# Evergreen International SA v Volkswagen Group Singapore Pte Ltd and Others [2003] SGHC 142

**Case Number** : OS 1853/2000

**Decision Date** : 27 June 2003

**Tribunal/Court** : High Court

**Coram** : Belinda Ang Saw Ean J

**Counsel Name(s)** : Richard Kwek and S Mohan (Gurbani and Co) for the plaintiffs; Steven Chong SC and Adrian Tan (Rajah and Tann) for defendants

**Parties** : Evergreen International SA — Volkswagen Group Singapore Pte Ltd

*Admiralty and Shipping – Collision – Limitation action – Anti-suit injunction – Limitation decree obtained and limitation fund established in Singapore – Whether application for injunction should be granted to restrain defendants from continuing proceedings in Belgium*

*Admiralty and Shipping – Collision – Limitation action – Collision in Singapore waters – Significance of limitation decree and constitution of limitation fund*

*Civil Procedure – Injunctions – Anti-suit injunction – Governing principles*

*Conflict of Laws – Jurisdiction – Service out of jurisdiction – Setting aside service*

1 In this Originating Summons, the principal issue is whether an anti-suit injunction should be granted to restrain the Defendants as cargo interests and insurers from pursuing their action in Belgium against "Ever Reach", a sister ship of "Ever Glory". The Plaintiffs, Evergreen International S.A ("Evergreen"), are the registered owners of both "Ever Glory" and "Ever Reach". The Defendants' application to set aside the Order for service of the Originating Summons on the 4th to 74th Defendants out of jurisdiction and the Originating Summons were heard concurrently since the matters in issue overlap.

**Background Facts**

2 On 17 September 1998, there was a collision between the container vessel "Ever Glory" of the port of Panama and the car carrier "Hual Trinita" of the port of Monrovia, Liberia. It is not disputed that the collision occurred in Singapore territorial waters within the traffic separation scheme. The "Hual Trinita" with some 2,000 vehicles of different car makes such as BMW, Mercedes Benz, Audi and Peugeot, was en route to Hong Kong, Taiwan and Japan. After the collision, Semco Salvage & Marine Pte Ltd rendered salvage services to the "Hual Trinita" and her cargo, which included the Defendants'.

3 On 18 September 1998, the Plaintiffs commenced an in rem action against "Hual Trinita" in Singapore in Admiralty in Rem No. 603 of 1998. On 15 June 1999, the second day of trial, the Plaintiffs reached a settlement on liability with the owners of "Hual Trinita". Pursuant to Order 70 r 34 of the Rules of Court, the agreement on liability was filed in the Registry on 16 June 1999 and it henceforth had the same effect as an Order of Court. Collision liability was apportioned at 50:50.

4 Owners of "Hual Trinita" also commenced an in rem action against "Ever Glory" in Singapore in Admiralty in Rem No. 575 of 1999. In November 1999, the owners of the colliding vessels settled this action.

5 On 2 October 1998, the Plaintiffs commenced a limitation action in Singapore in Admiralty In Personam No. 645 of 1998 against the owners of "Hual Trinita" and all other persons including the

Defendants that have potential claims arising out of the incident. The International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships, 1957 (the "1957 Convention") to which Singapore gave effect to are found in Part VIII of Merchant Shipping Act (Cap. 179). On 14 December 1998, the Plaintiffs' solicitors, M/s Gurbani & Co, wrote to the representatives of the Defendants, namely M/s Clyde & Co, an English firm of lawyers, M/s Grier Olubi and cargo recovery agents, W K Webster International Pte Ltd. They were informed of the commencement of a limitation action in Singapore in Admiralty in Personam no. 645 of 1998 and notice was given to cargo claimants to participate in the limitation action. The owners of "Hual Trinita" initially contested the limitation action. Subsequently, on 11 September 1999, they withdrew their objections to challenge the Plaintiffs' right to limit. However, they reserved their right to challenge the computation of the limitation fund.

6 On 24 September 1999, the Singapore court granted to the Plaintiffs a decree of limitation. The Defendants' representatives were notified of the decree on the same day. Notice of the decree was advertised in the Straits Times, Business Times as well as Dutch and Belgium newspapers. Copies of the advertisements in the various newspapers were sent to the Defendants' representatives as a matter of course.

7 The Plaintiffs applied to the Singapore court on 5 October 1999 to determine tonnage limitation. On 28 October 1999, the owners of "Hual Trinita" withdrew their objection to the tonnage calculation. The Plaintiffs obtained a declaration on 3 November 1999 that their liability is to be limited to the sum of S$2,411,227.56 plus interest thereon from the date of collision to date of payment into court. On 4 November 1999, the Plaintiffs paid into court the aforesaid sum plus interest.

8 The limitation decree obtained on 3 November 1999 was advertised in the Straits Times, Business Times and Lianhe Zaobao on 10 November 1999. The Plaintiffs also placed similar advertisements in Dutch and Belgium newspapers.

9 It is not in dispute that the Defendants were aware of the limitation action and were informed of every step in the limitation proceedings leading to the constitution of the limitation fund. The Defendants were also aware that they had two months to set aside the decree or to file their claims against the limitation fund. The Defendants did not participate in the limitation action. Neither did they challenge or set aside the decree nor prove their claims against the limitation fund. The Defendants' preference as cargo owners and insurers of cargo lately laden on board "Hual Trinita" was to pursue their claims for damages for loss and damage arising out of the collision between the "Hual Trinita" and "Ever Glory" in a different jurisdiction that applies the Convention on Limitation of Liability for Maritime Claims, 1976 (the "1976 Convention").

10 Before the decree of limitation was obtained, the Defendants tried, albeit unsuccessfully, on 2 July 1999 to arrest the "Ever Glory" in the Netherlands. A sister ship, the "Ever Reach", was arrested in Belgium on 24 September 1999. The Plaintiffs furnished security in the sum of US$18.3 million to secure the release of the "Ever Reach" from arrest.

11 The Defendants' claims against the Plaintiffs in tort for damages for loss and damage to the vehicles exceed the limit of the "Ever Glory" under either Convention. In addition, they have claims for salvage remuneration and general average contribution. It is common ground that the Belgium courts would apply a higher limit based on the 1976 Convention. Under 1976 Convention, the limit of liability would be about S$13.5 million as compared to 1957 Convention limit of S$2,411,227.56.

12 After the arrest in Belgium, the Plaintiffs filed an application to set aside the arrest. The Plaintiffs failed at first instance before the Belgium court. The decision was handed down on 15

February 2000. The Plaintiffs appealed against the decision on 3 May 2000. The appeal was dismissed by the Court of Appeal on 5 February 2002. The Plaintiffs on 23 May 2002 appealed to the final appellate court, the Cour De Cassation. That appeal is still pending.

13 Other than arresting the "Ever Reach" in Belgium, the Defendants have no connection whatsoever with Belgium. The Plaintiffs are a company incorporated in Panama. The operators of "Ever Glory" are based in Taiwan. It is common ground that there is no doctrine of forum non conveniens in Belgium law nor is there a recognised jurisdiction to grant anti-suit injunction on forum conveniens ground.

**Anti-Suit Injunction**

14 An application for a grant of an anti-suit injunction would require consideration of whether a Singapore court has jurisdiction over the Defendants to grant an injunction, and if so, the applicable principles upon which it acts. The principles upon which the jurisdiction to grant anti-suit injunction may be exercised were enunciated by the Privy Council in *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] 1 AC 871 and adopted by the Court of Appeal in *Bank of America National Trust & Savings Association v Djoni Widjaja* [1994] 2 SLR 816 and re-affirmed in *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 3 SLR 121.

15 I do not propose to repeat the four well-known principles here as they will be referred to in the course of my judgment. Suffice it to say that a broad principle underlying the jurisdiction to grant an anti-suit injunction is that it is to be exercised when the ends of justice require it. A requirement to attract jurisdiction in the present case, which does not concern an agreement not to sue or an agreement only to sue in the jurisdiction in which the injunction is sought, is the establishment of an equity or equities which will ground the grant of injunctive relief. See *British Airways Board v Laker Airways Ltd* [1985] 1 AC 58 at 81 and 95 and *Adrian Briggs, Civil Jurisdiction and Judgment* (3rd ed), paragraph 5.40. This may occur when Singapore is the natural forum for the resolution of the dispute between the parties and the foreign proceedings are vexatious or oppressive. Additionally, in considering whether the Belgium action is vexatious or oppressive, account must be taken of the possible injustice to the Defendants should the injunction be granted, and the possible injustice to the Plaintiffs if it is not.

16 Accordingly, I have to consider (a) whether the Defendants are amenable to the jurisdiction of the Singapore Court; (b) the natural forum for resolution of the dispute between the parties; (c) the alleged vexation or oppression to the Plaintiffs if the Belgium proceedings are to continue and (d) the alleged injustice to the Defendants as an injunction would deprive the Defendants of the advantages sought in the foreign proceedings.

*(i) Jurisdiction over the Defendants to grant an injunction*

17 In Singapore, jurisdiction is founded on the presence of a defendant in the country and in certain specified instances on a power to serve the defendant with process outside the jurisdiction. Thus, a Singapore court has jurisdiction to grant an injunction against a defendant if it has personal jurisdiction over him. In order to establish personal jurisdiction, in the case of a foreign defendant, the consideration is whether Order 11 applies.

18 As the 1st and 2nd Defendants are not plaintiffs in the Belgium proceedings, they have been excluded from the Originating Summons after Justice Tan Lee Meng dismissed on 20 January 2003 the Plaintiffs' claims in the Originating Summons against both of them. The 3rd Defendant is a company

incorporated in the United Kingdom with a registered place of business in Singapore. The 4th to 74th Defendants are from United Kingdom, Netherlands, Denmark, France, Germany, Switzerland, Taiwan, Japan, Hong Kong SAR and China. It is common ground that the 3rd Defendant was properly served in Singapore. The 32nd, 34th, 56th and 62nd Defendants have assets in Singapore in that they own shares in Singapore companies. The remaining Defendants were joined as necessary and proper parties to the proceedings.

19 Mr. Steven Chong S.C. on behalf of the Defendants submits that the Plaintiffs have to meet the usual Order 11 test including a consideration of forum conveniens. Firstly, the Plaintiffs must show that there is a good arguable case in respect of the paragraphs in Order 11 r 1 relied upon as well as satisfy Order 11 r 2(1)(d). Secondly, there is a serious question to be tried on whether there should be an anti-suit injunction. Such a relief should only be granted where Singapore is the natural forum for the disputes and the pursuit of Belgium proceedings would be vexatious or oppressive to the Plaintiffs: *Lee Kui Jak*. It is for the Plaintiffs to show that Singapore is not merely an appropriate forum but that it is clearly the appropriate forum for the determination of the dispute between the parties: *The Spiliada* [1987] AC 460. Thirdly, the Plaintiffs must demonstrate in accordance with Order 11 r 2(2), that it has been made "sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order."

20 It is accepted that the outcome of the Defendants' application to set aside the Order for service of the Originating Summons out of jurisdiction is dependent on whether or not the Plaintiffs succeed in obtaining injunctive relief against the Defendants. If the circumstances are appropriate to grant an anti-suit injunction against the Defendants, the Defendants' application to set aside the Order for service of the Originating Summons on 4th to 74th out of jurisdiction should be dismissed. This was the approach taken in *Donohue v Armco Inc* [1999] 2 Lloyd's Rep. 649.

21 On amenability to the jurisdiction, Mr. Chong argues that apart from considering whether the Defendants have been properly served, the court in exercising its discretion has to consider whether the injunction would be an effective remedy against the Defendants. In the course of his submission, Mr. Chong said the Defendants do not dispute the court's jurisdiction to grant an anti-suit injunction in the present case. The 3rd Defendant was properly served and the other Defendants are "necessary and proper parties". But, when it comes to the exercise of its discretion, Mr. Chong contents that the court should consider whether the injunction could be enforceable against the Defendants. He referred to cases such as *People's Insurance Co Ltd v Akai Pty Ltd* [1998] 1 SLR 206 and *The Sea Hawk* [1986] 1 Lloyd's Rep. 317 where an injunction was not granted as the defendant had no assets within the jurisdiction. Mustill LJ alluded to the general principle of law as to injunctions that the court should not put itself in the position of making an order which it cannot enforce. [p.321]

22 It is not part of the amenability test that consideration be given as to whether or not the injunction could be enforced. It is not a matter "germane to the issue of amenability": Mann LJ in *E.D.& F. Man (Sugar) Ltd v Yani Haryanto (No.2)* [1991] 1 Lloyd's Rep. 429 at 439. So, when in personam jurisdiction over the Defendants through service on them with process is established, the Defendants become subject to the jurisdiction and hence can be restrained by an injunction granted by a Singapore court. Yong CJ delivering the decision of the Court of Appeal in *Koh Kay Yew* said:

> "….[B]eing amenable to the jurisdiction of the local courts simply means being liable or accountable to this jurisdiction. As such, so long as any local courts have in personam jurisdiction over a party, either through the proper service of documents or through submission to the jurisdiction, this first criteria would be satisfied."[p.126].

23 A similar approach was taken in *The Tropaioforos (No.2)* [1962] 1 Lloyd's Rep. 410. Megaw J held that once a defendant was properly served under Order 11 r 1, the court has jurisdiction to grant an injunction against him in precisely the same way as against a person within the jurisdiction. In that case, the defendant had no assets within the jurisdiction. Megaw J held that the mere fact that an injunction might be ineffective, at least for the time being, in whole or in part, did not deprive the court of jurisdiction to grant the injunction.

24 The court is not to be deterred from granting an injunction where it is appropriate in the circumstances of a particular case to do so. It should not contemplate that its order would be disobeyed. See *In re Liddell's Settlement Trusts* [1936] 1 CH 365 at 373-374; *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 at 574. Otherwise as Lord Bingham rightly observed in *South Bucks District Council v Porter and Another* [2003] UKHL 26, there would be one law for the law-abiding and another for the lawless and truculent. Lord Bingham said:

> "When granting an injunction the court does not contemplate that it will be disobeyed... Apprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate. ..The rule of law is not well served if orders are made and disobeyed with impunity." [para.32]

25 In my view, the Plaintiffs have satisfied the first criteria to the grant of an injunction. Personal jurisdiction over the Defendants was established through the service of the Originating Summons on the Defendants. As I shall elaborate below, Singapore is the proper forum for the determination of the dispute and it was appropriate on 1 December 2000 to have made the Order for Service of Document out of Singapore and Order for Substituted Service. By that time, the limitation decree was obtained and limitation fund constituted in Singapore.

*(ii) Natural Forum*

26 When the court is asked to grant an application of such a nature, it may be willing to do so if Singapore is shown to be the natural forum for the resolution of disputes between the parties. This is a general rule and not an invariable one: Lord Goff in *Airbus Industrie G.I.E v Patel & Ors* [1999] 1 AC 119 at 138.

27 As noted in *The Abidin Daver* [1984] AC 398 at 415, Lord Keith defined natural forum as "that with which the action had the most real and substantial connection." The same definition was adopted by our Court of Appeal in *Eng Liat Kiang v Eng Bak Hern* [1995] 3 SLR 97 at 103. The English Court of Appeal in *The Albaforth* [1984] 2 Lloyd's Rep. 91 held that the place where the tort was committed is prima facie the natural forum for the determination of the dispute.

28 Counsel for the Plaintiffs, Mr. Richard Kwek, submits that Singapore is the natural forum for the litigation of the claims asserted by the Defendants. He points to strong connection factors in favour of Singapore. The collision occurred in Singapore territorial waters. After the collision, both vessels discharged their respective cargoes in Singapore. Damage repairs were also undertaken in Singapore. Salvage services were provided by Semco Salvage & Marine Pte Ltd, a Singapore company.

29 Both masters of the colliding vessels were prosecuted in Singapore. They pleaded guilty in the criminal proceedings and were each fined S$5,000. Both colliding vessels litigated their respective claims in Singapore. Surveyors involved in the collision damage survey and cargo surveys were from Singapore. The bulk of the evidence is here in that the great majority of the witnesses and other evidential sources such as VTIS records are in Singapore. The occurrence of the collision in Singapore

in a sense was fortuitous, but as the Privy Council said in *Lee Kui Jak,* that carried with it the consequence that the applicable law governing the Defendants' claim in tort against the Plaintiffs is the law of Singapore.

30 The Defendants downplayed the Singapore connection with the argument that the only disputed issue is quantum and on that issue Singapore is not the natural forum. Mr. Chong argues that there is no genuine dispute between the parties on liability as the Defendants are willing to accept the same apportionment of blame, namely 50 per cent, as recorded in the Order of Court in the collision suit between the colliding vessels. It is said that quantum is a matter for the lex fori, namely the Belgium courts and furthermore, evidence on quantum is not located in Singapore. In any case, as the Defendants' claims exceed the limit of the "Ever Glory" under either Convention, there is really no dispute on the issue of quantum. Mr. Kwek in response said, amongst other things, that damages have to be determined in accordance with Singapore law. The value of the vehicles have to be assessed in accordance to the market value of the vehicles destroyed at the time and place of destruction i.e. Singapore, the place where the tort was committed. He cited paragraph 1362 of *McGregor on Damages* (16th ed) in support.

31 The Defendants did not, in my view, point to any factor of sufficient weight to displace what is an overwhelming case of natural forum in favour of Singapore. I am satisfied that the Plaintiffs have on the facts shown Singapore to be the natural forum for the determination of liability and quantum between the parties. The Defendants' claims against the Plaintiffs are for damages in tort. The tort was committed in Singapore and it is the law of Singapore that gave rise to a cause of action. Even though the Defendants' total claims would exceed the limit of the "Ever Glory" under either Convention, the fact remains that it is Singapore law that gave rise to the existence of an obligation and would determine the amount of damages that is recoverable under its general law. The Defendants would have to prove their claims so determined against the limitation fund. The position under either Convention is the same. See *The Happy Fellow* [1997] 1 Lloyd's Rep. 130 at 135.

*(iii) Vexatious or Oppressive to the Plaintiffs and Injustice to the Defendants*

32 It is to be noted that an injunction will not be granted simply because Singapore is shown to be the natural forum. It will be granted to prevent injustice, and in the context of this case, it means that the effect of litigating in Belgium is vexatious or oppressive. I have in addition to consider whether an injunction will deprive the Defendants of a legitimate juridical advantage to a greater extent than the oppression caused to the Plaintiffs. Whilst an injunction acts to restrain the Defendants, by doing so, it indirectly impinges upon the ability of the Belgium courts to act. Hence, the principle of comity becomes one to which careful regard must be had.

33 Both parties referred to various cases in the course of the hearing. They provide useful guidance on the circumstances in which anti-suit injunction may be granted. However, everything depends on the circumstances of the particular case and new circumstances will emerge, as was the case here.

34 I set out in brief the Plaintiffs' reasons why the Belgium proceedings are oppressive:

(i) The Belgium courts have no connection with the dispute between the Plaintiffs and the Defendants and Belgium is not the proper forum as the collision occurred in Singapore and that is where the bulk of the evidence relevant for the dispute is located.

(ii) The Belgium proceedings were commenced with the sole view of taking advantage of a higher limitation regime.

(iii) Furthermore, pursuit of the Belgium action will cause the Plaintiffs substantive and procedural disadvantages which are unjust and oppressive. The injustice and oppression result both from the features which render Singapore a natural forum and from the fact that the Plaintiffs have already established a limitation fund in Singapore according to the 1957 Convention. The Defendants have ignored and continue to ignore the limitation proceedings as well as all orders made therein, and continue to act in breach of all orders made in the limitation proceedings. In the circumstances, the Defendants' decision to proceed and continue with Belgium proceedings in itself creates injustice to the Plaintiffs.

(iv) The Defendants attempted to force the Plaintiffs, after the "Ever Reach" was arrested in Belgium, to agree to include in the security wording an exclusive Belgian jurisdiction clause for the Defendants' claims. It demonstrates the Defendants' continued efforts to vex and oppress the Plaintiffs.

35 Briefly, Mr. Chong's submissions are that none of the reasons sought to be relied upon by Mr. Kwek constitute oppressive conduct on the part of the Defendants either singly or collectively. But, even if they did, they have to be considered against the injustice to the Defendants if they were prevented from litigating in Belgium. The Plaintiffs' application should be dismissed because it would not be right to grant an anti-suit injunction as it would have the effect of preventing the Defendants from litigating their claims in Belgium where they enjoy a higher limit of liability compared to Singapore. He argues that the Defendants founded jurisdiction in Belgium as of right through the arrest of the "Ever Reach" and consequently obtained a juridical advantage that will result in their being able to recover under 1976 Convention a higher percentage of their losses. He acknowledges that the Plaintiffs commenced limitation action in Singapore as they were rightly entitled to do so. But as between the Plaintiffs and Defendants who are victims of the Plaintiffs' wrongdoing, viewed objectively, justice must lie with the Defendants. It is for the Belgium courts to decide what effect, if any, it would give to the limitation decree granted in Singapore.

36 Mr. Chong points out that it is not unusual to see limitation action and liability issues dealt with in separate jurisdictions. There is nothing vexatious or oppressive for liability proceedings to continue in a jurisdiction different from that of the limitation action.

37 It has been submitted that the English courts in identical situations faced by this court have not taken the view that to allow liability proceedings to continue in a foreign country which applies a different limitation regime would be disregarding the limitation decree previously granted by its own court. Likewise, this court should not take the view that in refusing to grant the anti-suit injunction, it would be disregarding an order of court previously pronounced by this court. The reason why the English courts have not adopted such an attitude is that (i) they are conscious of the limited nature of a declaratory order (i.e. it is not coercive) and (ii) although a limitation decree is "good against the world", it is only good insofar as it concerns the claimants who wish to participate in the proceedings in the country in which the limitation decree is obtained. The reasoning does not stand up to scrutiny. The rationale put forward for the so-called attitude of the English courts is unfounded. My attention was not drawn to the specific cases where Counsel said the English courts were faced with identical situations.

38 There are English cases where a stay of the liability action was sought on forum non conveniens basis that it should more appropriately have been brought in another jurisdiction. The availability of a higher limit was a factor raised in the stay application as a juridical advantage available in the English proceedings. Not featured in the decisions is the shipowner's prerogative to choose the forum for the limitation action. In *Caspian Basin Specialised Emergency Salvage Administration & Anor v Bouygues Offshore SA & Ors (No. 4)* [1997] 2 Lloyd's Rep. 507, Rix J was

concerned with whether the limitation action commenced in England should be stayed on the basis that it should be brought in South Africa as an adjunct of the liability action. The barge owned by Bouygues was lost in South African waters whilst under tow by the tug belonging to Azerbaijani interests (Caspian). Bouygues had chartered the tug from Ultisol Transport Contractors Ltd who had time chartered the tug from Caspian. No case was cited to Rix J in which a limitation action, validly commenced in England, has been stayed on the forum non conveniens basis that it should more appropriately have been brought in another jurisdiction. A stay of the limitation action was declined principally on the ground that it is not for the liability claimant to choose the forum for limitation, but for the shipowner who seeks to limit. His decision was upheld by the Court of Appeal in *Bouygues Offshore SA v Caspian Shipping Co & Ors* [1998] 2 Lloyd's Rep. 461.

39 The situation I am confronted with is different. The question I am supposed to be concerned with is whether the liability action is better fought in Belgium or in Singapore. But the question is not as simple as it is made out to seem. Either Convention envisages a single limitation fund against which all possible claims arising out of the collision would be brought. Mr. Chong accepts that the limitation decree binds the Defendants in that it is "good against the world" but it does not mandate the Defendants to prove their claim against the limitation fund. Mr. Chong said that the Defendants have elected not to participate in the limitation fund and are taking a risk by going to Belgium. In other words, the Defendants have decided to "stand or fall" by their decision to sue and continue with proceedings in Belgium. It is said that the Belgium courts would apply the 1976 Convention and not recognise the Singapore decree and limitation fund constituted on 4 November 1999. That is the Plaintiff's dilemma in the present case.

40 The conduct complained of is not just the continuation of proceedings in an inappropriate forum, namely Belgium. Mr. Wang Horng-Chuen, Deputy Junior Vice-President, Marine Department, Shipping Division in Evergreen International Corporation, alleged that the Defendants' Belgium proceedings are in blatant contravention of the limitation decree and orders of the Singapore court. It is said that the Defendants commenced action in Belgium to force the Plaintiffs to defend the cargo claim in a 1976 Convention country when the Plaintiffs had already obtained a limitation decree and constituted a limitation fund in Singapore based on 1957 Convention. Mr. Kwek points out that no authority was put forward in support of the Defendants' interpretation of the phrase "good against the world". The meaning assigned by the Defendants goes against the substratum of the 1957 Convention. The whole purpose of the 1957 (and 1976) Convention is to enable a shipowner to set up one fund against which all claimants would be required to make their claim. Mr. Kwek said, and I agree with him, that the Defendants are still claimants against the limitation fund even though they choose not to make a claim against the fund.

41 The question for consideration is whether the conduct of the Defendants in continuing with the Belgium proceedings is vexatious or oppressive and is hence unconscionable. Lord Hobhouse in *Turner v Grovit & Ors* [2002] 1WLR 107 at 117 explained that the power to make the restraining order is dependent upon there being wrongful ("unconscionable") conduct of the party to be restrained of which the applicant is entitled to complain and has a legitimate interest in seeking to prevent. He said that the word "unconscionable" is derived from English equity law. Injunctive relief is based on equity. The words "vexatious" or "oppressive" have been used in relation to the conduct of the party to be restrained. They are derived from "the basic principle of justice." As the complaint is that unconscionable, vexatious or oppressive conduct lies in the pursuit of proceedings in Belgium, an assessment or evaluation of the conduct complained of and the nature of the Plaintiffs' rights or interests that are being infringed or threatened is needed.

42 It cannot be argued, and was not (and rightly so), that the limitation decree and thereafter the limitation fund was not properly obtained and constituted in Singapore. The limitation decree is

that of a competent court having jurisdiction as the natural forum over the dispute on liability and quantum. The decree has not been set aside or varied. Singapore was also the Plaintiffs' choice of forum for commencing limitation action. There is also the Defendants' election not to prove their claims against the limitation fund. These are all objective factors which weigh heavily in the balancing exercise: whether or not injustice would be caused to the Plaintiffs by not granting the injunction and whether a grant would deprive the Defendants of a legitimate juridical advantage to a greater extent than the oppression caused to the Plaintiffs. The constitution of a limitation fund in Singapore provides the necessary focal point for consideration of the issues at hand.

43 S136 of the Merchant Shipping Act confers a right to limit liability in respect of relevant maritime claims arising from a particular occurrence if the incident arose without the fault or privity of the shipowner. The Plaintiffs commenced limitation action in Singapore as it was envisaged that there would be several claims. Thus the question of limitation cannot be dealt with as between the "Ever Glory" and "Hual Trinita", but must be dealt with as between the Plaintiffs and all the claimants, and also as amongst the different claimants themselves. As explained by Longmore J in *The Happy Fellow*, a limitation action is a special proceeding to which all potential claimants are made parties.

44 Justice Sheen in *The Falstria* [1988] 1 Lloyd's Rep. 495 at 497 explained that "[t]he essence of limitation action is that the plaintiffs in that action seek a decree, which is valid against all possible claimants, that a limit is set upon the eventual liability of the plaintiffs to all those claimants." A limitation decree not set aside, as was the case here, is good against the world: See *The Volvox Hollandia* [1988] 2 Lloyd's Rep. 361; *The Happy Fellow.*

45 The Defendants here have renounced their right to prove against the limitation fund in Singapore by pursuing their claims against the Plaintiffs in Belgium which applies the 1976 Convention. The Defendants' underlying cause of action to sue the Plaintiffs in tort for loss and damage arising from the collision is unaffected by the Plaintiffs' right to limit liability under s136 Merchant Shipping Act (Cap. 179) in the absence of fault or privity: *The Happy Fellow*. Jurisdiction was established as the Defendants were able to assert their maritime claim in a country where the Arrest Convention is in force and jurisdiction was obtained by arresting the "Ever Reach" in Belgium. Undoubtedly, the Defendants have a strong commercial interest in seeking higher limit and it would be unrealistic to expect them not to do so given the size of their claims. Mr. Chong said the Defendants had elected not to claim against the limitation fund as was their right. But that is not to say, in the circumstances of the present case, the continuation of proceedings in Belgium (and even though jurisdiction was properly founded) should be sanctioned.

46 In my judgment, the vexatious or oppressive conduct of the Defendants lies in their unlawful challenge to the Plaintiffs' right to choose the limitation forum and the invasion or attack on the Plaintiffs' legal rights conferred by the limitation decree and limitation fund. The limitation decree which is a declaratory order is binding and conclusive, whether or not any consequential relief is given: Order 15 r 16. See also *Volume 10 Halsbury's Laws of Singapore para. 120.216*.

47 The right to claim limitation in any particular forum is a right that belongs to the shipowner alone and that choice is not to be pre-empted by a claimant. In other words, a claimant cannot dictate where the limitation fund is to be constituted. See *The Volvox Hollandia*. Rix J in *Caspian Basin Specialised Emergency Salvage Administration & Anor v Bouygues Offshore SA & Ors (No. 4)* with whom the Court of Appeal agreed with relied on *The Volvox Hollandia* for the proposition that it would be wrong for a claimant to seek to usurp a shipowner's choice of forum for his limitation action by seeking a negative declaration in the liability action to the effect that the shipowner is not entitled to limit. In the same way, the effect and consequence of litigating in Belgium like the device of the negative declaration of non-entitlement to limit is another means or way to frustrate or subvert the

Plaintiffs' choice of forum for pursuing a limitation action. It purports to dictate the limitation forum and that is wrong in law. It is hence oppressive as the Plaintiffs are compelled or coerced through the institution and continuation of foreign proceedings to set up another limitation fund in this case in Belgium when there is already an existing and properly constituted limitation fund in Singapore. In addition, the Defendants' election to have limitation determined under Belgium law is not only inconsistent with the *Volvox Hollandia* principle, it seeks to obviate the need to share rateably with others in the amount of the Plaintiffs' limited liability available for distribution in Singapore. That is obviously wrong not only as between the Plaintiffs and Defendants but also as between the Defendants and other claimants to the limitation fund.

48 The *Volvox Hollandia* principle is applicable in circumstances where the two jurisdictions apply different Conventions or that the shipowner is seeking limitation in a jurisdiction which is not its domicile. Rix J in *Caspian Basin* said:

> " This [Volvox Hollandia] was a case in which both competing fora applied the same Convention, and in which the shipowner was bringing the limitation action in his own forum: it is nevertheless authority for a strong warning against a claimant being permitted to interfere in a shipowner's (legitimate) choice of forum for his action to limit liability, even in circumstances where the appropriate forum for the adjudication of liability …was elsewhere…". [p.527]
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> "….*The Volvox Hollandia* stands as a firm reminder, within the modern *Spiliada* era, that it is not for the liability claimant to choose the forum for limitation, but for the shipowner who seeks to limit."[p.530].

49 So where a higher limit is sought by the liability claimant like the Defendants in contravention of the *Volvox Hollandia* principle, the court should not go to his assistance. The advantage of 1976 Convention contended for by the Defendants is not a legitimate consideration in the overall question of where the ends of justice lie.

50 The Plaintiffs' choice of Singapore as the forum for the limitation action was entirely legitimate and appropriate. The limitation decree is that of a competent court having jurisdiction as the natural forum over the dispute on liability and quantum. It is appropriate that the limitation action and liability action should be concentrated in a single jurisdiction, namely Singapore. More so when the likelihood is that the limitation decree will not be recognised in the liability forum.

51 I now turn to consider the other point i.e. the litigation in Belgium constitutes an attack on the Plaintiffs' legal rights conferred by the Singapore limitation decree and the limitation fund. These legal rights are derived from the orders granted by the Singapore court. They are the legitimate interests which the Plaintiffs seek protection.

52 In Singapore, the decree of limitation conferred upon the Plaintiffs a right to limit total liability. After the limitation fund is constituted, all claims arising out of the collision are to be brought against that fund. The Defendants' right to recover full compensation from the Plaintiffs is transformed into a right to payment of a proportionate amount of a limited fund. See *The Happy Fellow*. The Defendants are to share rateably with others in the amount of the owners' limited liability available for distribution. In short, the Plaintiffs are given a personal right to limit liability and protection from proceedings in rem after the decree is granted and the limitation fund constituted. It has been suggested in *The Bowbelle* [1990] 1 Lloyd's Rep. 532 at 536 that the Plaintiffs could enforce their rights by filing an appropriately worded caveat against arrest. The Belgium proceedings will alter

those rights and obligations if the Singapore decree is not recognised. To that extent, the effect and consequence of the Belgium proceedings infringe or undermine the protection granted to the Plaintiffs by the Singapore court.

53 The Privy Council in *Airbus Industrie G.I.E v Patel & Ors*, recognised that, in a proper case, the court should grant an anti-suit injunction to protect its own jurisdiction or to prevent evasion of its public policy. In *South Carolina Insurance Co v Assurantie Maatschappij "de Zeven Provincien" N.V*. [1987] AC 24 at 40, Lord Brandon referred to the grant of injunction in two situations: (a) when one party to an action can show that the other party has invaded or threatens to invade a legal or equitable right of the former; and (b) where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable.

54 In the circumstances of this case, there is justification for the Court to protect the Plaintiffs' legitimate interests as well as to give effect to the policies of its own legislature and its orders especially in a case like this where an arrest is made under a system of law that acknowledges a different limitation regime and as a result would not recognise a limitation decree of a court of competent jurisdiction. Otherwise as Sir Christopher Staughton said in *The Herceg Novi* [1998] 2 Lloyd's Rep. 454 (and his statement is valid and relevant to an anti-suit injunction application),

> "..jurisdiction could often be obtained by arresting a ship in a 1976 country, and if that action were allowed to proceed despite there being a more appropriate forum where 1957 prevailed, the 1957 country would be left with no effective use for its own law." [p.460]

55 Not only will Singapore be ineffective in the use of its own law, the protection of the Plaintiffs' legal rights and the court's protection of its orders are the purview of the Singapore court. The application for a restraining order is made in this country as Belgium has no concept of forum non conveniens. In *Bouygues Offshore SA v Caspian Shipping Co & Ors*, Evans LJ said that it is for the South African courts to decide whether the English decree will be recognised there. His dictum in the context of the case is understandable. In that case, South Africa was the natural forum for the determination of liability. Caspian would be exposed to unlimited liability if it could not prove absence of fault or privity in South Africa. If that were to happen, the South African courts will surely not recognise or enforce the English decree. The question of recognition was sensibly left to the South African courts as Caspian's actual fault or privity would not prevent it from invoking limitation of liability under the 1976 Convention and hence enforcing the English decree. The present case is distinguishable so much so that the effect of the Singapore decree is not a question for the Belgian courts to decide. It is a matter for the Singapore court and Singapore law. The same risk that Caspian faced that it may not be able to limit its liability does not exist here. The Plaintiffs have already obtained a decree that established that the collision was not due to their fault or privity, a threshold test that is much lower than that required under the 1976 Convention. Singapore and not Belgium is clearly the appropriate forum for the determination of the dispute between the parties. In the circumstances, a grant of an injunction does not imply disrespect for comity. This is not one of those occasions where there is a countervailing comity argument to which the Plaintiffs' legal rights are subordinated.

56 It is said on behalf of the Defendants that the limitation action had already run its course and resulted in the declaration of a limitation decree and the constitution of the limitation fund. The only issue is the distribution of the fund. The Plaintiffs are at liberty to distribute the fund if they wish to do so. I do not agree that the Defendants have not impeded the distribution of the fund. The effect of litigation in Belgium had prevented that. After the fund is provided, the court then administers the fund brought into court by the Plaintiffs. The court ascertains, which it has yet to do, the claims upon it, marshals them and distributes the fund rateably among the claimants.

57 It has been submitted on behalf of the Defendants that it could not be suggested, that recourse to 1976 limitation of liability could ever be vexatious such as to justify an anti-suit injunction. Mr. Chong argues that the Defendants have no intention to harass the Plaintiffs and had only proceeded with their action in Belgium pursuant to their expectation of having their claims heard in a 1976 convention country. Besides founding jurisdiction in Belgium, a good majority of the Defendants have no connection with Singapore other than for the fact the collision occurred in territorial waters. And, having mainly come from countries that apply the 1976 Convention (save for Taiwan), it was within their legitimate expectations that the 1976 regime would apply such that there is no justification for describing their conduct as being in any way vexatious or oppressive. It is said that the Defendants as innocent victims of the tort are entitled to minimise their losses by seeking a higher limit. It would be unjust to deny them of this advantage.

58 If, so the argument runs, the Defendants are compelled to litigate their claims in Singapore, their recovery will be reduced since the difference in the size of the funds under the two limitation regimes is about S$11 million. They will therefore suffer a legitimate juridical disadvantage if they have to make their claims in Singapore. The Plaintiffs' response is that this point has been authoritatively decided both in Singapore and in England that such an argument does not amount to a legitimate disadvantage. It is said that a party who forum shops in a 1976 Convention country to avoid 1957 Convention applicable in Singapore is seeking to gain an unfair or illegitimate advantage.

59 In *Caltex Singapore Pte Ltd v BP Shipping Ltd* [1996] 1 Lloyd's Rep. 286, the action in England was not stayed so as not to deprive the claimant of higher limit under English law. It was argued on behalf of BP that the higher limit in England was not a legitimate advantage since it was merely the obverse to a disadvantage to BP. I would mention that after *Caltex*, the English Court of Appeal in *The Herceg Novi* moved away from the approach adopted in *Caltex*. In *Caspian Basin Specialised Emergency Salvage Administration & Anor v Bouygues Offshore S.A. & Ors (No. 4),* Rix J and the English Court of Appeal gave effect to the principle that limitation of liability is a right that belongs to a shipowner and declined to stay a limitation action commenced in England. In that case, limit of liability in England was a mere fraction of the amount claimed by Bouygues as compared to the possibility of breaking limit in South Africa under the 1957 Convention to recover its full claim.

60 I would make some additional observations. Firstly, the Defendants did not, when they had the opportunity to do so, oppose the limitation action under a regime with a greater prospect of breaking limit to recover their full claim. They did not protect their common law right of action for all damages sustained by reason of the occurrence. The Plaintiffs have discharged the burden of proving that the occurrence did not result from their fault or privity and are entitled to limit their liability based on 1957 Convention. If the Defendants had broken limit in Singapore, the matter would have ended here. Conversely, it is wrong to deprive through foreign proceedings the Plaintiffs' legal rights conferred by the decree and limitation fund and at the same time allow the Defendants a second bite of the cherry in foreign proceedings.

61 Secondly, limitation of liability is founded on public policy reasons. As Lord Denning M.R. in *The Bramley Moore* [1964] P 200 succinctly pointed out:

> "The principle underlying limitation of liability is that the wrongdoer should be liable according to the value of his ship and no more. ..I agree that there is not much room for justice in this rule: but limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience." [p.220]

62 Thirdly, as Rix J in *Caspian Basin* acknowledged, the 1957 Convention is not an unjust regime and jurisdictions which adhere to that system are not less civilised for doing so. The fact that s136

Merchant Shipping Act provides for 1957 limit may well be a disadvantage to the Defendants in Singapore, but it cannot be properly termed an injustice. Selvam J in *The Herceg Novi* (unreported decision dated 10 September 1998 in Admiralty in Rem No. 514 of 1996) when asked to stay a Singapore action for London where a higher limit is available in England made the following observations which are similarly relevant to the present case on anti-suit injunction:

> "Then comes the question of substantial justice. This is based on the higher limitation fund under English law. The defendants say that if the Singapore action continues they will be deprived of the higher limitation fund under English legislation…*The true meaning and effect of the defendants' submission based on the question of substantial justice is that something is lacking in the system of justice of Singapore as regards limitation of liability. I am not aware of a decision anywhere whereby a court has stayed an action legitimately brought before it on the ground that there is something wanting in its system of justice and that better justice will be done in another jurisdiction. For my part it would be wrong in principle to do so because I cannot accept that the law of Singapore is unjust to either party. As the Singapore legislature had deemed it just [to] retain the lower limitation when there is no actual fault or privity this Court must give effect to that legislation and the merits of that legislation are not justiciable before this Court.*" (emphasis added)

63 Arising out of the incident in Singapore, the owners of "Herceg Novi' separately commenced proceedings in England. A sister ship of the "Ming Galaxy" was arrested in England. The English Court of Appeal in "*The Herceg Novi"* stayed the English proceedings for Singapore. It did not accept that there was juridical advantage for three reasons. Firstly, the 1976 Convention was not universally accepted. Secondly, the International Maritime Organisation, which commended the 1976 Convention to the international community, was not a legislature and thirdly, it was quite impossible to say that substantial justice was not available in Singapore. The plaintiffs' preference (like the Defendants here) for 1976 limit had no greater justification than for the 1957 regime. The Court of Appeal held that whilst the 1976 Convention provided a greater degree of certainty, in terms of abstract justice, neither Convention was objectively more just that the other.

64 It is clear that the Belgium proceedings have that effect of undermining and interfering with the Plaintiffs' rights and the judicial process of this court. This interference can only be defined as vexatious and oppressive. Hein Michael Keiser in his affidavit filed on 14 March 2001 disclosed that the Defendants' solicitors were already in discussions with the English solicitors of the "Hual Trinita" in December 1998 on how best to pursue the Plaintiffs in a 1976 Convention country, in particular Holland or Belgium. After considering the facts, I conclude that whilst the Defendants arrested "Ever Reach" in Belgium as of right, their conduct was, for the reasons stated, an invasion or attack on the Plaintiffs' rights with the consequence that the Plaintiffs were vexed and oppressed by the Defendants' conduct thereby creating the equity and justifying the grant of the injunction. When one has regard to all the circumstances, the Defendants knew and intended that a separate limitation fund be created. They knew and intended that by pursuing the Belgium proceedings (and not in United Kingdom or Hong Kong where the Plaintiffs' vessels called undoubtedly to avoid possibly the same result as in *The Herceg Novi*) it will place pressure on the Plaintiffs to force them to accept 1976 limit and that will disadvantage the Plaintiffs legally and commercially.

65 All these reasons add up to a case of oppression. Balancing all the factors more injustice would be done to the Plaintiffs if the Defendants are allowed to proceed in Belgium rather than would be done to the Defendants if they were restrained from proceeding in Belgium.

**Result**

66 Accordingly, I grant the Plaintiffs' application for an injunction restraining the Defendants from continuing with proceedings in Belgium with costs. I will hear Counsel as to the precise terms of the order to be made for I wish to hear Counsel on whether leave should nonetheless be given to the Defendants to prove against the fund in Singapore.

67 As for the application to return the security provided in Belgium, the bank guarantee was provided before the limitation fund was constituted. The arrest and security provided to secure the release of the "Ever Reach" was therefore consistent with the principle in *The Wladyslaw Lokietek* [1978] 2 Lloyd's Rep. 520. However, in view of my decision to grant injunctive relief, the security is to be returned to the Plaintiffs.

68 As there are no present threats to start proceedings elsewhere it is inappropriate to grant a similar injunction against the Defendants in other jurisdictions in respect of hypothetical future actions.

69 The Defendants' application to set aside the Order for service of the Originating Summons out of jurisdiction is dismissed with no order as to costs. This costs order reflects the success of the Defendants' application before Justice Tan and the over-lapping issues in the Originating Summons.