proceedings in Singapore and Hong Kong against the defendants. The plaintiff claimed that the defendants were involved in an unlawful conspiracy to defraud the plaintiff through what is known as missing trader intra-community fraud ("MTIC fraud"). The plaintiff (alternatively referred to as "HMRC") is, amongst other things, responsible for collecting, accounting for, and otherwise managing, the revenue of customs and excise; and the collection and management of value added tax ("VAT") in the United Kingdom ("UK"). The defendants are Singapore residents and are the alleged officers and agents of an Indonesian incorporated company known as "PT Naina Exim Indo" ("PT Naina").

Facts

2 The *modus operandi* of MTIC fraud is as follows:

(a) a trader registered in the UK for VAT imports goods into the UK from a supplier in a member state of the European Union ("EU supplier"). Under Art 28c(A)(a) of Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the member states relating to turnover taxes and s 30 of the Value Added Tax Act 1994 (c 23) (UK), the importer is not required to pay VAT as such imports are zero-rated;

(b) the UK registered importer ("UK importer") sells the goods to another party registered for VAT in the UK, known as a "Buffer". The UK importer charges VAT on the consideration for these sales but the UK importer directs the Buffer to pay the purchase price of the goods together with VAT to a third party ("third party recipient") outside of the UK's jurisdiction;

(c) the UK importer then fails to account to the plaintiff for VAT properly payable ("output VAT");

(d) the Buffer sells the goods directly or via a chain of traders to an exporter ("Exporter") who pays VAT ("input VAT") thereon and then exports the goods out of the UK; and

(e) the Exporter claims reimbursement of the input VAT which he paid on the exported goods from the plaintiff.

3 The plaintiff claimed to have suffered loss in the sum of £40,391,100.01, taking into account the amount of input tax paid by the plaintiff on the reimbursement claims made by the Exporter and the output tax that the UK importer failed to account for. For a substantial number of these transaction chains, the plaintiff admitted that it was not able to identify the full transaction chain connecting the Broker to the UK importer.

4 The relevant third party recipient in the present case is a company incorporated in Denmark, known as "Sunico A/S" ("Sunico"). The plaintiff alleged that several EU suppliers sold to the UK importer goods which they had purchased from Sunico. The UK importer in turn sold the goods to Buffers situated in the UK. Although accountable for output VAT charged for these sales, the UK importer directed the Buffers to make payment for the goods, *together with VAT* to Sunico. The UK importer then defaulted in making payment of output VAT properly payable to the plaintiff.

5 A company incorporated in Indonesia, PT Naina, introduced some of the EU suppliers to Sunico and was paid commission in consideration. The defendants negotiated the commission agreement between Sunico and PT Naina, under which Sunico agreed to pay PT Naina a percentage of Sunico's profits as commission. The plaintiff alleged that the commission payments to PT Naina between October 2002 and July 2006 totalled US$14,764,612. The plaintiff claimed that the commission payments were a "mechanism for the division of the proceeds of MTIC fraud amongst co-conspirators" and that the defendants are jointly and severally liable to the plaintiff in damages for the tort of conspiracy. Seen in its totality, the plaintiff's claim is that the fraudulent conspiracy was to "unlawfully divert monies properly payable to the Plaintiff principally to Sunico and thereafter distributed to its co-conspirators". The plaintiff obtained a Mareva injunction in Singapore against the defendants ("the Mareva injunction"). The defendants applied to strike out the plaintiff's claim under O 18 r 19 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) and the inherent jurisdiction of the court. The defendants also applied to discharge the Mareva injunction.

Issue

6 The defendants contended that the plaintiff's claim for conspiracy was in effect an enforcement of UK revenue law in Singapore and ought therefore to be struck out under one or more of the grounds in O 18 r 19 or under the inherent jurisdiction of the court. The plaintiff argued that its claim was not an enforcement of UK revenue law, whether directly or indirectly but one based on the tort of conspiracy. As such, the issue between the parties was whether the plaintiff's claim was directly or indirectly an enforcement of UK revenue law in Singapore.

Decision

The "revenue rule"

7 There is no dispute that the revenue rule applies if the plaintiff's claim is an enforcement of UK revenue law. The dispute, principally, is as to the *characterisation* of the plaintiff's claim. As such, a short discussion on the revenue rule will suffice. *Dicey, Morris and Collins on The Conflict of Laws*, vol 1 (Sweet & Maxwell, 14th Ed, 2006) ("*Dicey*") at para 5-029 quoted Tomlin J's observation in *In re Visser* [1928] 1 Ch 877 at 884 that:

> ... [T]here is a well recognised rule, which has been enforced for at least 200 years or thereabouts, under which these courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States.

Lord Keith of Avonholm gave the following widely quoted explanation for the revenue rule in *Government of India v Taylor* [1955] AC 491 ("*The Government of India*") (at 511):

> One explanation of the rule thus illustrated may be thought to be that enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an ***assertion of sovereign authority by one State within the territory of another*** , as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all ***concepts of independent sovereignties*** . Another explanation has been given by an eminent American judge, Judge Learned Hand, in the case of *Moore v. Mitchell* [(1929) 30 F (2d) 600, 604], in a passage, quoted also by Kingsmill Moore J. in the case of *Peter Buchanan Ld*. [[1955] AC 516] as follows:
>
> > "While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign State, if they run counter to the 'settled public policy' of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic State. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign State and its own citizens or even those who may be temporarily within its borders. ***To pass upon the provisions for the public order of another State is, or at any rate should be, beyond the powers of the court; it involves the relations between the States themselves, with which courts are incompetent to deal, and which are intrusted to other authorities*** . It may commit the domestic State to a position which would seriously embarrass its neighbour. Revenue laws fall within the same reasoning; they affect a State in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper."
>
> [emphasis added in bold italics]

Lord Somervell of Harrow enunciates the rationale very clearly at 514:

> Tax gathering is an administrative act, though in settling the quantum as well as in the final act of collection judicial process may be involved. Our courts will apply foreign law if it is the proper law of a contract, the subject of a suit. Tax gathering is not a matter of contract but of authority and administration as between the State and those within its jurisdiction. ... it would be remarkable comity if State B allowed the time of its courts to be expended in assisting in this regard the tax gatherers of State A. Once a judgment has been obtained and it is a question only

of its enforcement the factor of time and expense will normally have disappeared. ...

Lord Keith's explanation of the rationale of the revenue rule was endorsed more recently in the English Court of Appeal decision of *Mbasogo and another v Logo Ltd and others* [2007] QB 846 at [40], where it was observed at [41] and [50]:

> 41 ... the courts will not enforce or otherwise lend their aid to the assertion of sovereign authority by one state in the territory of another. The assertion of such authority may take different forms. Claims to enforce penal or revenue laws are good examples of acts done by a sovereign by virtue of his sovereign authority ('jure imperii'). In each case, it is necessary to see whether the relevant act is of a sovereign character. Penal and revenue laws are assumed to be of a sovereign character.
>
> ...
>
> 50 ... The critical question is whether in bringing a claim, a claimant is doing an act which is of a sovereign character or which is done by virtue of sovereign authority; and whether the claim involves the exercise or assertion of a sovereign right. If so, then the court will not determine or enforce the claim. On the other hand, if in bringing the claim the claimant is not doing an act which is of a sovereign character or by virtue of sovereign authority and the claim does not involve the exercise or assertion of a sovereign right and the claim does not seek to vindicate a sovereign act or acts, then the court will both determine and enforce it. As we see it, that was the broad distinction of principle which the court was seeking to draw in the *Emperor of Austria* case 3 De GF & J 217. In deciding how to characterise a claim, the court must of course examine its substance, and not be misled by appearances ...

8 In *Relfo Ltd (in liquidation) v Bhimji Velji Jadva Varsani* [2008] 4 SLR(R) 657 ("*Relfo*"), a decision upheld by the Court of Appeal, Judith Prakash J observed at [55]:

> ... both direct and indirect enforcement of a foreign state's revenue laws are prohibited. Indirect enforcement occurs where the foreign state (or its nominee) ***in form seeks a remedy, not based on the foreign rule in question, but which in substance is designed to give it extra-territorial effect*** . Thus, the court must not look at the form alone but also at the substance and the effect of the claim to determine if it is an indirect enforcement of a foreign state's revenue claim. [emphasis added in bold italics]

It is necessary therefore properly to characterise the plaintiff's claim. However, before doing so, it is also necessary to consider which system of law is applicable for this purpose.

The law applicable to the "characterisation" process

9 The characterisation of the plaintiff's claim is a question for the *lex fori*. Several distinguished commentaries have opined that it is *irrelevant* that a foreign law has regarded a claim as one based on the foreign revenue law. As observed by *Dicey* ([7] *supra*) at para 5-020:

> ... Whether a foreign law falls within the categories of those laws which the English court will not enforce is a matter for English law. Thus whether the foreign law regards the law in question as a penal law or a revenue law or a public law is irrelevant.

It has been observed in Cheshire, North & Fawcett, *Private International Law*, (Oxford University Press, 14th Ed, 2008) at pp 122–123 that:

> ... Whether the claim sought to be enforced in the English courts is one which involves a penal, revenue or other public law is an issue to be determined according to the criteria of English law. It is irrelevant whether a foreign law so regards it. ...

10 In the case of *Metal Industries (Salvage) Limited v Owners of the S.T. "Harle"* [1962] SLT 114, the French Government's claim for arrears of compulsory contributions to the health insurance and family benefits scheme was dismissed by the Scottish Court as it was an attempt to enforce the revenue laws of a foreign state. Lord Cameron held that the characterisation of the claim was to be made in accordance to the *lex fori* (at 116):

> ... in determining whether these [heads of claim] are in fact attempts to enforce revenue law, they have to be considered in light of the *lex fori*, and it is ***irrelevant*** to consider whether these contributions are regarded by French law as fiscal. ... It is a general rule of law that no state will act as a tax gatherer for another or permit its courts to be used for that purpose, and it is a corollary of that rule that what is a revenue or fiscal claim is to be determined by the Courts of the country where the claim is sought to be enforced and in accordance with the *lex fori*. Now what is fiscal and what would be regarded as enforcement of a revenue claim or an attempt to recover taxes due under foreign law seems to me to depend, not so much upon the form which the imposition takes or the object upon or in respect of which it is levied, but upon the substance of the claim as viewed by a Scottish Court applying Scots law. ... [emphasis added in bold italics]

11 The English Court of Appeal held in *United States of America v Inkley* [1989] QB 255 that (at 265):

> ... the consideration of whether the claim sought to be enforced in the English courts is one which involves the assertion of foreign sovereignty, whether it be penal, revenue or other public law, is to be determined according to the criteria of English law. ...

The Privy Council in *Huntington v Attrill* [1893] AC 150, in determining whether the substance of the claim before it involved the execution of the penal law of another jurisdiction, held at 155:

> ... Judicial decisions in the State where the cause of action arose are not precedents which must be followed, although the reasoning upon which they are founded must always receive careful consideration, and may be conclusive. The Court appealed to ***must determine for itself*** , in the first place, the substance of the right sought to be enforced; and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another State. ... [emphasis added in bold italics]

12 It is clear therefore that the characterisation of the plaintiff's claim is a matter for the *lex fori*, *ie*, this court. Nevertheless, the court may, where appropriate, *have regard* to the characterisation of the claim made in accordance with the foreign law. In so doing, the court should be mindful of the purpose for which the foreign law was applied to the characterisation process; it may be that the characterisation of the claim was made in the context of the interpretation of domestic legislation unique to the foreign forum. In those circumstances, the foreign characterisation of the claim may be of little assistance or relevance to the matter before the *lex fori*. Bearing these principles in mind, it is appropriate to consider the plaintiff's argument that the facts of the present case are the same as those in the House of Lords' decision of *Revenue Commissioners v Total Network SL* [2008] 1 AC 1174 ("*Total Network*") and that this court should reach the same conclusion as to characterisation as that made by the House of Lords.

The House of Lords' decision of Revenue and Customs Commissioners v Total Network SL

[2008] 1 AC 1174 ("Total Network")

13 In *Total Network*, the "carousel frauds" were similar to the alleged MTIC fraud in the present case. Total Network, a company incorporated in Spain, sold goods to a UK importer, Redlaw Ltd ("Redlaw"). Redlaw paid no input VAT as the imports were zero-rated, Spain being part of the European Union. In turn, Redlaw sold goods to another UK company but failed to account for VAT ("the output tax") to HMRC. The goods were sold down a chain of traders in the UK to an Exporter (Alldech) which sold and exported the goods back to Total Network, thus completing one full circle. Alldech obtained reimbursement of VAT ("input VAT") from HMRC. HMRC brought a claim against Total Network for unlawful means conspiracy in sums equivalent to the amounts of VAT which they claimed to have lost as a result of the carousel frauds.

14 The plaintiff submitted that the House of Lords in *Total Network* decided that a carousel fraud claim (a specific type of MTIC fraud) is not a claim for tax. However, in my view, the assistance offered by *Total Network*, if any, is limited. There is no doubt that the House of Lords in *Total Network* faced the task of *characterising* the substance of the plaintiff's claim. However, the question faced by the House of Lords was of a much more precise nature. Their Lordships had to characterise the substance of the plaintiff's claim *for the specific purpose* of determining whether it contravened the fundamental constitutional principle enshrined in Art 4 of the Bill of Rights (1689) (c 2) (UK) in England. The discussion of the issue in *Total Network* was first laid out by Lord Hope of Craighead. The issue was whether the plaintiff's claim, presented in the form of a claim for damages, was contrary to Art 4 of the Bill of Rights (per Lord Hope at [21]):

> Total submits that it is a fundamental constitutional principle that no money shall be levied for or to the use of the Crown except by grant of Parliament, and that this in substance is what the commissioners are seeking to do in this case without Parliamentary authority. Although their claim is presented as one for the award of damages, what they are really seeking to do is to recover by indirect means sums due as tax. Their action was ultra vires of the statute, from which alone they derive their powers. It was also contrary to article 4 of the Bill of Rights (1689) which declares:
>
> > 'That levying money for or to the use of the Crown, by pretence of prerogative without grant of Parliament for longer time, or in other manner then the same is or shall be granted, is illegal.'

Lord Scott of Foscote defined the issue similarly where it was observed that (at [58]):

> The ... issue is whether the commissioners can bring a private law action to recover the loss they have been caused by the fraudulent conspiracy. It is said that the damages claim is, in substance, a claim to recover the tax that Redlaw has failed to pay. The action constitutes, it is said, an attempt to make Total liable to pay the tax, an attempt that is ***barred by article 4 of the Bill of Rights*** : ...
>
> [emphasis added in bold italics]

In the same vein, Lord Mance observed (at [111]):

> ... The questions to which they give rise are (a) whether the pursuit of any claim by the commissioners against Total Network SL in conspiracy is precluded by (i) the Bill of Rights and/or (ii) the statutory scheme of the Value Added Tax Act 1994 and (b) whether, if it is not, it can as pleaded exist in law.

15 Indeed, Lord Mance emphasised that the appeal was brought *only* on the question whether the plaintiff's claim was precluded by the Bill of Rights. This was the case even during oral argument before the House of Lords. Holding that the claim did not fall within Art 4 of the Bill of Rights, Lord Mance stated at [126]–[127]:

> 126 ... It is a curious feature that the appeal was in terms ***brought only*** on part (i) of issue (a), that is the Bill of Rights point. Part (ii), the inconsistent statutory scheme point, was taken below, but not in either the cross-notice of appeal or the statement of issues. Total's case only mentions the statutory scheme as a background factor to its submissions on issue (b) and to the Bill of Rights. ***Even during oral argument before the House*** , Mr Charles Flint for Total did no more than say that issue (a) could also be put on a pure 'ultra vires/statutory' basis, but that article 4 of the Bill of Rights was how they had formulated it. However, as all aspects of issue (a) involve pure questions of law and raise questions of general importance, I agree that they need deciding.
>
> 127 ... I agree with Lord Scott (para 59) and Lord Neuberger (paras 168–172) in rejecting Total's submission that the commissioners' claim infringes article 4 of the Bill of Rights (issue (a), part (i)). For the reasons they give the commissioners' claim is a damages claim for being wrongfully cheated of moneys or revenue with the management or collection of which the commissioners were entrusted, ***rather than a claim to levy money for or to the use of the Crown within the meaning of article 4*** .
>
> [emphasis added in bold italics]

Lord Neuberger of Abbotsbury observed (at [168]):

> Article 4 of the Bill of Rights (1689) renders 'illegal' 'levying money for or to the use of the Crown' if it is 'by pretence of prerogative, without grant of Parliament'. It appears to me that, in order to decide whether this provision bars the present claim, it is necessary to identify the proper characterisation of the commissioners' claim. In particular, is their claim for damages in tort, or for recovery of tax, or indeed should it be characterised in some other way? ...

16 It is clear that the issue in *Total Network* ([13] *supra*) was whether the plaintiff's claim was a levying of money for or to the use of the Crown without grant of Parliament. If it was, the claim would be struck out. It did not matter that the words "levying" or "recovery" of taxes were at times used interchangeably by the Law Lords; that did not detract from the fact that the characterisation made by the House of Lords was for a specific purpose, which was to determine whether the claim fell *within the meaning* of Art 4 of the Bill of Rights (1689).

17 In my view, the fact that the English court found that a claim presented as one for damages upon the tort of conspiracy in the factual context of an alleged MTIC fraud, was not a levying of money for or to the use of the Crown within the meaning of Art 4 of the Bill of Rights (1689) does not preclude a Singapore court from determining, after a process of characterisation of the substance of the claim for the purposes of the revenue rule, that such a claim is in effect an indirect (if not direct) enforcement of UK revenue law to recover VAT. The revenue rule encompassses a much broader test with especial regard to *indirect attempts* to recover tax than the determination of whether such a similar claim fell within the scope of Art 4 of the Bill of Rights.

Characterisation of the plaintiff's claim

18 In the characterisation of the plaintiff's claim to determine if it is in substance, either directly or

indirectly, a claim to enforce a foreign revenue law or an attempt to recover tax for another sovereign, the court has to take into account all relevant facts. It is important to consider the facts set out in the pleaded case, as well as the measure of loss claimed by the plaintiff. As will be seen below, the identity of the plaintiff may also go some way towards suggesting the nature of the plaintiff's claim.

19 The plaintiff submitted that its claim for losses was measured by the input tax reimbursed to the Exporter *less* what the plaintiff *collected* in output tax properly payable to it. Para 4(m) of the statement of claim stated as follows:

> 4. ...
>
> (m) in a lawful chain of supply, in which goods are imported from the European Union and subsequently exported, the net VAT treatment would be ***substantially neutral*** in that:
>
> i. VAT would be receivable by the Plaintiff from the [UK] importer;
>
> ii. VAT would be repayable by the Plaintiff to the [Exporter]; and
>
> iii. VAT would be accounted to the Plaintiff on the net profit made on sales between UK vendors and purchasers.
>
> [emphasis added in bold italics]

As submitted by the plaintiff, its claim may be represented by the equation:

Claim Amount	=	Total Input Tax	–	Output Tax collected

20 In similar vein, the first defendant submitted that ordinarily the total output tax should be equal to the total input tax credited to the respective taxpayers. This was presented graphically as follows:

Total Input Tax	=	Total Output Tax

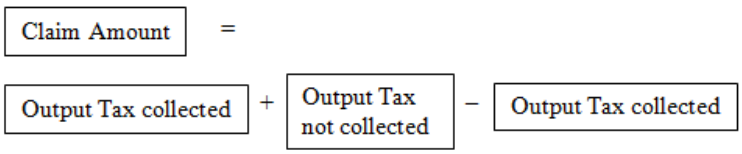
But Total Output Tax is the sum of Output Tax collected and Output Tax which ought to have been collected but was not:

Total Input Tax	=	Output Tax collected	+	Output Tax not collected

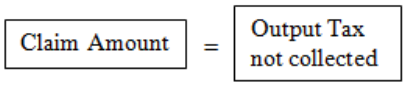
Following the plaintiff's submissions,

Claim Amount	=	Total Input Tax	–	Output Tax collected

Substituting:



Therefore:



21 Lord Scott (in *Total Network*) found that the plaintiff's claim was a claim for damages for loss caused by the fraudulent conspiracy; it was not a claim for tax. However, His Lordship made this finding because the sum claimed by the plaintiff in *Total Network* was the amount of input tax that Alldech (the Exporter) had claimed by way of reimbursement from HMRC. The plaintiff's claim was not against Redlaw (the UK importer) for the amount of unaccounted output tax properly payable to the HMRC (per Lord Scott at [59]):

> ... It is true that Total are not taxable under the statutory VAT scheme in respect of any of the pleaded transactions, but the claim against Total is not a claim for tax. It is a claim for damages, for loss, caused by the fraudulent conspiracy. The consolidated and amended particulars of claim claim from Total damages (for the first conspiracy) of 'not less than £253,345.50'. ***That was the sum paid by the revenue to Alldech in response to Alldech's claim for repayment of the VAT Alldech had paid as input tax to The Accessory People. It was not the amount of the VAT in respect of which Redlaw, the missing trader, should have accounted to the revenue*** . ... [emphasis added in bold italics]

22 In the present case, there is no allegation that the claims by the Exporter for reimbursement were illegitimate and not genuine. Indeed, the plaintiff's counsel conceded that, as pleaded, the alleged conspiracy *did not* involve the Exporter. I must add that the decision to omit the Exporter from the statement of claim was a conscious decision made, even after the plaintiff had amended its claim, and the same position was maintained by counsel even at the very last hearing before me. It is undisputed that based on the plaintiff's claim, the *only* party that could have wrongfully obtained reimbursements of input tax from HMRC in the whole factual matrix of MTIC fraud would have been the Exporter. If the claim was indeed against the Exporter, or had at least implicated the Exporter, it might have been arguable that HMRC was in essence making a civil claim for recovery of *input tax* which it had previously collected but had been deceived into reimbursing to the Exporter. Unlike a claim for recovery of unpaid output VAT, such a civil claim might arguably be distinguishable from a sovereign claim for recovery of a revenue debt. In the present case however, by omitting the Exporter from the alleged conspiracy ("the material omission"), the plaintiff's claim *is not in respect of* the reimbursements paid out by HMRC. It was common ground before me that in the absence of conspiracy involving the Exporter as co-conspirator, the UK importer's failure or default in payment of VAT does not affect the eligibility of the Exporter to make a *bona fide* reimbursement claim from HMRC. Equally, the failure (intentional or otherwise) on the part of the Exporter to make a claim for reimbursement does not absolve the UK importer from liability to pay any outstanding output VAT. It follows from the material omission that the losses were suffered by HMRC *because of the UK importer's failure to pay output tax*, regardless of whether the reimbursements of input tax were wrongly paid out. The present claim is therefore essentially for the recovery of output tax properly payable (but not paid) by the UK importer to HMRC. As such, the present claim is *different in a significant respect* from the claim in *Total Network* where, as highlighted by Lord Scott (see above), the claim was against Alldech (the Exporter) for recovery of reimbursements wrongly paid out by

HMRC. Where, as in *Total Network*, the Exporter was complicit in the carousel fraud, it did not matter whether HMRC's claim was for recovery of the reimbursements which HMRC had been induced to pay out or for payment of the output tax.

23 Turning now to the specific facts alleged in the statement of claim, the plaintiff averred that:

> 14. Harm was inflicted on the Plaintiff and/or the Plaintiff was injured by (inter alia):
>
> (a) payment by the Plaintiff to the [Exporter] of the sums referred to in paragraph 5 above ...

24 Without doubt, in such circumstance HMRC suffered a loss in that while it did not receive output tax from the UK importer, it paid out to the Exporter, by way of reimbursement, input tax previously paid by the latter. However, the pleading stopped short of alleging that the Exporter was a co-conspirator. In the absence of such an averment, the Exporter's claim for reimbursement could well be legitimate. As earlier observed, the UK importer's failure to pay output VAT does not affect the eligibility of the Exporter to make a *bona fide* claim for reimbursement of input VAT from HMRC. Therefore, the plaintiff's claim remains essentially one for recovery of output VAT which the UK importer defaulted in paying and instead caused to be diverted to Sunico. The plaintiff pleaded that:

> 13. In the Relevant Transaction Chains, between August 2004 and January 2006 the Defendants fraudulently conspired with (amongst others):
>
> (a) the [UK importer] Defaulters;
>
> (b) the EU Suppliers ...
>
> (c) the Buffers ***making the payments to Sunico*** ;
>
> (d) the Buffers ***passing on the instructions to pay Sunico*** ...
>
> (e) Sunico ... and its officers and shareholders;
>
> (f) PT Naina Exim Indo ...
>
> (g) Dayal Dhalomal Shadadpuri ('Dayal'), a resident in Hong Kong and the brother of the 1st Defendant; ...
>
> ...
>
> 15. The ***design*** and ***effect*** of the fraudulent conspiracy was to ***unlawfully divert monies properly payable*** to the Plaintiff principally to Sunico and thereafter distributed to its co-conspirators.
>
> 16. ...
>
> (g) In each of the Relevant Transaction Chains the EU Supplier who sold goods to the Defaulter was in turn supplied goods by Sunico. Each of the EU Suppliers was a company of no substance; in each instance, it sold the goods it had purchased from Sunico at a loss; and failed to declare the extent of its purchases and sales to the relevant taxation authority ...

...

18. ...

(b) Payment was received by Sunico from UK Buffers, ... Each Buffer would for a short period ... make substantial payments to Sunico's bank accounts ... Goods would be sold by Sunico to a number of different EU Suppliers who would in turn sell to different Relevant Defaulting Traders who would also sell to different Buffers. ...

21. ...

(a) By a written agreement dated 20 December 1999 and made between PT Naina and Sunico, PT Naina agreed to act as an introducer of suppliers and customers to Sunico with effect from February 2002 ('the Commission Agreement'). In consideration of the introductions from PT Naina, Sunico agreed to pay PT Naina a commission, ...

(b) The Commission Agreement was negotiated on behalf of PT Naina by the 1st and 2nd Defendants who held themselves out to Sunico as having actual or ostensible authority on behalf of PT Naina.

...

22. ... the commission payments pursuant to the Commission Agreement were not for the introduction of genuine commercial customers of Sunico but ***a mechanism for the division of the proceeds of MTIC fraud amongst co-conspirators*** .

[emphasis added in bold italics]

In addition, it was pleaded that:

4. ...

(k) the Third Party Recipient [Sunico] thus receives sums that ***lawfully ought to have been available to the Defaulter to pay to the Plaintiff in discharge of its VAT liability*** .

[emphasis added in bold italics]

25 It is clear that the plaintiff was seeking to recover the uncollected output tax properly payable by the UK importer to the plaintiff that had been diverted from the UK importer to Sunico. First, the UK importer directed the Buffer to pay the purchase price of the goods together with VAT to Sunico. Part of the output tax was then diverted to PT Naina with the alleged help of the defendants under the guise of a commission agreement. Based on the pleadings, the essence of the claim was for output tax properly payable to the plaintiff but diverted to Sunico. Unlike the factual matrix in *Total Network*, there was *no allegation*that the input tax reimbursed by the plaintiff to the Exporter was channelled to Sunico/PT Naina.

26 As alluded to earlier, *Total Network* ([12] to [17] *supra*) is not a decision on the characterisation of a claim for the purposes of the revenue rule. Obviously, the House of Lords was not required to characterise the claim for the purpose of determining whether it was in substance an attempt to enforce foreign revenue law. In this respect, I find more of assistance the decision of *Peter Buchanan Ld and Macharg v McVey* [1955] AC 516 ("*Peter Buchanan*") and the local decision of

Relfo ([8] *supra*). In *Relfo*, a decision upheld by the Court of Appeal, a company became liable to pay a substantial amount of income tax to the United Kingdom Inland Revenue ("UKIR") as a result of a highly profitable property transaction. The directors of the company diverted to different entities moneys which would otherwise have been available to pay the tax. When the company became insolvent, a liquidator was appointed to recover the moneys. The liquidator caused an action to be brought by the company against the defendant for knowing receipt of moneys wrongfully disposed of by the directors of the company. The defendant argued that the liquidator's claim on behalf of the company was brought for the purpose of enforcing a foreign revenue debt in Singapore. The plaintiff disagreed, arguing that it was not a claim brought by the UKIR and that the UKIR did not fund the plaintiff's claim nor direct the liquidation proceedings. The court rejected this argument and found that the claim was one to enforce a foreign revenue debt in Singapore (at [70]):

> ... The plaintiff argued that this was not a claim by the UKIR because it was not funding the liquidator and was not directing this action or the liquidation proceedings. In my view, these differences are only superficial. It must be remembered that Mr Bramston was not the Gorecias' choice of liquidator. They appointed someone else and it was the UKIR that decided to replace the original liquidator with Mr Bramston. Secondly, Mr Bramston is not the standard type of liquidator who is appointed to administer the assets of the company in liquidation. He is a liquidator who is appointed to pursue claims. This is his main area of practice and the UKIR is his main client. UKIR appointed him as liquidator because it considered that there were claims that could be pursued by the plaintiff to recover funds which funds could be used to repay the outstanding taxes. The fact that Mr Bramston works on a no-win no-fee basis should not be allowed to obscure the prime purpose of his appointment, *ie*, to recover funds for the creditors. Since the only creditor of the plaintiff is the UKIR, the funds will go to the UKIR as Mr Bramston agreed in court. There is no need for the UKIR to direct the liquidation since it knows that Mr Bramston will have to pursue the plaintiff's claims if he is to receive any payment for his work. ...

In the result, although the court was satisfied that on the facts a *prima facie* case of knowing receipt had been made out against the defendant, it disallowed the claim as having been brought for the purpose of indirectly enforcing a foreign revenue debt.

27 In *Peter Buchanan* ([26] *supra*), the plaintiff company was a company which had been put into liquidation by the revenue authorities of Scotland in respect of a very large claim for excess profits tax and income tax. The liquidator was essentially a nominee of the revenue. The defendant was the majority shareholder and managing director of the plaintiff company who had set up a series of transactions with the purpose of transferring the funds of the plaintiff company to Ireland and then decamped to Ireland so as to avoid paying taxes. The liquidator caused the plaintiff to sue the defendant to recover the moneys transferred. The summons claimed an account of all moneys due to the company by the defendant as director, trustee and agent and payment of all sums so found due. The Irish court considered the various cases on the enforcement of foreign revenue and penal laws and held that although the transaction was a dishonest transaction designed to defeat the claim of the revenue in Scotland, the claim had to be rejected because the proceedings were in substance an attempt to enforce the Scottish revenue laws in Ireland and the Irish court would not lend its aid for this purpose. As such, the claim was dismissed even though the court was clear that the defendant had been the perpetrator of a dishonest scheme to defraud the revenue authorities. Lord Keith of Avonholm in *Government of India* ([7] *supra*) (at 510) made the following observations of the decision in *Peter Buchanan*:

> ... The defendant having realized the whole assets of the company in his capacity as a director and having satisfied substantially the whole of the company's indebtedness, other than that due to the revenue, ***by a variety of devices had the balance transferred to himself to his credit***

with an Irish bank and decamped to Ireland . The action was in form an action to recover this balance from the defendant at the instance of the company directed by the liquidator. ... The judge held that the transaction was a ***dishonest transaction*** designed to defeat the claim of the revenue in Scotland as a creditor and was ultra vires of the company and accordingly rejected the defendant's submission. On the other hand, he held that although the action was in form an action by the company to recover these assets **it was in substance an attempt to enforce indirectly a claim to tax by the revenue authorities of another State**. He accordingly dismissed the action. ... [emphasis added in bold italics]

28 The court in *Peter Buchanan* found that the revenue authority knew that it would not have any chance of success if it brought proceedings in its own capacity, and had therefore attempted to recover the revenue debt through *bankruptcy proceedings* (at [529]–[530]):

> … it is clear that its enforcement must not depend merely on the form in which the claim is made. ***It is not a question whether the plaintiff is a foreign State or the representative of a foreign State or its revenue authority*** . In every case ***the substance of the claim must be scrutinized*** , and if it then appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue it must be rejected. Mr. Wilson has pressed upon me the difficulty of deciding such a ***question of fact*** …
>
> … The ***foreign revenue instead of courting certain defeat by suing him here in its own capacity resorts to bankruptcy proceedings in its own country*** …
>
> … I hold that the sole object of the present proceedings before me is also to collect a Scottish revenue debt, and that if I were to decide for the plaintiff ***the only result of those proceedings would be that every penny recovered after paying certain costs and liquidator's remuneration could be claimed by the Scottish Revenue*** . That, in my opinion, is the substance of the suit – to collect the revenue claim of a foreign State. ...
>
> [emphasis added in bold italics]

29 As can be seen from *Relfo* and *Peter Buchanan*, the intervening liquidation proceedings did not prevent the court from finding that the liquidator's claim was in substance one to enforce a foreign revenue debt. In my view, the argument for the application of the revenue rule is even stronger in the present case. The present claim was brought by the authority conferred by the UK Parliament with the power and responsibility to recover VAT, under the Value Added Tax Act 1994 (c 23) (UK) and the Commissioners for Revenue and Customs Act 2005 (c 11) (UK). Any moneys recovered by the present claim would *restore* the HMRC's tax coffers to the position *they would have been* in if VAT output tax had been collected. I should add, however, that I am not suggesting that *any* claim brought by a tax authority *ipso facto* amounts to a claim to enforce revenue law. The relevance of the plaintiff's identity must necessarily be determined within the factual context of the claim.

30 Having considered the above factors in totality, and based on the reasons given, I found that the plaintiff's claim to be in substance and in effect an attempt to recover the uncollected VAT (output tax) properly payable to the plaintiff. The cause of action pleaded as a claim based on the tort of conspiracy for which a remedy in damages is sought is in substance an attempt to recover UK Value Added Tax extra-territorially. Such a claim is contrary to considerations of public policy. The claim was thus struck out pursuant to O 18 r 19 (with emphasis on O 18 r 19(1)(*d)*) as well as in the exercise of the inherent jurisdiction of the court. In consequence, the Mareva Injunction was also discharged.

31 The plaintiff argued in the alternative that, "even if [its claim] were in any way an enforcement of foreign revenue law to pursue substantive relief in Singapore, that [was] not being done". The plaintiff argued that it "[did] not seek to have the substantive dispute between the parties determined in Singapore", since it had stayed its own proceedings in Singapore. As such, the plaintiff argued that the Mareva injunction was simply the rendering of assistance to the ongoing proceedings in the UK.

32 There were no authorities provided to support the plaintiff's arguments. Furthermore, the plaintiff could not explain how the existence of a Mareva injunction in Singapore could render *assistance* to the UK proceedings other than the subsequent *enforcement* and satisfaction of the UK judgment in Singapore, in the event that the plaintiff succeeded in the UK proceedings. The plaintiff's argument was therefore a mere attempt to *delay the application of the revenue rule* at the expense of the defendants. I therefore rejected the plaintiff's alternative argument.

33 After I allowed the defendant's application to strike out the plaintiff's claim, a Recorder in the High Court of Hong Kong dismissed a similar application by the same defendants in *Her Majesty's Revenue & Customs v Hashu Dhalomal Shahdadpuri and another*, High Court of Hong Kong, Court of First Instance, Miscellaneous Proceedings No 938 of 2010. In the course of further arguments before me, the plaintiff's counsel referred me to the Hong Kong decision and argued that it was of persuasive value. I was of the view that the decision offered little assistance.

34 The learned Recorder had at first observed, from counsel's submissions, that some of the Brokers might be wholly innocent and uninvolved in any alleged conspiracy. At [13] in the judgment, he stated:

> 13. Mr Pun also relies on what he submits is a 'concession' on the part of Mr Johnny Ma, counsel for HMRC, in his Skeleton Submissions to the effect that ***the Brokers involved in the carousel fraud are not necessarily parties to the conspiracy, including some who may be wholly innocent. Mr Pun submits that because some of the Brokers (recipients of refund from HMRC) may be innocent*** , the only viable claim can only be for loss resulting from failure by the Defaulters to pay the VAT. [emphasis added in bold italics]

If the Brokers were innocent, there would be no basis for the plaintiff to seek to recover from them the input tax reimbursed to them. If the learned Recorder did allow that some of the Brokers might have been innocent, it is surprising that further on in the judgment the learned Recorder regarded the refund of input tax to the Brokers to be part of the "whole fraudulent chain". In this regard, he appeared to have been misled by Mr Ma, counsel for HMRC whose submission was captured in [15] of the judgment as follows:

> 15. As to the 'concession', Mr Ma contends that the fact that some of the Brokers may have been innocent does not in any way affect the true nature of HMRC's claim, which is to recover the losses suffered by HMRC as a result of the unlawful conspiracy. ***The refund to the Brokers was the means by way of which money was extracted from HMRC, which was then used to fund the 'carousel'*** . [emphasis added in italics]

It is patently clear that if the refund was extracted from HMRC to fund the carousel, the Brokers could not have been innocent.

35 It would appear that, in the learned Recorder's mind, the entire chain, including the claim by the Brokers for refund, was fraudulent. This can be seen from [20] and [24] of his judgment:

20. In my view, ***HMRC is not seeking to recover any tax properly payable or seeking to enforce the UK's VAT legislation, but to seek recovery by way of damages the out of pocket losses*** which it has suffered ***as a result of the alleged fraud*** perpetuated by the conspirators. Mr Pun, in focusing his case on the failure on the part of the Defaulters to pay VAT, is only looking at half the story – and, for that matter, perhaps not the important half. ... ***the whole fraudulent chain must be considered*** and the inevitable view one comes to when taking into account the entire 'carousel' is that the scheme was a fraudulent one engineered to deceive HMRC by exploiting a loophole in the VAT legislation. ...

...

24. ... The plain fact as raised by HMRC in its pleaded case is that ***it has suffered monetary loss by having paid out on VAT refund claims which are not genuine*** and which are presented to it fraudulently pursuant to the conspiracy.

[emphasis added in bold italics]

If the refund claims tax were *not genuine* and were used to *fund the carousel fraud*, this would necessarily mean the Brokers were part of the conspiracy. The decision in Hong Kong is, therefore, significantly different from the present case where, as noted earlier there is no allegation that the Exporter is involved in the alleged conspiracy. In contrast, the plaintiff's statement of claim filed in the Hong Kong proceedings sought recover of the reimbursement of VAT to the Brokers:

HMRC's claims

13. HMRC have identified 719 MTIC fraud transaction claims ('the Relevant Transaction Chains') between August 2004 – January 2006 bearing each of the following characteristics:

...

(h) the making of a VAT repayment claim by the Broker in respect of the VAT period in which the goods were acquired and sold as set out above;

(i) the making by HMRC of the VAT repayment to the Broker.

14. By reason of the Relevant Transaction Chains, HMRC have suffered loss in the sum of £40,391,100.01, ***being the VAT that it has repaid to the Brokers in respect of those chains*** , having received no VAT payments from the Defaulter. ... Of the loss of £40,391,100.01:

(a) £39,387,622.36 is identifiable by reference to the unpaid VAT in 697 Relevant Transaction Chains involving the Defaulters ... and

(b) £1,003,477.65 is identifiable by reference to ***VAT repayments made to Brokers*** in 22 Relevant Transaction Chains ...

...

Losses to HMRC traceable back from Brokers

77. Of the loss of £1,003,477.65 set out in Paragraph 14 above:

(a) the sum of £771,077.65 represents ***VAT repayments made by HMRC to the Broker*** Dhalomal Kishore trading as Movil 2000 ...

(b) the sum of £232,400 represents ***VAT repayments made by HMRC to the Broker*** AmberCommunications Management Limited ...

[emphasis added in bold italics]

Striking out in "plain and obvious" cases

36 At a late stage of the proceedings, I raised the question whether the requirement that it be "plain and obvious" applied to each of the grounds for striking out in O 18 r 19. Counsel for the plaintiff submitted that the statement of claim should only be struck out if it was plain and obvious that it disclosed no reasonable cause of action, pursuant to O 18 r 19(1)(*a*), or that it was a plain and obvious case of an abuse of process, pursuant to O 18 r 19(1)(*d*). Counsel for the defendants submitted that the courts are stricter in this requirement with respect to the first limb (under O 18 r 19(1)(*a*), that the claim discloses no reasonable cause of action) and adopts a slightly more flexible view to striking out claims under the fourth limb (under O 18 r 19(1)(*d*) that the claim is an abuse of court process).

37 Upon further reflection, I came to the view that for purposes of the application before me, it was not necessary to reach a definitive conclusion. Suffice it to say that I was satisfied that the plaintiff's claim was a plain and obvious attempt to recover unpaid output tax for a foreign sovereign. The fact that the parties' detailed submissions took several sessions did not necessarily mean that there was no plain and obvious case for striking out. As L P Thean JA held in *Bank of China v Asiaweek Ltd* [1991] 1 SLR(R) 230 ("*Bank of China*") at [6]:

> The present case is, in my opinion, a plain and obvious case, ***though counsel for the plaintiff and the defendant each developed prolonged and serious arguments before me – both counsel took more than a day on their arguments*** . But, in the words of Sir Gordon Willmer in *Drummond-Jackson* ([5] *supra*) at 700, the question whether a point is plain and obvious ***does not depend upon the length of time it takes to argue. Rather the question is whether, when the point has been argued, it has become plain and obvious that there can be but one result*** . [emphasis added in bold italics]

38 The court in *Bank of China* endorsed with approval the observations made by the English Court of Appeal in *Drummond-Jackson v British Medical Association and others* [1970] 1 WLR 688, (Lord Pearson at 695–696):

> Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases. The authorities are collected in *The Supreme Court Practice, 1970*, under the heading 'Exercise of powers under this rule' in the notes under R.S.C., Ord. 18 r. 19, p. 284. One which might be added is *Nagle v. Feilden* [1966] 2 Q.B. 633, 648, 651. Reference has been made to four recent cases: *Rondel v. Worsley* [1969] 1 A.C. 191; *Wiseman v. Borneman* [1969] 3 W.L.R. 706; *Roy v. Prior* [1970] 1 Q.B. 283; and *Schmidt v. Home Office* [1969] 2 Ch. 149. ***In each of these cases there was an important question of principle involved, and the hearing of the application under R.S.C., Ord. 18, r. 19 was much longer and more elaborate than is usual, but the final decision was that the alleged cause of action was clearly unsustainable*** , and so the statement of claim disclosed no reasonable cause of action and was ordered to be struck out. There was no departure from the principle that

> the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed, but the ***procedural method was unusual in that there was a relatively long and elaborate instead of a short and summary hearing*** . ... [emphasis added in bold italics]

39 Consider for the moment, if the striking out application was dismissed on the basis that it was not plain and obvious, what would the result be? The same question of characterisation would still have to be decided either at trial or by way of a preliminary hearing (pursuant to O 33 r 2) in the same way as had taken place before me. Counsel would still be submitting the same arguments based on the same facts found in the same set of pleadings. *This was not a case where new evidence was required* (for none was relied on in the process of characterisation) *or that new facts had to be pleaded* (for the plaintiff had already amended its pleadings). The sole dispute was as to the characterisation of the claim. Even if the trial judge was to take the plaintiff's case at its best, where all the facts set out in the statement of claim were accepted as true, the same question of characterisation of the claim would still have to be answered before the judge.

40 Indeed, in *Relfo* ([8] *supra*), although the court found from the evidence gathered during the trial that there was a *prima facie* case of knowing receipt made out against the defendant, the court had to deal with the inescapable question of characterisation, and the claim was in the end found to be an indirect enforcement of foreign revenue law and therefore dismissed on that basis. In this regard, the observation made by the Court of Appeal in *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin* [1997] 3 SLR(R) 649 is particularly apposite (at [18]):

> … The practice of the courts has been that, where an application for striking out involves a lengthy and serious argument, the court should decline to proceed with the argument unless, not only does it **have doubts as to the soundness of the pleading but, in addition, it is satisfied that striking out will obviate the necessity for a trial or reduce the burden of preparing for a trial**. [emphasis added in bold italics]

Conclusion

41 For the reasons above, I affirmed my decision that the plaintiff's claim be struck out pursuant to O 18 r 19 (with emphasis on O 18 r 19(1)(*d*)) and in the exercise of the inherent jurisdiction of the court and that the Mareva injunction be discharged. Nevertheless, the defendants undertook to observe the terms of the injunction until the final disposal of the appeal provided that the plaintiff filed the notice of appeal within a stipulated period of time (which, in the event, it has done).

42 At the hearing on 28 September 2010, I had ordered that the costs of and incidental to the applications in Summons Nos 2437 and 2559 (both of 2010) and the costs in the suit be to the respective defendants, such costs to be taxed unless agreed. It remains for me to add to these the costs in favour of the defendants in respect of further arguments, such costs similarly to be taxed unless agreed.

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