Fraud, Asset Recovery and Investigations

# Singapore High Court Issues Significant Judgment on Freezing Injunctions in Cross-Border Insolvency and Asset Recovery Claim

## Introduction

In *Allenger, Shiona (Trustee-in-bankruptcy of the Estate of Pelletier, Richard Paul Joseph) v Pelletier, Olga and another* [2020] SGHC 279, Rajah and Tann Singapore's Fraud, Asset Recovery and Investigations team led by partners Danny Ong and Yam Wern-Jhien, assisted by Bethel Chan and Chen Lixin, prevailed in a significant decision examining principles governing the grant of freezing injunctions against foreign defendants in the context of a cross-border insolvency and asset recovery claim.

The team successfully argued that the Singapore High Court has subject-matter jurisdiction to adjudicate claims based on foreign avoidance laws, and that the foreign defendants had submitted to the Singapore court's jurisdiction by failing to promptly raise a jurisdictional challenge and taking various steps in the proceedings that were inconsistent with an intention to challenge the Singapore court's jurisdiction.

## Brief Facts

The Plaintiff was appointed the trustee over a bankruptcy estate by the courts of the Cayman Islands. The Plaintiff commenced avoidance proceedings against the Defendants and related entities in the Cayman Islands under s 107(1) of the Cayman Islands Bankruptcy Law (1997) to set aside multiple transfers made by the bankrupt to various parties, including his wife, prior to the bankruptcy. The Plaintiff also obtained a worldwide freezing order against the Defendants and related entities from the Cayman Courts.

The Plaintiff then commenced proceedings in Singapore ("**Suit**") and obtained a domestic freezing injunction against the Defendants (the "**Singapore Injunction**"), leave to serve proceedings on the Defendants outside of jurisdiction, and a stay of all proceedings in the Suit.

The Defendants initially applied to vary the Singapore injunction, which they framed as an application to clarify the effect of certain terms of the Singapore injunction ("**Clarification Application**"), but were unsuccessful. The Defendants then applied for leave to appeal against the dismissal of the Clarification Application ("**Leave to Appeal Application**"), but later withdrew the application. Finally, after the

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Defendants utilised funds subject to the Singapore Injunction to make payments to their Cayman solicitors, and the Plaintiffs applied for these funds to be repatriated to Singapore ("**Application to Restore Funds**"), the Defendants participated substantively in the Application to Restore Funds.

Approximately four months after service of the Singapore Injunction, the Defendants applied to discharge the injunction and to set aside the order granting the Plaintiff leave to serve outside of the jurisdiction. The Defendants argued that:

(a) the Singapore court does not have subject-matter jurisdiction over a claim founded in Cayman bankruptcy law; and/or
(b) the Singapore court does not have *in personam* jurisdiction over the Defendants.

## Holding of the High Court

**Subject-matter jurisdiction**

The Court held that the jurisdiction of the Singapore High Court is statutorily conferred and circumscribed by the Supreme Court of Judicature Act ("**SCJA**"). Pursuant to ss 16 and 17 of the SCJA, the Singapore courts have unlimited subject-matter jurisdiction, unless or until prohibited either by legislation or case law. In other words, the Singapore courts do not require enabling legislation in order to have jurisdiction in a specific subject-matter. The Court thus held that the mere fact that the cause of action arose under a foreign insolvency legislation, i.e., section 107 Cayman Bankruptcy Law, was not a bar to it being adjudicated in Singapore.

The Court also observed that the Singapore Court's adoption of the modified universalism principle in the context of cross-border insolvency cases serves as a general indication that the courts will be less inclined to find that they have no subject-matter jurisdiction over claims arising under foreign insolvency legislation.

***In personam* jurisdiction**

The Court applied the well-established test for submission to jurisdiction and stated that a defendant is taken to submit to the jurisdiction of the Singapore court when he takes a step in the proceedings that is incompatible with the position that the Singapore court has no jurisdiction. On the facts, the Court found that the Defendants had submitted to the Singapore court's jurisdiction for two cumulative reasons.

First, while the Defendants had reserved their position to challenge the court's jurisdiction, they had failed to exercise their rights in a prompt fashion and had not offered good reasons why they failed to do so.

Secondly, beyond their inaction, the Defendants had taken various steps in the proceedings that amounted to submission:

(a) The Defendants had made a "Clarification Application" to seek the court's determination on various terms of the Singapore Injunction. The Clarification Application spoke to an acceptance that the Singapore Injunction would remain in place and that the Defendants were only trying to determine the limits that they could work around.
(b) The Defendants also had substantively participated in the "Application to Restore Funds" and agreed to facilitate the Plaintiff's investigation of funds falling within the scope of the Singapore Injunction.
(c) Lastly, the Defendants had filed the "Leave to Appeal Application", which the Court found to be the clearest indication of the Defendants' submission to jurisdiction. Even though the application was later withdrawn, the Court observed that this "belated *volte-face*" did not assist the Defendants, who were now "hoisted by their own petard".

As a result of the Defendants' submission to the Singapore court's jurisdiction, the Court found that it had *in personam* jurisdiction over the Defendants under s 16(1)(b) SCJA.

**Whether the Singapore court has *in personam* jurisdiction over the defendants: the issue of *forum non conveniens***

The decision also engages the question of whether the *forum conveniens* requirement under Order 11 rule 2(2) of the Rules of Court may be dispensed with, or modified, where a freezing order is sought in aid of foreign proceedings. This issue arose because the Defendant had argued that the Court should not have granted leave for service outside the jurisdiction in circumstances where Singapore is admittedly not the *forum conveniens* for the claim under section 107 Cayman Bankruptcy Law, and the Singapore court's jurisdiction was invoked for the purpose of obtaining ancillary relief in support of the Cayman Island proceedings.

The Plaintiff, on the other hand, argued that:

(a) the *forum conveniens* requirement is not found in the language of O 11 r 2(2) of the Rules of Court which requires the case to be "a proper one for service out of Singapore", and only has its origins in pronouncements by the courts;
(b) the requirement that "the case is a proper one for service out of Singapore" has never been interpreted by the Singapore courts in the context of a case where the Plaintiff seeks to invoke the court's jurisdiction to grant a freezing order in aid of foreign proceedings;
(c) the approach to service out of jurisdiction partly lies in the traditional notion that a foreigner having nothing to do with the local jurisdiction should not be inconvenienced by having to defend his rights in a foreign country, but such a notion should take a backseat in the present

context where the Defendants had made concerted efforts to disperse their assets across various jurisdictions; and

(d) the *Spiliada* test was developed in the interests of comity, but in the present circumstance, comity would instead dictate a more permissive approach that allows the court to deal with situations of international fraud.

The Court found the Plaintiff's arguments to be "eminently persuasive" and stated that it was inclined to adopt the Plaintiff's views especially in situations where transnational fraud was alleged. However, due to binding precedent from the Court of Appeal, the Court held that it was not able to accept the Plaintiff's arguments, and that change could only come about by way of amendment to legislation or by the Court of Appeal if it deemed fit.

Nevertheless, this part of the Court's decision was not determinative, in the light of the Court's finding that the Defendants had submitted to the jurisdiction of the Singapore court and further, that it could exercise jurisdiction over a part of the Plaintiff's claim which was grounded in Singapore legislation.

## Concluding Words

*Allenger, Shiona (trustee-in-bankruptcy of the estate of Pelletier, Richard Paul Joseph) v Pelletier, Olga and another* [2020] SGHC 279 is a significant decision, given its clarification that the statutorily conferred subject-matter jurisdiction in Singapore is unlimited and that there is no reason why the courts do not have subject-matter jurisdiction over claims based on foreign insolvency laws. In addition, the decision is notable for its in-depth analysis on the requirements to grant a freezing order in aid of foreign proceedings in the context of a cross-border insolvency and asset recovery claim.

For further queries, please feel free to approach our team below.

# Contacts

**Danny Ong**
Partner
Fraud, Asset Recovery and Investigations

T +65 6232 0260

danny.ong@rajahtann.com

**Yam Wern-Jhien**
Partner
Fraud, Asset Recovery and Investigations

T +65 6232 0396

wern.jhien.yam@rajahtann.com

Please feel free to also contact Knowledge and Risk Management at eOASIS@rajahtann.com

# Our Regional Contacts

RAJAH & TANN | *Singapore*
**Rajah & Tann Singapore LLP**
T +65 6535 3600
sg.rajahtannasia.com

R&T SOK & HENG | *Cambodia*
**R&T Sok & Heng Law Office**
T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN 立杰上海
SHANGHAI REPRESENTATIVE OFFICE | *China*
**Rajah & Tann Singapore LLP**
**Shanghai Representative Office**
T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*
**Assegaf Hamzah & Partners**

**Jakarta Office**
T +62 21 2555 7800
F +62 21 2555 7899

**Surabaya Office**
T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | *Lao PDR*
**Rajah & Tann (Laos) Co., Ltd.**
T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*
**Christopher & Lee Ong**
T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

RAJAH & TANN | *Myanmar*
**Rajah & Tann Myanmar Company Limited**
T +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

GATMAYTAN YAP PATACSIL
GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*
**Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)**
T +632 8894 0377 to 79 / +632 8894 4931 to 32
F +632 8552 1977 to 78
www.cagatlaw.com

RAJAH & TANN | *Thailand*
**R&T Asia (Thailand) Limited**
T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*
**Rajah & Tann LCT Lawyers**

**Ho Chi Minh City Office**
T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

**Hanoi Office**
T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

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